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The Attorney-Client Privilege in Civil Litigation

Protecting and Defending Confidentiality

CHAPTER 10

Applying the Attorney-Client Privilege to Investigations Involving Attorneys: What Is Fair Game in Discovery?

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CHAPTER 10

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I. Introduction

A typical law firm currently takes on far more duties than its traditional role of providing solely legal advice. Indeed, in an effort to achieve the “full service” that many of its clients desire, lawyers and their employees often find themselves rendering investigative, as well as legal, assistance in a myriad of different factual settings. Examples include an investigation of potential medical malpractice on behalf of a hospital,¹ an investigation into allegations of sexual molestation by an elementary school teacher,² an investigation of sexual discrimination complaints on behalf of an employer,³ an investigation on behalf of a factory owner of an explosion that killed and injured several on-site contractors,⁴ an investigation into the back-dating of stock options,⁵ an investigation of potential arson on behalf of a property insurance carrier,⁶ an investigation into possible trademark infringement by a competitor,⁷ an investigation of potential fraud and other improprieties on behalf of a bank,⁸ an investigation on behalf of a multinational corporation of questionable payments to a foreign governmental official to secure government business,⁹ an investigation into allegations that laboratory managers impeded a separate internal ethics investigation,¹⁰ and an investigation into the insurance aspects surrounding the World Trade Center attack.¹¹ Attorneys then communicate the results of their investigations to their clients.¹²

When the client’s adversary seeks discovery of the communications between the client and the attorney investigator in subsequent litigation, a dispute often arises as to what documents or information must be produced. The attorney-client privilege generally protects only those communications between attorney and client where the attorney is acting in his or her capacity as an attorney and not in some other capacity. The attorney-client privilege similarly applies only to those communications between attorneys and clients made for the purpose of obtaining or giving legal advice.¹³

Whether the attorney-client privilege shields production of the documents and information relating to an attorney’s investigation turns in the first instance on whether the attorney was acting in his or her capacity as an attorney and, if so, whether the attorney-client communication containing the results of the investigation was made with the purpose of giving legal advice. The scope of the attorney-client privilege also may depend upon whether the client is a corporation or an individual and whether the attorney’s advice is based on information from nonclients. The work-product doctrine also may

protect written documents containing the attorney's investigative results if the investigation was performed "in anticipation of litigation." This chapter addresses these issues as well as others that arise as a result of an attorney's investigation.

II. *The Attorney-Client Privilege Defined*

The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law," dating back to the days of Elizabethan England.¹⁴ Its purpose is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."¹⁵ Thus, it affords complete protection from disclosure to confidential communications between attorney and client, but is subject to several exceptions.¹⁶ The "attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice."¹⁷ But since the privilege hinders full discovery of the truth, it is oftentimes narrowly construed.¹⁸

The following criteria, set forth in Professor Wigmore's treatise on evidence,¹⁹ are typical of the requirements most jurisdictions have established to determine whether the attorney-client privilege applies: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.²⁰

While the attorney-client privilege protects the disclosure of confidential information communicated between a client and an attorney for the purpose of obtaining or giving legal advice or assistance,²¹ the attorney-client privilege does not prevent the disclosure of facts, documents, or other matters not privileged.²² Thus, during discovery, a client must disclose the facts of which he is aware, whether or not the client disclosed them to the attorney, but neither the client nor the attorney can be questioned about whether those facts were disclosed and what advice was given.²³ Similarly, documents supplied to an attorney are not protected from disclosure in discovery, but whether or not they were provided to the attorney is a privileged matter.²⁴ Documents created by virtue of the attorney-client relationship may be protected from disclosure by the work-product doctrine.²⁵

The attorney-client privilege applies not only to communications made directly to attorneys, but also to communications made to the subordinates or employees of attorneys, such as investigators, paralegals, law clerks, secretaries, or other persons acting as agents of the attorney.²⁶ Thus, statements made by the client to a private investigator employed by the client's attorney are protected by the attorney-client privilege to the same extent as if made directly to the attorney.²⁷

III. Is the Attorney Investigator Acting in the Capacity of an Attorney?

The attorney-client privilege attaches only to communications made by or to an attorney acting in his or her “capacity as such.”²⁸ Thus, the first issue addressed is whether an attorney hired to conduct an investigation is acting in his or her capacity as an attorney. Generally, an attorney is acting in the capacity of an attorney when he or she is being consulted by a client for the purpose of obtaining legal services or advice.²⁹ The privilege will not apply to attorney-client communications in cases where the client hires the attorney for business or personal advice or to perform the work of a nonlawyer.³⁰ Many courts dealing with attorney investigations, however, have had great difficulty in drawing the line between attorneys who are rendering legal advice and those who are merely performing the ordinary business of claims investigation for their clients.³¹

The disagreement among legal scholars highlights how important the resolution of this question is. Indeed, Charles Wright and Kenneth Graham express the view that “no privilege applies where the lawyer’s primary function is as a detective. Where the lawyer is retained for the purposes of litigation, the privilege should apply only where the investigation is one that cannot be carried out by non-lawyer investigators[.]”³² But even Wright and Graham openly acknowledge their disagreement on the issue.³³ This position was roundly criticized by the Ninth Circuit Court of Appeals in *United States v. Rowe*,³⁴ and, as set forth in more detail below, appears to be the minority view. On the other hand, the American Law Institute favors the broad approach that protects all communications from lawyer to client.³⁵ The Institute favors the broad approach because it “avoids difficult questions in determining whether a lawyer’s communication itself discloses a client communication.”³⁶

A. Attorney Investigator Acting in Capacity of Attorney

The New York Court of Appeals provided an excellent analysis of the “acting as such” requirement in *Spectrum Systems International Corp. v. Chemical Bank*.³⁷ There, Chemical Bank retained a law firm to “perform an investigation and render legal advice to Chemical regarding possible fraud by its employees and outside vendors, and to counsel Chemical with respect to litigation options.”³⁸ The law firm interviewed Chemical’s employees, a former Chemical officer, and representatives of Spectrum itself.³⁹ The law firm then prepared a report of the results of its investigation. The “Spectrum” section of the report consisted of a three-page narrative describing the problem and the facts, and a final paragraph containing the firm’s opinion as to the possible claims, an estimate of Chemical’s damages, the weaknesses of such a claim, and the firm’s view that there was insufficient proof to establish particular matters described in the letter.⁴⁰ After Spectrum sued Chemical and learned about the report, Spectrum requested it in discovery. Chemical moved for a protective order. The trial court, without ever viewing the documents, ordered the documents produced.⁴¹

On appeal, the appellate division modified the order, requiring the trial court to conduct an in camera inspection to determine materiality and necessity.⁴² The appellate division, having itself reviewed the documents, concluded that the documents were not privileged because, as the purpose of the investigation was to obtain business, rather than legal, advice, Chemical had not met its burden of proving that the investigation was done by lawyers acting as lawyers:

The communications pertain to an investigation of the plaintiff corporation and its employees, and suggest corruption prevention measures to be employed in the future. The records do not focus on any imminent litigation, nor on the parties' legal rights or obligations. There is no indication that legal research was performed in order to reach any conclusion with regard to the parties' legal positions. The outside law firm's final report, instead, reveals that meetings were to be held at some future date to discuss the course of action to be taken.

The information requested was assembled to aid defendant in the operation of its business and as such, is not exempt from disclosure. . . . [D]efendant's own affirmation attests to the fact that the material was not prepared primarily for litigation and that, in fact, there were other motivating forces behind its preparation.⁴³

The appellate division, nonetheless, granted leave to appeal to the court of appeals, certifying one question—was its order properly made?⁴⁴

The court of appeals answered this question in the negative.⁴⁵ Unlike the appellate division, the court of appeals found that the purpose of the attorney's investigation was to render legal advice to the client:

[T]he privilege is not narrowly confined to the repetition of confidences that were supplied to the lawyer by the client. That cramped view of the attorney-client privilege is at odds with the underlying policy of encouraging open communication; it poses inordinate practical difficulties in making surgical separations so as not to risk revealing client confidences; and it denies that an attorney can have *any* role in fact-gathering incident to the rendition of legal advice and services. The memorandum in *Rossi* included the lawyer's conversations with plaintiff's counsel and with third parties, as well as the lawyer's opinion and advice. Yet we determined, from reviewing the full content and context of the communication, that its purpose was to convey legal advice to the client, and we held the entire document exempt from discovery. We reach the same conclusion here.

[A]n investigative report does not become privileged merely because it was sent to an attorney. Nor is such a report privileged merely because an investigation was conducted by an attorney; a lawyer's communication is not cloaked with privilege when the lawyer is

hired for business or personal advice, or to do the work of a non-lawyer. Yet it is also the case that, while information received from third persons may not itself be privileged, a lawyer's communication to a client that includes such information in its legal analysis and advice may stand on different footing. The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client.⁴⁶

Here we conclude that the facts were selected and presented in the [law firm's] report as the foundation for the law firm's advice, and that the communication was primarily and predominantly of a legal character.⁴⁷

The court rejected any requirements that litigation be contemplated or that the attorney's investigative report contain legal research in order to be privileged:

The prospect of litigation may be relevant to the subject of work product and trial preparation materials, but the attorney-client privilege is not tied to the contemplation of litigation. . . .

* * * *

Similarly, the absence of legal research in an attorney's communication is not determinative of privilege, so long as the communication reflects the attorney's professional skills and judgments. Legal advice may be grounded in experience as well as research.⁴⁸

More recently, in *Sandra T.E. v. South Berwyn School District 100*,⁴⁹ the Seventh Circuit Court of Appeals was called upon to analyze this issue in the context of claims of sexual molestation against an elementary school teacher and his school district employer.⁵⁰ Sidley Austin LLP was hired by the school board to conduct an investigation and to provide legal advice to the district.⁵¹ Sidley and the school board entered into a written retention agreement.⁵² The board sent a letter to all parents advising them of Sidley's retention.⁵³ Sidley interviewed both current and former employees of the district and some third-party witnesses.⁵⁴ None of the interviews was recorded; the Sidley attorneys took notes during the interviews and later drafted memoranda summarizing them.⁵⁵ Sidley provided the school board with a written executive summary as well as an oral report of the legal advice it was retained to provide.⁵⁶

The victims and their families sued the school district in January 2005.⁵⁷ Plaintiffs first sought production of the Sidley materials from a Sidley partner by way of a deposition subpoena with an accompanying request for documents.⁵⁸ Sidley turned over more than 1,000 pages of documents but withheld the witness interview summaries and other internal legal memoranda.⁵⁹ Plaintiffs moved to compel the school district to turn over the materials, and the trial court so ordered, finding that Sidley was hired as an "investigator, not as an attorney."⁶⁰ When plaintiffs found out that these materials were in Sidley's

possession, and not in the school district's, plaintiffs subpoenaed Sidley directly.⁶¹ When Sidley continued to assert a privilege claim, plaintiffs sought an order compelling Sidley to produce the documents.⁶² The trial court, reiterating the view that Sidley was an investigator, not an attorney, ordered production, and Sidley appealed.⁶³

The Seventh Circuit reversed, concluding that Sidley was acting as an attorney while investigating the details of the allegations of sexual molestation.⁶⁴ The appellate court concluded that the trial court erred by not considering the engagement letter:

The engagement letter spells out that the Board retained Sidley to provide legal services in connection with developing the School Board's response to [teacher]'s sexual abuse of his students. Sidley's investigation of the factual circumstances surrounding the abuse was an integral part of the package of legal services for which it was hired and a necessary prerequisite to the provision of legal advice about how the District should respond. . . . [T]he conduct of Sidley attorneys during the investigation confirms that they were acting in their capacity as attorneys. During the confidential interviews with school-district employees, the attorneys provided so-called "Upjohn warnings" emphasizing that Sidley represented the School Board and not the employee and that the School Board had control over whether the conversations remained privileged. No third parties attended the interviews, the School Board received [Sidley]'s report of the firm's findings during an executive session not open to the public, and the written executive summary that Sidley turned over to the Board was marked "Privileged and Confidential," "Attorney-Client Communication," and "Attorney Work Product."⁶⁵

The court reached a similar conclusion in *Leucadia, Inc. v. Reliance Insurance Co.*,⁶⁶ where a subsidiary retained outside counsel to draft a company policy on conflicts of interest and to thereafter investigate past conduct to determine whether it complied with the newly drafted policy. Leucadia then filed suit under a bond issued by Reliance, and Reliance sought production of the outside counsel's 65-page report analyzing a series of past transactions on the basis that the information was gathered as part of a factual investigation, not for the rendition of legal services.⁶⁷ The court rejected this argument, holding: "Here counsel were engaged to determine whether plaintiff had legally enforceable rights against its employees or its insurer, and the privilege extends to factual matter given to counsel to enable them to render such an opinion."⁶⁸

Courts in other cases have also found that an attorney investigator was acting in his or her capacity as an attorney. For example, in *State ex rel. U.S. Fidelity & Guaranty Co. v. Canady*⁶⁹ and *Dunn v. State Farm Fire & Casualty Co.*,⁷⁰ the courts concluded that an attorney retained by the insurer to investigate a suspicious fire was acting as an attorney, not an investigator, and his reports to

the insurer were protected communications.⁷¹ Similarly, in *In re State Commission of Investigation Subpoena No. 5441*,⁷² the court found that an attorney hired by a school board association was acting in the capacity of a lawyer during his investigation of alleged improprieties in an investment program run by an insurance group of which the school board association was a member.⁷³ In *Bross v. Chevron U.S.A. Inc.*,⁷⁴ the court found that a root cause analysis report, prepared following the death of an oil worker by nonlawyers at the direction of a lawyer, was privileged because the investigators were directed by and reported only to counsel.⁷⁵ Also, in *Carte Blanche (Singapore) PTE, Ltd. v. Diners Club International, Inc.*,⁷⁶ the court found that an attorney investigating a proposed transaction in connection with an existing franchise agreement acted in his capacity as a lawyer in doing so.⁷⁷ Finally, the Fourth Circuit, in *In re Allen*, held that an attorney hired to investigate possible document mismanagement and breaches of confidentiality in an Attorney General's office was acting in her capacity as an attorney and that reports relating to her investigation were privileged because they were connected to the furnishing of legal advice.⁷⁸

A seemingly contrary result was reached by the Missouri Court of Appeals in *Crow v. Crawford & Co.*⁷⁹ At issue there was a set of notes taken by an employee of the defendant, which was hired by a self-insured company as a third-party administrator for its workers' compensation claims.⁸⁰ The notes were apparently made during the employee's investigation into plaintiff's workers' compensation claim.⁸¹ Even though the note-taker was not an attorney or an employee of an attorney,⁸² the appellate court upheld the trial court's conclusion that the notes were protected by the attorney-client privilege.⁸³ The appellate court reasoned: "Documents prepared by an agent or employee at the employer's direction for the purpose of obtaining advice of counsel or for use in prospective or pending litigation are encompassed by the attorney-client privilege."⁸⁴

B. Attorney Investigator Not Acting in Capacity of Attorney

Courts have not permitted clients to cloak a routine business investigation with attorney-client privilege protection simply by retaining an attorney to conduct that investigation.⁸⁵ Most of these cases have arisen in the context of an insurance company client where the courts have found that the attorney's investigation was part of the insurer's ordinary business of claims investigation.⁸⁶

*Mission National Insurance Co. v. Lilly*⁸⁷ is a good example. There, Mission insured a nightclub in northern Minnesota that was destroyed by fire. Because Mission retained the Cozen & O'Connor law firm "as a matter of course to conduct its claims adjustment investigations in a geographic area including Minnesota for all claims exceeding \$25,000,"⁸⁸ the Cozen firm investigated the loss and corresponded with Mission. After Mission sued for declaratory relief, the insured sought production of Mission's claim file, including correspondence from Cozen's office.⁸⁹ The court concluded that the Cozen firm was not

acting as counsel, but was performing a business function of Mission, thereby rendering the results of Cozen's investigation discoverable:

It is not the precepts of law that give rise to the difficulty in this case; instead, the difficulty exists because of plaintiffs [sic] decision, immediately upon receiving notice of the fire, to employ attorneys to fulfill its ordinary business function of claims investigation. Counsel for plaintiff agrees that Cozen & O'Connor was the only party responsible for performing that pure, ordinary business function. . . .

* * * *

To the extent that Cozen & O'Connor acted as claims adjusters, then, their work-product, communications to client, and impressions about the facts will be treated herein as the ordinary business of plaintiff, outside the scope of the asserted privileges. This approach results in the majority of the file being discoverable.⁹⁰

A similar result was reached in *St. Paul Reinsurance Co. v. Commercial Financial Corp.*⁹¹ There, St. Paul Reinsurance Co. and Zurich Reinsurance (London) Ltd. provided employment practice liability coverage to Commercial Financial Corp. (CFC).⁹² The insurers filed a declaratory judgment action, claiming that CFC made material misrepresentations in its application for coverage.⁹³ On that basis, they denied CFC's claims for coverage of employment discrimination claims by employees and sought rescission of the policy. CFC filed a counterclaim arguing that the insurers acted in bad faith by denying the claims.⁹⁴ To support its defense and counterclaims, CFC sought discovery of certain claim investigations undertaken by the insurers, which the insurers attempted to shield on the grounds of attorney-client privilege.⁹⁵

The insurers had hired an attorney to conduct an investigation into CFC's claims. CFC argued that the insurers had an existing obligation in the ordinary course of business to investigate and adjust CFC's claims; thus, the insurers could not shield the claims investigation documents produced by the attorney under the attorney-client privilege.⁹⁶ The insurers responded that the documents generated after they began to consider rescission of the policy were privileged, since, at that point, they ceased to be normal business functions.⁹⁷

The court agreed with CFC, rejecting the insurers' argument that the claims investigation files should be shielded from discovery because they were prepared by an attorney.⁹⁸ Specifically, the court held that even when the insurers and their attorney began to consider rescission on the grounds of nondisclosure, that consideration was part of the investigation of the availability of coverage, and, therefore, part of an insurer's normal business processes.⁹⁹

While *Lilly* and *St. Paul Reinsurance* present fairly clear examples of an attorney performing an investigation that is part of the client's ordinary business, *National Farmers Union Property & Casualty Co. v. District Court*¹⁰⁰ demonstrates that the line between an ordinary business investigation and an investigation to provide legal advice is not always clear.

In *National Farmers Union*, the court held that communications between the attorneys and their insurance company client that described a factual investigation were not protected by the attorney-client privilege. National Farmers Union (NFU) provided lease guaranty insurance to its insured, Tenneco, whereby NFU guaranteed payment of rents that came due under a sublease during the policy period in the event of a default. Following a default on the sublease payments, Tenneco made a claim under the NFU policy.¹⁰¹ NFU referred the matter to its general counsel, who in turn contacted outside counsel to investigate whether the claim was covered under the policy. Outside counsel submitted a lengthy memorandum to NFU's general counsel relating the results of the investigation.¹⁰² NFU subsequently denied Tenneco's claim. Tenneco sued and later filed a motion to compel production of certain documents, including the memorandum from the outside counsel to NFU's general counsel. Following in camera review, the trial court ruled that the first 27 pages of the memorandum were discoverable as ordinary business records.¹⁰³

On appeal, NFU argued that the memorandum was prepared by outside counsel in response to a request for legal advice relating to an investigation of the origination of the policy and the validity of the claim. The Colorado Supreme Court, however, rejected this argument. First, the court reasoned that the attorneys interviewed various officers and employees to determine the factual circumstances concerning the issuance of the policy and were acting more in the role of claims investigators than legal counsel for NFU. Second, the court reasoned that the dominant purpose of the interviews was to provide NFU with the factual circumstances underlying the issuance of the policy. Third, the court noted that there was no showing that the persons interviewed by the attorneys were ever informed that the attorneys were acting as company counsel or that the purpose of the investigation was to allow the company to obtain legal advice. Finally, the court stated that there was no indication that the employees were ever told that the investigation was confidential.¹⁰⁴ The court held that the attorney-client privilege did not protect the first 27 pages of the memorandum because the information was not legal advice but the result of a factual investigation relating to the issuance of the policy.¹⁰⁵ The remainder of the memorandum contained legal conclusions and was not discoverable.¹⁰⁶

In his dissent, Justice Rovira focused on the role of the attorneys hired by NFU, noting that upon receiving the insured's demand for payment, NFU referred the matter to its general counsel, who, in turn, retained outside attorneys to investigate the circumstances under which the policy was issued and determine whether the insured's claim should be denied.¹⁰⁷ The outside attorneys then initiated the investigation and submitted a memorandum to NFU, which provided information concerning the facts and circumstances surrounding the issuance of the policy and counsel's recommendation regarding whether the insured's claim should be paid.¹⁰⁸ The dissent concluded: "Where, as here, the client seeks the assistance of counsel to determine the operative facts and obtain legal advice based on those facts, I would, consistent with the purposes of the privilege, protect the memorandum against compelled disclosure."¹⁰⁹

In essence, the Colorado Supreme Court relied on the premise that the attorneys hired by NFU were not acting as attorneys, but rather were acting in another capacity—as claims investigators. *National Farmers Union*, however, appears wrongly decided. The court failed to focus on the real reason the attorneys were retained—to render an opinion concerning whether the insured’s claims should be denied. The attorneys had to investigate the facts to determine the circumstances under which the policy was issued before they could render their opinion on the denial of the claim. The attorneys were not acting as claims investigators, but rather as attorneys hired to investigate the factual circumstances and render a legal opinion accordingly.¹¹⁰

Investigations conducted by attorneys hired by insureds may also be discoverable, as illustrated by *SR International Business Insurance Co. v. World Trade Center Properties LLC*,¹¹¹ which arose out of the September 11, 2001, attack on the World Trade Center. There, a lender for World Trade Center leaseholders retained an insurance advisor in July 2001 to help determine the amount of insurance coverage that the leaseholders should obtain.¹¹² After the September 11 attack, the lender’s employees and the insurance advisor conducted an investigation to gather information regarding the available insurance.¹¹³ In the subsequent suit by the leaseholders for insurance coverage, SR International moved for an order compelling production of the documents resulting from the post-September 11 investigation.¹¹⁴ The lender, however, claimed that the information-gathering activities were protected by the attorney-client privilege, since the employees of the insurance advisor were acting as litigation consultants to the lender’s in-house counsel in the investigation following the September 11 attack.¹¹⁵

The U.S. District Court for the Southern District of New York held that the communications with investors after the terrorist attack were performed in the normal course of business and therefore were not protected.¹¹⁶ The court found that the purpose of the investor meetings was to provide information in response to the investors’ inquiries and not to provide legal advice. The court also found that notes documenting facts were not protected because the attorney-client privilege does not protect underlying facts.¹¹⁷ The court did find, however, that some meetings between the lenders’ employees and the lender’s in-house counsel were privileged, since those communications sought legal advice.¹¹⁸

C. Summary

The *Spectrum Systems*, *South Berwyn School District*, and *Leucadia* cases illustrate that the communications between attorney and client relating to the attorney’s investigation will be protected by the attorney-client privilege as long as the attorney is acting in his or her capacity as an attorney. The *National Farmers Union*, *Lilly*, *St. Paul Reinsurance*, and *SR International* cases, however, demonstrate that not all attorneys conducting investigations on behalf of clients are acting in the capacity of an attorney. Where, as in *Lilly*, *St. Paul Reinsurance*, and *SR International*, the attorney is performing an investigation that can

be generally considered part of the client's ordinary business practices, a client cannot shield the results of that investigation simply by having an attorney conduct the investigation. *National Farmers Union* illustrates that the line between an ordinary business investigation and an investigation for purposes of obtaining legal advice is not always clear. To obtain attorney-client privilege protection of attorney-client investigative communications, the party seeking to invoke the privilege must carry the burden of establishing that the attorney's investigation was conducted to render legal advice to the client. *Spectrum Systems* correctly notes that the prospect of litigation is irrelevant to a determination of whether the client is seeking legal advice and that an attorney-investigator is acting in the capacity of an attorney where the attorney's report integrates the factual results of the investigation with the attorney's assessment of the client's legal position or options.

IV. *Special Problems Facing Corporations That Retain Counsel to Investigate*

Corporations face a special problem when they hire attorneys to investigate and provide legal advice: Which employees can the attorney talk to and keep the communications within the attorney-client privilege? The first case to establish guidelines in these situations was *City of Philadelphia v. Westinghouse Electric Corp.*¹¹⁹ The court there determined that those employees in the "control group" would be covered by the privilege.¹²⁰ The control group included only those members of senior management who may be in a position to control or take action on the advice of the attorney.¹²¹ While some courts followed the control group approach,¹²² other courts developed a "subject matter" test, which required application of several factors to determine if the subject matter of an attorney-client communication was privileged.¹²³

A. **Supreme Court Rejects Control Group Test**

In *Upjohn Co. v. United States*,¹²⁴ the Supreme Court directly addressed a factual situation where an attorney conducted an investigation and interviewed numerous corporate employees, many of whom were not within the control group. In *Upjohn*, the attorney's investigation commenced after independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that improper payments had been made to foreign government officials in order to secure government business. After the accountants informed Upjohn's general counsel, Gerard Thomas, of the bribes, Thomas consulted with outside counsel and decided to enlist the aid of outside counsel in investigating the questionable payments.¹²⁵ Outside counsel prepared a letter containing a questionnaire that was sent by Upjohn's chairman to various Upjohn employees, including those outside the control group. The letter, which included an admonition that the investigation was "highly confidential," specified that the purpose of the investigation was to determine the nature and magnitude of any payments

made by Upjohn to any foreign government officials, and stated that management needed full information concerning any such payments.¹²⁶ The responses were sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaires and 33 other Upjohn employees and took notes during these interviews.¹²⁷

The Internal Revenue Service thereafter began an investigation to determine the tax consequences of the alleged payments after receiving a report about them from Upjohn.¹²⁸ In the course of the investigation, the Internal Revenue Service subpoenaed all of Thomas's investigative files, including the questionnaires, memoranda, and notes of the interviews. After Upjohn refused to produce the questionnaires and notes, the IRS sought enforcement from the district court, which ordered their production. The Third Circuit upheld this decision.¹²⁹

On further appeal, the Supreme Court held that the communications made by the employees (and the responses to the questionnaires) were protected by the attorney-client privilege.¹³⁰ The Court rejected the application of the control group test because it discouraged the communication of relevant information by the client's employees to the attorneys seeking to render legal advice to the corporation.¹³¹ The Court recognized that because lower-echelon corporate employees often embroil a corporation in serious legal difficulties, these employees often have the only relevant information needed by counsel to render legal advice to the corporation. If the communications with these employees are not privileged, the Court reasoned that the attorney faced a "Hobson's choice"—interview employees without the protection of the attorney-client privilege or forgo those interviews and render advice to the corporation based on incomplete information.¹³² Because the control group test too narrowly protected what the Court believed was privileged information, the Court rejected it in favor of the subject matter approach.¹³³

Upjohn, which arose from an IRS investigation, addressed the federal common law attorney-client privilege¹³⁴ and, thus, is not binding on state courts¹³⁵ or on federal courts in diversity cases.¹³⁶ Some state courts have followed the *Upjohn* approach,¹³⁷ while others have modified the *Upjohn* test. For example, in *Southern Bell Telephone & Telegraph Co. v. Deason*,¹³⁸ the Florida Supreme Court had to determine the extent of the attorney-client privilege when a regulated utility with a duty to disclose investigates its own conduct through counsel.¹³⁹ The Florida Public Services Commission (PSC) argued that because Southern Bell was regulated by state statute, the *Upjohn* rule did not apply, and the information it sought was not protected by the attorney-client privilege.¹⁴⁰ The court first rejected the control group test because it failed to recognize the "crucial role [that] middle and lower-level employees play in the corporation's activities."¹⁴¹ The court then rejected the PSC's argument that the rules of privilege should be applied differently because Southern Bell was a regulated industry.¹⁴² The court adopted the subject matter test,¹⁴³ relying principally on the rule developed in *Harper & Row Publishers, Inc. v. Decker*¹⁴⁴ as modified by *Diversified Industries, Inc. v. Meredith*.¹⁴⁵ The court then applied the rule it had

announced to the information Southern Bell claimed was privileged, allowing the PSC to discover some of it, and protecting some from discovery.¹⁴⁶

B. The Control Group Theory Remains Viable in Illinois

Even in light of *Upjohn*, the control group theory continues to be applied in at least one jurisdiction. In *Consolidation Coal Co. v. Bucyrus-Erie Co.*,¹⁴⁷ the Illinois Supreme Court rejected the *Upjohn* approach in favor of the control group test.¹⁴⁸ The court reasoned that the control group test struck a reasonable balance between protecting corporate decision makers' consultations with counsel and minimizing the amount of factual information that is immune from discovery.¹⁴⁹ Under this theory, however, communications to and from the person whose conduct gave rise to the potential corporate liability are protected, whether or not that person is part of the control group.¹⁵⁰

Indeed, until a subsequent change in a state rule of evidence, the Texas Supreme Court also continued to endorse the control group approach. In *National Tank Co. v. Brotherton*,¹⁵¹ the court interpreted its rule of evidence as adopting the control group test and refused to protect the statements taken by National's risk control coordinator—on behalf of National's general counsel—under the attorney-client privilege.¹⁵² The court ruled that the employees the coordinator interviewed were not "representatives" of National for the purposes of the Texas rule, and therefore, communications from those employees were not privileged.¹⁵³ Even though the employees "may have been speaking with management's blessing," the court held, they had not been authorized to seek legal advice on National's behalf, and thus fell outside the group of employees whose communications with counsel would be privileged.¹⁵⁴

In 1998, the Texas Legislature revised the applicable rule of evidence, thereby replacing the "control group" test previously used and analyzed in *National Tank*.¹⁵⁵ Subsequent Texas appellate court decisions have interpreted the revision to adopt the broader subject-matter test, finding privilege if "the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment."¹⁵⁶

C. Arizona Adopts a Third Approach

In *Samaritan Foundation v. Goodfarb*,¹⁵⁷ the Arizona Supreme Court rejected both the control group test and the subject matter test in favor of the "functional approach." In *Samaritan*, a child's heart stopped during surgery and the hospital's lawyer investigated the incident. The lawyer directed a nurse paralegal to interview three nurses and a scrub technician who were present during the surgery. The paralegal summarized the interviews in a memorandum that she submitted to the hospital's corporate counsel.¹⁵⁸

The child sued, and when the employees were unable to remember during their depositions what happened in the operating room, she sought production

of the summaries prepared by the paralegal.¹⁵⁹ The trial court rejected the hospital's argument that the summaries were protected by the attorney-client privilege, but gave them limited protection under the work-product doctrine.¹⁶⁰ The hospital appealed, and the appellate court upheld the trial court's ruling, adopting a modified form of the control group test for application of the attorney-client privilege.¹⁶¹ The appellate court found that the requisite showing of need for the information had been made and upheld the trial court's decision that the summaries were discoverable.¹⁶²

The Arizona Supreme Court rejected the court of appeals' "qualified privilege" approach,¹⁶³ opting instead for the "functional approach," which focuses on the relationship between the communicator and the need for legal services.¹⁶⁴ The court rejected both *Upjohn's* subject matter test and the control group test for the same reason—both would protect communications made by employees of a corporation in their capacity as witnesses to an event in which they were uninvolved from a liability perspective.¹⁶⁵ In the court's view, any privilege that attaches to communications between corporate employees and the corporation's attorneys must protect the legitimate needs of the corporation to obtain legal advice, yet not be so broad as to encompass statements made by mere witnesses to an event.¹⁶⁶ The court held that:

[W]here someone other than the employee initiates the communication, a factual communication by a corporate employee to corporate counsel is within the corporation's privilege if it concerns the employee's own conduct within the scope of his or her employment and is made to assist the lawyer in assessing or responding to the legal consequences of that conduct for the corporate client. This excludes from the privilege communications from those who, but for their status as officers, agents or employees, are witnesses.¹⁶⁷

Because the statements of the employees in this case were not of the kind described, the court ruled that the paralegal's summaries were discoverable.¹⁶⁸

In response to the *Samaritan* decision, the Arizona legislature enacted section 12-2234 of the Arizona Statutes,¹⁶⁹ which modifies the *Samaritan* decision and codifies the attorney-client privilege applicable not just to corporations, but to all business entities.¹⁷⁰ This statute protects communications with any employee of an entity and counsel if the communication is either (1) for the purpose of providing legal advice to the entity or (2) for the purpose of obtaining information in order to provide such advice.¹⁷¹ The statute also provides that the employee is not relieved of a duty to disclose facts by virtue of the statute.¹⁷² Accordingly, the witness statements the court viewed as not privileged in *Samaritan* would have been privileged under the statute.

It should be noted, however, that section 12-2234 of the Arizona Statutes applies only in the *civil* context. In *Roman Catholic Diocese v. Superior Court*,¹⁷³ the Arizona Court of Appeals rejected the plaintiff's contention that Arizona Statute section 13-4062(2), the codification of the attorney-client privilege in

criminal cases, should be interpreted in a manner similar to its revised civil counterpart.¹⁷⁴ The court observed that the civil and criminal attorney-client statutes were very similar when *Samaritan* was decided.¹⁷⁵ After the *Samaritan* decision, the legislature amended the civil attorney-client privilege statute in an effort to broaden the privilege afforded to corporations in civil cases.¹⁷⁶ The Arizona Legislature, however, did *not* modify the criminal attorney-client privilege statute—and without such a modification, the court declined to extend the civil privilege to criminal cases.¹⁷⁷

D. Summary

As the foregoing cases demonstrate, the fact that a lawyer investigates in her capacity as a lawyer for a corporate client does not necessarily mean that the communications to or from that lawyer will be protected. In those jurisdictions that follow *Upjohn*, an attorney can be more confident that the communications with the client's employees will be protected. In a control group jurisdiction, the communications will not be protected by the attorney-client privilege unless the communicator or recipient of the communication from the attorney is within the narrowly defined control group or is the person whose conduct gave rise to the potential liability. In states that follow Arizona's functional approach, communications to or from an employee whose conduct may give rise to liability of the corporation are protected; communications to or from mere witnesses to an event are not.

V. Information from Nonclients: Is It Protected?

Another issue that arises in cases where attorneys conduct investigations is the scope of protection for information supplied by nonclients. Indeed, in some investigations, much of the information will be supplied by nonclients. The attorney transmits the information to his or her client, and it forms the basis of counsel's legal advice and recommendations.

A. Application of the Attorney-Client Privilege

Under Professor Wigmore's approach, the attorney-client privilege does not apply if the attorney's legal advice to the client is based on information obtained from third parties.¹⁷⁸ This rule, if accurately stated, directly affects communications between attorneys and clients in a variety of contexts.¹⁷⁹ In fact, many courts hold that there is no attorney-client privilege for documents relating to factual information obtained from nonclient sources.¹⁸⁰

The court in *United States v. United Shoe Machinery Corp.*¹⁸¹ followed the Wigmore approach. There, the government brought a civil antitrust action against United Shoe and sought to introduce numerous exhibits that United claimed were attorney-client privileged.¹⁸² The first category of exhibits included letters to or from outside attorneys.¹⁸³ At the time of the communications, "each of the law partnerships was counsel for United, its subsidiaries and affiliates."¹⁸⁴ The

court found that the privilege did not apply when the legal advice is based on "facts disclosed to the attorney by a person outside the organization of defendant and its affiliates."¹⁸⁵

United Shoe is not simply an archaic decision with no recent support. Its support, however, appears limited to the federal courts. In *Merrin Jewelry Co. v. St. Paul Fire & Marine Insurance Co.*,¹⁸⁶ the court held that the report of an attorney hired by St. Paul to conduct an examination under oath in response to a theft claim was not privileged because it was based on information obtained from a nonclient during the examination.¹⁸⁷ Similarly, in *J.P. Foley & Co. v. Vanderbilt*,¹⁸⁸ the court ordered production of communications from attorney to client because they were based on information from third parties.¹⁸⁹

While not going as far as *United Shoe*, other courts have ordered parties to produce facts that the party's attorney discovered from nonclient sources. In *Carte Blanche (Singapore) PTE, Ltd. v. Diners Club International, Inc.*,¹⁹⁰ for example, the court ordered the client to produce its attorney's letter containing the results of an investigation from various nonclient sources.¹⁹¹ Similarly, in *Allen v. West Point-Pepperell, Inc.*,¹⁹² the court found that "plaintiffs and [counsel] must disclose to defendants all facts of which they were aware at all times relevant to this action, whether or not those facts were communicated by plaintiffs to [counsel] and whether or not those facts were learned by plaintiffs from [counsel],"¹⁹³ but all written communications between plaintiffs and counsel were deemed privileged and not discoverable.¹⁹⁴ And more recently, the court in the patent case *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*,¹⁹⁵ deemed communications between plaintiffs' attorneys and outside counsel regarding prior art privileged, but not the underlying communications to the inventor.¹⁹⁶ Similarly, a Louisiana federal court allowed the deposition of non-lawyer investigators to proceed, even though it found that the written report prepared by the proposed deponents was privileged.¹⁹⁷

In contrast, the Missouri Supreme Court considered and rejected the Wigmore approach in *State ex rel. Great American Insurance Co. v. Smith*.¹⁹⁸ There, Great American insured Cannova, who reported a fire loss and made claim for the damage. Great American hired an attorney, Risjord, to investigate the loss. At the conclusion of Risjord's investigation, Great American denied Cannova's claim on the grounds of arson, and Cannova sued.¹⁹⁹ Great American's claim files were produced, except for three letters from Risjord to Great American, which Great American claimed were privileged.²⁰⁰ After the trial court ordered production of the letters, Great American sought prohibition, and the supreme court ordered the trial court to conduct an in camera review of the letters pursuant to the direction set forth in the opinion, which approximated the Wigmore approach.²⁰¹ The trial court reviewed the letters in camera and again ordered their production.²⁰²

Great American appealed again, and this time the supreme court rejected the Wigmore approach it had adopted in the earlier decision and reversed the trial court's order.²⁰³ The court's rationale is instructive. First, the court determined that Wigmore's view was a narrow one, directed toward limiting

the scope of protected information.²⁰⁴ The court found that society's interests were better served by protecting communication between attorney and client beyond that suggested by Wigmore.²⁰⁵ Second, the court found that the rule proposed by the American Law Institute²⁰⁶ better reflected the reality of an attorney-client relationship today.²⁰⁷ The court then adopted a two-part test to determine whether the privilege applies:

There is no question but that the three letters Risjord wrote to relators pertained to these matters in which he had been employed. Risjord so stated and the court's findings as set out in the letter of April 21, 1977, so show. If this were not so, we would direct the court to conduct a hearing and examine representatives of relators or Risjord or both to determine whether at the time the letters were written, the relation of attorney and client regarding the insurance claims existed, and whether the letters pertained to the matters for which Risjord had been employed. If either answer were in the negative, the privilege would not apply.²⁰⁸

When comparing the Wigmore view to that of the court in *Great American*, the better-reasoned view is that of the Missouri Supreme Court, keeping in mind the scope of the privilege—communications are protected, but facts are not.²⁰⁹ The *Great American* court emphasized the protective scope of the attorney-client privilege as it applies to investigative reports:

When a client goes to an attorney and asks him to represent him on a claim which he believes he has against someone or which is being asserted against him, even if he as yet has no knowledge or information about the claim, subsequent communications by the attorney to the client should be privileged. Some of the advice given by the attorney may be based on information obtained from sources other than the client. Some of what the attorney says will not actually be advice as to a course of conduct to be followed. Part may be analysis of what is known to date of the situation. Part may be a discussion of additional avenues to be pursued. Part may be keeping the client advised of things done or opinions formed to date. All of these communications, not just the advice, are essential elements of attorney-client consultation. All should be protected.²¹⁰

But the court also distinguishes information that is not protected by the attorney-client privilege and, thus, is discoverable:

This does not mean that discoverable factual information can be made privileged by being recited by the attorney or the client in their confidential communications. Only the actual attorney-client communications are privileged. . . . If [the investigative report documents

prepared by investigators who were hired by the attorney or client] had been attached to or discussed in the letters from Risjord to relators [client], the fact that the attorney's letters would be privileged would not cause the GAB reports or the FBI letter to become protected by the attorney-client privilege.²¹¹

B. Are Former Employees Clients or Third Parties?

One question left open in *Upjohn* is whether communications with a corporation's former employees are protected by the attorney-client privilege.²¹² Because this issue had not been addressed in the courts below, the *Upjohn* Court declined to opine on it.²¹³

But in *In re Coordinated Pretrial Proceedings*,²¹⁴ the Ninth Circuit applied the *Upjohn* rule in the context of former employees. The trial court disqualified defense counsel from representing present employees (other than corporate executives) and former employees in discovery depositions²¹⁵ because the court wanted to allow the plaintiffs to inquire fully into the communications made at "orientation" sessions between the witnesses and defense counsel.²¹⁶ On appeal, the court applied the principles of *Upjohn*, which had been decided after the trial court ruled, and concluded that the trial court's ruling would have been different.²¹⁷ The court concluded that the *Upjohn* rationale applied with equal force to former employees:

Although *Upjohn* was specifically limited to current employees, the same rationale applies to the ex-employees (and current employees) involved in this case. Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties. Again, the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged after the employee leaves.²¹⁸

Other federal and state courts have reached the same conclusion.²¹⁹ Furthermore, the Fourth Circuit noted, in *In re Allen*,²²⁰ that courts that have declined to apply the attorney-client privilege to communications between the client's attorney and former employees have done so because they were following state law or because the former employee was not an employee when the relevant conduct occurred.²²¹

Waiver, however, does not occur when an attorney shares privileged materials with a consultant hired by the client, as *In re Bieter* illustrates.²²² There, a land developer hired an independent contractor, Klohs, to provide advice and guidance as to commercial and retail development in Minnesota.²²³ The consultant worked with the architects, consultants, and the developer's counsel, and also appeared at public hearings about the proposed development on behalf of the developer.²²⁴ After a lawsuit was filed by the developer against

a Minnesota city, the consultant attended meetings with the developer and its attorney.²²⁵ In an affidavit filed in the trial court, the developer's attorney indicated that he viewed the consultant as one of the developer's representatives.²²⁶ After the trial court allowed discovery of the communications with the consultant, the developer sought a writ of mandamus overturning the trial court's ruling.²²⁷

The court of appeals reversed the trial court, holding that communications with the consultant were privileged.²²⁸ The court first relied on Supreme Court Standard 503(b),²²⁹ even though the proposed rule was never made a part of the Federal Rules of Evidence by Congress, because it states the federal common law applicable to RICO actions.²³⁰ Finding no cases directly on point, the court next relied on a post-*Upjohn* law review article²³¹ that set forth five principles to guide courts in deciding these issues.²³² The court found that third principle—the “information-giver must be an employee, agent, or independent contractor with a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of legal services”—applied directly to the facts before it²³³ and chose to adopt it in reversing the trial court's decision.²³⁴

C. What Must Be Disclosed?

Even if attorney-client privileged communications contain discoverable factual information, it does not necessarily mean that communications containing those facts “are fair game in discovery.”²³⁵ Some courts hold that the written communications do not have to be produced, but rather the client must, in either depositions or interrogatory responses, disclose the discoverable factual information.²³⁶ Other courts require the written communication to be produced with the exception of any redacted portions relating to legal advice.²³⁷

If the Court's admonition in *Upjohn* that the protection of the attorney-client privilege applies only to communications and not facts is correct, then the obvious answer is that the communication should never be produced, but the party must always provide requested information in response to interrogatories or in depositions. The *Upjohn* Court clearly stated that the witnesses interviewed by counsel could be deposed and had to answer questions; what the government could not obtain were the questionnaires those witnesses filled out. In *Samaritan*, for example, the hospital should have disclosed all of the *facts* the nurses knew in response to well-crafted interrogatories, even when the nurses could not recall those facts in their depositions.

VI. Additional Attorney-Client Privilege Issues

A. Who Is the Client?

In some cases, an attorney may actually have two clients, even though only one client is or will be named as a party in litigation. An attorney representing both the insurer and the insured in a subrogation suit and an attorney

representing a liability insurer and the insured in a casualty defense matter are just two examples.²³⁸ The attorney-client privilege should apply whether or not the person asserting the privilege is named as a party. In *United Coal Cos. v. Powell Construction Co.*,²³⁹ for example, the court held that communications between United Coal's property insurance carrier and an attorney it retained to file a subrogation action on its behalf but in the name of the insured, which also retained the attorney to recover its uninsured loss, were privileged.²⁴⁰

Other courts, however, have taken a more restrictive view. In *Sterling Drilling Co. v. Spector*,²⁴¹ the court found that an attorney hired by an insured's insurer to defend the insured in subsequent litigation represented only the insurer. *Sterling Drilling* involved the death of a worker in an industrial accident. The employer's insurer hired an attorney to conduct an investigation into the insured's punitive damages exposure and to provide legal advice regarding those damages.²⁴² While the *Sterling* court implicitly found that the insurer shared an attorney-client privilege with the investigating attorney, the court refused to extend this protection to the employer because there was "no evidence that [the investigating attorney] had any real contact with [the employer] concerning the conduct of the investigation including the taking of the statements."²⁴³

B. When Is the Client a Client?

The attorney-client privilege also applies to communications between an attorney and a prospective client.²⁴⁴ The privilege will be inapplicable, however, where there is no clear prospective attorney-client relationship²⁴⁵ as the case *Poluch v. American Fan Co.*²⁴⁶ illustrates. There, Poluch was injured at work, and his employer's workers' compensation carrier retained Creative Services, an investigative agency, to determine the nature and extent of Poluch's injuries and the potential financial exposure of the workers' compensation carrier.²⁴⁷ Poluch hired her own attorney to pursue legal action against the manufacturer of the equipment allegedly responsible for Poluch's injury. After Creative Services completed its investigation, but before Poluch initiated a products liability action against the manufacturer, Poluch's attorney was also retained by the workers' compensation carrier to represent its subrogated interest. The workers' compensation carrier then turned over the entire workers' compensation file to Poluch's attorney.²⁴⁸

In discovery, the manufacturer requested production of the entire workers' compensation file. Poluch turned over certain portions of the file but withheld the investigation report. Poluch's counsel argued that the workers' compensation carrier was always in some sense "a de facto client."²⁴⁹ Poluch's attorney argued that the prospect of subrogation was a matter always considered by the insurer, and, therefore, the information obtained by the carrier's investigator was protected by the attorney-client privilege or the work-product doctrine.²⁵⁰ The court disagreed, holding that no attorney-client relationship existed between Poluch's attorney and the workers' compensation carrier at the time of the investigation, and, therefore, the attorney-client privilege did not apply.²⁵¹

The court also found that the work-product doctrine did not apply because of the lack of an attorney-client relationship at the time of the investigation.²⁵²

Three recent cases have analyzed the attorney-client privilege as it applies to situations involving prospective clients. In a case involving a dispute surrounding a tax strategy, *Diversified Group, Inc. v. Daugerdas*,²⁵³ the U.S. District Court for the Southern District of New York held that communications predating the attorney engagement agreement were not privileged because there was no indication that the client intended to obtain legal advice from the communication. In fact, the court stated that there was “strong proof” that the client sought business, not legal, advice from the attorney.²⁵⁴ Although the communications here did not fall within the purview of a prospective attorney-client relationship, the court noted that “[c]ommunications with an attorney that predate formal retention may be privileged ‘if the party divulging [the] confidences and secrets to [the] attorney believes that he is approaching the attorney in a professional capacity with the intent to secure legal advice.’”²⁵⁵

The court in *Auscape International v. National Geographic Society*²⁵⁶ focused on letters sent to prospective class action participants. There, the court held that the letters were not privileged, even if the sending of the letters was intended to further the interests of existing clients, because they constituted a form of “direct mail advertising.”²⁵⁷ The court analogized the letters to radio commercials advising potential plaintiffs that they may have a claim for asbestos exposure.²⁵⁸ Advertising by direct mail should not be considered privileged while advertising by radio is not privileged, the court reasoned. Application of the privilege in this context, the court said, “would take the attorney-client privilege to a galaxy far, far away from its roots and one that it is unnecessary to visit.”²⁵⁹

By contrast, the court in *Barton v. U.S. District Court for the Central District of California*²⁶⁰ determined that a law firm’s Internet questionnaires regarding an antidepressant drug were protected by the attorney-client privilege, even if those filling out the questionnaires were not ultimately retained by the law firm. In *Barton*, the law firm for the plaintiffs in a class action suit maintained what it called an “initial contact” questionnaire for those affected by the antidepressant Paxil.²⁶¹ The questionnaire asked for extensive information about the use of the drug and its symptoms, but later required the person filling out the form to acknowledge—by checking a “yes” box—that the questionnaire did not “constitute a request for legal advice,” and did not form an attorney-client relationship.²⁶²

The manufacturer sought disclosure of the four named plaintiffs’ questionnaires, arguing that the disclaimer waived any potential privilege.²⁶³ The district court agreed, concluding that, due to the plaintiffs’ having checked the “yes” box, the communications were not “confidential.”²⁶⁴ It therefore ordered the communications to be produced.²⁶⁵

The Ninth Circuit, granting the plaintiffs’ writ of mandamus, vacated the district court’s order.²⁶⁶ Applying California law, the court noted that the attorney-client privilege extends beyond the relationship between a client and a retained attorney:

Prospective clients' communications with a view to obtaining legal services are plainly covered by the attorney-client privilege under California law, regardless of whether they have retained the lawyer, and regardless of whether they ever retain the lawyer. . . . "[T]he fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result."²⁶⁷

C. Has the Privilege Been Waived?

The attorney-client privilege is, of course, waived when the communications have been revealed to third parties.²⁶⁸ Courts have developed a limited exception to this rule where the parties have a common legal interest.²⁶⁹ This exception has come to be known as the "joint defense" or "common interest" privilege, and can apply to both cooperating plaintiffs and cooperating witnesses.²⁷⁰ Generally, to establish the existence of this privilege, the party asserting the privilege must show that (1) the communications were made in the course of a joint litigation effort, (2) the statements were designed to further the effort, and (3) the privilege has not otherwise been waived.²⁷¹ Courts analyze several factors when determining whether parties qualify for the joint-defense or common-interest privilege, such as the method of payment, allocation of decision-making roles, requests for advice, presence at meetings, and frequency and content of correspondence.²⁷²

In *Broessel v. Triad Guaranty Insurance Corp.*,²⁷³ the U.S. District Court for the Western District of Kentucky identified three different situations where the common-interest or joint-defense privilege applies. First, the court noted that privilege can extend to a single attorney representing multiple clients in the same matter.²⁷⁴ Second, the privilege may apply to multiple parties with separate counsel if these parties share a common defense.²⁷⁵ Third, the court noted, the common interest is deemed sufficient to preclude waiver "when two or more clients share a common legal or commercial interest and, therefore, share legal advice with respect to that common interest."²⁷⁶ In the third of these situations, even "communications made years before" litigation may still be deemed privileged under certain circumstances.²⁷⁷ For example, because the parties in *Broessel* had created a trade organization and were involved in legislative and regulatory matters, they were deemed to have a "common legal interest" and certain communications between them were therefore privileged.²⁷⁸

In cases involving an attorney's investigation, the attorney-client privilege can be waived when the substance of the attorney's investigation has been placed "at issue"—as a defense or claim—in litigation. Under the at-issue doctrine, a party may be deemed to have waived the privilege where:

- (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making

it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.²⁷⁹

Courts have narrowly construed the at-issue waiver, limiting it to situations where the party puts the contents of an attorney-client communication at issue by asserting a claim or defense it intends to prove through disclosure of that communication.²⁸⁰ For example, in *Harding v. Dana Transport, Inc.*,²⁸¹ the defendant hired outside counsel to perform an investigation after two employees filed an administrative complaint for sexual harassment. In defense of the administrative action, Dana asserted that it had “fully investigated” plaintiffs’ complaint and “found that there is no supporting evidence” that the acts complained of occurred.²⁸² In a later Title VII proceeding in federal court, the defendant sought to introduce evidence of the investigation as a defense to the plaintiffs’ claim, because proof of “sufficiently effective” procedures for investigating and remediating alleged discrimination is a valid defense.²⁸³ At the same time, however, Dana resisted attempts by plaintiffs’ counsel to inquire into the substance of the investigation by invoking the attorney-client privilege.²⁸⁴ The court found that the defendant had waived the privilege by raising the investigation as a defense to the plaintiffs’ Title VII and New Jersey state claims.²⁸⁵ The court’s rationale, in part, was that “[w]ithout such information, the plaintiffs cannot determine the seriousness of Dana’s investigation into the plaintiffs’ allegations of sexual harassment.”²⁸⁶ Because “the investigation, itself, provides a defense to liability,” plaintiffs must be permitted to probe the substance of the investigation, not merely the fact that it occurred.²⁸⁷ Other jurisdictions faced with similar situations have adopted the *Harding* rationale.²⁸⁸

Similarly, the New Mexico Court of Appeals, in *Gingrich v. Sandia Corp.*,²⁸⁹ found that defendant waived the privilege that would have protected disclosure of an investigative report by (1) disclosing it to persons outside the scope of the attorney-client privilege, and (2) directly relying on it in an effort to defeat plaintiff’s claims.²⁹⁰ The court upheld the trial court’s ruling, and also upheld the trial court’s decision that waiver constituted a subject-matter waiver requiring the production of all communications in the subject.²⁹¹

The Connecticut Supreme Court, in *Metropolitan Life Insurance Co. v. Aetna Casualty & Surety Co.*,²⁹² established limits on the at-issue doctrine. In *Metropolitan Life*, the insured, who sued the excess liability insurer to recover the cost of settling asbestos tort cases after the insurer refused to defend the insured, sought to prevent disclosure of documents containing communications with other attorneys regarding the settlement of the tort cases.²⁹³ The court held that the documents were protected by the attorney-client privilege. Although the insured’s senior officials had relied on counsel’s advice to settle the asbestos tort actions, the insured was not relying on those privileged communications to prove the reasonableness of the settlements.²⁹⁴ The court stated the following:

Merely because the communications are relevant does not place them at issue. . . . If admitting that one relied on legal advice in making a

decision put the communications relating to the advice at issue, such advice would be at issue whenever the legal decision was litigated. If that were true, the at issue doctrine would severely erode the attorney-client privilege and undermine the public policy considerations upon which it is based.²⁹⁵

VII. Work-Product Issues

Even if attorney-client communications from attorney to client reflecting factual information or information received from nonclients are not protected by the attorney-client privilege, the work-product doctrine may preclude discovery in some cases. Work-product issues arise frequently in litigation involving insurance investigations.²⁹⁶

The work-product doctrine was first recognized by the U.S. Supreme Court in *Hickman v. Taylor*.²⁹⁷ In *Hickman*, the Court addressed the discoverability of statements taken by a lawyer representing a tugboat company. The statements had been taken from several witnesses to a tugboat accident that killed five crew members and were recorded in memoranda prepared by the attorney.²⁹⁸ The Court held that the attorney-client privilege was inapplicable, but it also held that the memoranda were not discoverable based on an immunity for materials prepared by attorneys in anticipation of litigation.²⁹⁹ The Court indicated that the statements might be discoverable upon a sufficient showing of need, but that it would be nearly impossible to discover information containing the attorney's mental impressions.³⁰⁰

The *Hickman* decision was essentially codified in a 1970 amendment to Rule 26 of the Federal Rules of Civil Procedure.³⁰¹ Rule 26(b)(3) of the Federal Rules of Civil Procedure protects from disclosure documents and materials otherwise discoverable that were prepared in anticipation of litigation or for trial by or for another party or by or for the other party's representative, including an attorney, consultant, insurer, or agent, except upon a showing that the party seeking discovery has substantial need for the materials in the preparation of its case and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.³⁰² Rule 26(b)(3), however, provides virtually absolute protection to work-product materials that contain the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.³⁰³ The reasoning behind the nearly unconditional protection of opinion work product was described by the Fourth Circuit, in *Chaudhry v. Gallerizzo*:³⁰⁴

"[C]ourts should proceed cautiously when requested to adopt a rule that would have an inhibitive effect on an attorney's freedom to express and record his mental impressions and opinions without fear of having these impressions and opinions used against the client." As a result, "opinion work product enjoys a nearly absolute

immunity and can be discovered only in very rare and extraordinary circumstances.”³⁰⁵

Most states have similar, if not identical, rules providing strong protection to work-product materials.³⁰⁶

Assuming the documents are relevant, courts generally use a two-step analysis to determine whether the work-product doctrine provides protection to the disclosure of the documents: Were they compiled in anticipation of litigation or trial, and if so, has the party seeking discovery shown substantial need and undue hardship?³⁰⁷

A. In Anticipation of Litigation

The first step in the analysis—whether the document was prepared “in anticipation of litigation”—is the one most often addressed by the courts. This issue arises most often because the line between documents prepared in the ordinary course of business and those prepared in anticipation of litigation is not always clear. Generally, courts ask not whether litigation was a certainty but rather whether the document was prepared “with an eye toward litigation.”³⁰⁸

Courts have taken differing views as to the meaning of the phrase “in anticipation of litigation.” For example, the Fifth Circuit requires that a document be prepared “primarily to assist in litigation” for work-product protection to apply. In *United States v. Davis*,³⁰⁹ the Fifth Circuit held that documents prepared in conjunction with a tax return were not protected by the work-product doctrine. In so holding, the court held that work-product protection applies to a document only if the “primary motivating purpose behind the creation of the document was to aid in possible future litigation.”³¹⁰ Thus, under the Fifth Circuit’s standard, a document is protected by the work-product doctrine only if the party invoking the doctrine establishes that the document was created *primarily* to assist in possible future litigation; if the document was created primarily to aid in a business decision and secondarily to aid in future litigation, the document is not protected by the work-product doctrine.

Indeed, the U.S. District Court for the District of Maryland appears to have taken an even stricter stance on work product. In *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*,³¹¹ the court remarked, “The fact that defendant anticipated litigation with plaintiffs does not make all documents thereafter ‘generated by or for its attorneys subject to work product immunity.’”³¹² Instead, the court held, a party claiming such immunity must establish an underlying “nexus” between the preparation of the document and the *specific* litigation.³¹³ If a party cannot establish such a nexus, the court held, the privilege “generally does not apply.”³¹⁴

More recently, the Sixth Circuit Court of Appeals, in *In re Professionals Direct Insurance Co.*,³¹⁵ held that the work-product protection applied to documents prepared in anticipation of litigation even if the document also serves an ordinary business purpose.³¹⁶ The party claiming that a document is protected

must show that the anticipated litigation was the “driving force” behind the preparation of the document.³¹⁷

Notwithstanding the restrictive language of *Davis* and *Neuberger*, the more common standard for defining “in anticipation of litigation” is set out in the Second Circuit’s decision in *United States v. Adlman*.³¹⁸ There, an aerospace manufacturer considered merging with its subsidiaries. The merger was designed to produce a loss and corresponding tax refund; therefore, the manufacturer expected an IRS challenge that would result in litigation. Litigation with the IRS did ensue, and the IRS moved to compel production of a legal memorandum prepared by the manufacturer’s accountant/lawyer.³¹⁹

The *Adlman* court framed the issue as follows: “[W]hether Rule 26(b)(3) is inapplicable to a litigation analysis prepared by a party or its representative in order to inform a business decision which turns on the party’s assessment of the likely outcome of litigation expected to result from the transaction.”³²⁰ Use of the “primary motivating purpose” test that was endorsed by the Fifth Circuit would not protect the present document, the court reasoned, because the document’s primary purpose was to “inform a business decision,” not to aid in possible future litigation.³²¹ This scenario forced the court to undertake a critical analysis of the “primary motivating purpose” test, since, in the *Adlman* court’s opinion, use of the “primary motivating purpose” test would impede business transactions and access to information needed to make sound decisions. Furthermore, the use of the “primary motivating purpose” test in these circumstances would offend the very purpose of the work-product doctrine and leave no “zone of privacy” for companies to obtain an assessment of how litigation may affect their business decisions.³²²

Based on the foregoing analysis, the *Adlman* court adopted a “because of” standard—a document prepared “because of” anticipated litigation will be protected by the work-product doctrine:

A document created because of anticipated litigation, which tends to reveal mental impressions, conclusions, opinions, or theories concerning the litigation, does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation. Where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of litigation, it falls within Rule 26(b)(3).³²³

In *Jumpsport, Inc. v. Jumpking, Inc.*,³²⁴ the U.S. District Court for the Northern District of California promulgated a third standard for determining whether a document is prepared “in anticipation of litigation.” There, the court concluded that deciding whether a document was prepared in anticipation of litigation requires a two-prong test. The first prong considers “whether the party trying to invoke work product protection has shown that the prospect of litigation was a substantial factor in the mix of considerations, purposes, or

forces that led to the preparation of the document."³²⁵ If this prong is satisfied, the court must ask a second question: whether denying protection to the document would harm the policy objectives underlying the work-product doctrine (or, conversely, whether granting work-product protection would advance the policy objectives surrounding the work-product doctrine).³²⁶ A document is granted protection only if it meets both requirements, which the document at issue in *Jumpsport*—a draft report prepared by an accounting and consulting firm that contained a description of the U.S. economy and the sporting goods market, a company overview, a valuation of invested capital and intellectual property, and a valuation synthesis and conclusion—did not.³²⁷

No matter which test the court employs, the "in anticipation of litigation" requirement does not include documents prepared merely to avoid litigation. As the court in *In re Grand Jury Proceedings* stated, "[T]o find that 'avoidance of litigation' without more constitutes 'in anticipation of litigation' would 'represent an insurmountable barrier to normal discovery' and could subsume all compliance activities by a company as protected from discovery."³²⁸ Because of the divergent views as to what constitutes "in anticipation of litigation," courts have looked at whether an attorney's investigation was conducted in the ordinary course of business or whether it was conducted in anticipation of litigation on a case-by-case basis. For example, in *Ryall v. Appleton Electric Co.*,³²⁹ the court found that notes of interviews by the client's chief employment counsel in a sexual harassment investigation commenced in response to contact by an employee's attorney, which indicated that litigation was imminent, were protected by the work-product doctrine.³³⁰ Similarly, in *Arkwright Mutual Insurance Co. v. National Union Fire Insurance Co.*,³³¹ the court determined that a subrogation investigation undertaken by counsel for a property insurer was not within the normal business activities of the insurer and was therefore protected by the work-product doctrine.³³² In contrast, the court in *In re Leslie Fay Cos., Inc. Securities Litigation*³³³ held that the work-product doctrine did not protect documents relating to an attorney's investigation of a client's publicly alleged accounting irregularities.³³⁴ The investigation was conducted primarily for business purposes because the client used the investigation results to make decisions on firing responsible personnel; to implement a new financial structure, organization, and internal control systems; and to reassure creditors and lenders that the culpable parties and suspect internal policies "were being vigorously sought and rooted out."³³⁵ Finally, in *City of Springfield v. Rexnord Corp.*, the court held that documents that might have been prepared in anticipation of possible litigation with the Massachusetts Department of Environmental Quality Engineering were not protected by the work-product doctrine, since they were prepared primarily for media inquiries and represented the corporation's public statements.³³⁶

B. Substantial Need

The final step in the analysis is determining whether materials and documents prepared in anticipation of litigation may still be discoverable because the

requesting party can establish that it has a substantial need for the materials and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.³³⁷ Courts generally find such a need where a witness, for example, is unavailable or hostile, or has difficulty recalling information previously given to an attorney.³³⁸ Some courts also find such a need when bad-faith allegations are made.³³⁹ While factual materials may be discovered upon a showing of “substantial need,” the attorney’s mental impressions, conclusions, opinions, or legal theories are not discoverable.³⁴⁰

C. Witness Statements

The most frequently litigated issue is whether statements from nonclients are afforded protection by the work-product doctrine. Some courts hold that the statements are not protected at all, some hold the statements are “core” work product,³⁴¹ while others resolve the issue under the substantial need concept. The following cases are representative of the means by which courts resolve this issue.

A recent California Court of Appeal case, *Coito v. Superior Court*,³⁴² falls into the first category. There, the 13-year-old son of plaintiff drowned in a river in Modesto.³⁴³ The possibly criminal conduct of several other juveniles present at the site led the California Bureau of Investigation to take recorded statements from four of them.³⁴⁴ After plaintiff sued the state and the City of Modesto, the state used its interviews as a basis for questioning one of the juveniles in depositions.³⁴⁵ Plaintiff then requested all the statements, and the state refused, claiming the statements were protected by the attorney-client privilege and were also attorney work product.³⁴⁶ The trial court upheld the state’s position as to all of the statements except the one the state used to question the deponent.³⁴⁷

On appeal, the court of appeal looked at the codification of the work-product privilege³⁴⁸ and prior decisions by the California courts³⁴⁹ in ultimately concluding that the statements were not protected.³⁵⁰ The court summarily rejected the trial court’s reliance on *Nacht & Lewis Architects, Inc. v. Superior Court*³⁵¹ and rejected the state’s argument that the questions asked of the witnesses revealed the mental impressions of the attorney.³⁵² The dissenting judge agreed with the majority that the witness statements were not “absolute work product” under California law,³⁵³ but contended that they may be “qualified work product.”³⁵⁴ The dissenter would have remanded the case to the trial court for a determination of the qualified work product issue.³⁵⁵

*Soter v. Cowles Publishing Co.*³⁵⁶ is representative of the cases that protect witness statements taken by lawyers as core work product. There, a nine-year-old student with a peanut allergy ultimately died after ingesting a peanut-butter cookie on a school field trip.³⁵⁷ The school district, through its insurance carrier,³⁵⁸ undertook an investigation of the circumstances surrounding the death and, when sued by the child’s parents, resolved the case through mediation.³⁵⁹ Thereafter, a reporter for a Seattle newspaper filed a request for the school district’s investigation files under Washington’s Public Records Act.³⁶⁰ The school district produced all the records except for 75 documents it claimed

were protected from disclosure.³⁶¹ The trial court agreed with the district, as did the court of appeals.³⁶²

The Washington Supreme Court thoroughly analyzed the issue and affirmed the appellate court.³⁶³ The court concluded that counsel's notes of interviews with school district employees were protected by the attorney-client privilege.³⁶⁴ Notes of interviews with parent chaperones and other students constituted attorney opinion work product, and were protected from disclosure on that basis.³⁶⁵ The court stated: "[A]ll of the notes taken by attorneys or other members of a legal team when interviewing witnesses constitute opinion work product that will be revealed only in rare circumstances, for example, where the attorney's mental impressions are at issue or where there are issues of attorney crime or fraud."³⁶⁶

*Bickler v. Senior Lifestyle Corp.*³⁶⁷ is representative of those cases that look at the issue of substantial need in determining whether witness statements are discoverable. There, plaintiff was injured in a collision with another resident and sued the care facility for negligence.³⁶⁸ Shortly after the incident, the care facility conducted an investigation at the direction of in-house counsel.³⁶⁹ Eighteen employees were interviewed as a part of the investigation, and each provided a written statement.³⁷⁰ After litigation was commenced, plaintiff sought production of the statements.³⁷¹ The court concluded that the statements were not protected by the attorney-client privilege³⁷² and went on to consider whether they constituted work product.³⁷³ The court determined that the documents were not routine business documents, but were, in fact, documents created in anticipation of litigation.³⁷⁴ The court next considered plaintiff's claim of substantial need and concluded that one statement should be produced because the witness, when deposed, had some loss of memory.³⁷⁵ The court concluded that plaintiff had failed to prove substantial need for the remaining statements.³⁷⁶

A recent decision in a criminal case highlights how the work-product doctrine is applied to attorney investigations.³⁷⁷ The United States brought an action against baseball great Roger Clemens for various crimes arising out of his testimony before Congress during its investigation of steroid use in professional baseball.³⁷⁸ The Commissioner of Baseball retained former senator George Mitchell to investigate the steroid use claims for him, and provide him with recommendations.³⁷⁹ Mitchell in turn retained DLA Piper as his counsel.³⁸⁰ During the course of its work, DLA Piper interviewed many witnesses, and thereafter prepared detailed memoranda of the interviews.³⁸¹ Clemens subpoenaed DLA Piper, seeking production of three of DLA Piper's notes of interviews taken in connection with the preparation of the Mitchell Report.³⁸² DLA Piper moved to quash the subpoena, arguing that the requested information was opinion work product protected from disclosure to Clemens.³⁸³ The court held a hearing during which the involved DLA Piper attorneys testified, and the court also reviewed the disputed documents in camera.³⁸⁴

The court first acknowledged that the rules set forth by the Supreme Court in *Hickman v. Taylor*³⁸⁵ applied in criminal cases as well as in civil cases.³⁸⁶ DLA Piper urged the court to quash the subpoena, arguing that the interview summaries were opinion work product afforded almost complete protection from

discovery.³⁸⁷ The court focused on the nature of the interview summaries to determine whether they were opinion work product or fact work product.³⁸⁸ After reviewing the documents themselves, the court heard testimony from the DLA Piper attorneys that conducted the interviews to learn more about the preparation of the summaries to help it determine whether they were fact or opinion work product.³⁸⁹ After reviewing the documents themselves, as well as the testimony of DLA Piper attorneys, the court concluded that the documents were fact work product, and, for the most part, discoverable.³⁹⁰

This case is interesting for two reasons. First, the court noted that the work-product doctrine applies to materials prepared for litigation,³⁹¹ but chose to apply it in this context where the interviews were done simply to provide legal advice to the Commissioner of Baseball outside the context of any litigation. Second, and perhaps more important, the court cited to and discussed *Upjohn Co. v. United States*,³⁹² but never discussed or applied that portion of the *Upjohn* decision that the attorney-client privilege protected the investigation done by the *Upjohn* attorneys.³⁹³ The question that remained undecided in *Upjohn* was whether the attorney-client privilege applied to the interviews of ex-employees.³⁹⁴ To the extent the interviews in *Clemens* were conducted for the purpose of providing legal advice to the Commissioner of Baseball, it is at least arguable that the summaries were not discoverable because they were protected by the attorney-client privilege.

D. Summary

In sum, an attorney cannot ensure that the results of an investigation will be protected by the work-product doctrine. An attorney, however, can take steps to help establish that investigation materials were prepared in anticipation of litigation. For example, an attorney can, upon receiving a request to evaluate and investigate on behalf of a client, send a confirming letter to the client, noting that the attorney is investigating and evaluating the matter in anticipation of litigation and specifying the precise claims the attorney “anticipates.” An attorney can make sure not to perform a task that the client would perform as a regular part of its business if it had not hired the attorney, especially if the client is an insurance company. A lawyer can also make sure that any related claims are considered to protect the work product of all of those involved. A lawyer should determine the law applicable to statements from nonclients before deciding whether to take them and how to record them. Finally, while the work-product doctrine may shield *documents* from discovery, most courts hold that an opposing party can, by interrogatories or by deposition, discover factual information learned during an investigation.³⁹⁵

VIII. Conclusion

The attorney who conducts a factual investigation for the purpose of providing legal advice to a client should be able to communicate those facts to the client within the purview of the attorney-client privilege. This is clearly the majority rule, but it has not garnered a universal following. An attorney undertaking

an investigation for a corporation may not be able to speak with employees at every level within the company under the cloak of the privilege, although the majority rule protects communications by corporate employees with knowledge no matter what position they hold in the company. The better-reasoned rule protects communications with third parties, at least where such facts were necessary to the rendering of the requested legal advice. Again, this rule is not universally followed. Even in those jurisdictions that may not recognize a privilege as to third-party facts, absent extraordinary circumstances, the work-product doctrine often shields the communications from discovery.

Attorney-Client Privilege Practice Pointers

Who Is the “Attorney”?

- Attorneys acting in the capacity of attorneys are allowed to claim privilege. See *Spectrum Sys. Int’l Corp. v. Chem. Bank*, 581 N.E.2d 1055 (N.Y. 1991) (attorneys retained to conduct investigation in order to render legal advice); *Leucadia, Inc. v. Reliance Ins. Co.*, 101 F.R.D. 674 (S.D.N.Y. 1983) (same).
- Attorneys acting in other capacities, however, are not allowed to claim privilege. See *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 197 F.R.D. 620 (N.D. Iowa 2000) (attorney retained to conduct investigation of loss); *Mission Nat’l Ins. Co. v. Lilly*, 112 F.R.D. 160 (D. Minn. 1986) (same).
- Employees and subordinates of attorneys are included in the privilege. See *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 138 (N.D.N.Y. 2007); *Broessel v. Triad Guar. Ins. Corp.*, 238 F.R.D. 215, 218–19 (W.D. Ky. 2006).

Who Is the “Client”?

Corporations

- In federal courts, as well as most state courts, some form of the “subject matter” test is used, in which attorney-client privilege applies to employees of corporations if (1) the employee makes the communications at the direction of the employee’s superior; and (2) the subject matter upon which the attorney’s advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his or her employment. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Lexington Pub. Library v. Clark*, 90 S.W.3d 53, 59 (Ky. 2002); *Wardleigh v. Dist. Court*, 891 P.2d 1180 (Nev. 1995).
- In some jurisdictions, the “control group” test applies, in which only communications with those who actually control the corporation or normally advise those in control are privileged. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982).
- In Arizona, the courts have adopted the “functional approach” in civil cases, which focuses on the relationship between the communicator and the need for legal services. *Samaritan Found. v. Goodfarb*, 862 P.2d 870 (Ariz. 1993).

Insurers

- In many cases where the insured was hired to represent both the insured and the insurer, the attorney-client privilege generally extends to communications between the attorney and both clients. See, e.g., *Port Auth. of N.Y. v. Arcadian Corp.*, Civ. No. 96-1635, 1996 U.S. Dist. LEXIS 22038 (D.N.J. Sept. 30, 1996) (holding that an attorney who represents an insurer in a subrogation action also owes a fiduciary duty to the

insured); *Doctors' Co. Ins. Servs. v. Superior Court*, 275 Cal. Rptr. 674, 680–81 (Cal. Ct. App. 1990) (holding that an attorney employed by an insurance company to defend an action against an insured represents both the insurer and the insured).

- In some jurisdictions, however, the attorney-client privilege extends only to communications between the attorney and the insured, even when the insurer hires the attorney. See *Sterling Drilling Co. v. Spector*, 761 S.W.2d 74 (Tex. App. 1988).

Prospective Clients

- In general, communications with prospective clients are privileged if such communications are made for the purpose of obtaining legal advice. This remains true even if the attorney is not ultimately retained. See *Bennett Silvershein Assoc. v. Furman*, 776 F. Supp. 800 (S.D.N.Y. 1991).
- If the communications are not made for the purposes of obtaining legal advice, the communications are not privileged. *Diversified Group, Inc. v. Daugerdas*, 304 F. Supp. 2d 507 (S.D.N.Y. 2003).
- Mass mailings to potential clients are also not considered privileged. *Auscape Int'l v. Nat'l Geographic Soc'y*, No. 02 Civ. 6441 (LAK), 2002 WL 31250727 (S.D.N.Y. Oct. 8, 2002).

Joint-Defense Agreements

- Parties with a common interest may maintain the attorney-client privilege under certain circumstances if the parties are cooperating in litigation. See, e.g., *Loustalet v. Refco, Inc.*, 154 F.R.D. 243, 247 (C.D. Cal. 1993); *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997) (quoting *United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir. 1989)).

What Information Is Protected?

Communications Involving Information from Nonclients

- Under Professor Wigmore's approach, the attorney-client privilege does not apply if the legal advice to the client is based on information obtained from third parties. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950); *Merrin Jewelry Co. v. St. Paul Fire & Marine Ins. Co.*, 49 F.R.D. 54 (S.D.N.Y. 1970).
- Other courts have been less restrictive on the privilege, holding that though the *underlying facts* communicated from third parties may not be privileged, the actual communications between the attorney and client *are* privileged. *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379 (Mo. 1978), *overruling on later appeal*, 563 S.W.2d 62 (Mo. 1978). See also *Soter v. Cowles Publ'g Co.*, 174 P.2d 60 (Wash. 2007), *aff'g* 130 P.3d 840 (Wash. App. 2006).

Does the Work-Product Doctrine Apply?

State or Federal Court

- The Federal Rules of Civil Procedure apply to all cases filed in federal courts, and Rule 26 determines the extent of the work-product protection afforded documents prepared in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495 (1947).
- State court rules can vary from those applied in the federal courts. See, e.g., *Coito v. Superior Court*, 106 Cal. Rptr. 3d 342 (Cal. Ct. App. 2010), *review granted and opinion superseded*, 232 P.3d 97 (Cal. 2010).
- One of the most frequently litigated issue involving work-product claims are statements taken from third-party witnesses. Before such statements are taken, a careful review of the applicable state or federal decisions should be undertaken to maximize the protection to be given to such statements.

Notes

1. Samaritan Found. v. Goodfarb, 862 P.2d 870 (Ariz. 1993); Hyams v. Evanston Hosp., 587 N.E.2d 1127 (Ill. App. Ct. 1992).
 2. Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612 (7th Cir. 2010).
 3. Harding v. Dana Transp. Inc., 914 F. Supp. 1084 (D.N.J. 1996).
 4. Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193 (Tex. 1993).
 5. United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).
 6. Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869 (5th Cir. 1991); Burr v. United Farm Bureau Mut. Ins. Co., 560 N.E.2d 1250 (Ind. Ct. App. 1990); State *ex rel.* U.S. Fid. & Guar. Co. v. Canady, 460 S.E.2d 677 (W. Va. 1995).
 7. Gucci Am. Inc. v. Guess?, Inc., 271 F.R.D. 58 (S.D.N.Y. 2010).
 8. Spectrum Sys. Int'l Corp. v. Chem. Bank, 581 N.E.2d 1055 (N.Y. 1991).
 9. Upjohn Co. v. United States, 449 U.S. 383 (1981).
 10. Gingrich v. Sancia Corp., 165 P.2d 1135 (N.M. Ct. App. 2007).
 11. SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC, No. 01 Civ. 9291 (JSM), 2002 U.S. Dist. LEXIS 11949 (S.D.N.Y. July 3, 2002).
 12. See *In re Allen*, 106 F.3d 582, 602 (4th Cir. 1997) (noting that “[c]ourts have consistently recognized that investigation may be an important part of an attorney’s legal services to a client”).
 13. See *infra* section III.
 14. *Upjohn*, 449 U.S. at 389; see also 8 JAMES H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (John T. McNaughton rev. ed. 1961 & Supp. 1996).
 15. *Upjohn*, 449 U.S. at 389.
 16. For example, Ohio courts have recognized a “bad faith” exception to the general rule. See *Garg v. State Auto. Mut. Ins. Co.*, 800 N.E.2d 757, 761 (Ohio Ct. App. 2003) (holding that the attorney-client privilege did not protect materials in a claims file created prior to the denial of the claim that would provide insight into whether the insurer acted in bad faith in handling the insured’s claims); *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154, 158 (Ohio 2001) (holding that “in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage”); *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 349 (Ohio 1994) (“[D]ocuments and other things showing the lack of a good faith effort to settle by a party or the attorneys acting on his or her behalf are wholly unworthy of the protections afforded by any claimed privilege.”).
- A similar exception to the general rule, the “crime fraud” exception, applies if the client communicates with its attorney to obtain advice or assistance while committing what the client knows is a crime or fraud. *E.g.*, *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1265 (Pa. Super. Ct. 2007); *In re Gen. Agents Ins. Co. of Am., Inc.*, 224 S.W.3d 806, 818–19 (Tex. Ct. App. 2007); *Ginsburg v. Pachter*, 893 So. 2d 586, 588 (Fla. Dist. Ct. App. 2004).
17. *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 838 A.2d 135, 167 (Conn. 2004) (internal quotation marks and citing references omitted); see, *e.g.*, *In re EchoStar Commc’ns Corp.*, 448 F.3d 1294, 1300–01 (Fed. Cir. 2006); *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999); *In re Lindsey*, 158 F.3d 1263, 1267 (D.C. Cir. 1998); *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996); *United States v. Textron Inc.*, 507 F. Supp. 2d 138, 146 (D.R.I. 2007); *Evans v. United*

- Servs. Auto. Ass'n, 541 S.E.2d 782, 790 (N.C. Ct. App. 2001); *In re Ford Motor Co.*, 988 S.W.2d 714, 718 (Tex. 1998). *See also* WIGMORE, *supra* note 14, § 2320, at 628 (“That the attorney’s communications to the client are also within the privilege was always assumed in the earlier cases, and has seldom been brought into question.”) (footnotes omitted.) *But see* Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1264 (Pa. Super. Ct. 2007), *aff’d by an equally divided court*, 992 A.2d 65 (Pa. 2010) (holding that “the privilege protects confidential communications from an attorney to his or her client only to the extent that such communications contain and would thus reveal confidential communications from the client”); *see also* Harrisburg Auth. v. CIT Capital USA, Inc., 716 F. Supp. 2d 380, n.11 (M.D. Pa. 2010) (noting that the supreme court’s decision in *Nationwide* did not decide whether the attorney-client privilege applies to communications from attorneys to clients).
18. *See, e.g., In re Grand Jury Subpoena*, 204 F.3d 516, 519–20 (4th Cir. 2000); *Hicks v. Bush*, 452 F. Supp. 2d 88, 100 (D.D.C. 2006).
 19. WIGMORE, *supra* note 14, § 2292, at 554.
 20. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950). *See, e.g., Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2002); *United States v. Martin*, 278 F.3d 998, 999 (9th Cir. 2002); *United States v. Int’l Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997); *In re Miller*, 584 S.E.2d 772, 786 (N.C. 1994); *People v. Simms*, 736 N.E.2d 1092, 1117 (Ill. 2000).
 21. *See generally* KENNETH S. BROUN, MCCORMICK ON EVIDENCE §§ 87–97 (6th ed. 2006); WIGMORE, *supra* note 14, §§ 2290–2329. *See, e.g., Allied Irish Banks v. Bank of Am., N.A.*, 240 F.R.D. 96, 103 (S.D.N.Y. 2007); *Evans v. Atwood*, 177 F.R.D. 1, 3 (D.D.C. 1997); *Schenet v. Anderson*, 678 F. Supp. 1280, 1281 (E.D. Mich. 1988); *Potts v. Allis-Chalmers Corp.*, 118 F.R.D. 597, 602 (N.D. Ind. 1987); *Henson v. Wyeth Lab., Inc.* 118 F.R.D. 584, 587 (W.D. Va. 1987).
 22. *Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981). Quoting from *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962), the Court stated:

[The] protection of the privilege extends only to *communications* and not 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.* (emphasis added by *Upjohn* Court); *see also* *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995); *Dunkin’ Donuts Inc. v. Mary’s Donuts, Inc.*, 206 F.R.D. 518, 520–21 (S.D. Fla. 2002); *Onwuka v. Fed. Express Corp.*, 178 F.R.D. 508, 515 (D. Minn. 1997); *Phillips Elecs. N. Am. Corp. v. Universal Elecs. Inc.*, 892 F. Supp. 108, 110 (D. Del. 1995); *Swarthmore Radiation Oncology, Inc. v. Lapes*, 155 F.R.D. 90, 92 (E.D. Pa. 1994). *See generally* Wigmore, *supra* note 14, §§ 2306–2311.
23. *See, e.g., Kan. Wastewater, Inc. v. Alliant Techsystems, Inc.*, 217 F.R.D. 525, 528–29 (D. Kan. 2003).
 24. *See, e.g., Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 385 n.9 (D.D.C. 1978).
 25. *See infra* notes 296–376 and accompanying text.

26. *See* NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 138 (N.D.N.Y. 2007); Broessel v. Triad Guar. Ins. Corp., 238 F.R.D. 215, 218–19 (W.D. Ky. 2006). *But see* Reed Dairy Farm v. Consumers Power Co., 576 N.W.2d 709 (Mich. Ct. App. 1998) (holding that the attorney-client privilege did not attach to attorney's paralegal, because, even though an employee of the attorney, he was not acting as an agent of the attorney, and the information sought was not the type that the attorney-client privilege was designed to protect).
27. Sanchez v. Matta, 229 F.R.D. 649, 660 (D.N.M. 2004); Clark v. City of Munster, 115 F.R.D. 609, 613 (N.D. Ind. 1987); Am. Nat'l Watermattress Corp. v. Manville, 642 P.2d 1330, 1333–34 (Alaska 1982). It makes no difference whether the investigator is an employee of the attorney or is hired by the attorney to conduct the investigation.
28. *See supra* note 14 and accompanying text.
29. *See* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319–20 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978); Henson v. Wyeth Lab., Inc., 118 F.R.D. 584, 587 (W.D. Va. 1987); Heathcoat v. Santa Fe Int'l Corp., 532 F. Supp. 961, 964 (E.D. Ark. 1982); *see also* United States *ex rel.* Fago v. M & T Mortgage Corp., 238 F.R.D. 3, 10–11 (D.D.C. 2006) (holding that communications with counsel concerning legal advice were protected by attorney-client privilege, but communications made by and to the same lawyer with respect to business matters were not protected by privilege).
30. *See, e.g., Westinghouse*, 580 F.2d at 1320; NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 130 (N.D.N.Y. 2007) (holding that communication with lawyer who was “coordinating media, public relations, lobbying, and other non-legal services” were not privileged); *see also* Smithkline Beecham Corp. v. Apotex Corp., 194 F.R.D. 624 (N.D. Ill. 2000) (holding that attorney-authored meeting agendas were not protected by the attorney-client privilege in patent infringement suit, since it was unlikely that legal advice was involved); *Henson*, 118 F.R.D. at 587. *See generally* WIGMORE, *supra* note 14, §§ 2296–2299.
31. *See, e.g.,* St. Paul Reinsurance Co. v. Commercial Fin. Corp., 197 F.R.D. 620, 641–42 (N.D. Iowa 2000); Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 190 F.R.D. 532, 535 (S.D. Ind. 1999) (noting that there is no bright-line rule for courts deciding whether an attorney is acting in his or her capacity as such).
32. 24 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5478, at 229 (1986 & Supp 2009).
33. *See id* at n.178.

The senior author does not fully agree with the statement in the text. He agrees with the distinction adopted by the cases cited at notes 174 [*Diamond v. City of Mobile*, 86 F.R.D. 324, 328 (N.D. Ala. 1978)] and 175 [*In re LTV Securities Litigation*, 89 F.R.D. 595, 600-01 (N.D. Tex. 1981)] above, that there is no privilege if the lawyer is purely an investigator but that investigative work is “professional legal services” if it is incidental to the rendering of legal advice.

34. 96 F.3d 1294, 1296 n.1 (9th Cir. 1996). *See also* State *ex rel.* Toledo Blade Co. v. Toledo-Lucas Cnty. Port Auth., 905 N.E.2d 1221 (Ohio 2009) (specifically rejecting Wright and Graham's approach).
35. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 (1998 & Supp. 2010).
36. *Id.* at cmt. i, illus. 7.

37. 581 N.E.2d 1055 (N.Y. 1991).
38. *Id.* at 1058.
39. *Id.*
40. *Id.*
41. *Id.* at 1059.
42. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 558 N.Y.S.2d 486 (N.Y. App. Div. 1990), *modified*, 581 N.E.2d 1055 (N.Y. 1991).
43. *Id.* at 488.
44. *Spectrum Sys.*, 581 N.E.2d at 1059.
45. *Id.* at 1059, 1062.
46. *Id.* at 1060–61 (citations omitted).
47. *Id.*
48. *Id.* at 1061–62.
49. 600 F.3d 612 (7th Cir. 2010).
50. The teacher ultimately confessed to the crimes he was charged with and received a sentence of 20 years. *Id.* at 615.
51. *Id.* at 616 (“The School Board wanted Sidley to review the criminal charges filed against [teacher], investigate the actions of school administrators in response to the allegations of sexual abuse, examine whether any district employees had failed to comply with district policies or federal or state law, and analyze the effectiveness of the District’s existing compliance procedures.”).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 616–17.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 618–21.
65. *Id.* at 620; *see also* *Gingrich v. Sandia Corp.*, 165 P.2d 1135, 1139 (N.M. Ct. App. 2007).
66. 101 F.R.D. 674 (S.D.N.Y. 1983).
67. *Id.* at 676–77.
68. *Id.* at 678; *see also* *State v. von Bulow*, 475 A.2d 995, 1005 (R.I. 1984) (finding that an attorney hired to investigate the circumstances surrounding Martha von Bulow’s comatose condition was acting as an attorney during his investigation).
69. 460 S.E.2d 677 (W. Va. 1995).
70. 927 F.2d 869 (5th Cir. 1991). *Accord* *Hawes v. Langston*, 853 So. 2d 1237, 1244 (Miss. 2003) (“the privilege relates to and covers *all information* regarding the client received by the attorney in his professional capacity and in the course of his representation of the client).
71. *Id.* at 875 (“The privilege is not waived if the attorneys perform investigative tasks provided that these investigative tasks are related to the rendition of legal services.”); *Canady*, 460 S.E.2d at 689–90, 692. Because of the absence of crucial factual findings, however, the *Canady* court remanded the issue to the

trial court for further consideration in light of the court's opinion. The *Canady* court also refused, however, to "adopt a *per se* rule making ordinary investigative employees, who hold licenses to practice law, attorneys for purposes of the attorney-client privilege." *Id.* at 690. In the insurance industry context, such a decision "would shield from discovery documents that otherwise would not be entitled to any protection if written by an employee who holds no law license but who performs the same investigation and duties." *Id.*

72. 544 A.2d 893 (N.J. Super. Ct. App. Div. 1988).
73. *Id.* at 895.
74. No. 06-1523, 2009 WL 854446 (E.D. La. Mar. 25, 2009).
75. *Id.* at *1-2, *4.
76. 130 F.R.D. 28 (S.D.N.Y. 1990).
77. *Id.* at 31-32.
78. 106 F.3d 582, 602-03 (4th Cir. 1997).
79. 259 S.W.2d 104 (Mo. Ct. App. 2008).
80. *Id.* at 111.
81. *Id.* at 111-12, 122.
82. *Id.* at 122.
83. *Id.*
84. *Id.*
85. *See, e.g.,* Griffith v. Davis, 161 F.R.D. 687, 697 (C.D. Cal. 1995) ("defendant . . . cannot prevent disclosure of an administrative investigation by having its litigation counsel (or an agent of its litigation counsel) conduct that investigation").
86. St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp., 197 F.R.D. 620, 642 (N.D. Iowa 2000) (holding that communications to attorney acting as a claims investigator were not protected by attorney-client privilege); Bertalo's Rest. Inc. v. Exch. Ins. Co., 658 N.Y.S.2d 656, 659 (N.Y. App. Div. 1997). California has recognized the importance of files created in the investigation of a claim filed by an insured by promulgating regulations that require insurance companies to investigate every filed claim and maintain claims files containing all documents, notes, and work papers relevant to each claim. *See* 2,002 Ranch, L.L.C. v. Superior Court, No. D042323, 2003 Cal. App. LEXIS 1804, at *37-38 (Cal. Ct. App. Dec. 5, 2003) (citing CAL. CODE REGS. tit. 10, § 2695.5, subdiv. (e)(3) & § 2695.3, subdivs. (a) & (b)). 2,002 Ranch noted, however, that the entirety of the claims file is not discoverable—attorney-client protected communications are exempt from discovery. *See id.* at *39.
87. 112 F.R.D. 160 (D. Minn. 1986).
88. *Id.* at 162.
89. *Id.* at 162-63.
90. *Id.* at 163. The court also relied on the fact that Mission retained other counsel to handle the lawsuit that Lilly filed. *Id.*
91. 197 F.R.D. 620 (N.D. Iowa 2000).
92. *Id.* at 623.
93. *Id.*
94. *Id.* at 624.
95. *Id.* at 626.
96. *Id.*
97. *Id.* at 637.
98. *Id.* at 641.

99. *Id.* at 638.
100. 718 P.2d 1044 (Colo. 1986). *Accord* Compton v. Safeway, Inc., 169 P.3d 135 (Colo. 2007). *But see* Bonnano v. Quizno's Franchise Co. LLC, No. 06-cv-02358-WYD-KLM, 2008 WL 1801173, at *3 (D. Colo. Apr. 18, 2008) (finding investigating attorney was acting in legal capacity and results of investigation therefore protected).
101. *Id.* at 1046.
102. There is no indication that the key factor here was that the investigative work was performed by outside counsel and not in-house counsel.
103. 718 P.2d at 1046, 1048.
104. *Id.* at 1049.
105. *Id.*
106. *Id.*
107. *Id.* at 1050 (Rovira, J., dissenting).
108. *Id.*
109. *Id.*
110. *National Farmers Union* has been criticized by commentators. *See* Kenneth A. Hindman & Paul W. Burke, *A Frightening Discovery*, BRIEF, Spring 1988, at 18. Notwithstanding this criticism, *National Farmers Union* remains good law in Colorado. *See* Markwest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co., No. 05-cv-1948, 2007 WL 1106105 (D. Colo. Apr 12, 2007).
111. No. 01 Civ. 9291 (JSM), 2002 U.S. Dist. LEXIS 11949 (S.D.N.Y. July 3, 2002).
112. *Id.* at *2.
113. *Id.*
114. *Id.* at *1.
115. *Id.* at *2–3.
116. *Id.* at *13.
117. *Id.* at *12.
118. *Id.*
119. 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus denied sub nom.* Gen. Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963).
120. *Id.* at 485.
121. *Id.* *See generally* *In re* Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979) (adopting control group approach).
122. *See, e.g.,* Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968).
123. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (en banc); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam without opinion by an equally divided Court*, 400 U.S. 348 (1971). In *Harper & Row*, the court held that employee communications are privileged when (1) the employee makes the communications at the direction of the employee's superior and (2) the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his or her employment. *Harper & Row*, 423 F.2d at 491–92. *Meredith* expanded the second *Harper & Row* factor and added three additional factors:
 - (1) The communication was made for the purpose of securing legal advice;
 - (2) the employee making the communication did so at the direction of his corporate superior;
 - (3) the superior made the request so the corporation

could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Meredith, 572 F.2d at 609.

124. 449 U.S. 383 (1981).
125. *Id.* at 386.
126. *Id.* at 387.
127. *Id.*
128. *Id.* Upjohn simultaneously sent the report to the SEC and to the IRS.
129. *United States v. Upjohn Co.*, 600 F.2d 1223 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).
130. *Upjohn*, 449 U.S. at 390–91. Because the Court viewed investigative activities as a necessary predicate to the rendering of legal advice, the Court determined that the activities of Thomas and outside counsel were done in the capacity of lawyers:

The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the company with respect to the payments." . . . Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas.

Id. at 394.

131. *Id.* at 392.
132. *Id.* at 391–92. The Court quoted in part from *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978), which highlighted the scope of the "Hobson's choice" inherent in adopting the subject-matter test.
133. *Upjohn*, 449 U.S. at 397.
134. Some courts have applied *Upjohn* to cases interpreting ethical rules barring ex parte contact with represented parties when the party is an organization, of which a detailed discussion is outside the scope of this chapter. *See Palmer v. Pioneer Inn Assocs., Ltd.*, 59 P.3d 1237 (Nev. 2002) (the no-contact rule restricts contact with only those employees whose actions are legally binding on the organization); *see also Snider v. Superior Court*, 7 Cal. Rptr. 3d 119 (Cal. Ct. App. 2003) (citing *Upjohn* and *Palmer* in support of its rejection of the control group test for determining whether a witness was a party under the no-contact rule). *But see Capital Cities/ABC, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1842 (S.D.N.Y. 1990) (holding that the *Upjohn* decision should not be extended to ex parte contact cases).
135. FED. R. EVID. 501 ("[I]n 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.”); *see, e.g.*, *Samaritan Found. v. Goodfarb*, 862 P.2d 870, 873–76 (Ariz. 1993); *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 254–57 (Ill. 1982).
136. Under the Federal Rules of Evidence, *Upjohn* will govern in any case in federal court where there is federal question jurisdiction, but state law will control in those federal cases where there is diversity jurisdiction. *See* FED. R. EVID. 501; *see, e.g.*, *Nakajima v. Gen. Motors Corp.*, 857 F. Supp. 100, 104 (D.D.C. 1994); *Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515, 516–17 (N.D. Ill. 1990); *Command Transp., Inc. v. Y.S. Line (USA) Corp.*, 116 F.R.D. 94, 95, 97 n.10 (D. Mass. 1987).
137. *See, e.g.*, *Lexington Pub. Library v. Clark*, 90 S.W.3d 53, 59 (Ky. 2002); *Wardleigh v. Dist. Court*, 891 P.2d 1180 (Nev. 1995).
138. 632 So. 2d 1377 (Fla. 1994).
139. *Id.* at 1379–80, 1384–89. The court identified a number of different kinds of information claimed to be privileged, including audits, interviews between security personnel and employees, notes of interviews of employees by counsel, and statistical analyses. *Id.*
140. *Id.* at 1381–82.
141. *Id.* at 1381. The court explained:
- Although upper-echelon management may be responsible for making decisions on behalf of the corporation, the noncontrol-group employees are frequently the ones responsible for implementing those decisions. Thus, an attorney representing the corporation is charged with gathering facts from employees with information relevant to the corporation’s legal problems, regardless of their rank.
- Id.*
142. *Id.* at 1382.
143. *Id.* at 1383. Under the *Southern Bell* test, a corporation’s communications with counsel are protected by the attorney-client privilege if (1) the communication would not have been made but for the contemplation of legal services; (2) the employee making the communication was directed to do so by his or her corporate superior; (3) the superior made the request of the employee as part of the corporation’s efforts to secure legal services or advice; (4) the content of the communication relates to the legal services being rendered to the corporation, and the subject matter is within the scope of the employee’s duties at the corporation, and (5) the communication is not disseminated beyond those persons, who, because of the corporation’s structure, need to know its contents. *Id.*; *see also* *Tyne v. Time Warner Ent. Co.*, 212 F.R.D. 596 (M.D. Fla. 2002) (noting that Florida has rejected the control group test in favor of the subject matter test).
144. 423 F.2d 487 (7th Cir. 1970), *aff’d per curiam without opinion by an equally divided Court*, 400 U.S. 348 (1971).
145. 572 F.2d 596 (8th Cir. 1977). The *Harper & Row/Meredith* subject matter test can be found *supra* at note 123.
146. 632 So. 2d at 1384–89.
147. 432 N.E.2d 250 (Ill. 1982).
148. *Id.* at 256–57. There, Bucyrus-Erie’s counsel conducted an investigation into the failure of equipment manufactured by Bucyrus-Erie that damaged Consolida-

tion's coal mine. *Id.* at 251. At issue were Bucyrus-Erie's attorney's notes and a metallurgical report of a Bucyrus-Erie employee. *Id.* The notes in question were made by in-house counsel of interviews with numerous Bucyrus-Erie employees. *Id.* The report was described as a notebook containing objective information, mathematical computations, formulae, tables, charts, drawings, photographs, industry specifications, and handwritten notes. *Id.* at 254. The trial court rejected Bucyrus-Erie's objections to discovery of these documents, and the court of appeals essentially affirmed the trial court's decision. *Id.* at 253–54. *See also* *Equity Residential v. Kendall Risk Mgmt., Inc.*, 246 F.R.D. 557 (N.D. Ill. 2007) (noting Illinois's continuing application of control-group test, but choosing to apply Connecticut law to attorney-client communications that occurred in Connecticut).

149. *Id.* at 257. The court defined a member of the control group as one “whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority.” *Id.* at 258. If the individual merely supplies information to those on whom top management relies, that individual is not within the control group. *Id.* Because Sailors was not in the control group, his report was not protected. *Id.*
150. *Golminas v. Fred Teitelbaum Constr. Co.*, 251 N.E.2d 314 (Ill. App. Ct. 1969). The court stated the following:

[T]he principle underlying the attorney-client privilege would demand that an employee's communications should be privileged when the employee of the defendant corporation is also a defendant or is a person who may be charged with liability and makes statements regarding facts with which he or his employer may be charged, which statements are given or delivered to the attorney who represents either or both of them.

Id. at 318.

151. 851 S.W.2d 193 (Tex. 1993).
152. At the time, the applicable Texas rule provided privilege to representatives of the client “having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.” *Nat'l Tank*, 851 S.W.2d at 197 (citing *Tex. R. Civ. Evid.* 503(a)(2)).
153. *Nat'l Tank*, 851 S.W.2d at 197.
154. *Id.* at 199.
155. *See In re Monsanto Co.*, 998 S.W.2d 917 (Tex. Ct. App. 1999).
156. *Id.* at 922.
157. 862 P.2d 870 (Ariz. 1993).
158. *Id.* at 873.
159. *Id.*
160. *Id.* The trial court ordered in camera inspection of the documents, and all protected information would be redacted before the summaries—the “functional equivalent of a witness statement”—were turned over to plaintiffs. *See Samaritan Found. v. Superior Court*, 844 P.2d 593, 596 (Ariz. Ct. App. 1992), *vacated in part*, 862 P.2d 870 (Ariz. 1993).
161. *Samaritan*, 844 P.2d at 605. The traditional control group test was modified by the court in these respects: (1) management must direct a corporate employee to communicate in confidence with the corporation's legal staff about mat-

ters within the scope of the employment; (2) no requirement of “anticipation of litigation” applies; (3) the qualified privilege can be overcome in the same way as the work-product doctrine—proof of substantial need and the inability to obtain the substantial equivalent by other means; and (4) the party seeking discovery must show that its substantial need outweighs the corporation’s interest in maintaining confidentiality. *Id.* at 605–06.

162. *Id.* at 607.
163. The court noted that a qualified privilege “is an uncertain privilege, and an uncertain privilege is tantamount to no privilege at all.” *Id.* at 879.
164. *Id.*
165. *Id.*
166. *Id.* In a recent decision, the Arizona Supreme Court determined that the attorney-client privilege for such communications also extends to government entities. *State ex rel. Thomas v. Schneider*, 130 P.3d 991, 995 (Ariz. 2006).
167. *Samaritan*, 862 P.2d at 880.
168. *Id.* at 880–81. The court commented on one other fact that appears to have had some impact on the court’s decision. At the time of the interviews, each of the witnesses signed a form consenting to representation by Samaritan if a claim was filed against her. *Samaritan*, 844 P.2d at 596. The supreme court viewed this as an “acknowledgment that the corporation was not satisfied that the employee statements were within the corporation’s privilege. . . . [I]t is difficult to see what these forms intended to accomplish other than to silence the employees by shielding their communications in the cloak of the attorney-client privilege.” *Samaritan*, 862 P.2d at 880–81.
- In a case of first impression, the Iowa Supreme Court was called upon to decide the scope of the attorney-client privilege in the corporate context. *Keefe v. Bernard*, 774 N.W.2d 663 (Iowa 2009). The court, rejecting the control-group test, chose to adopt the standard set forth in *Samaritan*. *Id.* at 672.
169. ARIZ. REV. STAT. ANN. § 12-2234 (2006). For a review of the legislative history and a commentary on the statute generally, see W. Todd Coleman, Note, *Arizona’s Attorney-Client Communications Privilege for Corporations*, 27 ARIZ. ST. L.J. 335 (1995). The author concludes that the legislative history suggests that the statute was intended to be a codification of *Upjohn*. See *id.* at 351–53.
170. ARIZ. REV. STAT. ANN. § 12-2234(B) (2006). The statute applies to an employee of a “corporation, governmental entity, partnership, business, association or other similar entity or an employer.” *Id.*
171. *Id.* § 12-2234(B.1), (B.2).
172. *Id.* § 12-2234(C).
173. 62 P.3d 970 (Ariz. Ct. App. 2003).
174. *Id.* at 972.
175. *Id.* at 971.
176. *Id.*
177. *Id.* at 975.
178. WIGMORE, *supra* note 14, § 2320, at 628. Professor Wigmore states: “That the attorney’s communications to the client are also within the privilege was always assumed in the earlier cases and has seldom been brought into question.” *Id.* The supporting footnote cites to one early case, *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950), for the proposition that legal advice based on information from third parties is not privileged.

179. The rule would not protect communications in virtually every area of litigation, for it is truly the rare case that does not involve facts obtained from non-client third parties.
180. *See, e.g.*, *Dombrowski v. Bell Atl. Corp.*, 128 F. Supp. 2d 216, 219 (E.D. Pa. 2000); *Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc.*, 111 F.R.D. 76, 80 (S.D.N.Y. 1986); *see also Kenford Co. v. Cnty. of Erie*, 390 N.Y.S.2d 715, 719 (N.Y. App. Div. 1977) (“[I]n this respect, the attorney serves as a fact-gathering agent for the client.”).
181. 89 F. Supp. 357 (D. Mass. 1950).
182. Defendant produced these documents to the government in response to a subpoena subject to agreement from the government that all privilege objections would be preserved and were not waived. *Id.* at 359. This fact was not raised by the court as a factor in its decision. *Id.*
183. *Id.* It is not clear who within the company communicated with outside counsel, but this fact is unimportant to the result ultimately reached.
184. *Id.*
185. *Id.*
186. 49 F.R.D. 54 (S.D.N.Y. 1970).
187. *Id.* at 57. The court held that because the policy allowed the examination under oath to be conducted by “any person” designated by the insurer, the fact that the insurer chose an attorney should not allow the insurer to protect the attorney’s report. *Id.* After in camera review, the court commented: “The [in camera] study discloses that the report consists almost *in toto* of an analysis of the sworn testimony such as ‘any person’ (lawyer or not) might have made. The facts are summarized; credibility is appraised; inferences are proposed—all tasks we entrust daily to lay jurors.” *Id.* This kind of information would likely be protected from discovery by Federal Rule of Civil Procedure 26(b)(3) as the “mental impressions, conclusions, [or] opinions” of an attorney or other representative of a party. *See infra* notes 301–302 and accompanying text.
188. 65 F.R.D. 523 (S.D.N.Y. 1974).
189. *Id.* at 526.
190. 130 F.R.D. 28 (S.D.N.Y. 1990).
191. *Id.* at 33. The magistrate judge reviewed the attorney’s letter in camera and “found them to be communicating factual information, not legal advice.” *Id.* The Magistrate Judge ordered the letter to be produced, with the exception of redacted portions relating to legal advice. The district court upheld the Magistrate Judge’s ruling. *Id.*
192. 848 F. Supp. 423 (S.D.N.Y. 1994).
193. *Id.* at 428.
194. *Id.*
195. 227 F.R.D. 382, 394–95 (W.D. Pa. 2005).
196. *Id.* at 394–95.
197. *Bross v. Chevron U.S.A. Inc.*, No. 06-1523, 2009 WL 854446, at *6 (W.D. La. Mar. 25, 2009) (“Neither [proposed deponent] nor the other team members are attorneys, and statements made to them by witnesses, statements made by team members to witnesses or to each other, are not privileged.”)
198. 574 S.W.2d 379 (Mo. 1978), *overruling on later appeal*, 563 S.W.2d 62 (Mo. 1978).
199. *Id.* at 380.
200. *Id.* at 380–81.

201. *Id.*
202. *Id.* at 382.
203. *Id.*
204. *Id.* at 382–83. The court found the Wigmore approach would protect only (1) advice from the lawyer concerning a communication from a client, (2) anything the lawyer said that could be an admission of the client, and (3) anything the lawyer said that would lead to an inference about what the client may have said to the lawyer. The court found this insufficient “to accomplish the objective for which the privilege was created and now exists.” *Id.* at 384.
205. *Id.* at 383.
206. *Id.* at 384 (citing ALI MODEL CODE OF EVIDENCE, RULE 209(d) (1942), which defines a “confidential communication between client and lawyer” as “information transmitted by a voluntary act of disclosure between a client and his lawyer in confidence”; this definition includes information transmitted voluntarily by any means).
207. *Id.* at 383. The court stated:

The nature and complexity of our present system of justice and the relationships among people and between the people and their government make the preservation and protection of the attorney-client privilege even more essential. If this is to be accomplished, when one undertakes to confer in confidence with an attorney whom he employs in connection with a particular matter at hand, it is vital that all of what the client says to the lawyer and what the lawyer says to the client to be treated as confidential and protected by the attorney-client privilege. This is what the client expects.

Id.

208. *Id.* at 386.
209. *Id.* at 385.
210. *Id.* at 384–85 (footnotes omitted).
211. *Id.* at 385; *see also* *Allied Irish Banks v. Bank of Am., N.A.*, 240 F.R.D. 96 (S.D.N.Y. 2007) (holding that attorney-client privilege did not apply to drafts of investigative report prepared by attorney for independent banking expert, memos of attorney’s investigation interviews, and reports of attorney communications with plaintiff bank’s board of directors, as there was no showing that the documents were primarily or predominantly of legal character); *In re Bd. of Registration for the Healing Arts v. Spinden*, 798 S.W.2d 472, 476 (Mo. Ct. App. 1990) (holding that investigative reports prepared by state medical board investigators acting at direction of board’s general counsel were discoverable by doctor in administrative action). In *Rossi v. Blue Cross & Blue Shield of Greater New York*, 540 N.E.2d 703 (N.Y. 1989), in-house counsel wrote a memorandum to Blue Cross’s medical director, describing the results of an investigation counsel had undertaken, including conversations with plaintiff’s attorney, conversations with the Food and Drug Administration, an analysis of a Blue Cross reimbursement policy, and his opinion and advice regarding a form used to reject certain kinds of medical charges. *Id.* at 704. The court decided that the entire memorandum was protected by the attorney-client privilege, stating:

So long as the communication is primarily or predominately of a legal character, the privilege is not lost merely by reason of the fact that it also

refers to certain non-legal matters. Indeed, the nature of a lawyer's role is such that legal advice may often include reference to other relevant considerations. Here, it is plain from the content and context of the communication that it was for the purpose of facilitating the lawyer's rendition of legal advice to his client.

- Id.* at 706 (citations omitted).
212. The *Upjohn* court noted that seven of the 86 employees interviewed by counsel had terminated their employment by the time they were interviewed. *Upjohn Co. v. United States*, 449 U.S. 383, 394 n.3 (1981).
 213. In a concurring opinion, Chief Justice Burger suggested that the *Upjohn* rule should apply to communications otherwise falling within the framework of *Upjohn*. *See id.* at 402–03.
 214. 658 F.2d 1355 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982).
 215. *Id.* at 1356.
 216. *Id.* at 1359.
 217. *Id.* at 1361.
 218. *Id.* at 1361 n.7 (citations omitted). This opinion remains as recognized authority in the Ninth Circuit. *See United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996).
 219. *See, e.g.*, *Guillen v. City of Chicago*, 956 F. Supp. 1416, 1425 (N.D. Ill. 1997); *Command Transp., Inc. v. Y.S. Line (USA) Corp.*, 116 F.R.D. 94, 96–97 (D. Mass. 1987); *Porter v. Arco Metals Co.*, 642 F. Supp. 1116, 1118 (D. Mont. 1986); *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 880 (Colo. Ct. App. 1987). *But see* *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 305–06 (E.D. Mich. 2000) (holding that no privilege can attach to communications with former employees absent special circumstances). For cases reaching similar conclusions, but in different contexts, *see Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999) (holding that the attorney-client privilege attaches to communications with former employees only if the communications relate to knowledge obtained during employment or the communications were held with the employee prior to termination and were privileged at that time); *Camden v. State*, 910 F. Supp. 1115 (D. Md. 1996); and *Fruehauf Trailer Corp. v. Hagelthorn*, 528 N.W.2d 778 (Mich. Ct. App. 1995).
 220. 106 F.3d 582 (4th Cir. 1997).
 221. *Id.* at 606 (citing *Nakajima v. Gen. Motors Corp.*, 857 F. Supp. 100, 104 (D.D.C. 1994) (D.C. law); *Barrett Indus. Trucks v. Old Republic Ins. Co.*, 129 F.R.D. 515, 517–18 (N.D. Ill. 1990) (Illinois law); *Connolly Data Sys. v. Victor Techs.*, 114 F.R.D. 89, 93–94 (S.D. Cal. 1987) (California law)).
 222. 16 F.3d 929 (8th Cir. 1994).
 223. *Id.* at 934.
 224. *Id.*
 225. *Id.*
 226. *Id.*
 227. *Id.* at 930.
 228. *Id.* at 941.
 229. *Id.* at 935. Supreme Court Standard 503(b) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1)

between himself or his representatives and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representatives, 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.

3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.01 (Joseph M. McLaughlin ed., 2d ed. 2010).

230. *See, e.g.*, *United States v. Spector*, 793 F.2d 932, 938 (8th Cir. 1986) (citation omitted), *cert. denied*, 479 U.S. 1031 (1987); *United States v. (Under Seal)*, 748 F.2d 871, 874 n.5 (4th Cir. 1984) (Supreme Court Standard 503 "provides a comprehensive guide to the federal common law of attorney-client privilege").
231. John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 498 (1982).
232. 16 F.3d at 936.
233. *Id.* at 937.
234. *Id.* at 940. The court stated: "Klohs is, for purposes of the privilege, the functional equivalent of Bieter's employee, and the communications in question fell within the scope of his duties, were made at the behest of his superior, and were made for the purpose of seeking legal advice for Bieter." *Accord United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010); *Hope for Families & Cmty. Serv., Inc. v. Warren*, No. 3:06-CV-1113-WKW, 2009 WL 1066525 (M.D. Ala. Apr. 21, 2009); *Every Penny Counts, Inc. v. Am. Express Co.*, No. 8:07-cv-1255-T-26MAP, 2008 WL 2074407 (M.D. Fla. May 15, 2008); *Am. Mfrs. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc.*, No. CV 05-5155(SJF)(AKT), 2008 WL 5231831 (E.D.N.Y. Dec. 11, 2008); *Davis v. City of Seattle*, No. C06-1659Z, 2007 WL 4166154 (W.D. Wash. Nov. 20, 2007); *Alliance Constr. Solutions Inc. v. Dep't of Corr.*, 54 P.3d 861 (Colo. 2002). *See also Fed. Trade Comm'n v. GlaxoSmithKline*, 294 F.3d 141, 147-48 (D.C. Cir. 2002); *Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1 (D.D.C. 2010).
235. Documents in a party's counsel's files are within the scope of documents that must be produced in response to a discovery request directed to that party. Rule 34 of the Federal Rules of Civil Procedure, for example, requires parties to produce requested documents that are within their possession, custody, or control. *See* FED. R. CIV. P. 34. "Control" is broadly construed to mean not only physical possession but the legal or practical right to obtain them from another source on demand. *See, e.g.*, *Golden Trade v. Lee Apparel Co.*, 143 F.R.D. 514, 525 (S.D.N.Y. 1992); *M.L.C., Inc. v. N. Am. Philips Corp.*, 109 F.R.D. 134, 136 (S.D.N.Y. 1986). Thus, "documents in the possession of a party's counsel are deemed within the control of the party, regardless of the origin of the documents." *Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co.*, No. 90 Civ. 7811, 1994 WL 510043, at *3 (S.D.N.Y. Sept. 16, 1994); *see also Hanson v. Gartland S.S. Co.*, 34 F.R.D. 493, 496 (N.D. Ohio 1964).
236. *See, e.g.*, *Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co.*, No. 90 Civ. 7811, 1994 WL 510043 (S.D.N.Y. Sept. 16, 1994). In *Arkwright*, National Union sought production of documents in the possession of Arkwright's counsel in prior litigation and in possession of counsel hired by Arkwright to conduct a subrogation investigation. National Union argued that some of the claimed attorney-client privileged documents lost their privilege because they contain dis-

- coverable factual information. The court rejected National Union's argument, noting "[t]hat principle simply means that Arkwright must, in either depositions or interrogatory responses, disclose relevant facts if National Union inquires, not that any privileged communications containing facts are fair game in discovery." *Id.* at *8. See also *Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.*, 2002 WL 31729693, at *18 (S.D.N.Y. Dec. 5, 2002).
237. See, e.g., *Carte Blanche (Singapore) PTE, Ltd. v. Diners Club Int'l, Inc.*, 130 F.R.D. 28, 31 (S.D.N.Y. 1990) (information the court called "factual" obtained from third parties must be disclosed).
238. See, e.g., *Port Auth. of N.Y. v. Arcadian Corp.*, Civ. No. 96-1635, 1996 U.S. Dist. LEXIS 22038 (D.N.J. Sept. 30, 1996) (holding that an attorney who represents an insurer in a subrogation action also owes a fiduciary duty to the insured); *Doctors' Co. Ins. Servs. v. Superior Court*, 275 Cal. Rptr. 674, 680-81 (Cal. Ct. App. 1990) (holding that an attorney employed by an insurance company to defend an action against an insured represents both the insurer and the insured). *But see Pine Island Farmers Coop. v. Erstad & Riemer, P.A.*, 649 N.W.2d 444 (Minn. 2002) (holding that defense counsel did not represent both the insured and the insurer in an action brought against the insured, because defense counsel did not consult with or obtain the express consent of the insured to engage in the dual representation).
239. 839 F.2d 958 (3d Cir. 1988).
240. *Id.* at 965. In this case, United Coal Cos. owned a coal mine and processing plant, and operated an aerial tramway to transport coal refuse from one of its processing facilities. *Id.* at 960. United sustained a loss when a haul rope broke, causing 62 cars on the aerial tramway to fall to the ground. United's property insurers paid United \$1.5 million, thereby becoming subrogated to United's rights against the manufacturer and installer. *Id.* The subrogation receipts authorized the insurers to sue in United's name. The insurers retained attorneys to pursue subrogation. United also retained the same attorneys to recover its uninsured loss. The attorneys filed suit in United's name against the manufacturer and installer for the entire loss, including United's uninsured loss. *Id.* During the course of discovery, defendants filed discovery requests seeking the production of two letters from the attorneys to the property insurers. *Id.* at 961. United withheld these documents from production as privileged, and defendants moved to compel. *Id.* at 960-61. The trial court granted the motion to compel because the insurers were not named plaintiffs in the action. The reported colloquy between the court and counsel for the plaintiff is instructive:

COUNSEL: Your Honor, I think the problem is the insurance companies are our clients. You know, if I could just have a moment to address this.

THE COURT: Not according to the caption of the case.

COUNSEL: They may not be named plaintiffs. They are our clients. We were retained by them. They have an interest in this action.

THE COURT: If those documents are not in the hands of these defendants by Monday at noon, this case will be dismissed.

Id. at 964.

On appeal, the Third Circuit, recognizing the true nature of a subrogation action, determined that the trial court had erred:

It is undisputed that the correspondence in issue is between attorneys and insurance companies which retained them to prosecute this action.

Where, as here, an attorney represents two clients, the privilege applies to those clients as against a common adversary. . . . Thus the district court committed legal error when it ruled that the non-party status of the insurers was dispositive on their claim of attorney client privilege. They were clients, and no more was required to support their assertion of the privilege.

Id. at 965.

241. 761 S.W.2d 74 (Tex. App. 1988).
242. *Id.* at 76.
243. *Id.* In many jurisdictions, communications made by an insured to his liability insurance company, concerning an event that may be made the basis of a claim against him covered by the policy, is a privileged attorney-client communication if the policy requires the liability insurer to defend the insured through its attorney and the communication is intended for the information or assistance of the attorney hired by the liability insurer to defend the insured. *See, e.g., State Farm Fire & Cas. Co. v. Superior Court*, 254 Cal. Rptr. 543 (Cal. Ct. App. 1988); *Hyams v. Evanston Hosp.*, 587 N.E.2d 1127 (Ill. App. Ct. 1992). Other courts have explicitly refused to apply the attorney-client privilege to insured-insurer communications. *See, e.g., Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Corp.*, 5 F.3d 1508, 1515 (D.C. Cir. 1993); *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 617 S.E.2d 40, 47 (N.C. Ct. App. 2005).
244. *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124 n.1 (3d Cir. 1986); *Moore v. Tri-City Hosp. Auth.*, 118 F.R.D. 646, 648 (N.D. Ga. 1988); *Am. Nat'l Watermattress Corp. v. Manville*, 642 P.2d 1330, 1333 (Alaska 1982); *Nat'l W. Life Ins. Co. v. Walters*, 216 So. 2d 485, 486 (Fla. Dist. Ct. App. 1968).
245. Potential clients are increasingly requesting that firms engage in competitive interviewing processes in which a client (usually a large corporation) interviews several different law firms for the same assignment. Participating in such a process can raise several ethical issues, including the creation of an attorney-client relationship between the law firm and the prospective client even when the law firm did not intend such a relationship to exist, the concomitant creation of a duty to maintain confidences of that "client," and disqualification of the firm from representing another party in the same or a substantially related matter, even though the law firm was not retained. *See, e.g., B.F. Goodrich Co. v. Formosa Plastics Corp.*, 638 F. Supp. 1050 (S.D. Tex. 1986) (holding that no attorney-client relationship had been created during one-day interview, because firm had not actually received confidential information); *Bridge Prods., Inc. v. Quantum Chem. Corp.*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,940 (N.D. Ill. Apr. 27, 1990) (disqualifying firm based on a prior interview attended by the corporation's CEO, its general counsel, and two lawyers from the firm, since the corporation had shared confidences with the firm and had reasonably believed that the firm was acting as its attorney); Kenneth D. Agran, *The Treacherous Path to the Diamond-Studded Tiara: Ethical Dilemmas in Legal Beauty Contests*, 9 GEO. J. LEGAL ETHICS 1307 (1996) (recommending presumption of lawyer-client relationship in initial consultation, rebuttable only by written waiver from prospective client); Debra Bassett Perschbacher & Rex R. Perschbacher, *Enter at Your Own Risk: The Initial Consultation & Conflicts of Interest*, 3 GEO. J. LEGAL ETHICS 689, 704-05 (1990) (arguing that the lawyer

- must make it clear to the prospective client that no attorney-client relationship is being created by the consultation).
246. 119 F.R.D. 621 (D. Mass. 1988).
247. *Id.* at 622.
248. *Id.*
249. *Id.*
250. *Id.* at 621–22.
251. *Id.* at 622.
252. *Id.*
253. *Diversified Group, Inc. v. Daugerdas*, 304 F. Supp. 2d 507 (S.D.N.Y. 2003).
254. *Id.* at 513. The Maryland courts, however, have noted that even communications with business rather than litigation counsel may be cloaked by attorney-client privilege if litigation counsel instructs that such communications remain confidential. *E.g.*, *Devetter v. Alex. Brown Mgmt. Servs., Inc.*, No. 24-C-03-007514, 2006 WL 1314014 (Md. Cir. Ct. Mar. 22, 2006). In *Devetter*, the trial court determined that communications to litigation counsel through its business counsel could remain confidential under the “intermediary doctrine”:
- The “critical factor” in determining whether the doctrine applies is whether the communications are made in confidence for the purpose of obtaining legal advice from the lawyer. In the instant case, it is undisputed that the representatives of Ballentine Finn were instructed by Plaintiffs to treat their communications as strictly confidential. Indeed, they were not to communicate with anyone other than Plaintiffs and their counsel.
- Id.* at *8 (citations omitted). Under such circumstances, even law firms providing primarily business advice may enjoy some protection through attorney-client privilege. *Id.*
255. *Diversified Group*, 304 F. Supp. 2d at 513 (quoting *Bennett Silvershein Assoc. v. Furman*, 776 F. Supp. 800, 803 (S.D.N.Y. 1991) (internal quotation marks and citation omitted)).
256. No. 02 Civ. 6441 (LAK), 2002 WL 31250727 (S.D.N.Y. Oct. 8, 2002).
257. *Id.* at *1.
258. *Id.*
259. *Id.*
260. 410 F.3d 1104, 1110–12 (9th Cir. 2005).
261. *Id.* at 1107.
262. *Id.* The law firm required this acknowledgment because it did not want the thousands of responses it received to create attorney-client relationships, thus “leav[ing] itself open to suits for malpractice for those who answered.” *Id.*
263. *Id.* at 1110.
264. *Id.* at 1108.
265. *Id.*
266. *Id.* at 1106.
267. *Id.* at 1111 (quoting *Beery v. State Bar of Cal.*, 739 P.2d 1289, 1293 (Cal. 1987). *But see* *Castaneda v. Burger King Corp.*, No. C 08-4262 WHA (JL), 2009 WL 2382688, at *6 (N.D. Cal. July 31, 2009) (holding that communications *Barton* found privileged did not mean there was an attorney-client relationship between putative class members and class counsel).
268. *See, e.g.*, *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1369 (D.C. Cir. 1984); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984). As a gen-

- eral rule, only the client, and not its counsel, may waive the attorney-client privilege. *See, e.g.*, *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *Carte Blanche (Singapore) PTE, Ltd. v. Diners Club Int'l, Inc.*, 130 F.R.D. 28, 31 (S.D.N.Y. 1990); *Leibel v. Gen. Motors Corp.*, 646 N.W.2d 179, 185 (Mich. Ct. App. 2002) (“The attorney-client privilege is personal to the client, and only the client can waive it.”). However, the attorney may waive the attorney-client privilege on behalf of his client where the client voluntarily discloses or voluntarily consents to disclosure of the privileged communication. *See, e.g.*, *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 460 (N.D. Cal. 1978).
269. *See, e.g.*, *In re Grand Jury Subpoenas*, 902 F.2d 244, 248–49 (4th Cir. 1990); *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987); *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986); *Weil Ceramics & Glass, Inc. v. Work*, 110 F.R.D. 500, 502–03 (E.D.N.Y. 1986); *In re Bairnco Corp. Sec. Litig.*, 148 F.R.D. 91, 102 (S.D.N.Y. 1993).
270. *See, e.g.*, *Loustalet v. Refco, Inc.*, 154 F.R.D. 243, 247 (C.D. Cal. 1993); *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997) (quoting *United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir. 1989)).
271. *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986); *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007).
272. *FDIC v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000) (citing *McMorgan & Co. v. First Cal. Mortgage Co.*, 931 F. Supp. 699, 702 (N.D. Cal. 1996)).
273. 238 F.R.D. 215 (W.D. Ky. 2006).
274. *Id.* at 219.
275. *Id.* at 219–20.
276. *Id.* at 220 (emphasis added).
277. *Id.*
278. *Id.*
279. *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975). Many courts applying the at-issue waiver follow *Hearn’s* three-factor test. *See, e.g.*, *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989) (citing cases); *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 413 (D. Del. 1992); *Williams v. Sprint/United Mgmt. Co.*, 464 F. Supp. 2d 1100, 1104 (D. Kan. 2006). Other courts follow a variation of *Hearn’s* three-factor test. *See, e.g.*, *Koppers Co. v. Aetna Cas. & Sur. Co.*, 847 F. Supp. 360, 363 (W.D. Pa. 1994). In *Koppers*, for example, the court adopted the first two *Hearn* factors but replaced the third factor with a balancing test—“the likelihood of chilling the type of ordinarily-privileged communication is outweighed by the unfairness to the seeking party if privilege is found.” *Id.* at 363–64.
280. *See, e.g.*, *N. River Ins. Co. v. Phila. Reinsurance Corp.*, 797 F. Supp. 363, 370 (D.N.J. 1992); *Fox v. Cal. Sierra Fin. Serv.*, 120 F.R.D. 520 (N.D. Cal. 1988); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51, 60 (Conn. 1999).
281. 914 F. Supp. 1084 (D.N.J. 1996).
282. *Id.* at 1093.
283. *Id.* at 1094.
284. *Id.* at 1088.
285. *Id.* at 1091–92.
286. *Id.* at 1094.
287. *Id.* at 1096.
288. *See, e.g.*, *EEOC v. WRS Infrastructure & Env’t, Inc.*, No. 09 C 4272, 2010 WL 2604747, at *3 (N.D. Ill. June 23, 2010); *Reitz v. City of Mt. Juliet*, 680 F. Supp.

- 2d 888, 892–93 (M.D., Tenn. 2010); *EEOC v. Outback Steakhouse of Fla., Inc.*, 251 F.R.D. 603, 611–12 (D. Colo. 2008); *Carpenter v. Mohawk Indus. Inc.*, No. 4:07-CV-0049-HLM, 2007 WL 5971741 (N.D. Ga. Oct. 1, 2007); *Walker v. Cnty. of Contra Costa*, 227 F.R.D. 529, 533 (N.D. Cal. 2005).
289. 165 P.2d 1135 (N.M. Ct. App. 2007).
290. *Id.* at 1139.
291. *Id.* at 1142.
292. 730 A.2d 51 (Conn. 1999).
293. *Id.* at 53.
294. *Id.* at 61.
295. *Id.*
296. *See, e.g.*, *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 630 (N.D. Iowa 2000) (“Numerous courts have noted the difficulty of determining the scope of work product privilege as it applies to insurance claims files or records from an insurer’s investigation of an insured’s claim. . . .”); *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 190 F.R.D. 532, 535 (S.D. Ind. 1999) (“Because an insurer’s business is to investigate claims that may or may not result in litigation, application of the work product privilege to insurance claims investigations has been frequently litigated.”); *Ex parte Nationwide Mut. Fire Ins. Co.*, 898 So. 2d 720, 722–24 (Ala. 2004).
297. 329 U.S. 495 (1947).
298. *Id.* at 498.
299. *Id.* at 510.
300. *Id.* at 509–12.
301. FED. R. CIV. P. 26 advisory committee’s note.
302. FED. R. CIV. P. 26(b)(3).
303. *Upjohn Co. v. United States*, 449 U.S. 383, 397–402 (1981). While the Court stopped short of adopting an absolute rule because the issue had not been directly decided below, the Court held that the notes prepared by the attorneys during conversations were likely not discoverable. *Id.* at 401–02. The Court stated:
- [S]uch work product [the notes] cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.
- While we are not prepared at this juncture to say that such material is always protected by the work product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure.
- Id.*
304. 174 F.3d 394 (4th Cir. 1999).
305. *Id.* at 403 (quoting *In re Grand Jury Proceedings*, 33 F.3d 342, 348 (4th Cir. 1994)) (internal citations omitted); *see also Conn. Indem. Co. v. Carrier Haulers, Inc.*, 197 F.R.D. 564, 570 (W.D.N.C. 2000) (“The work product privilege is intended to prevent a litigant from taking a free ride on the research and thinking of his opponent’s lawyer and to avoid the resulting deterrent to a lawyer’s committing his thoughts to paper.”).
306. *See, e.g.*, ARIZ. R. CIV. P. 26(b)(3) (West 2010); CAL. CIV. PROC. CODE §§ 2018.010–.080 (West 2010); MICH. CT. R. 2.302(B)(3) (West 2010); MINN. R. CIV. P. 26.02(3) (West 2010).

307. *Taroli v. Gen. Elec. Co.*, 114 F.R.D. 97, 98 (N.D. Ind. 1987), *aff'd*, 840 F.2d 920 (7th Cir. 1988); *State Farm Fire & Cas. Co. v. Perrigan*, 102 F.R.D. 235, 237 (W.D. Va. 1984).
308. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). *Compare* *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995) (holding that the work-product protection can apply even when the event giving rise to the litigation has not yet occurred), *and* *A. Michael's Piano, Inc. v. Fed. Trade Comm'n*, 18 F.3d 138, 146 (2d Cir. 1994) (holding that documents prepared during close out of an investigation by employees who believed litigation would never occur are protected), *with* *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1120 (7th Cir. 1983) (holding that an investigation performed while settlement discussions were ongoing was not in anticipation of litigation).
309. 636 F.2d 1028 (5th Cir. 1981).
310. *Id.* at 1040.
311. 230 F.R.D. 398 (D. Md. 2005) (citing *Burton v. B.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 485 (D. Kan. 1997)).
312. *Neuberger*, 230 F.R.D. at 418.
313. *Id.*
314. *Id.*
315. 578 F.3d 432 (6th Cir. 2009).
316. *Id.* at 439. The court ultimately found that the burden had not been met and that the documents were discoverable. *Id.* at 443.
317. *Id.* (relying on *United States v. Roxworthy*, 457 F.3d 590, 594 (6th Cir. 2006)). *Accord* *United States v. Deloitte LLP*, 610 F.3d 129, 136 (D.D.C. 2010); *Sandra T.E. v. S. Berwyn Sch. Dist.* 100, 600 F.3d 612, 622 (7th Cir. 2010); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004); *PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP*, 305 F.3d 813, 817 (8th Cir. 2002); *Maine v. U.S. Dep't of the Interior*, 298 F.3d 60, 68 (1st Cir. 2002); *Montgomery Cnty. v. Microvote Corp.*, 175 F.3d 296, 305 (3d Cir. 1999); *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998); *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992). The Fifth Circuit, however, requires that anticipation of litigation be the "primary motivating purpose" behind the document's creation. *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982).
318. 134 F.3d 1194 (2d Cir. 1998).
319. *Id.* at 1195.
320. *Id.* at 1197.
321. *Id.* at 1198.
322. *Id.* at 1201–02.
323. *Id.* at 1195; *see also* *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 181 (N.D. Ill. 2006) ("[requiring that] the primary motivating purpose for creating the document must be to 'aid in litigation' is overly narrow and contrary to the principles underlying the work product doctrine.").
324. 213 F.R.D. 329 (N.D. Cal. 2003).
325. *Id.* at 330–31.
326. *Id.* at 331.
327. *Id.*
328. *In re Grand Jury Proceedings*, 2001 WL 1167497, at *52 (S.D.N.Y. Oct. 3, 2001) (quoting *In re William L. Derienzo*, 96 Civ. 01186, 1998 WL 283201, at *5 (Bankr. M.D. Pa. Apr. 28, 1998)).
329. 153 F.R.D. 660 (D. Colo. 1994).

330. *Id.* at 662–63; *see also In re Grand Jury Subpoena*, 599 F.2d 504, 511 (2d Cir. 1979) (holding that questionnaire prepared and sent by attorney to 71 employees of corporate client and the employees’ replies and memoranda containing results of interviews with 39 of the employees were prepared in anticipation of litigation).
331. No. 90 Civ. 7811, 1994 WL 510043 (S.D.N.Y. Sept. 16, 1994).
332. *Id.* at *9. Because insurers investigate claims in the ordinary course of business, courts have struggled to apply the work-product doctrine in insurance cases. There appear to be three different approaches to the question of whether documents compiled by an attorney or insurer after an insurance loss have been prepared in anticipation of litigation.
- The first approach generally denies protection to insurance reports prepared after a loss that may generate a potential claim. *See, e.g., Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 374 (N.D. Ill. 1972).
- The second view provides the work-product protection to documents if they were generated after a loss that likely will be litigated. *See, e.g., Basinger v. Glacial Carriers, Inc.*, 107 F.R.D. 771, 773–74 (M.D. Pa. 1985).
- The final approach is a case-by-case analysis that considers the unique factual context of the given factual situation. This is the approach taken by most courts today. *See, e.g., McNulty v. Bally’s Park Place, Inc.*, 120 F.R.D. 27 (E.D. Pa. 1988) (statement taken by insurance adjuster from witness at the request of insured’s legal department was prepared in anticipation of litigation but statement was discoverable because of substantial need of plaintiff in view of fact that witness was the only eyewitness to the incident in question, and was not located); *Taroli v. Gen. Elec. Co.*, 114 F.R.D. 97 (N.D. Ind. 1987) (defendant failed to demonstrate that its investigation following injury caused by explosion of fluorescent light bulb manufactured by defendant was conducted in anticipation of litigation, even where defendant received subrogation notice from plaintiff’s workers’ compensation carrier); *W. Nat’l. Bank of Denver v. Emp’rs Ins. of Wausau*, 109 F.R.D. 55 (D. Colo. 1985) (holding that investigation by law firm hired by liability insurer was not work product, but rather the investigative file of the insurer prepared in the ordinary course of business); *State Farm Fire & Cas. Co. v. Perrigan*, 102 F.R.D. 235 (W.D. Va. 1984) (investigative report prepared by independent investigator hired by insurer was not work product but rather prepared during the ordinary course of investigating a fire); *Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420 (S.D.N.Y. 1981) (holding that investigation by insurer was routine investigation of possibly resistible claim and reports generated during such investigation held discoverable).
333. 161 F.R.D. 274 (S.D.N.Y. 1995).
334. *Id.* at 280–81.
335. *Id.*; *see also Phillips Elecs. N. Am. Corp. v. Universal Elecs. Inc.*, 892 F. Supp. 108, 110 (D. Del. 1995) (documents relating to patent infringement investigations, tests and analyses performed by plaintiff’s employees for its in-house counsel were prepared in the ordinary course of business).
336. 196 F.R.D. 7 (D. Mass. 2000).
337. *Miller v. Holzmann*, 238 F.R.D. 30, 33 (D.D.C. 2006) (holding that defendant had substantial need for disclosure of plaintiff’s selection of approximately 20,000 documents to scan; the action was an extremely complex case with many parties, the action had been in litigation for over 10 years and was procedurally

- in midst of expedited discovery schedule that involved numerous depositions and review of thousands of documents, and disclosure would accelerate the progress of the litigation).
338. EEOC v. Int'l Profit Assocs., Inc., 206 F.R.D. 215, 221 (N.D. Ill. 2002); McNulty v. Bally's Park Place, Inc., 120 F.R.D. 27, 30 (E.D. Pa. 1988); Long's Drug Stores v. Howe, 657 P.2d 412, 417 (Ariz. 1983). *But see* Duffy v. Wilson, 289 S.W.2d 555, 559 (Ky. 2009) (holding that witness statements taken shortly after the death of a high school football player immediately after practice were not discoverable (1) because plaintiff had not taken the deposition of those interviewed by the school district and (2) "witness's memory only fades to a certain extent over a period of time.") The dissenting justice stated: "[C]ommon sense dictates that the written statements taken from witnesses within two weeks of this tragedy, and those taken six months later, cannot be the 'substantial equivalent' in quality or veracity." *Id.* at 561.
339. *See, e.g.*, Brown v. Superior Court, 670 P.2d 725 (Ariz. 1983) (complete file of insurer subject to discovery on ground that substantial equivalent not obtainable; no attorney-client privilege asserted). *But see* Aetna Cas. & Sur. Co. v. Superior Court, 200 Cal. Rptr. 471 (Cal. Ct. App. 1984) (communications between attorney and insurer not discoverable in bad-faith action when insurer's representatives can articulate insurer's reasons for denying claim).
340. FED. R. CIV. P. 26(b)(3); Upjohn Co. v. United States, 449 U.S. 383 (1981); *In re* Leslie Fay Cos. Sec. Litig., 161 F.R.D. 274, 279 (S.D.N.Y. 1995). The U.S. Supreme Court has said that "[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." United States v. Nobles, 422 U.S. 225, 238 (1975).
341. "Core" work product is work product containing "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." *See* FED. R. CIV. P. 26(b)(3)(B).
342. 106 Cal. Rptr. 3d 342 (Cal. Ct. App. 2010), *review granted and opinion superseded*, 232 P.3d 97 (Cal. 2010). The supreme court's grant of review does not specify the issues to be reviewed. Even though the grant of review supersedes the cited opinion, it is instructive nonetheless.
343. *Id.* at 344-45.
344. *Id.* at 345.
345. *Id.*
346. *Id.* at 345-46.
347. *Id.* at 346. The trial court relied on *Nacht & Lewis Architects, Inc. v. Superior Court*, 54 Cal. Rptr. 2d 575 (Cal. Ct. App. 1996) in reaching its decision that the witness statements were automatically "absolute work product" because the statements were taken by an investigator given a list of questions by an attorney. California distinguishes between "absolute work product" and "qualified work product." Absolute work product is defined in California Civil Procedure Code section 2018.030(a) (West 2010) as "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories" and "is not discoverable under any circumstances." Qualified work product is defined in section 2018.030(b) as "[t]he work product of an attorney, other than a writing described in subdivision (a)" and "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party

- seeking discovery in preparing that party's claim or defense or will result in an injustice."
348. CAL. CIV. PROC. CODE §§ 2018.010–2018.080
349. *Id.* at 348–51.
350. *Id.* at 351. The court relied on *Greyhound Corp. v. Superior Court*, 364 P.2d 266 (Cal. 1961), and *Beesley v. Superior Court*, 373 P.2d 454 (Cal. 1962), both of which allowed discovery of percipient witness statements. Both cases were decided before the adoption of the Civil Discovery Act. *Contra Mitchell Eng'g v. City of San Francisco*, No. C 08-04022 SI, 2010 WL 1853493 (N.D. Cal. May 6, 2010) (decided under federal law).
351. 54 Cal. Rptr. 2d 575 (Cal. Ct. App. 1996).
352. *Id.* at 351–52.
353. *Id.* at 356–59.
354. *Id.* at 359–62.
355. *Id.* at 362.
356. 174 P.2d 60 (Wash. 2007), *aff'g* 130 P.3d 840 (Wash. App. 2006).
357. *Id.* at 64–66.
358. *Id.* at 65.
359. *Id.* at 66.
360. *Id.* at 64. *See* WASH. REV. CODE § 42.56 (2010).
361. *Id.*
362. *Id.* at 68.
363. *Id.* at 69–78.
364. *Id.* at 76–77.
365. *Id.* at 75.
366. *Id.* at 75; *see also* *Zawadzki v. Cmty. Hosp. Ass'n*, No 09-cv-01682-LTB-MEH, 09-cv-02450-CMA, 2010 WL 3085719 (D. Colo. Aug. 6, 2010).
367. 266 F.R.D. 379 (D. Ariz. 2010).
368. *Id.* at 381.
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.* at 381–82.
373. *Id.* at 382–83.
374. *Id.* at 383.
375. *Id.* at 384–85.
376. *Id.* at 385.
377. *United States v. Clemens*, Crim. Action No. 10-223 (RBW) (D.D.C. June 21, 2011).
378. *Id.* slip op. at 1.
379. *Id.* at 2–3.
380. *Id.*
381. *Id.* at 9.
382. *Id.* at 1. The subpoena sought production of the statements of Jose Canseco, Brian McNamee, and Kirk Radomski.
383. *Id.* at 1–2.
384. *Id.* at 4–8.
385. 329 U.S. 495 (1947).
386. *United States v. Clemens*, slip op. at 11 (relying on *United States v. Nobles*, 422 U.S. 225, 238 (1975)).

- 387. *Id.* at 10.
- 388. *Id.* at 28–37.
- 389. *Id.* at 7–10.
- 390. *Id.* at 37–38. The opinion is silent as to what the court would have done had it found that the interviews were opinion work product.
- 391. *Id.* at 26 n.17 (“It is not perfectly clear what the Circuit meant when it held that facts elicited in a ‘litigation-related investigation’ are necessarily reflective of an attorney’s focus, and that facts garnered from a more generalized inquiry are not entitled to ‘opinion’ work-product protection.”).
- 392. 449 U.S. 383 (1981).
- 393. *Clemens*, slip op. at 16–17.
- 394. Compare *Upjohn*, 449 U.S. 383, 394 n.3 (remanding the issue of discoverability of the ex-employee interviews), with *id.* at 402–03 (Burger, C.J., concurring) (urging adoption of “bright line” rule protecting the ex-employee interviews that relate to the past employment if requested by management).
- 395. See, e.g., *Raso v. CMC Equip. Rental, Inc.*, 154 F.R.D. 126, 128 (E.D. Pa. 1994); *Eopolo v. Nat’l R.R. Passenger Corp.*, 108 F.R.D. 292, 294 (E.D. Pa. 1985).