Be Wary of Multiple Hats

By D. Larry Kristinik

Preserving the Attorney–Client Privilege when Communicating with Corporate Counsel

Don't assume the attorney–client privilege protects all pre-litigation communication with in-house counsel. That privilege may not attach or may be easily waived by the unwary.

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A dangerous and common misconception in the practice of law is that all communications between business personnel and in-house counsel are protected by the attorney–client privilege. An email between nonlawyer corporate employees that merely copies an attorney in the corporate legal department offers no more protection than a privilege legend at the bottom of the email asking an in-house attorney to go to lunch. If company employees and the in-house and outside counsel with whom they work take a cavalier approach to privilege, they risk a court strictly applying the elements of the attorney–client privilege and finding one or more missing.

Whether privilege exists when a communication is directed to an in-house attorney often depends on whether that attorney is

acting in a legal capacity or in a business capacity. The standards applied by the courts to make this determination are varied and oftentimes vague. The inquiry does not stop, however, once privilege is determined to exist. Privilege can be waived, and with the ease of dissemination of communications through email, social networking, and other electronic means, communications can fall outside of the group that needs to know, and thereby fall outside of the protection of the attorney–client privilege.

This article discusses the standards applied when determining whether communications with in-house attorneys are privileged. It also addresses the existence of privilege for both in-house and outside counsel communications during insurance claims investigations and the decision-making process. This article focuses on communications that occur prior to litigation or a threat of litigation. Accordingly, a discussion of the work-product doctrine is beyond the scope of this work.

Two Key Issues Determine When the Attorney–Client Privilege Protects Communications with In-House Attorneys

Two issues have emerged as critical to whether a communication involving an in-house attorney is protected by the attorney–client privilege: Was the attorney acting as a legal advisor, and was the privilege waived? These issues are separately addressed below.

Was the Attorney Acting as a Legal Advisor?

Because in-house attorneys are on the payroll and have no need for retainer letters or other formal expressions of their engagement as legal advisors, their roles within their client corporations can become blurred. This is especially true when the in-house attorney performs key business functions in addition to providing legal advice. Courts have uniformly held that communications with in-house attorneys will be protected only when they are acting in their capacity as a legal advisor and not when they are acting in a business capacity. Hence, the metaphor, which hat are they wearing?

While the requirement in substance is the same—the attorney must be acting as a legal advisor—the application of this requirement for determining privilege has proved difficult in practice. No less than three different standards have been articulated by the courts in an effort to capture this element of the attorney–client privilege: (1) the "predominately legal" standard; (2) the "primary purpose" standard; and (3) the "but for" standard. *See Welch v. Eli Lilly & Co.*, 2009 U.S. Dist. Lexis 21417, at *35 (S.D. Ind. Mar. 16, 2009) ("[T]he advice given must be predominately legal, as opposed to business, in nature."); *Faloney v. Wachovia Bank, N.A.*, 2008 U.S. Dist. Lexis 49547, at *12 (E.D. Pa. Jun. 26, 2008) ("Communications by in-house counsel are privileged only where the 'communication's primary purpose is to gain or provide legal assistance.'"); *Spiniello Cos. v. Hartford Fire Ins. Co.*, 2008 U.S. Dist. Lexis 53509, at *5–6 (D.N.J. July 14, 2008) ("[T]he court… should require the claimant to 'demonstrate that the communication would not have been made but for the client's need for legal advice or services.'").

The seminal case on this issue is *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789 (E.D. La. 2007). The court in *Vioxx* was asked to rule on the application of privilege to numerous emails sought in discovery. The court applied the "primary purpose" standard, stating: "The test for the application of the attorney–client privilege to communications with legal counsel in which a mixture of services are sought is whether counsel was participating in the communications primarily for the purpose of rendering legal advice or assistance." *Id.* at 798. Because of the many different factual scenarios in which the emails arose, the court listed and explained nine substantive guidelines for counsel to use when determining whether a communication was privileged. *Id.* at 809–13. While the decision in *Vioxx* does not mark any shift in the standards for determining privilege, it provides substantial guidance to other courts as they grapple with mixed purpose communications, email carbon copies, nonprivileged attachments, and other issues particular to electronic communications.

When insurance claims are involved, the legal advice requirement of attorney–client privilege is often the focal point of the court's analysis. Insurance companies whose attorneys are intimately involved in the investigation and decision-making with respect to claims are at risk of being characterized as "claims adjusters" rather than legal advisors. Once such a determination is made, the attorney–client privilege is lost, and disclosure can be required. A detailed discussion is provided later in this article of cases addressing situations involving in-house attorneys handling claims for their insurance company employers.

Has the Privilege Been Waived?

Once privilege is determined to exist, the question then arises whether the privilege has been waived. Two types of waiver pose a particular risk for in-house attorneys with insurance companies. First, waiver can occur through overdissemination among the company's employees. Second, the express or implicit reliance on advice of counsel can lead to a finding of waiver. Each is discussed below.

Overdissemination Within a Corporation

Although dissemination of privileged information to third parties generally waives attorney–client privilege, the distribution within a corporation of legal advice received from its counsel does not, by itself, vitiate the privilege. *See Strougo v. BEA Assocs.*, 199 F.R.D. 515, 519–20 (S.D.N.Y. 2001). The court in *Scholtisek v. Eldre Corp.*, 441 F. Supp. 2d 459 (W.D.N.Y. 2006), articulated the test for determining when dissemination within a company would result in waiver:

> In general, whether the dissemination of privileged communications to corporate employees vitiates the privilege is decided by applying a 'need to know' standard: did the recipient need to know the content of the communication in order to perform her job effectively or to make informed decisions concerning, or affected by, the subject matter of the communication?

Id. at 464.

The application of this rule is illustrated in *Southeastern Pennsylvania Transportation Authority v. CaremarkPCs Health, L.P.*, 254 F.R.D. 253 (E.D. Pa. 2008). The claims in this case involved the interpretation of a written contract. The plaintiff sought the production of emails involving in-house counsel and other employees of

the defendant that related to the drafting and negotiation of the contract. The plaintiff asserted that any potential privilege was waived "because the documents were too widely disseminated." *Id.* at 257. The court denied the plaintiff's request for the emails, holding that they were privileged and that there had been no waiver. For one email, the court reasoned as follows:

> The email was sent to those that needed to stay informed. Three of the individuals involved in the communication were members of Caremark's in-house legal staff and the other three individuals were those who were intimately involved with the SEPTA contract negotiation and formation. Because this email was not widely disseminated and was only sent to individuals who had a "need to know" the legal advice, Caremark has satisfied its burden of establishing that the privilege has not been waived.

Id. at 260.

With respect to another disputed document, the court concluded that "all employees involved in the discussion surrounding the disputed memorandum were acting within the scope of their employment on the SEPTA contract." *Id.* at 263.

Robbins & Myers, Inc. v. J.M. Huber Corp., 274 F.R.D. 63, 93 (W.D.N.Y. 2011), is one example finding the privilege to have been waived through overdissemination. In this case, the defendant sought the production of emails and notes involving in-house counsel and six other employees of the plaintiff company that related to the drafting of a public service announcement. The plaintiff asserted that disseminating the information to the six other employees did not waive the privilege because they were "'few' in number and 'directly involved with the Public Safety Notice.'" *Id.* at 94. The court disagreed, holding that the plaintiff did not satisfy its burden of establishing that these employees were persons needing to know of the communications. The court stated that the recipients of the information must serve as policymakers with a need to know, and merely claiming that they were involved was not enough to satisfy this burden. *Id.* at 94.

Advice of Counsel Defense

Many jurisdictions recognize that when an insurer expressly relies on the "advice of counsel" defense, it will be deemed to have waived its attorney–client privilege, and such waiver will make related communications vulnerable to discovery. *See, e.g., Lindley v. Life Investors Ins. Co.*, 2010 U.S. Dist. Lexis 13821, at *29–30 (N.D. Okla. Feb. 17, 2010). The scope of the waiver will remain an issue, however, and courts will consider limits on communications implicated in the waiver. For example, in *Robertson v. Allstate Insurance Co.*, 1999 U.S. Dist. Lexis 2991 (E.D. Pa. Mar. 10, 1999), the court held that reliance on the advice of *outside* counsel as a defense did not require a finding of waiver of communications involving *in-house* attorneys.

A more difficult situation for insurers is when they do not expressly assert the advice of counsel defense but are still found to have implicitly waived the attorney–client privilege.

Note that Rule 502 of the Federal Rules of Evidence sets a standard for determining the scope of the waiver of privilege when litigation is pending in the federal courts and an intentional waiver of part of the privileged communications has occurred. This rule is exemplified in *Arizona ex rel. Goddard v. Frito-Lay, Inc.*, 273 F.R.D. 545 (D. Ariz. 2011), in which the court stated that Rule 502 suggests that courts limit the waiver to communications about "the same subject matter as the communication constituting the waiver." *Id.* at 556. The court held that the plaintiff waived any attorney–client privilege in its investigations, advice given, and communications related to reaching its determination and drafting of the document in which privilege was intentionally waived. *Id.*

A more difficult situation for insurers is when they do not expressly assert the advice of counsel defense but are still found to have *implicitly* waived the attorney–client privilege. *See Lexington Ins. Co. v. Swanson*, 2007 U.S. Dist. LEXIS 53509, at *10 (W.D. Wash. July 24, 2007) ("A number of courts have concluded that an insurer waives the attorney-client privilege between it and its coverage counsel when the insurer, in response to a bad faith action, implicitly relies on counsel's legal advice as a justification for non-payment of claims"). As explained in *State Farm Mutual Automobile Insurance Co. v. Lee*, 13 P.3d 1169 (Ariz. 2000), "in cases such as this in which *the litigant* claiming the privilege *relies* on and advances as a claim or defense a subjective and allegedly reasonable evaluation of the law—but an evaluation that necessarily incorporates what the litigant learned from its lawyer—the communication is discoverable and admissible." *Id.* at 1175 (emphasis in original). This doctrine is well entrenched in Arizona. *See, e.g., Mendoza v. McDonald's Corp.*, 222 Ariz. 139 (2009) (holding that a defense of subjective reasonability puts the advice of counsel constituting the foundation of that belief in question, regardless of whether the advice is expressly or impliedly relied upon); *Hunton v. Am. Zurich Ins. Co.*, No., 2017 WL 3712445, at *2 (D. Ariz. Aug. 29, 2017) (quoting *Mendoza*, "[b]y electing to defend this case based on the subjective, not just objective, reasonableness of its adjuster's actions, Defendant placed at issue its 'subjective beliefs and directly implicated the advice and judgment [it] had received from [the defendant's] ICA counsel incorporated in those actions.'").

The South Carolina Supreme Court recently issued an opinion recognizing the implied waiver of the attorney–client privilege in insurance bad-faith cases. In *In re Mt. Hawley Insurance Co.*, 829 S.E.2d 707 (S.C. 2019), the court held that an insurer, under certain circumstances, can be found to have waived its ability to assert the attorney–client privilege when an insured can establish a prima facie showing of bad faith in the handling of the claim. Its decision adopted the approach of *Lee v. State Farm*, 13 P.3d 1169 (Ariz. 2000), cited above, wherein the Arizona Supreme Court concluded that when an insurer relies on and advances as a defense a subjective and allegedly reasonable evaluation of the law, and the evaluation necessarily incorporates

what the insurer learned from its lawyers, the communications are discoverable and admissible.

Not all courts have agreed with the principle of implied waiver articulated in *Lee v. State Farm*, 13 P.3d 1169 (Ariz. 2000). For example, in *Bertelsen v. Allstate Insurance Co.*, 796 N.W.2d 685 (S.D. 2011), the court stated that the *Lee* decision went too far and failed to "strike an appropriate balance of the need for discovery with the importance of maintaining the privilege." *Id.* at 703. The court held that the analysis "should begin with a presumption in favor of preserving the privilege," and "[a] denial of bad faith or an assertion of good faith alone is not an implied waiver of the privilege." *Id.* The court imposed limitations, stating that "a client only waives the privilege by expressly or impliedly injecting his [or her] attorney's advice into the case," there must be "reliance of the client upon the advice of his attorney," and "a client only waives the privilege to the extent necessary to reveal the advice of counsel he [or she] placed at issue." *Id.*

Privilege Issues Arising During the Insurance Claim-Handling Process

The risk that arises from attorney participation in the claim-handling process is that the attorney will be viewed as performing the same business function as an insurance adjuster: "To the extent th[e] attorney act[s] as a claims adjuster, claims process supervisor, or claim investigation monitor, and not as a legal advisor, the attorney-client privilege would not apply." *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 671 (S.D. Ind. 1991). This is a risk for both in-house attorneys and outside counsel who assist claims examiners and adjusters in the proper handling of their duties.

The general rule for both in-house attorneys and outside counsel was summarized in *Cutrale Citrus Juices USA, Inc. v. Zurich American Insurance Group*, 2004 U.S. Dist. Lexis 22487 (M.D. Fla. Sept. 10, 2004): "In the insurance context, 'no privilege attached when an attorney performs investigative work in the capacity of an insurance claims adjuster, rather than as a lawyer, [but] simply because [the attorney's] assigned duties were investigative in nature' does not preclude an assertion of the attorney-client privilege." *Id.* at *10–11 (alternation in original) (internal citation omitted). The court explained that "'the relevant question is not whether [the attorney] was retained to conduct an investigation, but rather, whether this investigation was related to the rendition of legal services. If it was… the privilege is not waived.'" *Id.* at *11 (alteration in original) (internal citation omitted).

Cases across different jurisdictions have addressed whether *in-house* attorneys involved in handling insurance claims were acting in a legal capacity, thereby activating the privilege. *See, e.g.*, *Certain Underwriters at Lloyd's v. National Railroad Passenger Corp.*, No. 14-CV-4717(FB), 2016 WL 2858815 (E.D.N.Y. May 16, 2016) (finding that the privilege protected work-product created by in-house counsel because counsel provided legal advice pertaining to the handling and settlement of bodily injury claims); *Sell v. Country Life Insurance Co.*, 189 F. Supp. 3d 925 (D. Ariz. 2016) ("The mere identification of a lawyer as a recipient or sender of an email, in and of itself, does not cause the content of that email to be privileged."); *Bacchi v. Mass. Mut. Life Ins. Co.*, 110 F. Supp. 3d 278, 282–83 (D. Mass. 2015) (holding the privilege applicable when in-house counsel confers, subject to a confidentiality agreement, with counsel for an insurance association regarding the association's amicus brief); *Lacaretta Restaurant v. Zepeda*, 115 So. 3d 1091, 1092–93 (Fla. Dist. Ct. App. 2013) (finding that the privilege protected paperless internal communications between in-house counsel and the employer and carrier when communications were made in the rendition of legal services); *Penn Mut. Life Ins. Co. v. Rodney Reed. 2006 Ins. Trust*, 2011 U.S. Dist. Lexis 46825 (D. Del. Apr. 25, 2011) (holding that the privilege was applicable where the plaintiff "has provided evidence, however, that [the in-house attorney] Best was acting in his legal capacity at all relevant times"); *Allstate Ins. Co. v. Levesque*, 263 F.R.D. 663, 668 (M.D. Fla. 2010) ("[C]orrespondence and communications between an insurer's employees or agents and the insurer's in-house counsel are privileged and not subject to production."); *Spiniello Cos. v. Hartford Fire Ins. Co.*, 2008 U.S. Dist. Lexis 53509 (D.N.J. July 14, 2008) (finding no privilege for an email to the plaintiff's counsel with copy of reaffirmance of a denial letter that merely carbon copied in-house counsel, but finding privilege was applicable to emails to in-house counsel seeking legal advice); *Robertson v. Allstate Ins. Co.*, 1999 U.S. Dist. LEXIS 2991, at *17 n.6 (E.D. Pa. Mar. 10, 1999) (finding communications between employees and in-house counsel privileged "in light of Allstate's representation that the communications at issue did not contain business advice, but rather involved legal advice about how to proceed with the UIM arbitration."); *Quaciari v. Allstate Ins. Co.*, 1997 U.S. Dist. Lexis 13834, at *2–3 (E.D. Pa. Sept. 5, 1997) ("I find that the redacted portions of the documents labeled as 'diary entries' on Allstate's Privilege Log relate to communications between Allstate's claims adjuster and Allstate's counsel or other personnel in counsel's office and are therefore protected by the attorney-client privilege[.]"); *2,022 Ranch, L.L.C. v. Superior Court*, 7 Cal. Rptr. 3d 197, 212 (Ct. App. 2003) ("In this insurance bad faith action we are presented with the issue of what, if any, claims investigation material is protected by the attorney-client or attorney work product privileges where the in-house claims adjusters also happen to be licensed attorneys."), *overruled in part*, *Costco Wholesale Corp. v. Superior Court*, 101 Cal. Rptr. 3d 758 (2009); *USAA v. Crews*, 614 So. 2d 1213, 1214 (Fla. Ct. App. 1993) ("Contrary to the trial court's ruling, the evidence clearly established that the 'in-house' counsel, at least some of the time, were functioning as attorneys, giving protected legal advice to USAA.").

In other cases, courts addressed whether *outside* counsel involved in handling insurance claims were acting in a legal capacity, thereby activating the privilege. *See, e.g.*, *In re Allen*, 106 F.3d 582, 602 (4th Cir. 1997) ("The relevant question is not whether [the attorney] was retained to conduct an investigation, but rather, whether this investigation was related to the rendition of legal services."); *Parisi v. State Farm Mut. Auto. Ins. Co.*, No. 3:16-179, 2017 WL 4403326, at *5 (W.D. Penn. Oct. 2, 2017) ("This Court is not aware of any authority that limits the attorney-client privilege to communications with outside counsel, as opposed to in-house counsel, and Plaintiff has cited

none. Therefore, this Court rejects Plaintiffs' claim that the attorney-client privilege could not have attached before Attorney McDonnell was retained as outside counsel to handle Plaintiffs' claim."); *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685 (S.D. 2011) ("Allstate's retention of counsel was for the 'purpose of facilitating the rendition of professional legal services,' which is a 'classic example of a client seeking legal advice from an attorney.'"); *Transamerica Life Ins. Co. v. Moore*, 274 F.R.D. 602 (E.D. Ky. 2011) ("The purpose of the report was to provide legal advise [sic] regarding Transamerica's potential changes to its claims processing… the communications at issue are protected by the attorney-client privilege and not discoverable unless waived or subject to an exception."); *Connecticut Indemnity Co. v. Carrier Haulers, Inc.*, 197 F.R.D. 564 (W.D.N.C. 2000) (finding the attorney–client privilege applicable when outside counsel corresponded with insurer's senior examiner regarding the results of the investigation of an outside adjuster for purposes of preparing coverage opinion); *Great Am. Ins. Co. v. J. Aron & Co.*, 1995 U.S. Dist. Lexis 7427, at *5 (S.D.N.Y. May 30, 1995) ("Nor will the attorney/client privilege protect documents prepared by outside counsel hired to monitor the progress of [the] case to the extent that attorneys act as claims adjusters, claims process supervisors, or claims investigation monitor rather than legal advisors."); *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 671 (S.D. Ind. 1991) ("Outside counsel was hired five days after the fire to monitor the progress of the case, ensure compliance with the Indiana arson reporting requirements, and conduct the examination under oath of the plaintiff and his wife as provided in the policy…. To the extent that this attorney acted as a claims adjuster, claims process supervisor, or claim investigation monitor, and not as a legal adviser, the attorney-client privilege would not apply."); *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986) ("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.").

Ohio Exception in Bad-Faith Litigation

Practitioners with cases pending in Ohio, or where Ohio law may apply, need to be aware of the decision in *Boone v. Vanliner Insurance Co.*, 744 N.E.2d 154 (Ohio 2001). There, the Ohio Supreme Court held, in an insurance bad-faith case, that the insured is entitled to discover claim file materials containing attorney–client communications related to the issue of coverage that were created before the denial of coverage. The court in *Boone* reasoned that "claims file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection." *Id.* at 158. Plaintiffs' attorneys argue that *Boone* requires automatic production of all pre-denial privileged documents contained in an insurer's claim file merely because a complaint *alleges* a bad-faith claim. The *Boone* decision continues to be recognized as a valid exception to the attorney–client privilege in Ohio. *See, e.g., In re Prof'ls Direct Ins. Co.*, 578 F.3d 432, 442 (6th Cir. 2009); *CSX Transp., Inc. v. Columbus Downtown Dev. Corp.*, No. 2:16-cv-557, 2019 WL 1499164 (S.D. Ohio Apr. 5, 2019); *Shah v. Metropolitan Life Ins. Co.*, No. 2:16-cv-1124, 2017 WL 5712562 (S.D. Ohio Nov. 27, 2017).

> One procedural technique used to mitigate the effect of *Boone* is to bifurcate the proceedings so that the contract claim is resolved first, thereby postponing the relevance of the handling of the claim until the court reaches the bad-faith claim, if necessary.

Ohio courts have held that *Boone*'s rationale extends to work-product materials, such that both attorney–client materials and work-product materials are subject to disclosure during discovery on bad-faith claims. *See Garg v. State Auto. Mut. Ins. Co.*, 800 N.E.2d 757 (Ohio Ct. App. 2003).

One procedural technique used to mitigate the effect of *Boone* is to bifurcate the proceedings so that the contract claim is resolved first, thereby postponing the relevance of the handling of the claim until the court reaches the bad-faith claim, if necessary. *See Loukinas v. State Farm Mut. Auto. Ins. Co.*, No. C-180462, 2019 WL 3852547 (Ohio Ct. App. Aug. 16, 2019) ("[W]e hold that, where the trial court bifurcated the bad-faith claim from the underlying claims, the court erred by compelling State Farm to disclose materials protected by the work-product doctrine or attorney-client privilege contained in its claims file and compelling the depositions of its representatives about these materials prior to the resolution of the declaratory-judgment and breach-of-contract claims").

It has been argued that the rule in Ohio has been modified by statute so that a prima facie showing of bad faith is required before disclosure can be compelled. Ohio Rev. Code Ann. §2317.02(A)(2). This statute provides:

> [I]f the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima facie showing of bad faith, fraud, or criminal misconduct by the client.

Id. However, courts have held that this statute does not apply to documents, but only to testimony. *See, e.g., William Powell Co. v. National Indemnity Co.*, No. 1:14-cv-00807, 2017 WL 1326504, at *17–18 (S.D. Ohio Apr. 11, 2017) ("The majority of courts to have addressed the issue have found that the statute is limited to attorney testimony and does not extend to documents related to coverage issues that were created prior to the denial of coverage.… Thus, the overwhelming weight of authority holds that the testimonial privilege in bad faith insur-

ance cases set forth in §2317.02(A)(2) does not apply to documents."); *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 905 N.E.2d 1221 (Ohio 2009) ("R.C. 2317.02(A), by its very terms, is a mere testimonial privilege precluding an attorney from testifying about confidential communications.") (quoting *State ex rel Leslie v. Ohio Hous. Fin. Agency*, 824 N.E.2d 990, 996 (Ohio 2005)); *Grace v. Mastruserio*, 912 N.E.2d 608, 612 (Ohio Ct. App. 2007) ("A plain reading of the statute clearly limits the statute's application to cases in which a party is seeking to compel testimony of an attorney for trial or at a deposition—as opposed to cases where a party is seeking to compel production of nontestimonial documents.").

Attempts by the plaintiffs' bar to have *Boone* adopted in other jurisdictions have been rejected. *See, e.g., In re Mt. Hawley Ins. Co.*, 829 S.E.2d at 714 ("While this approach would certainly promote South Carolina's policies in favor of promoting broad discovery and holding insurers accountable when they act in bad faith, we reject it, as the approach places only nominal value on the importance of the attorney-client privilege."); *Spiniello Cos. v. Hartford Fire Ins. Co.*, 2008 U.S. Dist. Lexis 53509, at *19–20 (D.N.J. July 14, 2008) (listing jurisdictions rejecting *Boone*, including Connecticut, West Virginia, Indiana, Massachusetts, Louisiana, Delaware, Montana, and California); *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169, 1181–82 (Ariz. 2000) (adopting the Restatement (Third) of the Law Governing Lawyers §80(1)(a) approach, which rejects the Ohio exception and other minority views).

Conflict of Laws

Because insurance company legal departments often manage litigation nationwide that involve claims from various jurisdictions, and because the insurance policies at issue often involve interstate contacts, the starting point in the analysis of the privilege issue is to determine which state's law controls. As a general rule, federal courts acting under their diversity jurisdiction must apply state law and are not permitted to fashion federal common law privilege rules outside of the separate work-product doctrine. *See* Fed. R. Evid. 501. *But see Hartford Life Ins. Co. v. Bank of Am. Corp.*, 2007 U.S. Dist. Lexis 61668 (S.D.N.Y. Aug. 21, 2007) (applying federal privilege law to evidence relevant to both federal and state law claims).

The analysis of whether to apply federal privilege law or state privilege law becomes more complicated, however, when both federal and state claims and multidistrict litigation proceedings are involved. For example, in *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation* MDL, 2011 WL 1375011 (S.D. Ill. Apr. 12, 2011), the court declined to follow the portion of the seminal *Vioxx* decision (discussed above) that concerned the choice of law for determining attorney–client privilege and held as follows:

> (1) privilege matters that are relevant to an element of a federal defense will be governed by federal privilege law; and (2) privilege matters that are relevant to an element of a claim or defense for which state law supplies the rule of decision will be governed by state privilege law.

Id. at *7.

There are three commonly recognized methods for resolving choice-of-law issues when determining whether disclosure can be prevented under a claim of attorney–client privilege: (1) assume the state that supplies the rule of decision is the state that also supplies the privilege law; (2) apply the privilege rules of the state in which the federal court sits; or (3) apply the conflict-of-law doctrine of the state in which the federal court sits. *Valencia v. Colorado Cas. Ins. Co.*, 2007 U.S. Dist. Lexis 97721, at *15–16 (D.N.M. Dec. 6, 2007). Section 139 of the Restatement (Second) of Conflict of Laws also addresses this issue and articulates a not-so-easily applied test that first asks which state has the most significant relationship and then requires determining whether strong public policy of the forum state would require an opposite result pertaining to admission or exclusion of the purportedly privileged evidence.

When possible, courts will avoid the choice-of-law issue altogether by concluding that there are no material differences in the privilege law of the competing states that would affect the outcome of the court's decision. *See Baker v. Gen. Motors Corp.*, 197 F.R.D. 376 (W.D. Mo. 1999). The Illinois appellate courts have mandated this approach and first require a finding of an *actual* conflict before moving to the choice-of-law analysis. *See Bridgeview Health Care Center, Ltd. v. State Farm Fire & Cas. Co.*, 10 N.E.3d 902, 908–909 (Ill. 2014) (abrogating *Sterling Fin. Mgmt., L.P. v. UBS Painewebber, Inc.*, 782 N.E.2d 895 (Ill. Ct. App. 2002)), and ordering that a choice-of-law determination should be required only after a moving party has established an actual, not potential, conflict between state laws). Prior to *Bridgewater Health Care Center*, the mere *potential* for conflict of state laws allowed Illinois courts to make a choice-of-law determination.

Determining which state's law governs the privilege issue necessarily is very fact specific and varies from court to court because they select among a variety of choice-of-law rules. *See, e.g., In re: Bard IVC Filters Products Liab. Litig.*, MDL No. 15-2641 PHX DGC, 2016 WL 3970338 (D. Ariz. Jul. 25, 2016) (holding, in the multidistrict litigation context, that the court should look to "the transferor states' choice of law rules to determine which privilege law to apply"); *Manumitted Cos. v. Tesoro Alaska Co.*, 2006 U.S. Dist. Lexis 57658 (D. Alaska Aug. 16, 2006) (holding that under the Restatement test Alaska law governed the determination of privilege because, even if Washington or Texas was the forum with most significant relationships, there was no convincing reason why other jurisdictions' privilege law should trump the law of the forum state); *Abbott Labs. v. Alpha Therapeutic Corp.*, 200 F.R.D. 401 (N.D. Ill. 2001) (applying the law of the forum state to determine privilege despite fact that agreement called for application of California law); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643 (Tex. 1995), *superseded by* Tex. R. Civ. P. 192.3(g), *as recognized in In re Univar USA, Inc.*, 311 S.W.3d 175 (Tex. App. 2010) (applying Michigan privilege law because Michigan had the most significant relationship to communications at issue); *Delta Fin. Corp. v. Morrison*, 831 N.Y.S.2d 352 (Sup. Ct. 2006) (holding that South Carolina law applied to determine privilege for an email sent to person in South Carolina and reply email sent from same person).

Miscellaneous Issues Affecting the Privilege for In-House Attorneys

Three other things may affect the privilege for in-house attorneys: parent and subsidiary relationships; fiduciary relationships in ERISA matters; and European Union privilege principles.

Parent–Subsidiary Communications

Courts uniformly recognize that communications between parent and subsidiary corporations retain their privilege. As explained in *Glidden Co. v. Jandernoa*, 173 F.R.D. 459 (W.D. Mich. 1997),

> [t]he universal rule of law, expressed in a variety of contexts, is that the parent and subsidiary share a community of interest, such that the parent (as well as the subsidiary) is the "client" for purposes of the attorney-client privilege. Consequently, disclosure of legal advice to a parent or affiliated corporation does not work a waiver of the confidentiality of the document, because of the complete community of interest between parent and subsidiary. Numerous courts have recognized that, for purposes of the attorney client privilege, the subsidiary and the parent are joint clients, each of whom has an interest in the privileged communications.

Id. at 472—73 (citations omitted).

This principle was recently reaffirmed in *Margulis v. Hertz Corp.*, No. 14-1209-JMV-MF, 2019 WL 2406344 (D.N.J. Feb. 19, 2019). In *Hertz*, the court noted that parent companies often centralize the corporate group's legal services into one in-house legal department. *Id.* at *2. The court elucidated:

> In those situations, "the separate corporate members of a larger corporate family can be considered joint clients of the same in-house counsel for purposes of the privilege, regardless of which specific company employs the lawyer." An in-house attorney may be found to represent "joint clients" only if the lawyer "actually has as separate clients the individual members of a larger corporate family."

See id. (quoting *In re Teleglobe*, 493 F.3d 345, 371–72 (3d Cir. 2007)).

However, as explained in the seminal case *In re Teleglobe Communications Corp.*, 493 F.3d 345 (3d Cir. 2007), privilege protections can be lost when corporations become insolvent and creditors make claims, and when parent corporations divest themselves of their subsidiaries. The Third Circuit explained:

> It is inevitable that on occasion parents and subsidiaries will see their interests diverge, particularly in spin-off, sale, and insolvency situations. When this happens, it is wise for the parent to secure for the subsidiary outside representation. Maintaining a joint representation for the spin-off transaction too long risks the… parent companies [being] forced to turn over documents to their former subsidiaries in adverse litigation—not to mention the attorneys' potential for running afoul of conflict rules.

Id. at 373. *See also MA Equip. Leasing I, L.L.C. v. Tilton*, 980 N.E.2d 1072, 1086–87 (Ohio Ct. App. 2012) (applying *Teleglobe*, the court held that there was no privilege between parent and wholly owned subsidiary after parent asserted its adverse interests in bankruptcy proceedings). *Cf. Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 620 (2016) (holding that pre-merger communications did not fall within privilege because the common-interest doctrine is limited to communications relating to either pending or anticipated litigation).

Courts uniformly recognize that communications between parent and subsidiary corporations retain their privilege.

Fiduciary Exception in ERISA Matters

Cases involving ERISA claims pose a unique exception to the attorney–client privilege. "The 'fiduciary' exception to the attorney-client privilege 'comes into play when… the administrator for an ERISA plan invokes the attorney-client privilege against the plan beneficiaries.'" *Redd v. Brotherhood of Maint. of Way Employees*, 2009 U.S. Dist. Lexis 46288, at *2 (E.D. Mich. June 2, 2009). The "exception derives from the principle that when an attorney advises a plan fiduciary about the administration of an employee benefit plan, the attorney's client is not the fiduciary personally but, rather, the trust's beneficiaries." *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 619 (D. Kan. 2001).

The point in time is critical to the application of this exception. It will be found applicable and disclosure required when a plan administrator seeks the advice of counsel in the pre-decisional phase of a benefit determination. *See Geissal v. Moore Med. Corp.*, 192 F.R.D. 620, 620 (E.D. Mo. 2000). But attorney–client communications made after a decision is final, or addressing a challenge to plan administrators in their personal capacity, have been deemed privileged and exempt from disclosure. *Id.* at 625–26. Courts readily reject the application of the exception when the plan administrator seeks advice after litigation has been commenced by beneficiaries. *See Soc'y of Prof'l Eng'g Employees in Aerospace v. Boeing Co.*, 2009 U.S. Dist. Lexis 102345 (D. Kan. Nov. 3, 2009).

The issue that often determines whether the fiduciary exception applies is whether the actions of the plan administrator constitute an act in the course of plan administration. *See, e.g., Comrie v. IPSCO, Inc.*, 2009 U.S. Dist. Lexis 111965, at *7 (N.D. Ill. Nov. 30, 2009) ("[A]mending or abolishing unaccrued benefits by… 'spinning off plan assets to a new plan' does not constitute plan administration."); *Fortier v. Principal Life Ins. Co.*, 2008 U.S. Dist. Lexis 43108, *8 (E.D.N.C. June 2, 2008) (finding communication "was intended to assist in plan administration" where email "related to Plaintiff's claims for benefits under his plan and other severance benefits that he was denied.").

European Union Privilege Principles

Since the time of the 1982 judgment of the European Court of Justice in the case of *AM & S* (Rs. 155/79, Slg. 1982, 1575), it has been acknowledged that privilege applies only to the correspondence and communications between companies and their *out-*

side counsel. In that case, it was held that privilege does not extend to *in-house* attorneys because, according to the court, there is a lack of independence, and the in-house attorneys are subject to the instructions and interests of the company. The 1982 decision was reaffirmed in the 2010 decision in Case C-550/07, *Akzo Nobel Chems. Ltd. v. Comm'n*, EUR-Lex CELEX LEXIS 62007J0550 (Sept. 14, 2010).

One must not assume that the privilege will be recognized for an in-house attorney in foreign jurisdictions, even when legal advice is being sought. There is also a risk of waiver if an attorney in a country that recognizes privilege communicates with an in-house attorney in the European Union, India, or another country that does not recognize privilege for in-house attorneys.

Courts in the United States have applied European privilege principles in state-side actions. In *Louis Vuitton Malletier v. Dooney & Bourk, Inc.*, 2006 WL 3476735 (S.D.N.Y. Nov. 30, 2006), the court noted that no privilege existed, under French law, for communications between in-house attorneys. *Id.* at *17. While the French attorneys were not members of any bar, the court ruled that even if they were bar members, French law does not afford in-house counsel an expectation of privilege, and thus, no privilege could exist. *Id.* at *17–18. A similar outcome occurred in *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 78 (S.D.N.Y. 2006). In this case, the defendants sought disclosure of certain allegedly privileged documents. *Id.* at 72. However, the court ruled that Swiss law confidentiality protections did not apply to communications with in-house counsel; thus, the documents were to be disclosed. *Id.* at 76–78.

Conclusion

Minimizing the risk of a finding of no privilege by a court is largely a function of education of company employees as well as counsel. Once employees are aware that there are limitations on privilege protections with communications with in-house and outside counsel, they can take appropriate care to ensure that confidential communications that truly need protection have that protection.

Whether privilege protection will be afforded when an in-house attorney listens or speaks varies with the applicable standards in different jurisdictions and the differing scenarios in which communications arise. The ever-increasing use of emails, texting, and other electronic communication forms further complicate the analysis as illustrated in the *Vioxx* decision. The only guarantee is that there are no guarantees that any particular communication with counsel will be protected from disclosure.