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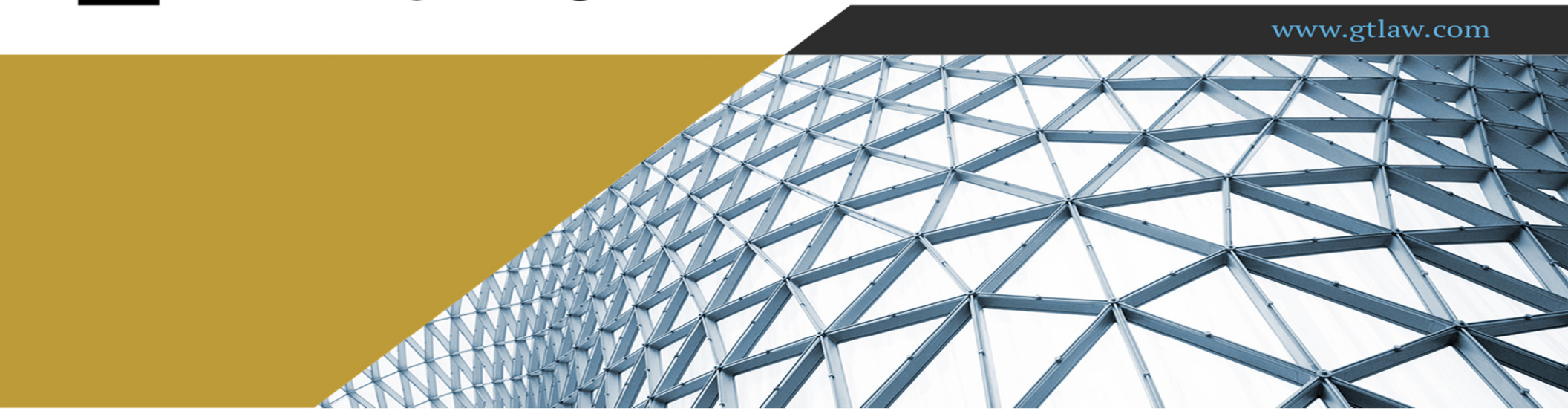

Protecting Privileges for In-House Professionals: Understanding the Available Tools and How to Use Them

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Privileged & Confidential

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Today's Focus

- Protecting privileges in key areas
- Practical points for in-house professionals
- Steps to take when waiver and other issues arise

Attorney-client privilege

- Communication between a lawyer and client
- In the course of a professional relationship
- For the purpose of obtaining legal advice (if from client) or for purpose of facilitating legal advice or services (if from lawyer)
- And must be confidential (not shared with third party)

Key Points – Determining Privilege

- Inhouse professionals can wear “two hats”
- “Lawyer/client” communication = legal advice
  - People matter
  - Content matters

Starting Point – Who Is Protected

- Inhouse counsel's legal communications can create privilege
- Paralegal professionals cannot create privilege
- Transactions: inhouse lawyers on opposite sides of transaction can't have privilege – even if interests aligned
- Inhouse counsel can claim privilege for their client – *i.e.*, the company, but what about officers, employees, ___?

Need to know before You hit "send"

Key Points – Who Is the Client?

- General Rule: Your client is the company
- From there –
  - Most courts: privilege protects communications between company's lawyers and employees of wholly owned affiliates
  - Majority rule: *Upjohn* – any level employee covered if they possess facts within the scope of employment that the lawyer needs to give legal advice
  - Illinois/minority rule: "control group" – protection applies only to "upper management" who acts on legal advice
- Former employees – same rules if dealing with time at the company

Key Points – What Is Protected

- ✓Legal advice: if significant/predominant purpose
- ✓Business advice = not privileged
- ✓Mixed Purpose? Depends on . . .
  - People – e.g., who wrote it (title), who received it (titles), what they do
  - Communication – e.g., why was it written, what was written

Key Test:

Does it relate to legal rights and obligations and professional skills such as counsel's judgment and recommended legal strategies

Key Points – Before You Hit Send

- Don't send/forward if told not to, or are unsure
- Consider sending two e-mails when business and legal advice being conveyed
- Review everyone on the e-mail
  - Does this person need to receive this?
  - Does this person need to know this?
  - Is this person part of the protected group?
- Use of ACP label = mark it

Board Level Communications

- Board minutes and PowerPoints can be protected
- Same rules apply
- Often the focus of discovery

Attorney Work Product Doctrine

- The attorney work product doctrine is different
- This protects from discovery:
  - "documents *and tangible things*"
  - "prepared in anticipation of litigation or for trial"
  - if such items were prepared "by or for the party or its representative (including an attorney consultant, surety, indemnitor, insurer, or agent."

Applies to lawyers and non-lawyers working at the direction of counsel
Paralegal work may be protected under AWP

Key Differences – ACP versus AWP

Attorney Client Privilege	Attorney Work Product
Requires attorney to be involved, a communication, and must relate to legal advice	None of this required
Does not need to relate to litigation	Must relate to litigation
Privilege is absolute (subject to certain exceptions like crimes)	Can be overcome by adversary's absolute need
Can last forever	May expire after litigation ends

ACP = more absolute, but fragile protection
AWP = more robust protection (third parties), but can be overcome

Waiver – What to Do If Disclosed

- Intentional → can extend to undisclosed communications that:
  - concern the same subject matter; and
  - ought in fairness to be considered together
- Inadvertent → can be recovered if:
  - Reasonable steps were taken to prevent disclosure; and
  - Reasonable steps are promptly taken to correct ("clawback")

New Tool

FRE 502(d)/(e) Clawback Agreements

Remedy/control the scope of potential waiver

Waiver – What to Do If Disclosed

- Plan ahead when dealing with protected information
- If intending to disclose, think ahead about all possible consequences
- If mistake is made,
  - Contact lead inhouse lawyer immediately
  - Contact recipient in writing and demand return or destruction
  - Require written confirmation of compliance
- If recipient won't return / comply with requests
  - Take further action as necessary
  - Act immediately


Internal Investigations

Internal Investigations

- Investigations often undertaken with government action in mind
- May be done internally only, or cooperatively with government

- Could be triggered by compliance function, private parties (whistleblowers alleging legal violations), subpoena

Protecting Privilege During Investigations

- Initiation
  - ✓ Involve lawyers as soon and as extensively as possible
  - ✓ Non-lawyers act at direction of lawyers
  - ✓ Memorialize legal purpose of investigation
- Documents
  - ✓ Maintain separate investigative file with proper markings
  - ✓ Avoid mixing investigation with other business
- Witnesses
  - ✓ Avoid showing privileged docs
  - ✓ Advise witnesses to keep conversations confidential
  - ✓ Attorneys take notes, to extent possible; non-lawyer present as witness as needed

What Business Folks Need to Know

Cooperation is essential to protecting privilege

- ✓Request for help is for purpose of legal advice to corporation
- ✓Communications with counsel are privileged and confidential, should be marked.
- ✓Include counsel in meetings/discussion
- ✓Do not forward

Upjohn Warning – "Corporate Miranda"

- Critical piece of all investigations
- Key concept – privileged owned by employers
- Typical warning – an instruction to start of interview
- Followed by the written memorialization

This is not a replacement for conflict waiver

Objectives of Upjohn Warning

- ✓Comply with ethical obligations to third parties
- ✓Maintain corporate privilege
- ✓Prevent inadvertent creations of A/C between corporate counsel and constituent/employee
- ✓Preserve company's ability to waive privilege (e.g., to receive cooperation credit from government)

Disclosures to Government

- DOJ cannot request that a company waive privilege
- SEC cannot request that a company waive privilege without Assistant Director approval

BUT . . .

to receive cooperation credit with DOJ or SEC, a company must disclose **all relevant facts** uncovered in its investigation

Selective Waiver Doctrine

- Minority view: disclosure to government as part of cooperation does not waive privilege
  - *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (en banc)
- Majority view: waiver (D.C., Ninth, Sixth, Tenth, Third, First)
  - Example: *In re Columbia/HCA Healthcare Corp.*, 293 F.3d 289, 294-310 (6th Cir. 2002)
    - Government was investigating company for Medicare fraud.
    - Produced audit report under confidentiality agreement: "The disclosure of any report, document, or information by one party to the other does not constitute a waiver of any applicable privilege or claim under the work-product doctrine."
    - Investigation led to consumer litigation
    - Litigants entitled to audit report because production to government waiver privilege.
  - Exception: Where company and government have common interest

So… When Planning Strategy

- Assume intentional disclosures will be obtained by litigants
- If company nonetheless believes disclosure is in its interest:
  - Produce as narrowly as possible
  - Consider asking for confidentiality agreement with government agency
- Rule 502(d),(e) and court approval of confidentiality agreements:
  - Pros: Court order limiting waiver is controlling on other proceedings
  - Cons: Little case law in pre-litigation context

    The filing of papers may alert public to fact of investigation

Key Points – Government Investigations

- Witness Interviews
  - Avoid verbatim notes
  - Memorialize notes that contain attorney impressions
- When disclosing to government as part of cooperation
  - State/memorialize that company does not intend to waive privilege
  - Give oral downloads only
  - Avoid downloading directly from attorney notes
  - Consider having outside counsel prepare separate document for download
  - Don’t disclose findings of investigation if not prepared to disclose report


Confidential Supervisory Privilege

Confidential Supervisory Privilege

- Protects from disclosure certain materials prepared for and communications with specific regulators
- Regulators: Federal Reserve, OCC, OTS, FDIC, CFPB, and state banking authorities
- Not applicable: SEC, DOJ, CFTC, and FINRA
- Intent: protect internal deliberations by regulators and encourage candid communication

Waiver

- Unlike attorney-client privilege, CSI belongs to regulators
- Only supervisor regulator can waive – administrative process to request this
- One regulator cannot waive another regulator's privilege

* Privilege can be overridden with "good cause"

Application of CSI

Covered	Not Covered
Requests from regulators (including emails)	Ordinary course documents – routine reports
Documents relating to exams	Documents generally referencing MRAs
Non-public administrative actions – MOUs, Consent Orders	Public consent orders
Deliberations of regulators – e.g, MRAs	Regulatory requirements of general application
Materials prepared at request of regulators	Documents relating to rulemaking – comment letters, etc.
Supervisory ratings	
Special information – e.g., CCAR, DFAST, etc.	

If any doubt, reach out and ask


Best Practices

Best Practices

- Be careful when communicating
- Look at content and who is on it
- Think before you click
- If in doubt, reach out
- If a disclosure occurred that shouldn't, address asap

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Table of Contents

The Corporate Client: Key Tests

Test	Corporate Client Factors	Citations
Upjohn:	To be privileged, a communication must be: (i) made to in-house counsel at the direction of corporate superiors, (ii) concerned matters within the scope of the employees' in-house duties, (iii) the information was not available from upper-level management; and (iv) the employees were aware that they were being questioned in order for the corporation to receive legal advice.	*Upjohn* applies to all federal courts applying federal law. Some states have also endorsed Upjohn's definition. *E.g.*, *Wardleigh v. Second Judicial Dist. Court in & for Cnty. of Washoe*, 891 P.2d 1180, 1185 (Nev. 1995) (**Nevada**)
Control Group:	Only communications between the attorney and those in the "control group" are privileged. Under this test, an employee whose advisory role to top management in a particular area must be such that a final decision would not normally be made without her opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority, is properly within the control group. However, individuals who merely supply information to those in an advisory role are not members of the control group.	*E.g., Caldwell v. Advocate Condell Med. Ctr.*, 2017 IL App (2d) 160456, ¶ 70, 87 N.E.3d 1020, 1036 (**Illinois**); *Langdon v. Champion*, 752 P.2d 999, 1002 (Alaska 1988) (**Alaska**); *Harris Mgmt., Inc. v. Coulombe*, 2016 ME 166, ¶ 15, 151 A.3d 7, 14 (**Maine**)
Subject Matter:	Privilege attaches to communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication.	*E.g., Hubka v. Pennfield Twp.*, 494 N.W.2d 800, 802 (Mich. Ct. App. 1992), *rev'd in part on other grounds*, 504 N.W.2d 183 (Mich. 1993) (**Michigan**); *In re Fairway Methanol LLC*, 515 S.W.3d 480, 487 (Tex. App. 2017) (**Texas**); *DeLaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 531 (Mo. App. E.D. 1991) (**Missouri**)

Protect the Privilege: Checklist

- ✓ Label your e-mail/document: "Attorney/Client Communication – for the Purpose of Legal Advice"
  - ✓ Also label any attachments to any e-mail, "Attorney/Client Communication" or "Attorney Work Product"
- ✓ If an e-mail is to a group of people, only the lawyer should be in the "to" line.
  - ✓ The lawyer should not be in the "cc" line.
- ✓ Limit the people on the e-mail to only those who must be on it.
- ✓ Don't over-label e-mails/documents "attorney/client communication" – you may lose credibility with a judge.
- ✓ If an e-mail or document contains mixed business/legal advice, segregate the types of information in the e-mail and clearly label the legal sections as such.
  - ✓ Or, consider sending separate e-mails; one for business advice, one for legal advice
- ✓ Know your jurisdiction and the applicable "corporate client" test.

Key Cases Communication NOT Found Privileged

- *Allied Irish Banks v. Bank of Am., N.A.*, 240 F.R.D. 96, 104 (S.D.N.Y. 2007) (memos of attorney's interviews and summary drafts of investigative findings not privileged where the attorney prepared them for the primary purpose of an investigative report, not for purpose of rendering legal advice).
- *Bernstein v. Mafcote, Inc.,* 43 F. Supp. 3d 109, 115 (D. Conn. 2014) (e-mail chains forwarded to attorney stating only "I would like to talk to you about this" were not privileged because asserting party did not meet burden of showing that the communication was made for the purpose of obtaining legal advice).
- *MediaTek Inc. v. Freescale Semiconductor, Inc.*, No. 4:11–cv–05341, 2013 WL 5594474, at *4-5 (N.D. Cal. Oct. 10, 2013) (Fact that company's general counsel requested technical consultant's report and drafts of report was insufficient to establish privilege where the report and drafts of the report were sent to the Intellectual Property Division and never seen or relied on by counsel).
- *MSF Holdings, Ltd. v. Fiduciary Trust Co., Int'l*, 2005 U.S. Dist. LEXIS 34171 (S.D.N.Y. Dec. 7, 2005) (corporation's senior vice president and deputy corporate counsel's communications about whether the corporation should honor a line of credit were not protected by the attorney-client privilege as the communications reflected predominantly a commercial function).

Key Cases Communication Found Privileged

- *Carhartt, Inc. v. Innovative Textiles, Inc.*, 333 F.R.D. 113, 115 (E.D. Mich. 2019) (corporate counsel's e-mails regarding legal advice on product recall were privileged even though counsel was part of a group with three other non-lawyer business individuals who together made the decision to issue the recall).
- *F.T.C. v. Boehringer Ingelheim Pharm.,* 892 F.3d 1264 (D.C. Cir. 2018) (transmission of factual information from company's employees to the general counsel, at the general counsel's request, for the purpose of assisting the general counsel in formulating her legal advice regarding a possible settlement were privileged even though the communications also served a business purpose).

- *Costco Wholesale Corp. v. Super. Court,* 219 P.3d 736 (Cal. 2009) (where outside counsel drafted memorandum to corporate counsel performing a legal analysis of employee wage classifications, entire memorandum was privileged even though letter contained factual information obtained from interviews with employees).

Paralegals and Privilege

- General Rule: "Communications with the subordinate of an attorney, such as a paralegal, are also protected by the attorney-client privilege so long as the subordinate is 'acting as the agent of a duly qualified attorney under circumstances that would otherwise be sufficient to invoke the privilege.'" *SodexoMAGIC, LLC v. Drexel Univ.*, 291 F. Supp. 3d 681, 684 (E.D. Pa. 2018) (quoting *Dabney v. Investment Corp. of America*, 82 F.R.D. 464, 465 (E.D. Pa. 1979)).
- Examples of privileged paralegal communications:
    - General Counsel to in-house Paralegal: "The President wants a contract with College X for a food services contract. Please take language from our prior contract with College Z to get the process started." *SodexoMAGIC, LLC*, 291 F. Supp. 3d at 685.
    - In-house paralegal conveys counsel's legal advice to Company employee. *Equity Residential v. Kendall Risk Mgmt., Inc.*, 246 F.R.D. 557, 566 (N.D. Ill. 2007).
- Examples of non-privileged paralegal communications:
    - VP to Paralegal: "I heard you are working on our contract with College X. Please write these exact words into provision 6: 'It is hereby agreed that the amount is $400.' " *SodexoMAGIC, LLC*, 291 F. Supp. 3d at 685.
    - Company e-mailed paralegal, who had developed significant familiarity with marketing and regulatory matters, for *her* opinion on legal matters. *HPD Labs., Inc. v. Clorox Co.*, 202 F.R.D. 410, 415 (D.N.J. 2001).

State Banking Examination Privilege Statutes

State	State Banking Supervisory Agency	Applicable State Statute
Alabama	The Alabama State Banking Department	ALA.CODE 1975 § 5-3A-3
Alaska	The Alaska Division of Banking and Securities (Division)	AK STAT § 06.01.028
Arizona	The Arizona Department of Financial Institutions	A.R.S. § 6-129
Arkansas	The Arkansas State Bank Department	ARK. CODE § 23-46-101
California	California Department of Financial Institutions	CAL. GOV'T CODE § 6254(d)(2)
Colorado	Colorado Division of Banking	C.R.S.A. § 11-102-306
Connecticut	Connecticut Department of Banking	C.G.S.A. § 36A-21
Delaware	Delaware Office of the State Bank Commissioner	5 DEL.C. § 145E.
District of Columbia	Department of Insurance, Securities and Banking	DC ST § 26-551.18
Florida	Florida Office Of Financial Regulation	F.S.A. § 655.057
Georgia	Georgia Department of Banking and Finance	O.C.G.A. § 7-1-70
Hawaii	Hawaii Division of Financial Institutions	HI REV STAT § 412:2-104
Idaho	Idaho Department of Finance	I.C. § 26-1111
Illinois	Illinois Department of Financial Regulation	205 ILCS § 5/48.3
Indiana	Indiana Department of Financial Institutions	IC § 28-11-3-3
Iowa	Iowa Division of Banking	I.C.A. § 524.215
Kansas	Kansas Office of State Bank Commissioner	K.S.A. § 9-1712
Kentucky	Kentucky Office of Financial Institutions	KY ST § 286.3-470
Louisiana	Louisiana Office of Financial Institutions	LA REV STAT § 6:103
Maine	Maine Bureau of Financial Institutions	ME ST T. 9-B § 226
Maryland	Maryland Department of Labor, Licensing, And Regulation	MD CODE, FINANCIAL INSTITUTIONS, § 2-117
Massachusetts	Massachusetts Division of Banks	M.G.L.A. 167 § 2(B)(2)
Michigan	Michigan Office of Financial and Insurance Services	MICH. COMP. LAWS ANN. § 487.12202
Minnesota	Minnesota Department of Commerce	M.S.A. § 46.07
Mississippi	Mississippi Department of Banking and Consumer Finance	MISS. CODE ANN. § 81-1-89
Missouri	Missouri Division of Finance	MO. REV. STAT. ANN. § 361.080

Montana	**Montana Division of Banking and Financial Institutions**	**MONT. CODE ANN. § 32-1-234**
Nebraska	**Nebraska Department of Banking & Finance**	**NEB.REV.ST. § 8-112**
Nevada	**Nevada Division of Financial Institutions**	**N.R.S. § 604A.710.**
New Hampshire	**New Hampshire Banking Department**	**NH ST § 383:10-B**
New Jersey	**New Jersey Department of Banking and Insurance**	**N.J.S.A. §17:9A-264**
New Mexico	**New Mexico Financial Institutions Division**	**N. M. S. A. 1978, § 58-1-48**
New York	**New York State Banking Department**	**N.Y. BANKING LAW § 36**
North Carolina	**North Carolina Commissioner of Banks**	**N.C.G.S.A. § 53C-2-7**
North Dakota	**North Dakota Department of Financial Institutions**	**NDCC § 6-01-07.1**
Ohio	**Ohio Department of Commerce Division of Financial Institutions**	**OH ST § 1181.25**
Oklahoma	**Oklahoma State Banking Department**	**6 OKL.ST.ANN. § 208**
Oregon	**Oregon Division of Finance and Corporate Securities**	**O.R.S. § 706.723**
Pennsylvania	**Pennsylvania Department of Banking**	**71 P.S. § 733-404**
Rhode Island	**Rhode Island Department of Business Regulation**	**19 R.I. GEN. LAWS ANN. § 19-4-3**
South Carolina	**South Carolina Office of The Commissioner of Banking**	**S.C. CODE ANN. § 34-30-590**
South Dakota	**South Dakota Division of Banking**	**SD ST § 51A-2-35**
Tennessee	**Tennessee Department of Financial Institutions**	**TN CODE § 45-2-1603**
Texas	**Texas Department of Banking**	**V.T.C.A., FINANCE CODE § 31.105**
Utah	**Utah Department of Financial Institutions**	**U.C.A. 1953 § 7-1-802**
Vermont	**Vermont Division of Banking**	**8 V.S.A. § 2126**
Virginia	**Virginia Bureau of Financial Institutions**	**VA CODE ANN. § 6.2-101**
Washington	**Washington State Department of Financial Institutions**	**WASH. REV. CODE ANN. § 30A.04.075**
West Virginia	**West Virginia Division of Banking**	**W. VA. CODE, § 31A-2-4**
Wisconsin	**Wisconsin Department of Financial Institutions**	**WIS. STAT. ANN. § 220.06**
Wyoming	**Wyoming Division of Banking**	**W.S.1977 § 9-1-512**

Minority view: Applying Selective Waiver – Disclosure to Government as Part of Cooperation Does Not Waive Privilege

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

Majority view: Rejecting Selective Waiver

1st Circuit	*United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997)	Held that MIT fully waived the privilege with respect to documents it disclosed to a government audit agency or pursuant to the terms of a contract that it had with the government.
3rd Circuit	*Westinghouse Electric Corp. v. Republic of Philippines*, 951 F.2d 1414, 1424-27 (3d Cir. 1991)	Held that the corporation's voluntary disclosure of privileged documents during a government investigation fully waived any attorney-client or work product privilege, even with respect to third parties in civil litigation.
6th Circuit	*In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294-310 (6th Cir. 2002)	Noted the inconsistent application of selective waiver within the circuit and followed *Westinghouse* in rejecting selective waiver in favor of a "bright line" rule that disclosure waives the privilege.
9th Circuit	*In re Pac. Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012)	Noted that given that Congress has declined to broadly adopt a new privilege to protect disclosure of attorney-client privileged materials to the government, courts should not do so.
10th Circuit	*In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1186 (10th Cir. 2006)	Held that selective disclosure of privileged material to a government agency waives the privilege as to all third-party litigants.
D.C. Circuit	*Permian Corp. v. United States*, 665 F.2d 1214, 1221, 214 U.S. App. D.C. 396 (D.C. Cir. 1981)	
	United States v. Thompson, 562 F.3d 387, 394 (D.C. Cir. 2009)	

Circuits that Apply Selective Waiver in Certain Circumstances

2nd Circuit	*In re Steinhardt Partners, L.P.,* 9 F.3d 230, 236 (2d Cir. 1993)	There is some room to argue for selective waiver in the Second Circuit, which held in *In re Steinhardt Partners* that waiver determinations require a fact-specific analysis that considers any confidentiality agreement or common interest. The Court refused to acknowledge selective waiver in the case before it, but expressly declined to adopt a per se rule, thereby leaving the door open where the parties enter into a confidentiality agreement.
4th Circuit	*In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir. 1988)	The court found that a client's disclosure to the government of the results of an internal investigation resulted in waiver for other civil litigation. The resulting waiver extended to non-disclosed materials, and even to undisclosed details underlying the published data. However, the court noted that there was only a partial waiver for opinion work product.
Delaware Chancery Court	*Saito v. McKesson HBOC, Inc.*, No. 18553 (Del. Ch. Oct. 25, 2002)	In light of Delaware's general reluctance to find waiver of privileges, the court upheld a form of selective waiver, compelling production of documents disclosed to the government prior to execution of a confidentiality agreement but protecting documents disclosed after the confidentiality order was in place.
S.D.N.Y.	*Schnell v. Schnall*, 550 F. Supp. 650, 652-53 (S.D.N.Y. 1982)	Finding a public policy of encouraging disclosure to SEC compels finding of selective waiver.
	Info. Res., Inc. v. Dun & Bradstreet Corp., 999 F. Supp. 591, 593 (S.D.N.Y. 1998)	Held that voluntary disclosure of privileged information to the government in order to "incite it to attack the informant's adversary" waived privilege.
	In re Natural Gas Commodity Litigation, No. 03 Civ. 6186VMAJP, 2005 WL 1457666, at *5-6 (S.D.N.Y. June 21, 2005)	Noted that the Second Circuit in *In re Steinhardt Partners* did not completely reject selective waiver, leaving open the possibility that disclosure to the government might not constitute a waiver in all cases, particularly where disclosure was pursuant to a confidentiality agreement.

Circuits Undecided

- 7th Circuit
    - *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1126-27 (7th Cir. 1997) (noting that courts have generally rejected selective waiver doctrine but finding that government had not deliberately waived its law enforcement privilege by playing tapes to corporate counsel to persuade company to plead guilty merely because it made a mistake in failing to obtain a non-disclosure agreement with corporate counsel).
- The Fifth and Eleventh Circuits have not definitely ruled out the selective waiver doctrine, but lower courts in each have rejected it.

DOJ/SEC Policies

Below are excerpts from the U.S. Attorneys' Manual ("USAM"), the 2015 Yates Memo and SEC Enforcement Manual relating to waiver of privilege and cooperation credit:

1. **U.S. Attorneys' Manual**

    a. **Section 9-28.700 – The Value of Cooperation**

"Cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (*e.g.*, suborning perjury or false statements, or refusing to comply with lawful discovery requests). Thus, failure to cooperate, in and of itself, does not support or require the filing of charges with respect to a corporation any more than with respect to an individual."

"A. General Principle: In order for a company to receive any consideration for cooperation under this section, the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals substantially involved in or responsible for the misconduct, its cooperation will not be considered a mitigating factor under this section. Nor, if a company is prosecuted, will the Department support a cooperation-related reduction at sentencing. *See* U.S.S.G. § 8C2.5(g), cmt. (n. 13) ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient … to identify … the individual(s) responsible for the criminal conduct.")."

"If the company is unable to identify all relevant individuals or provide complete factual information despite its good faith efforts to cooperate fully, the organization may still be eligible for cooperation credit. *See* U.S.S.G. § 8C2.5(g), cmt. (n. 13) ("[T]he cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation."). For example, there may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is legally prohibited from disclosing it to the government. Under such circumstances, the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor."

"To be clear, a company is not required to waive its attorney-client privilege or attorney work product protection to be eligible to receive cooperation credit. *See* JM 9-28.720. The extent of the cooperation credit earned will depend on all the various factors that have traditionally applied in making this assessment (*e.g.,* the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation)."

b. Section 9-28.710 – Attorney-Client and Work Product Protections

"…[W]aiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative. Nonetheless, a wide range of commentators and members of the American legal community and criminal justice system have asserted that the Department's policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection. Everyone agrees that a corporation may freely waive its own privileges if it chooses to do so; indeed, such waivers occur routinely when corporations are victimized by their employees or others, conduct an internal investigation, and then disclose the details of the investigation to law enforcement officials in an effort to seek prosecution of the offenders. However, the contention, from a broad array of voices, is that the Department's position on attorney-client privilege and work product protection waivers has promoted an environment in which those protections are being unfairly eroded to the detriment of all."

"The Department understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system. What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review. In addition, while a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so. The critical factor is whether the corporation has provided the facts about the events, as explained further herein."

c. Section 9-28.720 – Cooperation: Disclosing the Relevant Facts

"Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant *facts* concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys."

"Thus, when the government investigates potential corporate wrongdoing, it seeks the relevant facts. For example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it? In this respect, the investigation of a corporation differs little from the investigation of an individual. In both cases, the government needs to know the facts to achieve a just and fair outcome. The party under investigation may choose to cooperate by disclosing the facts, and the

government may give credit for the party's disclosures. If a corporation wishes to receive credit for such cooperation, which then can be considered with all other cooperative efforts and circumstances in evaluating how fairly to proceed, then the corporation, like any person, must disclose the relevant facts of which it has knowledge."

d. Section 9-28.730 – Obstructing the Investigation (language regarding JDAs)

"Similarly, the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements. Of course, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired. Corporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate."

2. 2015 Yates Memo

This Memorandum produced on September 9, 2015 directs the DOJ to focus on individual prosecutions during both criminal and civil government investigations. Cooperating companies are required to share information about individuals and their potential misconduct. See relevant language below:

> "In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct…This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation."

3. SEC Enforcement Manual

a. Section 4.3 – Waiver of Privilege

"Both entities and individuals may provide significant cooperation in investigations by voluntarily disclosing relevant information. Voluntary disclosure of information need not include a waiver of privilege to be an effective form of cooperation and a party's decision to assert a legitimate claim of privilege will not negatively affect their claim to credit for cooperation. However, as discussed below, if a party seeks cooperation credit for timely disclosure of relevant facts, the party must disclose all such facts within the party's knowledge."

"To receive cooperation credit for providing factual information obtained from the [internal investigation] interviews, the corporation need not necessarily produce, and the staff may not request without approval, protected notes or memoranda generated by the attorneys' interviews. To earn such credit, however, the corporation must produce, and the staff always may request, relevant factual information—including relevant factual information acquired through those interviews."

b. Section 6.2.1 – Cooperation Agreements

"A cooperation agreement is a written agreement between the Division of Enforcement and a potential cooperating individual prepared to provide substantial assistance to the Commission's investigation and related enforcement actions. Specifically, in a cooperation agreement, the Division agrees to recommend to the Commission that the individual receive credit for cooperating in its investigation and related enforcement actions and, under certain circumstances, to make specific enforcement recommendations if, among other things: (1) the Division concludes that the individual has provided or is likely to provide substantial assistance to the Commission; (2) the individual agrees to cooperate truthfully and fully in the Commission's investigation and related enforcement actions and waive the applicable statute of limitations; and (3) the individual satisfies his/her/its obligations under the agreement. If the agreement is violated, the staff may recommend an enforcement action to the Commission against the individual without any limitation."

Collateral Consequences of Disclosure to the Government

Overview:

General rule: Parties cannot selectively divulge privileged information. As such, many courts hold that information shared with the government loses any privilege or other protection.

Courts tend to balance the disclosure's circumstances and the relative prejudices to the parties of permitting or denying future disclosures. *See Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1430 (Fed. Cir. 2005).

Example of Collateral Consequences:

1. *SEC v. Vitesse Semiconductor Corp.*, 2011 U.S. Dist. LEXIS 77538, *9 ("[T]he Court concluded that NuHo waived work product privilege with respect to the notes by providing very detailed, witness-specific information to the SEC. While it is undisputed that NuHo did not actually produce the notes themselves to the SEC, after reviewing the SEC's notes the Court found that NuHo effectively produced these notes to the SEC through its oral summaries.")

2. *Chinnici v. Central DuPage Hosp. Ass'n*, 136 F.R.D. 464, 465 (N.D. Ill. 1991) (held that once privileged materials are disclosed to a third party, the privilege is waived for all materials relating to that subject matter)

3. *Doe v. Baylor University*, 16-cv-173 (W.D. Tex. Aug. 11, 2017) (Dkt. 168) (Held that Baylor University was required to turn over parts of an internal investigation conducted by outside counsel on behalf of the university)

- Background
    - In September 2015, the Baylor University Board of Regents hired outside counsel to investigate Baylor's responses to certain issues under Title IX, and in May 2016, Baylor University released two documents summarizing the investigation.
    - In June 2016, former Baylor students filed a lawsuit alleging state and federal claims (including under Title IX) related to heightened risks of sexual assault on campus. The students sought all materials provided to and produced by outside counsel in connection with its Title IX investigation. Baylor objected, arguing that such documents were protected by the attorney-client privilege and work product protection. *Id.* at 2.
- Holding and Reasoning
    - Because outside counsel was engaged to provide the Board legal advice, the court ruled that communications with counsel regarding the investigation were protected by the attorney-client privilege. Plaintiffs argued that despite this protection, Baylor waived the privilege through its third-party disclosures. *Id.* at 5-7.
    - The court held that because Baylor's intentional disclosures to third parties "provide[d] substantial detail about both what Baylor and its employees told [outside counsel] and what advice Baylor received in return," the court held that

Baylor waived the attorney-client privilege as to communications between Baylor and counsel during its investigation. *Id*. at 9-10.

- However, materials that were prepared as part of outside counsel's investigation, and that were not released, remained protected. Additionally, Baylor was not required to answer questions regarding its counsel's mental impressions.

Collateral Actions by SEC, DOJ, or other Enforcement Agencies

- If attorney-client privileged materials are voluntarily disclosed to one government body during an investigation, privilege is likely waived for all materials disclosed. *In re Pac. Pictures Corp*., 679 F.3d 1121 (9th Cir. 2012). That is likely to be the case even as to other government agencies.

  However, undisclosed communications should not become discoverable unless they (1) concern the same subject matter as the waived communications, and (2) ought, in fairness under the circumstances, to be produced.

Improper *Upjohn* Warning Consequence

Majority Rule: The majority of federal circuit courts apply a version of the *Bevill* test, which requires corporate clients asserting a personal claim of attorney-client privilege to demonstrate five factors:

(1) Approached counsel for the purpose of seeking legal advice;
(2) When they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities;
(3) Counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise;
(4) Their conversations with counsel were confidential; and
(5) The substance of their conversations with counsel did not concern matters within the company or the general affairs of the company. *See United States v. Graf*, 610 F.3d 1148, 1159–160 (9th Cir. 2010) (citing *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 123–25 (3d Cir. 1986)).

The *Bevill* test has been adopted by the First, Second, Ninth, and Tenth Circuits. *See United States v. Int'l Bhd. of Teamsters*, 119 F. 3d 210, 214–15 (2d Cir. 1997); *In re Grand Jury Subpoena*, 274 F. 3d 563, 571–72 (1st Cir. 2001); *Graf*, 610 F.3d at 1157; *In re Grand Jury Subpoenas*, 144 F. 3d 653, 659 (10th Cir. 1998).

The Fourth Circuit: The Fourth Circuit has declined either to adopt or reject the *Bevill* test.

- Instead, the Fourth Circuit has relied on the larger body of law governing the creation of an attorney-client relationship to analyze whether the company's attorneys have created one with the interviewed employees.
- Under these general principles, the Fourth Circuit placed the burden on employees asserting privilege to show that they had a subjective belief that an attorney-client relationship existed, and that this subjective belief was reasonable under the circumstances. *See Under Seal v. United States (In re Grand Jury Subpoena: Under Seal)*, 415 F.3d 333, 339 (4th Cir. 2005). (holding that the employees asserting privilege could not have reasonably believed that an attorney-client relationship existed between them and the company's in-house and outside counsel)

Inadvertent Production: Privilege Claims, FRE 502, and Clawback Agreements

FRCP 26(b)(5)(B) - *Information Produced*

Rule: If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved

FRE 502

Under the subsections of FRE 502, the Rule provides three ways that parties may avoid waiver through inadvertent production:

(1) FRE 502(d) enables a court to enter an order that disclosure will not result in waiver and may provide specific steps for clawing back privileged documents that have been produced. This order obviates the need to apply the provisions of FRE 502(b).

(2) FRE 502(e) provides that, in a federal proceeding, a party agreement on the effect of disclosure is binding on the parties to the agreement but not on other parties unless incorporated into a court order. Parties obtain the best protection against inadvertent waiver by having the court enter the FRE 502(e) agreements in a FRE 502(d) order.

(3) When no FRE 502(d) order or FRE 502(e) agreement governs the effect of inadvertent disclosures, FRE 502(b) establishes the "middle" approach as the federal standard for determining when inadvertent production is a federal proceeding or to a federal office or agency will result in waiver. This approach is fact-intensive and determined on a case-by-case basis. To avoid the costly, time-consuming compliance, parties should seek an entry of a FRE 502(d) order or FRE 502(e) agreement.

The purpose of FRE 502 is to "respond to widespread complaint[s] that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive." FRE 502 advisory committee's note.

FRE 502(b) – Inadvertent Disclosure

Rule: When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

FRE 502(b) creates somewhat of a safety net for inadvertent disclosures but requires compliance with the three steps above. The term "inadvertent" is not defined and opposing counsel may challenge whether any of the three steps were met.

Key Cases:

(1) *Rajala v. McGuire Woods, LLP*, Civil Action No. 08- 2638-CM-DJW, 2010 WL 2949582, at *3-4 (D. Kan. July 22, 2010) (noting that FRE 502 was enacted to address the conflict among courts regarding the effect of inadvertent disclosures)

(2) *Heriot v. Bryne*, 257 F.R.D. 645 (N.D. Ill. 2009) (held that plaintiffs did not waive attorney-client privilege with respect to certain documents that were mistakenly disclosed to defendants because disclosure was inadvertent under FRE 502(b); although extent of disclosure was broad, plaintiffs acted within 24 hours of discovering disclosure to request that defendants destroy documents, and plaintiffs had taken reasonable steps to prevent disclosure)

(4) *Edelen v. Campbell Soup Co.*, 265 F.R.D. 676, 698 (N.D. Ga. 2010). (Pursuant to FRE 502(b), the court held that privilege was not inadvertently waived where only four pages out of more than 2000-page production were privileged, documents were checked by three different attorneys prior to production, and counsel immediately sought return of documents once they discovered their mistake)

FRE 502(d) & FRE 502(e) – Clawback Agreements

Pursuant to FRE 502(d) and (e), clawback agreements are aimed at avoiding waiver of privileges without having to resort to proof under Rule 502(b). Similarly, FRCP Rule 16 contemplates the Court approving the parties' clawback agreement ahead of time in regard to scheduling orders. Fed. R. Civ. P. 16(b)(3)(iv) ("The scheduling order may . . . include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502").

502(d) Controlling Effect of a Court Order

Rule: A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other federal or state proceeding.

FRE 502(d) advisory committee's note further states that "a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order."

Key Cases:

(1) *BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 09 Civ. 9783, 2013 WL 2322678, at *8-10 (S.D.N.Y. May 21, 2013) (the court enforced the plain language meaning of the agreement pursuant to a FRE 502(d) protective order allowing clawback of documents without waiver; the parties did not need to comply with the requirements of FRE 502(b))

(2) *Brookfield Asset Mgmt., Inc. v. AIG Fin. Prods. Corp.*, No. 09 Civ. 8285 (PGG)(FM), 2013 WL 142503, at *1 (S.D.N.Y. Jan. 7, 2013) (Rule 502(d) "provide[d] a clear answer" regarding the use of privileged documents that were produced and eliminated the need to consider sanctions)

(3) *Rajala v. McGuire Woods, LLP*, Civil Action No. 08-2638-CM-DJW, 2013 WL 50200, at *3, *5 (D. Kan. Jan. 3, 2013) (Rule 502(d) orders are designed to reduce costs, expedite discovery, and eliminate disputes regarding inadvertent production)

(4) *United States v. Daugerdas*, No. S3 09 CR 581(WHP), 2012 WL 92293, at *2 (S.D.N.Y. Jan. 11, 2012) (court denied defendant's motion to unseal email produced by employer in defendant's criminal proceeding for use in arbitration against the employer pursuant to a FRE 502(d) order stating that the employer's production of documents in defendant's criminal proceeding did not waive privilege in any proceeding, "including any and all arbitration… proceedings")

(5) *SEC v. Bank of Am. Corp.*, No. 09 Civ. 06829, 2009 WL 3297493 (S.D.N.Y. Oct. 14, 2009) (court entered FRE 502(d) order to limit waiver to documents disclosed to the government and adopted the parties' definition of the subject matter of the disclosed documents)

FRE 502(e) Controlling Effect of a Party Agreement

Rule: An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

Key Cases:

(1) *BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, No. 09 Civ. 9783, 2013 WL 2322678, at *8 (S.D.N.Y. May 21, 2013) (holding that when there is a Rule 502(e) clawback agreement, no waiver occurs unless the production of documents was completely reckless)

(2) *Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2010 WL 2949582, at *6-7 (D. Kan. July 22, 2010) (where the parties could not agree on a clawback provision, the court entered one for them pursuant to its authority under FRE 502)

FRE 502(b)(2) - "Reasonable Steps"

FRE 502(b) does not provide guidance on what constitutes "reasonable steps to prevent disclosure." The Explanatory Notes indicate that the rule is "flexible enough to accommodate" the multiple factors considered by courts under the "middle" approach. The Notes further state, "The rule does not specifically codify that test, because it is really a set of non-determinative guidelines that vary from case to case." Courts have utilized the same factors applied by pre-FRE 502 decisions under the "middle of the road" approach when interpreting "reasonable steps."
Cautionary Note: Courts may not be willing to enforce a generally stated clawback agreement unless it explicitly speaks to the Rule 502(b) standard.

In *Irth Solutions, LLC v. Windstream Communications, LLC*, 2018 WL 575911 (S.D. Ohio Jan. 26, 2018), the district court confirmed that the defendant had waived its attorney-client privilege by twice producing 43 privileged documents to plaintiff's counsel notwithstanding that the parties had a clawback agreement, pursuant to FRE 502(b).

Defendant's counsel argued that the clawback agreement should trump the requirements of 502(b). However, the district court disagreed, instead focusing on whether the parties' agreement had language dispensing with FRE 502(b)(2)'s requirement to "take reasonable steps to prevent disclosure." The court concluded that the defense had waived the privilege by producing the documents and that the clawback agreement did not preserve the privilege.

Key Cases:

(1) *Irth Solutions, LLC v. Windstream Communications, LLC*, 2018 WL 575911 (S.D. Ohio Jan. 26, 2018) (see above)

(2) *United States v. Sensient Colors, Inc.*, No. 07-1275 JHR/JS, 2009 WL 2905474, at *3 (D.N.J. Sept. 9, 2009) (FRE 502 applies "essentially the same approach" as the middle approach adopted in *Ciba- Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404, 411 (D.N.J. 1995))

(3) *Heriot v. Bryne*, 257 F.R.D. 645 (N.D. Ill. 2009) (held that plaintiffs did not waive attorney-client privilege with respect to certain documents that were mistakenly disclosed to defendants because disclosure was inadvertent under FRE 502(b); although extent of disclosure was broad, plaintiffs acted within 24 hours of discovering disclosure to request that defendants destroy documents, and plaintiffs had taken reasonable steps to prevent disclosure)

(4) *Amobi v. D.C. Dep't of Corr.*, 262 F.R.D. 45, 81 (D.D.C. 2009) (held that memorandum regarding arbitration was not protected by attorney-client privilege because none of sources of information on which findings in memorandum were based constituted confidential disclosure by client, nor did they allude to any confidential disclosure; officials failed to show that they took reasonable steps to prevent disclosure of memorandum under FRE 502(b)(2))