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THE CORPORATE ATTORNEY-CLIENT PRIVILEGE: THIRD RATE DOCTRINE FOR THIRD PARTY CONSULTANTS

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**THE CORPORATE ATTORNEY-CLIENT PRIVILEGE:
THIRD RATE DOCTRINE FOR THIRD PARTY CONSULTANTS**
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*Michele DeStefano Beardslee**

Abstract:

Due to the increasingly complex legal landscape, lawyers often rely on information and guidance from non-lawyer consultants such as accountants, investment bankers, and public relations specialists to provide fully informed legal advice to their corporate clients. Currently, however, there is little agreement among federal courts on the appropriate standard to analyze the attorney-client privilege when communications involve third party consultants. Moreover, at the margins, third party attorney-client privilege doctrine is overly broad and overly narrow. The narrow interpretation shields third party communications in the rarest of situations, e.g., when the consultant is acting solely as an interpreter. The broadest interpretation protects communications whenever they help the lawyer provide legal advice – at the expense of the public’s access to information. Thus, the doctrine protects communications even those in favor of a robust corporate attorney-client privilege would not approve and denies protection in the very contexts for which the doctrine was created.

This Article examines when communications with third party consultations should be protected. It is informed, in part, by some empirical research I conducted on attorneys’ communications with external public relations consultants. It argues that exchanges between attorneys and third party consultants should be protected in certain circumstances. As a means to achieve that protection, this Article recommends the attorney-client privilege protect these exchanges when there is a strong nexus between the consultant’s service and the legal advice provided to the client. It proposes that the proponent show that communication with the third party was necessary to provide legal advice or services. To guard against the use of attorneys as shields for non-privileged communications and to help the court determine that the primary purpose of the exchange was for legal (as opposed to business) advice, it proposes that courts also take into account: 1) whether the lawyers were not skilled in the area in which they sought expert assistance; 2) the way the communication was conducted or distributed; 3) contemporaneous documentary support e.g., a separate retainer agreement; and 4) the substance of the law involved. Unlike the narrowest standard, this multi-factored nexus test embraces the role third party consultation plays in the provision of legal advice to large corporations. Unlike the broadest standard, this test prevents the ease with which corporations can funnel communications with third party consultants unrelated to legal services through their attorneys for protection. Further, these recommendations simplify the current doctrine and make it slightly more predictable.

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TABLE OF CONTENTS

- I. THE IMPORTANCE OF THIRD PARTY CONSULTATION TO THE PROVISION OF LEGAL ADVICE.. 11
- II. THE CORPORATE ATTORNEY-CLIENT PRIVILEGE AND THIRD PARTY CONSULTANTS 18
 - A. *The Corporate Attorney-Client Privilege* 18
 - B. *Third Party Attorney-Client Privilege Doctrine* 20
 - 1. Third Party as Agent 20
 - 2. Third Party as Functional Equivalent 23
 - 3. Functional Equivalent v. Agent 25
 - C. *The Law-Business Distinction in the Third Party Context* 28
 - D. *The Role of the Work Product Doctrine* 32
- III. ANALYSIS OF THE EXCEPTIONS 36
 - A. *The Narrow Approach is Too Narrow*..... 37
 - 1. Not in Keeping with the Spirit of the Doctrine 37
 - 2. May Result in Less Informed Decision-Making 40
 - 3. May Discourage Corporate Misconduct but Not Enhance Discovery 43
 - 4. May Not Increase Compliance 46
 - B. *The Broad Agency Approach is Too Broad*..... 49
 - 1. Not In Keeping with the Spirit of the Doctrine 49
 - 2. May Promote Informed Decision Making and Compliance but Shield Information ... 51
 - 3. May Enable Corporate Misconduct 52
 - C. *The Functional Equivalents Test is also too Broad* 53
 - 1. Not in Keeping with the Spirit of the Doctrine 53
 - 2. May Increase Informed Decision Making and Compliance but Decrease Discovery... 55
 - 3. May Not Deter Corporate Misconduct 57
 - D. *The Doctrine is Unpredictable and Subject to Abuse*..... 58
 - 1. Covertly Unpredictable 58
 - 2. Allows Inconsistent and Inequitable Results 62
- IV. RECOMMENDATIONS 63
 - A. *Specific Proposal*..... 64
 - 1. One Uniform Standard 65
 - 2. A Nexus Test 65
 - 3. Four Factors..... 69
 - B. *Analysis*..... 75
 - 1. Zone of Secrecy and Corporate Misconduct 75
 - 2. Compliance, Informed Decision-Making, and the Spirit of the Doctrine..... 77
 - 3. Predictability/Clarity 80
 - 4. Other Considerations 82

INTRODUCTION

A large publicly traded company releases an FDA approved drug into the marketplace. One year later, it becomes apparent that the drug is causing negative side effects in users. The Chief Executive Officer [CEO] wants a recommendation from the General Counsel about how best to limit legal liability and damage to the company’s reputation. The General Counsel meets with the company’s outside litigator, the internal Director of Public Relations and an external public relations consultant [the drug-recall crisis team] to strategize about if, when and how the

drug should be pulled from the market or modified and what type of statements the company can, should, or must make. They discuss the possible impact various legal responses might have on the public and government officials, the company's negotiation power, and the potential jury pool. Having overseen the clinical trials conducted by external scientists, the General Counsel shares the studies (which had previously been disseminated in the exact form to other members of the company) with the entire drug-recall crisis team. The external PR consultant takes notes during the meeting.

As requested by the General Counsel, the external and internal public relations [PR] consultants prepare two documents: One analyzes the potential reaction by the public and the government to various scenarios including pulling the drug, modifying the drug, and admitting or denying knowledge. Another provides a recommendation on the best media response from a reputational standpoint. These documents together suggest that quick action along with contrition and admission is the best route. The General Counsel ultimately recommends to the CEO that the company pull the drug from the market, admit to knowing some of the adverse side effects but explain that most had been disclosed in the drug's FDA-approved labeling. The public relations executives draft a proposed press release about the recall. The General Counsel and the outside attorneys look it over and make some suggested changes in writing on the draft. The draft press release is revised and then issued.

After the company recalls the drug, its earnings are substantially below original forecasts for that fiscal period. Consumers and stockholders file separate class actions against the corporation.¹

In general terms, this is a common scenario for large corporations today. They rely on a multidisciplinary web of services to conduct business in this increasingly complex, international marketplace.² They routinely utilize outside professional advisors such as accountants, investment bankers, public relations specialists, and other types of professional consultants to conduct business.³ Moreover, in order to provide fully informed, competent legal advice and services to their corporate clients, inside and outside lawyers have to understand the business consequences, and as a result, often consult with third party professional consultants.⁴ For example, a lawyer's advice to a corporate client about compliance with SEC disclosure rules or the viability of a possible restructuring may depend on information from a professional

¹ This drug-recall hypothetical is loosely based on *In re Vioxx Products Liability Litigation*, MDL No. 1657-L, 2007 U.S. Dist. Lexis 23164 (E.D. LA. Mar. 5, 2007).

² John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U.L. REV. 443, 464 (1982). See *infra* Part I.

³ See *infra* Part I.

⁴ *Id.*; see also, *Tri-State Outdoor Media Group Inc. v. Official Comm. of Unsecured Creditors*, 283 B.R. 358, 362 (Bankr. M.D. Ga. 2002).

accountant about the company's financial situation or potential tax implications. Similarly, a company may need the expertise of bankruptcy liquidation consultants to manage the administration of a sale of a subsidiary. Or, as in the drug-recall scenario, a lawyer may need the expertise of a PR consultant about the potential spin of a legal issue in order to advise the client to settle or pursue a certain defense strategy.⁵ Thus, in today's litigious, regulated, complicated world, lawyers sometimes have to look outside the box to form legal opinions.

However, it is unclear which communications between lawyers, clients, and third party professional, strategic consultants,⁶ if any, will be protected by the attorney-client privilege or some other privilege doctrine. For example, in the drug-recall hypothetical described at the beginning of this Article, it is not clear if the attorney-client privilege will be considered waived because confidential client information was shared with the external PR consultant. It is also unclear if the drug trials, the draft press release, the notes taken by the external PR consultant, or the documents prepared for the General Counsel by the internal and external PR consultant will be protected. This is because there is little agreement among federal (and state) courts on the appropriate standard to analyze the attorney-client privilege when inside or outside attorneys communicate with external third party consultants generally.⁷

⁵ See *infra* note 36.

⁶ This Article focuses on professional, strategic business consultants not other types of professionals that refer to themselves as consultants such as IT consultants or other types of third parties potentially covered by the attorney-client privilege doctrine (e.g., secretaries, family members). I use public relations consultants as one example of the many types of third party consultants lawyers rely on in providing legal advice. In a separate article, I explore the use of PR consultants specifically. See Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion Part I: Broadening the Role of Corporate Attorneys*, __ GEO. J. LEGAL ETHICS. __ (forthcoming 2009, Georgetown Law School Symposium: Empirical Research on the Legal Profession) [on file with author] [Beardslee, *Advocacy Part I*].

⁷ There are many questions regarding whether the privilege applies to communications between lawyers and *internal* consultants that rise and fall on the law/business distinction. See, e.g., *Amway v. Procter & Gamble Co.*, No. 1:98-CV-726, 2001 U.S. Dist. LEXIS 4561 (W.D. MI. Apr. 3, 2001) (denying privilege protection to communications between attorneys and *internal* pr consultants). Although controversial, these issues are outside the scope of this paper. Therefore, when this Article refers to third party or external consultants, it means specialists that are not technically client employees. Also, when this Article refers to lawyers, it means inside and outside lawyers unless specifically identified. When it refers to general counsels it means general counsels of corporations not law firms.

Although the attorney-client privilege does not apply or is waived when communications are exposed to third party consultants, there are two general exceptions. The attorney-client privilege can protect communications between attorneys and third party consultants when the third party is: 1) the agent of the attorney or client; or 2) the “functional equivalent” of the client’s employees. With respect to the agency exception, two extreme approaches have emerged. Under the narrow approach, courts protect communications with third party consultants when the consultants merely translate client information. Under the broad approach, courts protect communications when the communications help the lawyer provide legal advice. Courts have also taken a very broad view of the functional equivalence exception – deeming external consultants hired for a finite crisis (like the external PR consultant in the drug-recall scenario) functional equivalents of the client’s employees and protecting communications with them when they facilitate the provision of legal advice.⁸ Further confusing matters is the interchangeability of the standards. For example, a court majority might apply a narrow interpretation of the agency exception while the dissent applies the functional equivalents test.⁹

In addition to being unpredictable, the doctrine that provides exceptions for certain communications with third party consultants is substantively off base. The narrow approach to the agency exception is at odds with the spirit of the doctrine and the reality of modern practice and, as a practical matter, unsustainable. The broad approach denies the public access to too much information and enables misconduct. This is also often true of the functional equivalents test. Given the way corporations operate and courts apply the test, the functional equivalence exception collapses into the broad approach. Thus, courts protect communications that even

⁸ For further explanation, see Part II.

⁹ See *infra* notes 264-269 and accompanying text.

those in favor of a robust corporate attorney-client privilege would not approve and deny protection in the very contexts for which the third party doctrine was originally created.

Despite its practical importance little has been written about when the attorney-client privilege protects, or should protect, third party consultation in general. The scholarly literature that exists typically focuses on lawyers' communications with non-testifying experts in the context of litigation¹⁰ and work product protection¹¹ or with a specific kind of expert such as accountants or PR consultants.¹² None of these camps grapple with the entire scope of the doctrine. As a result, the doctrine's complexity is often simplified.¹³ The focus of this Article, however, is broader. It considers the issue as it relates to *all* third party consultants, paying special attention to those situations where work product protection might not apply.

When should communications between corporate lawyers and third party consultants be protected? Given corporations' propensity to outsource and hire external consultants, should the

¹⁰ See, e.g., Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and The Work Product Protection*, 68 WASH. U. L. Q. 19 (1990) (analyzing attorney-client privilege in the context of litigation and non-testifying experts); Steven B. Hantler, et al., *Extending the Privilege to Litigation Communications Specialists in the Age of Trial by Media*, 13 COMM'LAW CONSP'CTUS 7 (2004) (analyzing attorney-client privilege and work product protection for litigation communication specialists hired for high profile corporate litigation); Stanley D. Davis & Thomas D. Beisecker, *Discovering Trial Consultant Work Product: A New Way to Borrow An Adversary's Wits?*, 17 Am. J. Trial Advoc. 581 (1994) (analyzing when trial consultants are protected by attorney-client privilege and work product doctrine).

¹¹ Imwinkelried, *supra* note 10, at 48-49. See also notes 153-169 and accompanying text.

¹² See, e.g., Ann M. Murphy, *Spin Control and the High Profile Client – Should The Attorney-Client Privilege Extend to Communications With Public Relations Consultants*, 55 SYRACUSE L. REV. 545 (2005) (focusing on public relations consultants), Kim J. Gruetzmacher, Comment, *Privileged Communications with Accountants: The Demise of United States v. Kovel*, 86 MARQ. L. REV. 977 (2003) (focusing on accountants); Gertsberg, *supra* note 15 (focusing on public relations consultants in the criminal law context); Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN ST. L. REV. 381 (2005) (focusing in part on auditors and PR specialists); Teena-Ann V. Sankoorikal et. al, *Attorney-Client Privilege and Work Product Doctrine: Potential Pitfalls of Disclosure to Public Relations Firms*, PLI Order No. 14204 (Nov. 11, 200*) (focusing on PR relations firms but also providing brief overview of the doctrine as it relates to third party consultants). Scholarship on how the doctrine applies to specific situations or consultants is valuable. Indeed, in a forthcoming article I focus on how lawyers manage public relations for corporate clients and work with PR consultants. Further, I utilize some of the findings from an empirical study related to this topic to explore issues in the Article. See *infra* note 25-26 and accompanying text. My point, however, is that when making recommendations concerning the scope of the corporate attorney-client privilege with respect to specific kinds of external consultants, scholars often do not analyze the impact such recommendations will have on communications with other types of third party consultants.

¹³ See *infra* note 277.

attorney-client privilege follow suit? The answer to these questions must assuage the obvious tension between the need for effective legal service and the harm caused by misconduct that can occur within the zone of secrecy created by the privilege.¹⁴ When applied too broadly, the corporate attorney-client privilege enables corporations to run projects “through” lawyers to cover-up damaging information that might otherwise be discoverable. In the recent tobacco litigation, courts discovered that attorneys purposefully oversaw studies conducted by external scientists on the addictiveness of tobacco in order to cloak the results with the attorney-client privilege.¹⁵ This cloak allowed the companies to withhold information about the harms caused by smoking that otherwise would have informed public policy on tobacco marketing and sales.

¹⁴ See, e.g., *First Chicago Int'l v. United Exchange Co.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989) (explaining that a “standard that strikes a balance between encouraging corporations to seek legal advice and preventing corporate attorneys from being used as shields to thwart discovery” will likely do more good than harm). The answer to this question also, to a degree, requires bracketing the dispute over whether the attorney-client privilege should be applied to corporations. The risks and benefits of applying the attorney-client privilege to corporations can be (and have been) debated. See, e.g., Vincent Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 222-226 (1989) (outlining the debate); see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 177-205 (1988) (providing reasons why the privilege should not be applied to corporations); *id.* at 206-34; Sexton, *supra* note 2, at 464-468 (identifying risks and benefits of a corporate attorney-client privilege). However, this article assumes that the attorney-client privilege should be applied to corporations as the Supreme Court has consistently held. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing *United States v. Louisville & Nashville R. Co.* 236 U.S. 318 (1915)); see also Tim Glynn, *Federalizing Privilege*, 52 AMER. U. L. REV. 59, 81 (2002) (“[T]he privilege--including the corporate privilege--is here to stay in one form or another.”). This assumption, however, does not totally dispense with the dispute because the justifications for and against having a corporate attorney-client privilege are relevant to deciding how and when third party communications should be covered. See *infra* Part IV.

¹⁵ Deniza Gertsberg, *Should Public Relations Experts Ever Be Privileged Persons?*, 31 FORDHAM URB. L.J. 1443, 1455-1456 (2004) (explaining that the privilege was used to cover up damaging studies conducted by tobacco companies); Ido Baum, *Corporate Attorney-Client Privilege: Who Represents the Corporation?*, *Review of Law and Economics*, 62, 64 (2007) (“Tobacco companies structured research activities through the external attorneys in order to secure the privilege, which applied also to communications between lawyers and third party professionals.”); Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Firm Practice*, 70 *Geo. Wash. L. Rev.* 931, 938 (2002) (“Allegations have been lodged, for instance, that tobacco lawyers arranged to have research on health effects of smoking conducted under their aegis, in order to invoke the attorney-client privilege to prevent disclosure.”); Jonathon M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 *COLUM. L. REV.* 1811, 1844 n. 184 (1995) (same); Bruce A. Green, *Thoughts About Corporate Lawyers After Reading the Cigarette Papers: Has the “Wise Counselor” Given Way to the Hired Gun”?*, 51 *DEPAUL L. REV.* 401 (2001) (same). See, e.g., *United States v. Phillip Morris USA Inc.*, 449 F. Supp. 2d 1, 28 (D.D.C. 2006) (disparaging in-house and outside lawyers for “[taking] shelter behind baseless assertions of attorney client privilege” as it relates to use of both inside and outside specialists); *Burton v. R.J. Reynolds Tobacco Co.*, 200 F.R.D. 661, 678 (D. Kan. 2001) (denying protection to documents created by external Tobacco committee); *Liggett Group Inc., v. Brown & Williamson Tobacco Corp.*, 116 F.R.D. 205, 205-210 (M.D.N.C. 1986) (denying protection to communications with external marketing consultant).

Thus, on the one hand, protecting the free flow of information between attorneys and external consultants can be at odds with our system's cooperative discovery rules.¹⁶ This is precisely why the attorney-client privilege, perhaps the most robust of privileges, is generally strictly construed.¹⁷ On the other hand, when applied too narrowly, attorneys may not seek the help they need to provide competent legal advice and assist their clients in complying with the law.¹⁸ As Model Rule of Professional Conduct 2.1 emphasizes, when determining the best legal course of action, attorneys may need to "refer not only to law but to other considerations, such as moral, economic, social, and political factors, that may be relevant to the client's situation."¹⁹ In the drug-recall scenario, for example, absent any possibility of privilege protection, the lawyer might not have sought advice from the external PR executive and the company may have not recalled the drug as quickly or admitted knowledge of certain side effects.²⁰ The failure to take these actions could have negatively affected the legal strategies, judicial or juror opinions, or the corporation's bargaining power.

I contend, therefore, that, exchanges between attorneys and third party consultants should be protected under certain circumstances. My particular recommendation is to revise the attorney-client privilege doctrine so that there is one standard based on the agency approach. Specifically, I argue that there should be a strong nexus between the consultant's service and the legal advice or services ultimately provided to the client. As a few federal courts have mandated,²¹ the proponent must demonstrate not that the consultation simply helped the attorney but rather that it was *necessary* to the legal service actually provided. Some courts have

¹⁶ Indeed many rules pull us away from the adversarial system today such as those dictating judicial management of cases, pretrial settlement conferences, or a limited number of preemptory challenges.

¹⁷ *Fisher v. United States*, 425 U.S. 391, 403 (1975).

¹⁸ See *infra* Part II.D (explaining why the work product doctrine does not necessarily provide protection).

¹⁹ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002); see also *infra* notes 58-60 and accompanying text.

²⁰ See *infra* note 189 and accompanying text.

²¹ See *infra* note 92.

attempted to apply a nexus test along these lines,²² but they have not been very effective because this standard alone is too abstract to be predictable. To help determine whether the communication was for business as opposed to legal advice and the services provided by the attorney were essential and legal in nature – and not an attempt to shelter otherwise non-privileged information – courts should also consider four factors: 1) whether the lawyers were not skilled in the area in which they sought expert assistance; 2) the way the communication was conducted or distributed; 3) the existence of contemporaneous documentary or formal support for interpreting the facts surrounding the contested documents in the proponent’s favor; and 4) the substance of the law involved.²³

This standard, although still subject to interpretation which might produce varying results, will provide better reasoned decision-making because it requires litigants and courts to spell out the connection between the consultation and the *legal* service with a rigor currently absent from the analysis. Moreover, as opposed to the current doctrine, it will protect lawyers’ communications with third party consultants when necessary without creating an enormous asylum for malfeasant corporations. It also will enable informed decision making and compliance. Further, elucidating one uniform test improves consistency and predictability to some extent. Finally, the analysis and recommendations may also enhance the application of the attorney-client privilege in other contexts.²⁴

²² See *infra* note 296.

²³ Obviously, the other parameters of the attorney-client privilege still apply. Namely, protection would only be afforded to those communications that are legal advice or based on or directly or indirectly reveal client confidences. See *infra* notes 68-69 and accompanying text.

²⁴ Although this Article focuses on federal case law, the analysis and recommendations are also applicable to states. See *supra* note 289. Further, this Article focus on cases involving corporations but occasionally non-corporate cases will be addressed. Lastly, the recommendations apply equally to individuals. Indeed, there have been cases addressing the attorney-client privilege and use of third party consultants by attorneys representing individuals. See, e.g., In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003) (protecting communications with external PR consultant by attorney representing Martha Stewart); US v. Cote, 456 F.2d 142,

Granted, some may disagree with the exact recommendations in this Article and there may be alternate solutions to the problems identified in this paper. At a minimum, however, the Article highlights the importance of a discussion around the appropriate scope of the attorney-client privilege in the third party consultant context. Moreover, this Article attempts to define a set of first principles that should be considered when developing any solution.

My analysis is informed, in part, by a recent study I conducted on the intersection of public relations and corporate legal controversies [hereinafter PR Study]. The study consisted of: 1) 57 interviews of General Counsels of S&P 500 companies, outside lawyers and PR executives; and, 2) a survey sent to all General Counsels of the S&P 500 that elicited a 28% response rate.²⁵ Findings from this study are relevant to a degree because the study explores attorneys' use of one type of third party consultant, specifically external PR consultants.²⁶ The first part of this Article explains why third party consultation is integral to the provision of legal advice in the corporate context. The second part provides an overview of the corporate attorney-client privilege and examines how courts apply it to communications between attorneys and third party consultants. It also addresses the complexity involved in making the law/business distinction in this context and the role of the work product doctrine. The third part delineates a set of criteria by which third party attorney-client privilege doctrine should be judged. Based on

144 (8th Cir. 1972) (holding that privilege extended to communications with accountant by attorney representing two individual clients).

²⁵ For more information see *infra* note 34.

²⁶ That being said, the inferences that can be made from this study are limited because the study 1) only concerns one type of third party consultant; 2) was not, nor intended to be, random or statistically representative of all large, publicly traded companies that have high demand for legal services; and 3) suffers from bias since most participants are members of the corporate bar or corporate executives with a vested interest in the privilege. Although more research should be done (especially with other non-lawyer corporate executives), the goal of the study was primarily to explore the perspectives of general counsels servicing large, publicly traded corporations regarding the way the court of public opinion impacts corporate legal controversies and is managed today. Thus, I use preliminary results from this study minimally and only to enhance exploratory analysis and enrich the discussion.

these criteria, it concludes that the current application of the doctrine is too narrow, too broad, or not effective. The fourth and last part proposes one possible solution.

I. THE IMPORTANCE OF THIRD PARTY CONSULTATION TO THE PROVISION OF LEGAL ADVICE

Although it is relevant to individuals, the doctrine that applies protection to communications between lawyers and third party consultants is especially salient for lawyers servicing large corporate clients who face a wide range of legal challenges across multiple jurisdictions.²⁷ Given today's highly regulated, litigious, publicized, and complex marketplace, corporations often rely on consultants from various disciplines to help make business and legal decisions.²⁸ According to Professor Robert Eli Rosen, "this is the age of consultants."²⁹ As corporations have downsized and organized around self-managing project teams, they have hired external consultants to be part of those teams.³⁰ These teams (consisting of internal employee professionals and external consultants) work collaboratively on projects.³¹

²⁷ Sexton, *supra* note 2, at 464. Attorneys representing individuals also sometimes need to consult with third party professionals e.g., Roger Clemens. See *infra* note 199; see *supra* note 24 (listing cases that address the use of third party consultants by attorneys representing individuals). However, the issues addressed in this Article may arise more frequently for corporate clients. The landscape becomes even more complex for corporations operating in a global context given that in-house counsel communications are not privileged in some countries outside the U.S. www.thelawyer.com, Revealed: Akzo Nobel threat to Global Firms, last visited 2/18/2008.

²⁸ Robert Eli Rosen, *We're All Consultants Now: How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 659 (2002); THEODORE EISENBERG, INTRODUCTION, IN RISK BEHAVIOR AND RISK MANAGEMENT IN BUSINESS LIFE 257 (Bo Green ed., 2000) (explaining there is a "need for a multidisciplinary approach to risk research in business life"); 1 EDNA SELAN EPSTEIN, THE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE, 269 (5TH ED. 2007) ("[C]orporations increasingly conduct their business not merely through regular employees but also through a variety of independent contractors retained for specific purposes."); <http://www.businesstown.com/consulting/article3.asp>, last visited 2/14/08 (projecting use of independent consultants is rising "to compensate for knowledge gap" because large corporations are downsizing and reengineering); The movement in early 2000 to allow law firms to form multidisciplinary partnerships was based on corporate clients' need for a mix of independent consulting services. Cf. RHONDA ABRAMS, THE SUCCESSFUL BUSINESS PLAN, SECRETS AND STRATEGIES, 196 (4th ed. 2003) (recommending corporations hire independent management consultants, accountants, marketing consultants and designers to help fill gaps).

²⁹ Rosen, *supra* note 28, at 648 (analyzing organizational development in corporations and how law firms are reorganizing to serve company teams).

³⁰ *Id.* at 642-648. *Id.* at 647 ("The organizational strategies of downsizing and outsourcing link corporate demand and the supply offered by consulting firms."); *id.* at 648 (explaining that outside consultants do not replace inside consultants but instead complement each other). See also Michele D. Beardslee, *If Multidisciplinary Partnerships Are Introduced into the United States, What Could or Should Be the Role of General Counsel?*, 9 FORDHAM J. CORP. & FIN. L. 1, 36 (2003) ("When we have a particular matter we always form an MDP team and work together to solve

In turn, third party consultants often have information essential to the attorney's provision of legal advice.³² For example, given the impact the court of public opinion has on what charges are brought, whether a case will be filed or goes to trial, the parties' negotiation power, and the legal strategies, corporate lawyers sometimes need help from external PR experts.³³ As part of the PR Study, I conducted fifty-seven qualitative interviews with general counsels of the S&P 500, law firm partners and public relations executives. I also sent a survey to all general counsels in the S&P 500.³⁴ Of the 28% that responded to the survey, 98% claimed they dealt with a high profile legal issue one or more times in the past three years and 53% hired

a problem.”) (quoting General Counsel Interviewee) [hereinafter *Multidisciplinary Partnerships*]. Cf. Mary C. Daly, *What the MDP Debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform*, 50 J. LEGAL EDUC. 521, 536 (2000) (“A common feature of in-house lawyering is “teaming”: lawyers join with nonlawyer employees who have expertise in other disciplines to arrive at an integrated solution to a problem that has nonlegal as well as legal aspects to it”). *Id.* (“Some business problems are simply too big and too complex to be solved by in-house teams of lawyer and nonlawyer employees. Outside advice is needed.”); Robert Nelson and Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 488 (2000) (explaining that “corporate management turned from relying on a fixed institutional arrangement for conducting business to frequently reorganized, project based teams).

³¹ Rosen, *supra* note 28, at 647 (explaining that corporations have porous borders and that outsourcing is not only hiring workers “on a contingent basis with fewer benefits” but also includes hiring external specialists like engineers, accountants, and even outside counsel); General Counsel Interviewee GC-F-S-32 at 16 (“[Y]ou get together with your CEO, CFO, your general counsel, your outside counsel and your PR guy and you go through everything and get everyone’s input on the documents and strategy and you get your outside PR firm too.”). Research on collaboration and decisions by teams indicate that this approach is effective. See e.g., Alan S. Blinder and John Morgan, *Are Two Heads Better Than One?: An Experimental Analysis of Group vs. Individual Decisionmaking*, NBER Working Papers series number 7909, National Bureau of Economic Research [Downloadable]; <http://www.nber.org/papers/w7909.pdf>, 43-44 (finding that group decisions are not slower and are superior to individual decisions) (last visited 5/15/08); James C. Cox and Stephen C. Hayne, GROUP VERSUS INDIVIDUAL DECISION MAKING IN STRATEGIC MARKET GAMES, University of Arizona, 1998.

³² Cf. *Tri-State Outdoor Media Group Inc. v. Official Comm. of Unsecured Creditors*, 283 B.R. 358, 362 (Bankr. M.D. Ga. 2002). Legal work “requires obtaining input from the whole team.” Rosen, *supra* note 28, at 654.

³³ See generally Gertsberg, *supra* note 15, at 1462-65; cf. Hantler et al., *supra* note 10, at 8-10 (explaining that media affects settlement options, motions and juries; and “public relations can be a necessary element in litigating a case”); but see Linas, *supra* note 13, at 424 (arguing that media influence on prosecutorial discretion is “unsubstantiated, speculative, and hardly a valid reason to extend the privilege to public relations experts”). One interviewee explained the he may want to vet a letter written to the other side with a PR consultant before sending it to find out how the letter will be viewed by the public if the other side publishes it. LP-NA-L-27 at 5.

³⁴ This study was conducted as part of a larger research project funded by Harvard Law School’s Program on the Legal Profession. I was the Associate Research Director of the Center and the lead researcher on the project. For a full description of the research agenda and methodology, see Beardslee, *Advocacy Part I*, *supra* note 6.

an external PR agency in the last three years to deal with a high profile legal issue.³⁵ The preliminary findings from the interviews were consistent with the study. Moreover, they suggest that, as in the drug-recall scenario, in order to advise clients, general counsels meet with external PR consultants to discuss press releases, disclosure obligations, and the effect potential legal strategies might have in the media and, therefore, on governmental agency regulators, stockholders, judges, potential juries, etc.³⁶ Many of the interviewees in the PR Study described the impact of PR on legal controversies as follows:

[J]udges pay attention to the public relations effects of what they do I mean judges read newspapers, even the best judges aren't completely immune from the PR effects of the case. Certainly juries are not . . . even if they have been cautioned not to read the newspapers. So it's very important, and, take a proxy fight . . . how the shareholders perceive the combatants is the whole battle. . . . [and if it is a] "regulatory issue, . . . the SEC is now part of your audience."³⁷

In order to provide a meaningful overview of the PR implications to the attorney (so the attorney can provide informed legal advice to the client), the PR consultants often have to know the confidential details surrounding the legal issues.³⁸ As one General Counsel Participant explained

³⁵ Sixty percent of survey respondents reported dealing with a high profile legal matter many times in the past three years. Twenty-seven percent claimed a few times. Eleven percent said once or twice. Two percent said never. For more information on the use of PR consultants see generally Beardslee, *Advocacy Part I*, *supra* note 6.

³⁶ *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) [hereinafter *Calvin Klein I*] (explaining that PR consultants need to understand legal strategies to provide PR advice and PR advice influences attorneys' strategic and tactical legal decisions). This is not to imply that lawyers build legal strategies around the media strategy but simply that media impact is a consideration when providing legal advice. For example, a lawyer might want to meet with an external PR consultant if representing a private bank facing significant regulatory sanctions for money laundering. The company has to appear appropriately chastened before the regulators but also reassure the customers. A PR consultant can help the attorneys understand how certain statements might be construed and how to reach the right balance to prevent additional charges or cases against the company while still protecting defenses. *See, e.g.*, GC-I-L-12 (S-3) at 6. As one General Counsel Interviewee explained: A dialogue with the PR executive might lead to a lawyer recommending that "it's not worth it to confront a regulator publicly even when [he] think[s] [the regulator] is wrong" and he "was right on the narrow issue" because "it might be detrimental to [the] company's long-term dealings with them." GC-I-L-9 (S-23) at 5.

³⁷ *Cf.* LP-NA-L-27 at 14; *see also* LP-I-L-21 at 7-8 (explaining that juries are not as important as judges, shareholders, arbitragers, and market professionals because they often do not read the financial part of the paper).

³⁸ Some scholars assert that "[a] client need not divulge incriminating information in order to receive effective media advice." Murphy, *supra* note 12, at 587. However, the qualitative interviews I conducted suggest the opposite. *See infra* note 195. Other scholars have made similar contentions. Gertsberg, *supra* note 15, at 1476 ("There is simply no practical way for meaningful discussions to occur if the lawyer is unable to inform the public relations expert of nonpublic facts, as well as the lawyer's defense strategies and tactics."); Hantler et al., *supra* note 10, at

“there nonetheless are situations where you, in order to be fair to [PR consultants] and for them to give you good advice about what they think the media’s perspective on things might be, you are going to have to share some” confidential information with them.”³⁹ Moreover, the PR consultants need guidance from attorneys on how to position legal controversies and other types of disclosures to the public in a way that comports with the law, does not instigate potential lawsuits,⁴⁰ and is synergistic with the legal strategy. As one Law Firm Partner Interviewee explained, “more detailed briefing can help [the PR executives] understand the approach of the lawyer and the client so everyone is more likely to be on the same page.”⁴¹ To be sure, a message in the court of public opinion that is different than the message in the court of law can create inconsistencies that are fatal⁴² or instill mistrust, or even anger in the public at large.⁴³

23. That being said, many of the lawyer interviewees are careful about sharing information that could destroy their case such as their opinion on the client’s chance of winning. But when it comes to less major confidential information, they take their chances because they believe they have a good argument against waiver. *See, e.g.*, LP-NA-L-27 at 18.

³⁹ GC-C-L-17 (S-11) at 6 (explaining that the amount of information that has to be shared with the communications people may be a bit limited because media stories do not get written at the level of intense detail).

⁴⁰ Hantler *et al.*, *supra* note 10, at 22-23; Peter J. Gardner, *Media at the Gates: Panic! Stress! Ethics?*, 27-SEP VT. B.J. 39, 39 (2001); Beth A. Wilkinson, *When Talk is Not Cheap: Communications with the Media, the Government and Other Parties in High Profile White Collar Criminal Cases*, 39 AM. CRIM. L. REV. 203, 204 (1982).

⁴¹ LP-I-L-25 at 2.

⁴² For example, if a client is being sued for violation of antitrust laws, the lawyer will likely try to demonstrate that the client is not a monopolist. The PR strategy for the corporation, however, might be to emphasize that the client is the dominant market participant. Christopher P. Bogart and Robert D. Joffe, HIGH-PROFILE LITIGATION, OBJECTIVES CONCERNS AND PRELIMINARY CONSIDERATIONS (discussing the “strong need to coordinate the client’s litigation strategy and the client’s on-going business strategies, shareholder/investor relations, and public relations”).

⁴³ Michael Dore and Rosemary Ramsay, *Dealing with Public Relations Concerns in Products Liability and Toxic Tort Litigation*, 213 FEB N.J. LAW. 52, 56 (2002) (“Finally, all public disclosures must be coordinated. When clients, counsel, experts, and other persons in the disclosure process convey different information (or even the same information at different times) media mistrust and public uncertainty and/or anger inevitably increases.”); LP-NA-L-31 at 5 (“If a reporter decides that they do not believe your defense or that you are not being candid . . . you are hiding something . . . it creates even more of a story in and of itself. So you’ve got to be especially careful of this.”).

A need for expert consultation is not limited to the public relations context.⁴⁴ Lawyers may need advice from various external consultants in many different types of situations to provide complete legal advice.⁴⁵ For example, when an investment banking company approaches a large corporation about an investment to produce capital losses to offset gains from a recent transaction, the corporation's general counsel may need to talk with the investment banking consultant about the proposal and its potential tax consequences based on the corporation's goals, history, and confidential financial situation.⁴⁶ In addition, presuming the general counsel is not a tax expert, he or she may need to discuss the structure and purpose of the transaction and the potential tax consequences with a tax consultant. It is not until after these conversations take place that the general counsel can provide a recommendation on the risks and legality of the investment proposal. A similar need to resort to third party consultation exists when a corporation considers a restructuring that may lead to a significant tax refund.⁴⁷

As Professor Rosen points out, "[l]egal risks not only must be assessed, but also processed because legal risks often are not detached risks."⁴⁸ For example, attorneys need to

⁴⁴ Many scholars contend attorneys need to consult with accountants to provide competent legal advice about complex financial transactions. *See, e.g.*, Gruetzmacher, *supra* note 12, at 977; Carl Pacini, Pamella Seay, Raymond Placid, *Accountants, Attorney-Client Privilege, And the Kovel Rule: Waiver Through Inadvertent Disclosure Via Electronic Communication*, 28 DEL. J. CORP. L., 893, 893 (2003). Although twenty-five state courts recognize an accountant-client privilege, federal courts do not. *Id.* at 893, n.3. The Internal Revenue Service Restructuring and Reform Act of 1998 enacted in 2000 grants tax payers (in federal forums) something similar to the common-law attorney-client privilege. *See generally* Alicia K. Corcoran, Note, *The Accountant-Client Privilege: A Prescription for Confidentiality or Just a Placebo*, 34 NEW ENG.L. REV., 697 (2000). However, because it has severe limitations and its scope is very uncertain, the accountant-client privilege cannot be relied on to protect communications. *Id.*

⁴⁵ Gregory Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, Working Paper (on file with author), 7 (10-17-2008) (explaining that a real estate transaction may involve questions related to engineering, environmental science, tax, zoning, finance, insurance, and liability).

⁴⁶ *See, e.g.*, *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999). Or a lawyer might hire an environmental consultant to help with an environmental audit and assess whether the corporation has complied with environmental laws. Sisk *et al*, *supra* note 48, at 14 (describing this example).

⁴⁷ *See, e.g.*, *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995) [hereinafter Adlman I].

⁴⁸ Rosen, *infra* note 28, at 659; Sisk *et al*, *supra* note 48, at 11 ("[T]he lawyer must know the client's business and offer business-relevant advice if legal counsel is to have any practical value."); Daly, *What the MDP Debate Can Teach Us*, *supra* note 30, at 521-522 ("[L]egal' advice is rarely just that. The complexity of modern society increasingly creates a superabundance of problems in which it is virtually impossible to separate the legal component from components more traditionally associated with other disciplines. . . .").

understand the business risks in order to understand a company's insolvency risks and, therefore, must work with accounting and finance experts.⁴⁹ As a General Counsel Interviewee of a large pharmaceutical company explained:

[I]n the world there is now a convergence of discipline, not just legal and public affairs. People who are actually able to manage complicated situations have to be able to look at it from multiple perspectives. There are no more pure finance questions. There are no more pure marketing questions. There are no more pure policy questions or legal questions or HR questions. They are all multidisciplinary.⁵⁰

Accordingly, consultation with various third party specialists is sometimes essential to the provision of legal advice.

In *U.S. v. Kovel*, the attorney-client privilege was extended to communications with a third party consultant for just this reason⁵¹ – because “the complexities of modern existence prevent attorneys from effectively handling clients’ affairs without the help of others.”⁵² Since this case was decided in 1961, there has been dramatic growth in the number of cases filed each year, dollars spent on litigation,⁵³ amount of regulation,⁵⁴ number of governmental agencies,⁵⁵ complexity of corporate laws,⁵⁶ and number of media outlets.⁵⁷

⁴⁹ Rosen, *infra* note 28, at 659.; *cf id.* at 670 (“Teams are multidisciplinary so lawyers meet as equals with, for example, engineers and accountants.”). Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 281 (2000). (“The needs of clients are increasingly difficult to pigeonhole as ‘legal,’ ‘accounting,’ ‘financial planning,’ ‘environmental planning,’ etc. And the boundaries between law and other disciplines are blurring.”); *see also infra* notes 127-128 and accompanying text.

⁵⁰ GC-F-L-4 at 23.

⁵¹ *United States v. Kovel*, 296 F. 2d 918, 921 (2d Cir. 1961) (; *see supra* notes 74-76 and accompanying text; Emily Jones, Note and Comment, *Keeping Client Confidences: Attorney-Client Privilege and Work Product Doctrine in Light of United States v. Adlman*, 18 PACE L. REV. 419, 423 (1998).

⁵² *Kovel*, 296 F. 2d at 921 (internal citations and quotations omitted); *see also*, Jones, *supra* note 51, at 423.

⁵³ Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1255 (April 2005); Neal Ellis, *Saving the Jury Trial*, 34-SUM BRIEF 15, 15 (Summer 2005). *But see* Arthur Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y.U.L. REV. 982, 994-95 (2003) (arguing that there has not been a litigation explosion).

⁵⁴ In 2001, the Securities and Exchange Commission introduced the Fair Disclosure Regulation of 2001 (“Regulation FD”) that “prohibits executives from feeding market-moving information to select individuals.” Stephen Barr, *The FD Effect – Fair Disclosure Regulation on Corporations*, CFO: MAGAZINE FOR SENIOR FINANCIAL EXECUTIVES, April 2001, http://findarticles.com/p/articles/mi_m3870/is_4_17/ai_73848844.htm (last visited Feb. 13, 2008). *See infra* notes 204-208 and accompanying text. Also, the Sarbanes Oxley Act was enacted

As far back as 1950, courts believed it was the lawyer's "duty" to consider "relevant social, economic, political, and philosophical considerations" when providing legal advice.⁵⁸ Consistent with that, today's Model Rules of Professional Conduct urge lawyers to consider non-legal factors, consult with non-legal professionals, and guide the client when outside experts' recommendations conflict.⁵⁹ Attorneys are, therefore, in an awkward position. On the one hand, adequate legal representation cannot be provided without sometimes candidly consulting with third party consultants, but on the other, this divulgence may not be protected. One interviewee aptly summed up the conflict with respect to PR consultants: "In hindsight, maybe the PR people should have been more in the loop, but then you have privilege issues right? And, so it's you are damned if you do it and damned if you don't."⁶⁰

in 2002; Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1756 (2004) ("[T]he pace of regulatory development is increasing.").

⁵⁵ Even non-government organizations like Public Citizen focus attention on corporations and consumer protection.

⁵⁶ Dennis R. Lassila and Murphy Smith, *Tax Complexity and Compliance Costs of U.S. Multinational Corporations*, in *ADVANCES IN INTERNATIONAL ACCOUNTING* 10, at 207-237 (T.S. Douppnik ed., 1997) available at <http://ssrn.com/abstract=247726> (explaining that U.S. tax laws have become increasingly complex).

⁵⁷ Kathleen Brickey, *From Boardroom to Courtroom to Newsroom: The Media and the Corporate Governance Scandals*, 33 J. CORP. L. 625, 636 (2008) (describing media outlets that are "instrumental in orchestrating the public relations wars."); Cf. Schmuhl, *Government Accountability and External Watchdogs* <http://usinfo.state.gov/journals/itdhr/0800/ijde/schmuhl.htm> (last visited on Feb. 13, 2008) (describing "the new informational environment" as it relates to the government and press).

⁵⁸ *U.S. v. United Shoe Machinery Corporation*, 89 F. Supp. 357, 359 (D. Mass. 1950); cf. Murphy, *supra* note 12, at 589 ("One could even argue that it is an attorney's ethical obligation to attempt to influence public opinion.").

⁵⁹ Rule 2.1 states that attorneys "may refer not only to law but to other considerations, such as moral, economic, social, and political factors, that may be relevant to the client's situation). MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002). However, the comments explain that "[p]urely technical advice . . . can sometimes be inadequate. . . . Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts." *Id.* at R. 2.1, cmts (2), (4). Further, some legal scholars have argued that Model Rule 2.1 obligates attorneys to advise clients on non-legal, related issues. See, e.g., Larry O. Natt Gantt, II, *More than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 366-367.

⁶⁰ LP-NA-L-2 at 8 (referring to consultation with third party PR expert).

II. THE CORPORATE ATTORNEY-CLIENT PRIVILEGE AND THIRD PARTY CONSULTANTS

A. *The Corporate Attorney-Client Privilege*

In *Upjohn Co. v. United States*,⁶¹ the Supreme Court resolved the conflict among federal circuits about which employees personify the corporate entity so that their communications with corporate counsel can be considered attorney-*client* communications.⁶² The Court adopted a case-by-case approach that in practice has resulted in an expansive rule emphasizing the importance of the flow of information between corporate employees and attorneys for sound legal advice.⁶³ It justified broad protection on the grounds that lawyers need to be able to communicate freely with corporate employees in order to carry out their professional obligations and guide corporate clients to legal compliance.⁶⁴ Thus, the Court considered only whether: 1) the information helped the attorney provide legal advice; 2) the communications related to the employees' corporate duties; 3) the "employees were sufficiently aware that they were being

⁶¹ 449 U.S. 383 (1981).

⁶² Before this landmark decision, courts applied one of two standards to corporations. The narrow "control group" test (applied by a majority of federal courts) limited attorney-client privilege to communications with employees that could control corporate decisions based on the attorney's advice. Sexton, *supra* note 2, at 451. See also *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp at 485, 485-486 (E.D.P.A. 1962) (describing control test). The broader "subject matter" test (applied by a minority of federal courts) protected communications by employees when the subject matter concerned the employees' employment duties. Sexton, *supra* note 2, at 455; *Harper & Row Publishers, Inc v. Decker*, 423 F. 2d 487 (7th Cir. 1970) (rejecting the control group test). For a clear history of these tests, see Sexton, *supra* note 2, at 449-456.

⁶³ *Upjohn Co. v. United States*, 449 U.S. at 392-393 (1981); *cf.* Sexton, *supra* note 2, at 502. *Upjohn* rejected the control group test and, and neither accepted nor rejected the subject matter test. Some claim the Court, in rejecting the control group test, embraced the subject matter test. See, e.g., Baum, *supra* note 15, at 62, 64; Lonnie T. Brown, *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Paradox*, 34 HOFSTRA L. REV. 897, 933 (2006) ("Although the Court declined to set forth a bright-line test, its recognition of the privilege here suggests receptivity to the [subject matter] approach."). However, the subject matter test was never addressed and the Court expressly refused to adopt any specific test. *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981); *id.* at 402 (Burger C.J. concurring) (asserting that Court should articulate a standard); see also, Sexton, *supra* note 2, at 458, 462; Bufkin Alyse King, *Preserving the Attorney-Client Privilege in the Corporate Environment*, 53 ALA. L. REV. 621, 631 (2002) ("[Upjohn] did not adopt the subject matter test."). State courts still apply both the subject matter and control test and "everything inbetween." Brown, *supra* note 63, at 934 (commenting on the problems this lack of uniformity poses for national corporations).

⁶⁴ *Upjohn*, 449 U.S. at 390-392. Many agree that *Upjohn* provides very broad protection. See e.g., King, *supra* note 31, at 632; Hamilton *infra* note 67; Chambliss, *supra* note 54, at 1726 ("The Supreme Court [in *Upjohn*] has endorsed broad protection of the corporate privilege.").

questioned;”⁶⁵ and, 4) the communications were considered and kept “highly confidential.”⁶⁶ Therefore, *Upjohn* provides protection to a very broad group of corporate employees.⁶⁷ If the company is conducting an internal investigation, all the communications with the employees will be covered if the lawyer eventually provides legal advice to the client because these communications, arguably, helped the attorney do so. Although this rule is broad, other limits on the attorney-client privilege still apply. Communications from attorney to client are only covered when they constitute legal advice, or are based on or might disclose confidential client information.⁶⁸ Further, while neither client nor attorney can be compelled to disclose communications, the client may be obligated to reveal underlying facts.⁶⁹

⁶⁵ *Upjohn*, 449 U.S. at 394-95 (emphasizing that the conversations with the employees helped the lawyers “to be in a position to give legal advice to the company with respect to the payments”) (internal quotations omitted).

⁶⁶ *Upjohn*, 449 U.S. at 395. Some courts have interpreted this to be a “need to know” standard. *See, e.g.*, *Fed Trade Comm’n v. GlaxoSmithKline*, 294 F.3d 141, 147-148 (D.C. Cir. 2002); *Wrench LLC v. Taco Bell Corp.* 212 FRD 514, 517-518 (W.D. Mich. 2002). Other courts and scholars interpret this to mean that a communication is protected if it “would not have been made *but for* the client’s need for legal advice.” *First Chicago Int’l v. United Exchange Co.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989); *In re Bieter*, 16 F. 3d 929, 939 (8th Cir. 1994); *Sexton*, *supra* note 2, at 492

⁶⁷ Brian Hamilton, Note, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, 1997 ANN. SURV. AM. L. 629, 629-630 (1997) (characterizing the *Upjohn* decision as providing protection to “a much wider range of employees than would have been protected under the alternative ‘control group’ standard”).

⁶⁸ The attorney-client privilege “shields communications from the lawyer to the client only to the extent that these are based on or may disclose, confidential information provided by the client or contain advice or opinions of the attorney.” *United States v. Neal*, 27 F.3d 1035, 1048 (5th Cir. 1994); *United States v. Defazio*, 899 F.2d 626 (7th Cir. 1990) (privileging communication from attorney to client as long as they are legal advice or indirectly or directly reveal confidential information); *Rattner v. Netburn*, No. 88-Civ-2080, 1989 U.S. Dist. LEXIS 6876, at *9 (S.D.N.Y. June 20, 1989) (noting that courts generally concur that protection extends to legal advice from attorney if it might reveal confidential client communication); *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1069 (N.D. Cal. 2002) (“[It] is widely accepted that the privilege encompasses not only (qualifying) communications from the client to her attorney but also communications from the attorney to her client in the course of providing legal advice.”); *In re Sealed*, 737 F.2d 94, 99 (D.C. Cir. 1984) (“[A]dvice prompted by client disclosures may be further and inseparably informed by other knowledge and encounters . . . the privilege cloaks a communication from an attorney to client based in part at least upon a confidential communication to the lawyer from the client. “). Some courts have a narrower view and only apply protection if confidential information is actually disclosed. *See, e.g.*, *United States v. Ramirez*, 608 F.2d 1261, 1268 n. 12 (9th Cir. 1979). For an overview of federal cases applying the privilege to communications from lawyer to client see *Thurmond v. Compaq Computer Corp.*, 198 F.R.D. 475, 480-482 (E.D. Tex. 2000).

⁶⁹ *Davis & Beisecker*, *supra* note 10, at 592; *HW Carter & Sons v. William Carter Co.*, No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *3 (S.D.N.Y. May 16, 1995).

B. Third Party Attorney-Client Privilege Doctrine

Generally, the privilege does not apply or is considered waived when the client voluntarily discloses an otherwise confidential, privileged communication to a third party.⁷⁰ The rationale is that if clients are willing to divulge information to third parties, they would likely divulge it to their attorneys even if no privilege applies.⁷¹ Thus, a primary justification for the privilege – to promote the free flow of information between client and attorney – disappears.⁷²

There are, however, two general exceptions.⁷³ Communications between attorneys, clients, and third parties can be protected when: 1) the third party is the agent of the attorney *or* client [hereinafter the agency theory]; or, 2) the third party is the functional equivalent of the client's employees [hereinafter the functional equivalents test].

1. Third Party as Agent

The agency theory stems from *U.S. v. Kovel*, decided in 1961.⁷⁴ There, the Second Circuit applied the attorney-client privilege to communications between the lawyer, client and an accountant employed by a law firm.⁷⁵ It analogized the accountant to an interpreter translating a foreign language. It reasoned that attorneys sometimes have to seek help from others given

⁷⁰ *Hickman v. Taylor*, 329 U.S. 495, 508 (1947) (explaining there is no expectation of confidentiality); 8 Wigmore Evidence § 2317 (McNaughton rev. 1961); *Cavallaro v. United States*, 284 F.3d 236, 246 (1st Cir. 2002).

⁷¹ *See Westinghouse II*, 951 F.2d 1414, 1424 (3rd Cir. 1991).

⁷² *Westinghouse Electric Corp. v. Republic of the Philippines*, 132 F.R.D. 384, 388 (D.N.J. 1990) [hereinafter *Westinghouse I*].

⁷³ The exceptions apply to situations in which a) the lawyer, client, and third party consultant meet at the same time; and, b) after formation of the privilege, the client or lawyer later disclose privileged communications to the third party consultant. In the former, one might argue that the attorney-client privilege never formed and in the latter that the attorney-client privilege was waived.

⁷⁴ 296 F. 2d 918 (2nd. Cir. 1961) (holding attorney-client privilege may apply to employee/agent of lawyer under some circumstances).

⁷⁵ *United States v. Kovel*, 296 F. 2d 918 (2d Cir. 1961) (internal citations and quotations omitted). The accountant had been employed by the law firm for over 15 years and used to be an Internal Revenue agent. *Id.* at 919.

modern complexity and concluded that communications with third party agents should be protected when they are needed to accomplish the attorney's work.⁷⁶

Since *Kovel*, many federal courts, including the Second Circuit, have applied the privilege to various types of third parties.⁷⁷ It is generally safe to assume that the presence of non-professional agents, "immediate subordinates"⁷⁸ or "ministerial agents"⁷⁹ under the supervision of the attorney and necessary for an attorney to conduct business such as law clerks, paralegals, and secretaries,⁸⁰ will not abrogate the privilege.⁸¹ However, as will be discussed below, no assumptions are safe when the third party is a professional consultant.

Generally, a narrow and a broad view have emerged with respect to *Kovel's* agency theory:⁸²

a) *The Narrow Approach*

Courts that view *Kovel* narrowly generally follow the Second Circuit's interpretation in *U.S. v. Ackert*,⁸³ decided thirty-nine years after *Kovel*. There, the Second Circuit interpreted *Kovel's* exception only to apply to third parties who interpret information the client already has to

⁷⁶ *Id.* at 922 ("The presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege."). *Id.* at 923 ("What is vital . . . is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.").

⁷⁷ *Young v. Taylor*, 466 F.2d 1329, 1332 (10th Cir. 1972) (addressing secretaries and law clerks); *In re Grand Jury Proceedings*, 786 F.2d 3, n. 4 (1st Cir. 1986) (claiming paralegal can be protected by attorney-client privilege); *NLRB v. Harvey*, 349 F.2d 900, 906-07 (4th Cir. 1965) (private investigators); *United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 161 (E.D.N.Y. 1994) (non-testifying experts and patent agents); *Golden Trade v. Lee Apparel Co.*, 143 F.R.D. 514 (S.D.N.Y. 1992) (patent agents); *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989) (accountants); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (accountants); *United States v. Alvarez*, 519 F.2d 1036 (3rd Cir. 1975) (psychiatrists).

⁷⁸ *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 795 (D. Del.1954); *Burlington Industries v. Exxon corp.*, 65 F.R.D. 26, 40 (D. Md. 1974).

⁷⁹ *Fed Trade Comm'n v. TRW*, 628 F.2d 207, 212 (DC Cir. 1980).

⁸⁰ *Young v. Taylor*, 466 F.2d 1329, 1332 (10th Cir. 1972); *Imwinkelried*, *supra* note 10, at 26.

⁸¹ *United States v. Kovel*, 296 F. 2d 918, 922 (2d Cir. 1961) ("[T]he privilege covers communications to non-lawyer employees with a menial or ministerial responsibility that involves relating communications to an attorney."); *Imwinkelried*, *supra* note 10, at 25 ("All courts and commentators agree that clerks and secretaries fall within the definition [of attorney's agent]."); *Dabney v. Investment Corp. of America*, 82 F.R.D. 464, 465-66 (E.D. Pa. 1979) ("[P]rotected subordinates would include any law student, paralegal, [or] investigator.").

⁸² *See* *Deniza Gertsberg* peripherally describes *Kovel* as providing protection for two categories of third parties: 1) those that fit what I call the narrow theory; and, 2) those "whose work is sufficiently important that it deserves protection such as law clerks, assistants, and aides of other sorts." *Gertsberg*, *supra* note 15, at 1457. According to *Gertsberg*, the second category exists because of the "complexities of modern existence." *Id.* at 1457-58.

⁸³ 169 F.3d 136 (2nd Cir. 1999); *see also* *Murphy*, *supra* note 12, at 564-65 (explaining *Ackert* greatly limits *Kovel*).

improve comprehension between attorney and client.⁸⁴ In *Ackert*, an investment banker pitched a proposal to the corporate client to reduce tax liability from a recent sale of the client's subsidiary.⁸⁵ The client's internal tax counsel researched the proposal and met with the investment banker on several occasions to gauge the tax implications and better advise his client about the legal and financial ramifications of the proposal.⁸⁶ The court found that the consultation was important to the attorney's ability to give effective legal advice.⁸⁷ But it did not apply the privilege⁸⁸ because the investment banker did not translate client communications⁸⁹ nor "enable[] counsel to understand aspects of the client's *own* communications that could [not] otherwise be appreciated in the rendering of legal advice."⁹⁰ Accordingly, the common thread for applying a narrow interpretation of *Kovel* is the ability to analogize the third party consultant's role to that of a translator – solely interpreting the confidential client information without adding new information.⁹¹ Consequently, courts adopting the narrow approach would not protect any of the communications in the drug-recall scenario.

b) The Broad Approach

Perhaps because this standard is so limiting, courts have applied – even after *Ackert* – broader interpretations of *Kovel*. Often, courts adopting a generous view of *Kovel* claim the

⁸⁴ *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999). This case involved an IRS tax summons enforcement proceeding. *Id.* at 138. During an audit, the IRS wanted to question Ackert about conversations with counsel. *Id.*

⁸⁵ *United States v. Ackert*, 169 F.3d 136, 138 (2d Cir. 1999).

⁸⁶ *Ackert*, 169 F.3d at 138.

⁸⁷ *Id.* at 139.

⁸⁸ *Id.* ("The privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client.").

⁸⁹ *Ackert*, 169 F.3d at 140.

⁹⁰ *United States v. Ackert*, 169 F.3d 136, 138, 139 (2d Cir. 1999) (emphasis added).

⁹¹ *See Fed Trade Comm'n v. TRW*, 628 F.2d 207, 210-12 (DC Cir. 1980) (explaining it would have extended *Kovel* to a research institute consultant hired to study "a company's complex computerized credit reporting system" had the party shown the institute was hired to put company's computerized credit reporting system into a more understandable form for lawyers); *Sankoorikal et. Al, supra note 12*, at 280 (explaining both the functional equivalents and agency exceptions but claiming that the *Kovel* exception "has been viewed as a narrow "translator" or "interpreter" exception). Some courts claim to apply the translator approach yet instead apply broader protection. *See, e.g., Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d at 208 (protecting documents shared with external investment banker to help draft disclosure documents because investment banker interpreted for the client and law firm what a reasonable business person would consider "material" for disclosure purposes).

privilege applies to third parties who provide services that merely *facilitate* the attorney's ability to render legal advice.⁹² These courts privilege lawyers' consultations with many external professional consultants. For example, one court privileged communications between an outside PR consultant, the client, and lawyers because the PR specialist "participated to assist the lawyers in rendering legal advice, which included how defendant should respond to plaintiff's lawsuit."⁹³ Courts subscribing to a very broad view of *Kovel* would likely protect all communications in the hypothetical at the beginning of this article.

2. Third Party as Functional Equivalent

Although *Upjohn*⁹⁴ dealt with employees of a corporation, its reasoning has been applied by federal courts to third party consultants who are the "functional equivalents" of the corporate client's employees.⁹⁵ The rationale is that "[t]here is no reason to differentiate between, [for

⁹² See, e.g., *Golden Trade v. Lee Apparel Co.*, 143 F.R.D. 514, 518-19 (S.D.N.Y. 1992); *United States v. Alvarez*, 519 F.2d 1036 (3rd Cir. 1975); *Byrnes v. Empire Blue Cross Blue Shield*, No. 98-Civ-8520, 1999 WL 1006312, at *1 (S.D.N.Y. Nov. 4, 1999); *Willemijn v. Apollo Computer*, 707 F. Supp 1429, 1446 (D. Del. 1989); *Cuno v. Pall*, 121 F.R.D 198, 302 (E.D.N.Y. 1988); *Tri-State Outdoor Media Group Inc. v. Official Comm. of Unsecured Creditors*, 283 B.R. 358, 362-63 (Bankr. M.D. Ga. 2002) (applying a broad interpretation of *Kovel* to protect communications with financial bankruptcy advisor but ultimately determining that attorney-client privilege was waived in part by offering third party as testifying expert witness); *United States Postal Service, v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 161 (E.D.N.Y. 1994). As will be discussed *supra*, some courts take a less extreme approach like that recommended in this Article. See, e.g., *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (requiring that consultants "have a close nexus to the attorney's role in advocating the client's cause before a court or other decision making body" and protecting communication with external PR consultants because attorneys "were not skilled at public relations" and "needed outside help" to provide legal advice); see also *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (privileging audit papers created by an accountant at the attorney's request because the accountant was "a necessary aid to the rendering of effective legal services to the [non-corporate] client"). See also *Haugh v. Schroder Investment Mgt*, No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *9 (S.D.N.Y. Apr. 25, 2003).

⁹³ *HW Carter & Sons v. William Carter Co.*, No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *7-8 (S.D.N.Y. May 16, 1995). Courts have applied the broad interpretation of *Kovel* to protect communications with patent agents. See, e.g., *Golden Trade v. Lee Apparel Co.*, 143 F.R.D. 514, 518 (S.D.N.Y. 1992); *Id.* 519 n.3. It has also been applied to protect communications with jury consultants. See *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (explaining that jury and personal communication consultants come within attorney-client privilege as they have a close nexus to attorney's role in advocating the client's cause before a decision-making body); *In re Cendant Corp.*, 343 F.3d 658, 668 (3rd Cir. 2003) (Garth, J. concurring); *Smithkline Beecham Corp. v. Apotext Corp.*, 232 F.R.D. 467, 476-477 (E.D. Pa. 2005) (applying protection to jury consultant expert). Of course, jury consultants are often protected by the work-product doctrine.

⁹⁴ *Upjohn Co. v. United States*, 449 U.S. 383, 383 (1981).

⁹⁵ *In re Currency Conversion Fee Antitrust Litigation*, MDL No. 1409-M-21-95, 2003 U.S. Dist. Lexis 18636, at *1 (S.D.N.Y. Oct. 21, 2003) (noting that a "limited number of cases" support this interpretation). Because this

example], the accountant-employee and a regularly retained outside accountant when both occupy the same extremely sensitive and continuing position as financial adviser, reviewer, and agent: both possess information of equal importance to the lawyer.”⁹⁶ For example, in *In re Bieter*,⁹⁷ the Eighth Circuit, relying on *Upjohn*, found that the commercial and retail development consultant hired by the company was “in all relevant respects the functional equivalent of an employee” for the purposes of applying the privilege.⁹⁸ The consultant was “regularly retained,” often the sole company representative at meetings, and possibly the only person to possess information regarding the transaction at issue in the litigation.⁹⁹

The role the quasi-employee plays within the company and how he/she is treated is more important than the length or regularity of service, formal titles, or contracts between the parties. For example, in *NXIVM Corp. v. O’Hara*, the court found that a non-paid, volunteer was a functional equivalent of the client’s employees because this individual was “not some mere or informal advisor,” but a “quintessential insider of [the] business on every aspect confronting it.”¹⁰⁰ As the Third Circuit explained, the functional equivalence test protects communications to third party consultants who “possess[] a commonality of interest with the client.”¹⁰¹

exception is distinct in theory, courts do not reconcile holdings with *Kovel*. That being said, as will be discussed, sometimes courts consider both exceptions in one opinion. Moreover, in practice, when the functional equivalents exception is applied broadly, the functional equivalency test collapses into the broad approach to *Kovel*.

⁹⁶ Sexton, *supra* note 2, at 498; *see also* *In re Bieter*, 16 F. 3d 929, 937 (8th Cir. 1994).

⁹⁷ 16 F. 3d 929 (8th Cir. 1994),

⁹⁸ *In re Bieter*, 16 F. 3d at 938-39. The court also relied on the reasoning in *McCaugherty v. Siffermann*, 132 F.R.D. 234 (N.D. Cal. 1990) and Sexton, *supra* note 2, at 498.

⁹⁹ *In re Bieter*, 16 F. 3d at 938-39.

¹⁰⁰ *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 139 (N.D.N.Y. 2007).

¹⁰¹ *In re Grand Jury Investigation*, 918 F.2d 374, 386 n. 20 (3rd Cir. 1990); *Smithkline Beecham Corp. v. Apotext Corp.*, 232 F.R.D. 467, 476-477 (E.D. Pa. 2005) (same). Sexton, *supra* note 2, at 487 (explaining that functional equivalents should have “a significant relationship to the corporation” and attempting to define a rule to determine when attorney-client privilege extends to employees and/or functional equivalents); *Id.* at 498; *See, also*, *In re Bieter*, 16 F. 3d 929, 937 (8th Cir. 1994).

3. Functional Equivalent v. Agent

At first blush, the functional equivalents test seems practically and theoretically distinct from the agency theory. It concerns third parties who, because of their “continuing positions” and the way they are treated by employers, are deemed synonymous with client employees. The agency theory, on the other hand, concerns outsiders usually (but not always) hired by the attorney for a specific matter to facilitate the provision of legal advice. However, when the functional equivalent test is considered in the context of third party *professional* consultants (the subject of this Article), this difference begins to disappear for a few reasons.

a) *Commonality of Interest*

For some courts applying the functional equivalents test, a “commonality of interest” means simply that the third party had information or advice important to the lawyers’ provision of legal advice or services.¹⁰² Thus, the main inquiry mimics that found in the broad agency approach of *Kovel*.¹⁰³ For example, in *Baxter Travenol Laboratories v. Lemay*,¹⁰⁴ the client hired a former employee of the opposing party as a “litigation consultant” to provide information based on his former employment with the opposing party – in essence the client hired a witness.¹⁰⁵ The court reasoned that neither the status of the communicator nor the content of the communication should dictate application of the privilege.¹⁰⁶ As long as the communication is made by the functional equivalent “at the client's behest, in order to secure legal advice, and is intended by the client and participants to be confidential,” the communication should be

¹⁰² *In re Bieter*, 16 F. 3d 929, 938-39 (8th Cir. 1994); *Twentieth Century Fox Film Corp. v. Marvel Enterprises*, No. 01-Civ-3016, 2002 WL 31556383, at *2 (S.D.N.Y. Nov. 15, 2002).

¹⁰³ *But see Sankoorikal et. Al, supra note 12*, at 280 (claiming that “courts apply the [functional equivalents] exception carefully, often ruling that the facts do not support a finding that the third party operated as a “functional equivalent” because this exception can “encompass many communications with third-party contractors”).

¹⁰⁴ *Baxter Travenol Laboratories v. Lemay*, 89 F.R.D. 410 (S.D. Ohio 1981).

¹⁰⁵ *Id.* at 413-414.

¹⁰⁶ *Baxter Travenol Laboratories v. Lemay*, 89 FRD 410, 414 (SD Ohio 1981).

protected.¹⁰⁷ Although this case is an extreme one,¹⁰⁸ it epitomizes the importance some courts place on the flow of information between attorney and “client” so the attorney can render better legal advice. Moreover, it demonstrates the potential breadth of the functional equivalence test.

A more tempered example is *McCaugherty v. Siffermann*.¹⁰⁹ There, the court found that consultants, hired by a company to assist it in arranging the sale of another company, should be treated as functional equivalents of the hiring company.¹¹⁰ In making this determination, the court found important that: a) the consultants were hired to advance the interests of the hiring company in an “environment dense in regulations;” b) there were legal implications concerning the sale;¹¹¹ and, c) the consultants and lawyers needed to share information so that the lawyers could provide fully informed legal advice to the consultants and the company.¹¹²

b) The Context

Second, although providing regular, on-going services is indicative of functional equivalency, courts consider the context in which the third party was hired and do not always require a certain length of service.¹¹³ Consequently, a third party professional consultant can be hired for a discrete project, like the external PR consultant in the drug-recall scenario, and be deemed a functional equivalent. For example, in *Federal Trade Commission v.*

¹⁰⁷ *Id.*

¹⁰⁸ Alexander, *supra* note 14, at 321 n. 433 (critiquing the Baxter court’s “bootstrap approach”).

¹⁰⁹ 132 F.R.D. 234 (N.D. Cal. 1990).

¹¹⁰ *McCaugherty v. Siffermann*, 132 F.R.D. 234, 238-39 (N.D. Cal. 1990). This case involved a complicated fact pattern. In its simplest form, one company (FSB) hired another company (FADA) for management services and assistance in the sale of FSB. FADA hired two consultants to help with the sale of FSB. *Id.* at 235-36.

¹¹¹ *Id.* at 239.

¹¹² *Id.* at 239-240 (concluding that privilege attached, but finding company did not take steps to maintain Upjohn’s requirement of confidentiality with respect to other employees.) Similarly, in another case, the court protected all communications between the lawyer and an independent engineer hired to help develop an auto park because the engineer provided the attorneys with information necessary to obtain permits. *MLC Automotive v. Town of Southern Pines*, No. 1-05-cv-1078, 2007 WL 128945, at *4 (M.D.N.C. Jan. 11, 2007) (implying that communications from attorney to engineer were covered because they helped consultant handle client related tasks).

¹¹³ *Twentieth Century Fox Film Corp. v. Marvel Enterprises*, No. 01-Civ-3016, 2002 WL 31556383, at *2 (S.D.N.Y. Nov. 15, 2002) (finding that independent contractors providing production related services for company on temporary basis were functional equivalents because employment in movie industry is sporadic in nature and use of independent contractors in this fashion was standard practice).

GlaxoSmithKline, the FTC claimed that GlaxoSmithKline waived attorney-client privilege protection by sharing the documents with external government relations and PR consultants.¹¹⁴

The court, however, disagreed because GlaxoSmithKline's in-house attorneys

worked with these consultants in the same manner as they d[id] with full-time employees; indeed, the consultants acted as a part of a team with full-time employees regarding their particular assignments and as a result, the consultants became integral members of the team assigned to deal with issues [that] . . . were completely intertwined with [its] litigation and legal strategies.¹¹⁵

Therefore, it found "no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice."¹¹⁶

c) *Who Hires the Consultant*

Although some courts pay attention to who hires the third party consultant (client or attorney),¹¹⁷ even that distinction is not determinative.¹¹⁸ For example, the *Kovel* court stated that the Agency exception applied when *either* the attorney *or* the client hires the third party.¹¹⁹ And courts have analyzed communications with third party consultants under an agency theory when the consultants were hired by the client.¹²⁰ Similarly, to apply a functional equivalents analysis, courts have not required that the third party be hired by the client.¹²¹

¹¹⁴ Fed Trade Comm'n v. GlaxoSmithKline, 294 F.3d 141, 143-144 (D.C. Cir. 2002) (seeking all "documents related to the manufacturing and marketing of Paxil).

¹¹⁵ *Id.* at 148 (internal quotations and citations omitted).

¹¹⁶ GlaxoSmithKline, 249 F. 3d at 148 (internal quotations and citations omitted).

¹¹⁷ Cavallaro v. United States, 284 F.3d 236, 247-48 (1st Cir. 2002) (explaining that who hires the third party and when may be "probative" of an agency relationship but that it "need not determine whether, in all instances, the attorney or client . . . must hire the accountant in order to sustain a privilege under *Kovel*").

¹¹⁸ Many of the interviewees in the PR Study believed this to be a key factor and, therefore, have purposefully arranged hiring contracts through law firms for this reason. See *supra* note 330.

¹¹⁹ United States v. Kovel, 296 F. 2d 918, 922 (2d Cir. 1961); see, e.g., United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972) (explaining that it is immaterial who hired consultant or if consultant had previously provided services).

¹²⁰ See, e.g., Dorf & Stanton Communications, Inc. v. Molson Breweries, 100 F.3d 919 (Fed. Cir. 1996). See *infra* notes 263-269 and accompanying text.

¹²¹ In *NXIVM*, the consultant that was deemed a functional equivalent was a volunteer and not hired by either party. 241 F.R.D. 109, 139 (N.D.N.Y. 2007); see *supra* note 100 and accompanying text.

C. *The Law-Business Distinction in the Third Party Context*

Courts protect communications that mix business and law as long as they are “predominantly legal”¹²² or “made primarily for the purpose of generating legal advice.”¹²³ This is because a) business and law are often “intertwined” and hard to distinguish;¹²⁴ and, (b) even “the average lawyer— whether [in] house or outside counsel – often mixes his legal advice with business, economic and political counsel.”¹²⁵ Consequently, corporate lawyers pride themselves on their ability to provide integrated legal advice.¹²⁶

However, determining whether the purpose of a communication was *primarily* for garnering legal versus business advice is particularly difficult in the corporate context especially for in-house counsel because they usually play a multi-disciplinary role.¹²⁷ As one General

¹²² *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 794 (D. Del.1954) (“When he acts as an advisor, the attorney must give predominantly legal advice to retain his client’s privilege of non-disclosure, not solely, or even largely, business advice.”)

¹²³ *McCaugherty v. Siffermann*, 132 F.R.D. 234, 240 (N.D. Cal. 1990); *United Shoe*, 89 F. Supp. at 359 (“The privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.”); *United States v. Int’l Business Machines Corp.*, 66 FRD 206, 212 (S.D.N.Y. 1974).

¹²⁴ *See, e.g., Sedco Int’l v. Cory*, 683 F.2d 1201, 1205 (8th Cir. 1982); *Hercules v. Exxon*, 434 F. Supp. 136, 147 (D. Del. 1977); *Diversified Indus.*, 572 F.2d at 610; 8 J. Wigmore, on Evidence § 2296 (McNaughton rev. 1961); *see also* Murphy, *supra* note 12, at 581.

¹²⁵ *Rattner v. Netburn*, No. 88-Civ-2080, 1989 U.S. Dist. LEXIS 6876, at *15 (S.D.N.Y. June 20, 1989); *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 357, 360 (D. Mass. 1950); *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 126 (N.D.N.Y. 2007); John M. Burman, *Advising Clients About Non-Legal Factors*, 27-FEB WYO. LAW. 40, 40 (2004) (“[C]lients are in search of help with problems which they perceive . . . to involve legal issues. But they generally want more. No legal problem arises in a vacuum. . . A client usually wants, therefore, advice about how to resolve the problem, in general, and not just the legal aspects of it. Resolving a problem thus invariably involves non-legal issues.”) Sisk *et al*, *supra* note 48, at 37 (arguing that when “non-legal components of a communication are intertwined with genuine and material requests for or legal advice provided by corporate counsel, whether in-house or outside, the privilege should attach.”).

¹²⁶ As one Law Firm Partner Interviewee opined, “If you ask me to name five things you are most proud as a lawyer, I would say one is that I tend to understand the business considerations and can give [legal] advice with that very much in mind.” LP-I-L-21 at 10 (explaining that he “gives legal advice that has business impact”).

¹²⁷ *United States Postal Service, v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994); *NXIVM*, 241 F.R.D. at 126; Beardslee, *Multidisciplinary Partnerships*, *supra* note 30, at 15 (“[T]he job is multi-disciplinary and cross-functional by nature.”); *id.* at 20 (“Most general counsel have a broad range of responsibilities and perform a mixture of legal and non-legal work.”); *see also* Murphy, *supra* note 12, at 581 (“The problem is especially pronounced . . . if the attorney is in-house counsel.”); *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1069 (N.D. Cal. 2002) (“Because . . . attorneys . . . performed the dual role of legal and business advisor, assessing whether a particular communication was made for the purpose of securing legal advice (as opposed to business advice) becomes difficult.”); King, *supra* note 31, at 623; *see supra* notes 48-49 and accompanying text.

Counsel Interviewee in the PR Study explained, “It is not enough in an in-house position simply to say, well, here is the legal analysis and you make the business decisions. The business leaders and managers . . . want and they need recommendations from their lawyers” that take into account “the context of the business.”¹²⁸ Additionally, courts fear that corporations use in-house attorney participation to create a zone of secrecy.¹²⁹ This is unsurprising given the tobacco companies recent use of the privilege to shield studies conducted by external scientists about the addictiveness of tobacco.¹³⁰ Consequently, if the in-house attorney has non-legal duties, many courts require a higher showing that the attorney gave the advice in a legal capacity.¹³¹ Some courts consider whether the communication expressly requests legal advice.¹³² Others ask whether the communication would have occurred even if the client did not need legal advice¹³³ or there was no hope of privilege protection.¹³⁴ Some also consider whether a non-lawyer could have readily accomplished the task and whether the task was one normally tackled by attorneys.¹³⁵ Thus, when corporate attorneys consult with *internal* non-legal professionals, the business/law distinction becomes blurry.

¹²⁸ GC-F-S-37 at 15.

¹²⁹ First Chicago Int’l v. United Exchange Co., 125 F.R.D. 55, 57 (S.D.N.Y. 1989); Hercules, 434 F. Supp. at 142.

¹³⁰ See *supra* note 15 and accompanying text.

¹³¹ Borase v. M/A Com, Inc., 171 FRD 10, 14 (D. Mass. 1997); In re Sealed, 737 F.2d 94, 99 (D.C. Cir. 1984); Pacini, *supra* note 44, at 901 (2003); McCaugherty, 132 F.R.D. at 241; see Murphy, *supra* note 12, at 581 (“[S]ome courts . . . have imposed a heavy burden on corporations seeking to protect communications with persons holding dual legal/nonlegal rules.”) (internal citations and quotations omitted). King, *supra* note 31, at 623 (2002); Chambliss, *supra* note 54, at 1727.

¹³² Allied Irish Banks v. Bank of America, 240 F.R.D. 96, 101, 104 (S.D.N.Y. 2007).

¹³³ See, e.g., First Chicago Int’l v. United Exchange Co., 125 F.R.D. 55, 57-58 (S.D.N.Y. 1989); HPD Laboratories, Inc., v. Clorox Co., 202 F.R.D. 410, 415 (D.N.J. 2001); Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1423-24 (3rd Cir. 1991) [hereinafter Westinghouse II]; Phelps, 852 F. Supp. at 163-164; Sexton, *supra* note 2 at 459.

¹³⁴ Phelps, 852 F. Supp. at 160.

¹³⁵ Oil Chemical and Atomic Workers v. American Home Products, 790 F. Supp. 39, 39-40 (D. Puerto Rico 1992); see also Murphy, *supra* note 12, at 581. *But see* Chore-Time Equipment v. Big Dutchman, 255 F. Supp. 1020, 1022 (W.D. Mich. 1966) (“The mere fact that non-lawyers could also have performed the services in question does not in any way destroy the privilege.”).

The involvement of an *external* third party consultant adds another layer of complexity. Consider the drug-recall hypothetical. It is hard to determine whether the lawyer is meeting with the external PR consultant to help manage media spin to protect the corporation's image and bottom line or to provide legal advice to protect its ability to negotiate with shareholders or attain a fair trial or both. Although some courts resolve ambiguity in favor of protection,¹³⁶ others do the opposite.¹³⁷ The presence of a third party consultant can overshadow whatever legal purpose exists for the communication. For example, in *Allied Irish Banks v. Bank of America*, [hereinafter *AIB*]¹³⁸ the court refused to protect all documents created in *preparation* of a report on the internal investigation that was led by an independent financial services consultant and an outside law firm.¹³⁹ The court acknowledged that the investigation was a joint undertaking conducted in part so that the law firm could provide AIB with legal advice about the potential criminal, regulatory, and civil liabilities that could ensue.¹⁴⁰ However, the court reasoned that all

¹³⁶ See *Hercules v. Exxon*, 434 F. Supp. 136, 146, 148 (D. Del. 1977) (resolving doubts in favor of plaintiff).

¹³⁷ *Fed Trade Comm'n v. TRW*, 628 F.2d 207, 213 (DC Cir. 1980) (denying protection to a document that was prepared by a third party consultant to enable the law firm to advise the client regarding application of the Fair Credit Reporting Act to its current procedures because the legal/business distinction was ambiguous.).

¹³⁸ 240 F.R.D. 96 (S.D.N.Y. 2007).

¹³⁹ *Id.* at 102 (denying protection to "memos of Wachtell's investigation interviews, [and] reports of attorney communication with the bank's Board of Directors" among other documents). The court's ultimate conclusion may indeed be accurate, especially since it appears that AIB failed to present supporting evidence that the documents aided the lawyer in providing legal advice. *Id.* at 104. However, as will be discussed *supra*, its reasoning is faulty.

¹⁴⁰ *Id.* at 101. In today's post-Enron world, whether a corporation has conducted an internal investigation, cooperated and/or voluntarily disclosed wrongdoing is considered by prosecutors when deciding whether to charge a corporation and can greatly impact the amount the corporation is fined if convicted of an offense. See, e.g., Oren M. Henry, *Privilege? What Privilege? Culture of Waiver in the Corporate World*, 20 GEO J. LEGAL ETHICS 679, 684-686 (2007). See also Memorandum from Eric Holder, Deputy Attorney General, to All Component Heads and United States Attorneys (June 16, 1999) [hereinafter Holder Memo], available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>; Memorandum from Larry D. Thompson, Deputy Attorney General to Heads of Department Components and United States Attorneys (January 20, 2003) [hereinafter Thompson Memo] available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo In Theory and Practice*, 43 AM. CRIM. L. REV. 1095 (2006). The interviews with lawyers confirmed this. LP-NA-L-2 at 7 ("[I]n the past five years, it's very clear that the companies that cooperate do better than those who don't."). LP-NA-L-2 at 12-14 ("It's also very clear that the message that you are sending is: 'we are guilty if we say we are not going to waive the privilege.'"). However, recent revisions to the 2004 amendments to the Organizational Sentencing guidelines and the McNulty memo (which requires approval at a higher level before a request for waiver can be made) may change things. See Henry, *supra*, at 684, 687 (explaining that the comment in § 8C2.5 that implied corporations had to waive privilege protection to lower culpability score in certain circumstances was deleted and

the documents and notes in preparation of the report could not possibly be for the purpose of providing legal advice because the published report itself did not include legal advice and was not for the purpose of attaining legal advice.¹⁴¹ Ironically, had the investigation been led solely by the law firm, the decision may have been different.¹⁴² In short, inclusion of a third party business consultant makes the law/business distinction more complex and may lead some courts to assume that the purpose of the communication is not to attain legal advice.¹⁴³

Furthermore, in making the law/business distinction, some courts and scholars ask what type of advice the *third party consultant* provided. They consider whether the consultant is providing typical as opposed to special services.¹⁴⁴ Similarly, some scholars contend that the attorney-client privilege should only extend to certain types of third party *specialists* as opposed

discussing the McNulty memo). Moreover, if the recent proposals by the DOJ to revise its policy regarding how the Department will measure or demand cooperation are implemented, it may dissipate the culture of waiver. *See The BLT, The Blog of Legal Times*, <http://legaltimes.typepad.com/>, July 10, 2008 (last visited 7/14/2008) (explaining that these proposals are in response to the Attorney-Client Privilege Protection of 2008, S. 3217, 110th Cong. (2008) legislation introduced on June 26, 2008 by Senator Arlen Specter).

¹⁴¹ *Allied Irish Banks v. Bank of America*, 240 F.R.D. 96, 101, 104-05 (S.D.N.Y. 2007) (denying protection in part because the investigator's actual report was not legal advice or for the purpose of legal advice but also asserting that privilege protection must also be denied because financial consultant was not translating client's communications). *Id.* at 107 (observing that "critical public accountability concerns motivated the commissioning of the Report," and concluding that they necessarily also motivated "the creation of the underlying investigatory documents").

¹⁴² *See infra* notes 117-119, 328-331 and accompanying text. *Cf. In re Vioxx Products Liability Litigation*, MDL No. 1657-L, 2007 U.S. Dist. Lexis 23164 (E.D. LA. Mar. 5, 2007) (providing work product protection to the preparatory documents and communications for investigation led by lawyers alone).

¹⁴³ Court decisions like this – similar to those that do not uphold selective waiver agreements with the government – could discourage companies "from affirmatively investigating and reporting on irregularities, mistakes and outright wrongdoing" and, therefore, compliance. George T. Terwilleger, III et al, *Privilege in Peril: Corporate Cooperation in the New Era of Government Investigations*, 1592 PLI/CORP 163, 172 (January 19, 2007). Indeed, one of the factors the SEC considers in leniency is "whether the company conducted or had an outside entity conduct an internal review." *Id.* at 168. If using an outside entity destroys privilege protection for documents underlying the report, companies will not use outside entities. Arguably, an attorney may be better able to investigate whether the corporation is complying with the law and recommend how to avoid legal action in the future with the help of a third party consultant/investigator. The inclusion of an independent third party provides benefits perhaps not otherwise attainable such as enhanced cooperation with employees, accuracy, and perspective. *Cf. supra* note 261 and accompanying text.

¹⁴⁴ In one case, the court indicated that if the public relations consultant only provides standard public relations services then the communication would not be covered. *Haugh v. Schroder Investment Mgt*, No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *7-9 (S.D.N.Y. Apr. 25, 2003). *See also In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d at 329 (distinguishing a case that did not protect communications with PR consultant because, among other things, PR firm provided ordinary public relations advice); *Murphy, supra* note 12, at 585 (describing how courts consider the type of public relations advice).

to *regular* consultants.¹⁴⁵ On those same lines, others contend that communication should not be protected because the advice provided by *the third party* was not legal advice.¹⁴⁶

D. *The Role of the Work Product Doctrine*¹⁴⁷

Although a full analysis of work product doctrine is outside the scope of this Article, I turn to it briefly to demonstrate that it is not an adequate substitute for the attorney-client privilege.

Like the third party attorney-client privilege doctrine, the work product doctrine was developed to account for the realities of modern practice and the importance of third party consultation.¹⁴⁸ Generally, it protects tangible and intangible work product if it was prepared by an attorney or a representative or agent of the attorney¹⁴⁹ for litigation or in anticipation of

¹⁴⁵ See, e.g., Hantler et al., *supra* note 10 at 21-22 (claiming that the privilege should only covert litigation communication specialists and pointing out the skills and tasks of these specialists that make them “experts” compared to regular public relations consultants).

¹⁴⁶ See, e.g., Haugh, 2003 U.S. Dist. LEXIS 14586, at *8 (analyzing whether advice the PR firm provided was traditional PR advice as opposed to legal advice. See also, Murphy, *supra* note 12, at 587, 590 (arguing that communications with public relations consultants should not be protected in part because they do not provide legal advice); *id.* at 589 (“Public relations consultants do not provide legal advice.”).

¹⁴⁷ Courts consider the attorney-client privilege and work-product doctrine “inseparable twin issues” because “whenever the attorney-client privilege is raised in on-going litigation, concomitantly the work product doctrine is virtually omnipresent.” NXIVM, 241 F.R.D. at 126. Resultantly, courts are often imprecise when applying the two doctrines, relying on one to support the other. See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 391-97 (1981) (relying on work product cases to determine scope of attorney-client privilege); NXIVM Corp. v. O’Hara, 241 F.R.D. 109, 138-39 (N.D.N.Y. 2007) (merging analysis for both doctrines). Some use work product to side-step attorney-client privilege issues. See, e.g., In re Vioxx Products Liability Litigation, MDL No. 1657-L, 2007 U.S. Dist. Lexis 23164, at *8 (E.D. LA. Mar. 5, 2007) (deciding to not address the attorney-client privilege arguments because it found the communications were protected as work product). This is problematic. Although work product and attorney-client privilege doctrines are strongly allied, they are theoretically distinct. Hercules v. Exxon, 434 F. Supp. 136, 150-151 (D. Del. 1977). The former is designed to protect the adversary process, the latter to protect confidentiality so that communication can flow freely. *Id.* If courts do not consider the attorney-client privilege *ex post*, eventually it could affect the flow of information *ex ante*. Because there is the potential that the court will consider only the work product doctrine (which is not absolute), communication between attorney and client might be chilled thereby defeating the purpose of the attorney-client privilege. United States v. Zolin, 491 U.S. 554, 562 (1989) (defining the central purpose to “encourage full and frank communication between attorneys and their clients.”) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

¹⁴⁸ Hickman v. Taylor, 329 U.S. 496 (1947); United States v. Nobles, 422 U.S. 225, 238-239 (1975). Work product is governed, in part, by Federal Rule of Civil Procedure 26(b)(3) and Federal Rule of Criminal Procedure 16(b)(2). In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 332 (S.D.N.Y. 2003).

¹⁴⁹ In re Cendant Corp., 343 F.3d 658, 661-662 (3rd Cir. 2003); Federal Practice and Procedure § 2024, at 337; Fed. R. Evid. 502 (g) (2) (2008) (“[W]ork-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.”). Fed. R. Civ. Pro. 26(b)(3) states that it protects “the mental impressions, conclusions, opinions, or legal theories of the attorney *or other representative of a party* concerning the litigation.” Fed. R. Civ. Pro. 26(b)(3)(2002) (emphasis added); see

litigation.¹⁵⁰ When attorneys work with third party consultants “whose expertise and knowledge of certain facts can help the attorney in the assessment of *any* aspect of the litigation,” generally work product protection is not waived.¹⁵¹

However, the work product doctrine does not moot the issues addressed in this Article for three reasons. First, work product protection does not equate to attorney-client privilege protection. Unlike attorney-client privilege protection, work product protection can be pierced with certain showings of need.¹⁵² Second, the attorney-client privilege protects “different circumstances” than those protected by the work product doctrine.¹⁵³ Today, many legal battles are fought and won before a case is even filed,¹⁵⁴ yet courts do not consider the remote possibility of litigation to be in anticipation of litigation.¹⁵⁵ In the drug-recall scenario, the communications that occurred might not be considered to have occurred “in anticipation of

also Fed. R. Civ. Pro. 26(b)(3)(1998) (defining “other party’s representative” as “including the other party’s attorney, consultant . . . or agent”).

¹⁵⁰ *Linde Thomspson v. Resolution Trust Corp.*, 5 F.3d 1508, 1515 (D.C. Cir. 1993). Importantly, “the existence of litigation is not a prerequisite; materials qualify for work product protection if the primary purpose for their creation was related to potential litigation.” *In re Vioxx Products Liability Litigation*, MDL No. 1657-L, 2007 U.S. Dist. Lexis 23164, at *10 (E.D. LA Mar. 5, 2007) (internal quotations omitted).

¹⁵¹ *NXIVM*, 241 F.R.D. at 156. However, work product protection does not apply to third party consultants that are identified as experts that will present opinions at trial. Fed. R. Civ. Pro. 26(b)(4)(2002) (explaining that such testifying experts can be deposed).

¹⁵² *NXIVM*, 241 F.R.D. at 127; *see also* *Hickman v. Taylor*, 329 U.S. 496, 512 (1947). *United States v. Nobles*, 422 U.S. 225, 238 n. 11 (1975); *NXIVM Corp.*, 241 F.R.D. at 126; Fed. R. Civ. Pro. 26(b)(4). Some state courts, allow the attorney-client privilege to be pierced upon showings of need and relevance. *See, e.g.*, *Payton v. New Jersey Turnpike Authority*, 678 A.2d 279, 288 (N.J. Super. 1996); *Leonen v. Johns-Manville*, 135 F.R.D. 94, 100 (D. NJ. 1990) (applying state law).

¹⁵³ Although Edward J. Imwinkelried asserts that the attorney-client privilege is “hardly necessary,” he admits that courts have “severely restricted discovery of work product material from experts not called as trial witnesses.” Imwinkelried, *supra* note 10, at 49 (recognizing some of the same problems with third party attorney-client privilege doctrine highlighted here).

¹⁵⁴ *Cf.* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 519 (2004) (explaining that a significant number of case are now being resolved by Alternative Dispute Resolution and mediation instead of trial); Ellis, *supra* note 53, at 15-16; Ad Hoc Committee on the Future of the Civil Trial of the American College of Trial Lawyers, *The “Vanishing Trial:” the College, the Profession, the Civil Justice System*, 226 F.R.D. 414, 433 (2005).

¹⁵⁵ *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977) (explaining that “remote prospect of future litigation” is not in anticipation of litigation and is not work product).

litigation.”¹⁵⁶ Similarly, when an attorney meets with an accountant to discuss the structure and purpose of a transaction and potential tax consequences, the communication might not be considered to have been made “in anticipation of litigation” if subsequent litigation arises¹⁵⁷ – which often occurs after a high profile deal concludes.¹⁵⁸ Importantly, unlike the attorney-client privilege, the work product doctrine does not generally protect advice given before alleged misconduct – advice that may actually guide a client to compliance.¹⁵⁹ Also, many legal services are provided without the prospect of a trial such as preparations for an administrative proceeding,¹⁶⁰ or legal advice on disclosure statements,¹⁶¹ press tactics, or income tax returns.¹⁶²

¹⁵⁶ Cf. Moses, *supra* note 15, at 1839 (“[M]ost public relations work starts well in advance of indictment let alone a possible trial.”); Patricia L. Anel, *Inapplicability of the self-critical analysis privilege to the drug and medical device industry*, 34 SAN DIEGO L. REV. 93, 102 (1997) (“[T]he requirement that the information be compiled ‘in anticipation of litigation’ has been interpreted narrowly.”); Garfinkle v. Arcata Nat’l Corp., 64 F.R.D. 688, 690 (S.D.N.Y. 1974) (holding that the remote possibility of litigation does not meet this requirement).

¹⁵⁷ If they are not protected from discovery by the work product doctrine or attorney-client privilege, the communications “point out to the IRS the problems with the tax return and increase exposure to liability.” Jones, *supra* note 51, at 455; Cf. United States v. Arthur Young & Co., 465 U.S. 805, 812-813 (1984) (rejecting an accountant-client privilege protecting accountant’s tax accrual workpapers); Gruetzmacher, *supra* note 12, at 994 (explaining that work product doctrine “provides little protection for communications among a client, lawyer, and an accountant in connection with planning and execution of tax-advantaged transaction”). Further, some accountants cannot be protected by the work product doctrine because of the potential conflict of interest between providing an independent audit and advocacy. Pacini, *supra* note 44, at 895.

¹⁵⁸ LP-I-L-21 at 4, 7, 9 (claiming that litigation occurs after a deal is done almost 50% of the time but that “M&A is decided by dollars and cents not by litigation. Litigation can buy time. Litigation can create unpleasantness. Litigation can occasionally stop a deal but it’s rare”); GC-I-L-5(S-2) at 25 (explaining that in a hostile takeover or M&A, work product protection is less likely because the deal was not in anticipation of litigation “although certainly one could see that litigation might arise”).

¹⁵⁹ Cf. Louis Kaplow and Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 567, 569 (1999) (emphasizing the importance of *ex ante* advice and contending that *ex post* advice during litigation “cannot guide behavior for the simple reason that such advice is given only after individuals have chosen how to act”). Moreover, the fact that a consultant provided such *ex ante* advice may prevent work product protection or protection under FRCP 26(b)(4)(B) for work done by those consultants after litigation ensues unless care is taken to distinguish the two roles. See, e.g., *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 2008 WL 3878339 at *3 (Del.Ch.) (denying protection under Fed R. Civ. Proc. 26(b)(4)(B), the attorney-client privilege, and work product doctrine and explaining that Huntsman should not be able to protect communications with Merrill Lynch financial consultants that occurred prior to litigation “by simple expediency of purporting to hire the same team of Merrill Lynch employees as its counsel’s so-called litigation consultants”). Although it may make perfect business sense to use the same advisors or the same financial advising company to perform both roles, courts may suspect that the corporation is “trying to use the rule to shield testimony by a natural fact witness” and not apply work product protection or protection under 26(b)(4)(B). *Id.* at *3 (explaining that in cases that protected post litigation consultations with a financial consulting firm that was used prior to litigation, dual representation was protected because different analysts were used and/or there was a clearly defined separation between the financial and litigation advisory roles).

¹⁶⁰ Gruetzmacher, *supra* note 12, at 991-992 (explaining that work product protection would not apply).

Lastly, when documents are prepared in anticipation of litigation for both litigation and business purposes, they may not be protected.¹⁶³ For example, in the drug-recall hypothetical, even if a court determined that the meeting was in anticipation of litigation, it might not provide work product protection to either of the documents prepared by the external PR consultants because the court might determine that they were not designed primarily to assist in the pending litigation but instead to assess how to best manage negative publicity.¹⁶⁴ In one case, the court held that the attorney-client and work product doctrines were waived because confidential information was shared with the PR firm not to aid the attorneys in litigation but rather to control media spin¹⁶⁵ despite the fact that the way a trial is spun can affect judges' and juries'

¹⁶¹ In a typical securities fraud lawsuit, the communications between the client, lawyer, and any third party consultant leading up to disclosure of the client's future growth prospects would likely not be considered in anticipation of litigation because the lawsuit does not occur until after there is a drop in stock value which may not occur, if at all, for months or years after the original projection.

¹⁶² Thus, Imwinkelried's conclusion that some communications do not need to be protected by the attorney-client privilege because they will be by the work product doctrine is inapplicable outside the anticipation of litigation context. Imwinkelried, *supra* note 10, at 48-49.

¹⁶³ In re Om, 226 F.R.D. 579, 586-587 (N.D. Ohio 2005) (explaining that dual purpose documents "would have been generated in the absence of pending or possible future litigation"). In In re Om, the court ultimately privileged the documents but explained that this is not a certain result since there were business and litigation purposes that could not be separated. *Id.* at 594.

¹⁶⁴ In Rattner, the court refused work product protection to the public announcement crafted by the attorneys because the document was prepared to "bolster" the corporation's image that also had potential use in pending litigation. Rattner v. Netburn, No. 88-Civ-2080, 1989 U.S. Dist. LEXIS 6876, at *18-19 (S.D.N.Y. June 20, 1989); Kyle Kveton, *The Question of Whether a Lawyer Has Given Legal or Nonlegal Advice is Highly Fact-Specific*, 28-SEP. L.A. LAW. 31, 36 (2005) ("[W]ork product protection may not extend to business strategy or public relations plans"). Although some courts protect documents if they were prepared "primarily to assist in litigation" "others do so "if they were prepared *because of* existing or expected litigation." Adlman II, 134 F.3d 1194, 1198 (2d Cir. 1998) (applying the *because of* standard). *Id.* at 1195. *See also*, Maine v. United States Dept of the Interior, 298 F.3d 60, 67 n. 8 (1st Cir. 2002) (noting that the first, fourth, eighth, seventh, and third circuits have adopted the *because of* standard). U.S. v. ChevronTexaco Corp., 241 F.Supp.2d 106, 1082 (N.D. CA 2002) (explaining that a court will deem a document to have been prepared in anticipation of litigation "if 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation" and that [Rule 26\(b\)\(3\)](#) does not "state that a document must have been prepared to *aid* in the conduct of litigation in order to constitute work product, much less *primarily or exclusively* to aid in litigation. Preparing a document 'in anticipation of litigation' is sufficient."). Some courts define the "because of" test like a "but-for" test. *See, e.g.*, Hexion Specialty Chemicals, Inc. v. Huntsman Corp., 2008 WL 3878339 at *4 (Del.Ch.).

¹⁶⁵ NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 109 (N.D.N.Y. 2007); *id.* at 132-33, 142; *see also* Burke v. Lakin Law Firm, PC., No. 07-cv-0076-MJR, 2008 U.S. Dist. LEXIS 833, at *8 (S.D. Ill. Jan. 7, 2008) (denying protection of emails between client and PR firm because they "discuss preparation and strategy for minimizing the public relations fallout that could result from the pending litigation [The work product doctrine] does not protect documents that were merely prepared for one's defense in the court of public opinion."); Calvin Klein I, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) ("[T]he purpose of the [work product doctrine] is to provide a zone of secrecy for

decisions.¹⁶⁶ In a recent case involving a failed merger, a court held that that work product protection did not apply to consultations with financial advisors because the “presentations are similar to presentations one would expect from a company’s financial advisors in the context of a disputed merger agreement.”¹⁶⁷ Although the court admitted that “some of those presentations address questions raised by the outbreak of litigation,” it found that “the advice relates to business issues rather than the conduct or defense of litigation” and that the financial advisors were acting as financial advisors instead of in some “other capacity.”¹⁶⁸ In sum, many of the same problems inherent in making the law/business distinction in the attorney-client privilege context exist when the work product doctrine is involved. Thus, when consultation with third parties is not covered by the attorney-client privilege, it often does not fall within the protective shadow of the work product doctrine as well.¹⁶⁹

III. ANALYSIS OF THE EXCEPTIONS

Although this Article assumes that the attorney-client privilege applies to corporations as it has since 1915, the risks and benefits associated with having a corporate attorney-client privilege are relevant to deciding how and when third party communications should be protected and analyzing the effectiveness of the current doctrine. The risks often discussed in the literature

strategizing about the conduct of the litigation itself, not for strategizing about the effects of the litigation on the client’s customers, the media, or on the public generally.”). Under the narrow interpretation of the agency exception, a court would have denied protection but under a broad interpretation it might have protected the communication if it somehow facilitated the lawyer’s provision of legal services.

¹⁶⁶ See generally Beardslee, *Advocacy Part I*, *supra* note 6, at Part I. See also *infra*, note 186.

¹⁶⁷ *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 2008 WL 3878339 at *5 (Del.Ch.) (rejecting Huntsman’s argument that “Merrill Lynch would have no reason to create its post [litigation] work product in the absence of pending or anticipated litigation”).

¹⁶⁸ *Id.*

¹⁶⁹ Work product provides even less protection in state courts because some “confine absolute work product protection to written material reflecting the attorney’s personal mental impressions and legal theories.” Imwinkelried, *supra* note 10, at 22 (explaining that work product does not protect communications between attorneys and non-testifying experts in many states). In federal courts, however, the work product doctrine protects tangible and intangible work product. See *supra* note 149.

and in case opinions are: corporate misconduct and a shield against discovery of information.¹⁷⁰ The benefits often discussed are informed decision making and increased compliance.¹⁷¹ Also frequently integral to the analysis are concerns around predictability and clarity.¹⁷² Therefore, I contend that third party attorney-client privilege doctrine should seek to restrict the risks and wreak the benefits in a way that is consistent with the spirit of the doctrine. When these criteria are considered, it becomes clear that, at the margins, third party attorney-client privilege doctrine today is at once overly broad and overly narrow. Moreover, it is unpredictable.

A. *The Narrow Approach is Too Narrow*

The narrow interpretation of *Kovel*, although predictable, is not the appropriate standard to apply to communications between attorneys and third party consultants.

1. Not in Keeping with the Spirit of the Doctrine

Significantly, it is not clear that the original *Kovel* decision was supposed to be read as narrowly as the Second Circuit did in *Ackert* thirty-eight years later.¹⁷³ First, in limiting *Kovel* to

¹⁷⁰ This is one of the main arguments that opponents to the corporate attorney-client privilege make. See, e.g., Alexander, *supra* note 14, at 195 (“In a large corporation, cloaking all such communications with an inflexible privilege may produce a veil of darkness so impenetrable in some cases as to preclude effective discovery of the truth.”). Opponents also often support their position by highlighting the tactical costs associated with the zone of secrecy. Alexander, *supra* note 14, at 229 (explaining that “unearthing corporate knowledge may be quite difficult” and may “require depositions of numerous directors, officers and employees.”)

¹⁷¹ *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (explaining the importance of balancing these “two conflicting forces”); *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 125 (N.D.N.Y. 2007) (“The free flow of information and the twin tributary of advice are the hallmarks of the privilege. For all of this to occur, there must be a zone of safety for each to participate without apprehension that such sensitive information and advice would be shared with others without consent.”); *Hercules v. Exxon*, 434 F. Supp. 136, 144 (D.C. Del. 1977) (“In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity.”); Tanina Rostain, *The Emergence of Law Consultants*, 75 FORDHAM L. REV. 1397, 1426 (2008) (“The importance of the attorney-client privilege is premised on its capacity to further social values. . . not only . . . to assist counsel in formulating legal advice. . . [but] to create a zone of privacy . . . to convince corporate clients to abide by the law.”); see also note 195. Opponents claim claiming that more full and open communications with attorneys would still occur even if the attorney-client privilege did not apply to corporations because business professionals have to disclose information to lawyers in order to make good business decisions. Alexander, *supra* note 14, at 225-226; Paul R. Rice, *The Corporate Attorney-Client Privilege, Loss of Predictability does not Justify Crying Wolfinbarger*, 55 BUS. LAW. 735, 739-42 (2000); See also *supra* note 188.

¹⁷² See *supra* Part III. D. 1.

¹⁷³ *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999).

only apply protection to third party interpreters,¹⁷⁴ the Second Circuit relied primarily on two older decisions that do not support the narrow interpretation.¹⁷⁵ Second, the facts in *Ackert* are meaningfully different from those in *Kovel*. In *Ackert*, it was not apparent that the third party accountant had been hired to help with the specific project for which the attorneys were providing legal services.¹⁷⁶ Lastly, given the language of *Kovel*, the court likely considered its holding applicable to other situations where the “assistance of the[] agents is indispensable to [attorneys’] work.”¹⁷⁷ *Kovel* was justified based on the realities of modern practice at the time. The “complexities of modern existence” make it even more difficult than it was in 1961 to “handl[e] client’s affairs without the help of others.”¹⁷⁸

If it is true, as I posit, that attorneys sometimes have to consult with third party specialists in order to provide integrated legal advice, the Second Circuit’s reading of *Kovel* – even if accurate – is too narrow today. When applied literally, it bars protection for most communications with most third party consultants because: (a) companies usually do not need to hire third parties to assist their own employees in communicating with its attorneys; and, (b) consultants are hired primarily for their cumulative knowledge and expertise.

¹⁷⁴ *Blumenthal v. Drudge*, 186 F.R.D. 236, 243 (DC Cir. 1999) (denying protection because litigation consultant “was retained for the value of his own advice, not to assist the defendant’s attorneys in providing their legal advice”); *United States Postal Service, v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 162 (E.D.N.Y. 1994); *see also*, *Occidental Chemical Corp., v. OHM Remediation Services Corp.*, 175 F.R.D. 431, 437 (W.D.N.Y. 1997) (rejecting application of privilege to engineering consultants in part because consultants relied on information not obtained from client).

¹⁷⁵ The Court relied on a passage in *Hickman v. Taylor* that explains that information that an attorney procures from witnesses in anticipation of litigation is not covered by the attorney-client privilege but rather by the work product doctrine. *Ackert*, 169 F.3d at X (citing *Hickman*, 329 U.S. at 508 (1947)). It also relied on *Colton v. United States*. *Id.* at X. There, however, the defendant conceded that third parties were not covered and failed to assert any theory upon which to justify the privilege. *Colton v. United States*, 306 F.2d 633, 640 (2d Cir. 1962) (commenting that the principle behind the admittance is “obvious”).

¹⁷⁶ *Byrnes v. Empire Blue Cross Blue Shield*, No. 98-Civ-8520, 1999 WL 1006312, at *2 (S.D.N.Y. Nov. 4, 1999) (distinguishing *Ackert* on this basis).

¹⁷⁷ *United States v. Kovel*, 296 F. 2d 918, 921 (2d Cir. 1961) (internal citations and quotations omitted). When *Ackert* was written, the three judges that wrote *Kovel* had been dead for over 10 years.

¹⁷⁸ *Kovel*, 296 F. 2d at 921 (internal citations and quotations omitted); *see supra* notes 51-59 and accompanying text.

Even the small group of third party consultants most often protected by courts – like doctors,¹⁷⁹ auditors, and accountants,¹⁸⁰ – are not merely transmitting information into a more understandable language or functioning as merely ministerial agents. They are, as Professor Edward J. Imwinkelried points out, “adding an important increment of [their own] knowledge to evaluate the client’s communications and other case-specific information.”¹⁸¹ For example, auditors conduct trends analysis and make judgments about the company’s calculations when they certify that the corporation’s financial statements are not materially misstated and are in accordance with applicable accounting standards.¹⁸² Ironically, even accountants (the type of third party consultant originally protected by *Kovel*) do more than put the client’s information into a more usable format.¹⁸³ As claimed by scholars and judges alike, “[o]n closer scrutiny, the [translator] analogy breaks down.”¹⁸⁴ Hence, the narrow interpretation of *Kovel*, although more predictable, is under-inclusive and borders on pretence.

¹⁷⁹ Courts reason that the doctor is the conduit and “the client is the source of information” that “reveals intensely personal information to enable the [doctor] to translate the data, [the patient’s condition], into a form usable by the attorney.” Imwinkelried, *supra* note 10, at 24-29; *People v. Lines*, 13 Cal. 3d 500, 511 (1975); *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 237 (1951).

¹⁸⁰ See, e.g., *United States v. Judson*, 322 F.2d 460, 462 (9th Cir. 1963) (protecting communication with accountant); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *United States v. Schmidt*, 360 F. Supp. 339 (D.C. Pa. 1973).

¹⁸¹ Imwinkelried, *supra* note 10, at 31, 36, 37 (“The expert creates new information and thereby becomes an independent source of information about the case”); see also Gruetzmacher, *supra* note 12, at 980 (explaining that business advisors “do not translate information from the client to the attorney; rather, they provide information independently to the attorney”); *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 141 (N.D.N.Y. 2007) (explaining that PR consultants do not meet the test outlined in *Kovel* and categorizing *Kovel* and Ackert tests as “narrowly tailored”); See, e.g., *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1047-48 (E.D.N.Y. 1976) (“The doctor’s observations and conclusions are based upon far more than the client’s communications.”) (citing Jack H. Friedenthal, *Discovery and use of an Adverse Party’s Expert Information*, 14 STAN. L. REV. 455, 463-64 (1962)).

¹⁸² *United States v. Cote*, 456 F.2d 142 (8th Cir. 1972) (applying a broader interpretation of *Kovel* to protect communications with auditor).

¹⁸³ For example, when the accountant does a quality of earnings analysis about an acquisition candidate, the accountant analyzes and evaluates the significance of the information gleaned from the client and other sources. *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1072-73 (N.D. Cal. 2002) (holding communications between lawyer and accountant were not privileged because accountant did more than translate); *Black and Decker Corp. v. United States*, 219 F.R.D. 87, 89-90 (D. Md. 2003) (same).

¹⁸⁴ Imwinkelried, *supra* note 10, at 36; *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976) (noting that relying on the interpreter analogy to extend privilege to psychiatrists is “not beyond criticism”).

Interestingly, courts that adhere to a narrow reading of *Kovel* recognize that “[e]ven the most proficient and prolific attorneys have to resort to consultation with others in order to render full and complete legal services to their clients.”¹⁸⁵ For example, in a case involving an external PR firm, the court acknowledged that “the PR firm [might] need[] to know the attorney’s strategy in order to advise as to public relations, and the public relations impact [might] bear[] in turn, on the attorney’s own strategizing as to whether or not to take a contemplated step in the litigation itself and if so, in what form.”¹⁸⁶ But because these considerations are not taken into account when applying the narrow version of *Kovel*, the court would not privilege any of the communications between the lawyer and external PR agents.¹⁸⁷ Similarly, a court taking a narrow approach to *Kovel* would not privilege any of the communications involved in the drug-recall scenario. In all of the documents and recommendations, the external PR consultant provides information and advice of his/her own. Not even the notes taken by the external PR consultant can be said to serve a translator function. Moreover, even if all the attorneys’ comments on the draft press release were specific legal advice, they would not be protected under the narrow approach because confidentiality was breached by sharing the draft press release with the third party consultant.

2. May Result in Less Informed Decision-Making

Evidence suggests that lawyers, even if they truly need the advice, might not resort to third party consultation if they know beforehand it waives protection in all situations other than when the third party translates.¹⁸⁸ For example, the qualitative research I conducted in the PR

¹⁸⁵ NXIVM Corp. v. O’Hara, 241 F.R.D. 109, 140-41 (N.D.N.Y. 2007).

¹⁸⁶ Calvin Klein I, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (applying narrow agency theory).

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., Imwinkelried, *supra* note 10, at 27 (explaining that denying all protection to experts used for pretrial preparation “deters thorough pretrial investigation”); Gruetzmacher, *supra* note 12, at 977 (“No competent attorney would engage in confidential communications with a . . . representative of a client unless he were certain the privilege would apply.”). Admittedly, this evidence is from the corporate bar and, therefore, is subjective.

Study suggests that absent the possibility of protection, general counsels would either refrain from revealing confidential information or forego third party consultation with PR consultants altogether.¹⁸⁹ As one outside attorney vividly exclaimed, such a rule would “put the PR people out of business in all litigated matters – no one would hire them.”¹⁹⁰

This is problematic for several reasons. First, the deterrent effect is placed at the wrong point in the decision-chain. The effect is to discourage lawyers from seeking needed guidance, but it is not the attorneys’ privilege to lose. Lawyers would have to inform clients that they want third party expertise but that any shared information would be discoverable.¹⁹¹ Knowing what this means, lawyers might have to counsel the client against third party consultation even if the lawyer believed he/she could provide better legal advice with the consultation.

Second, a narrow rule may result in less adequate legal services. For example, if the narrow reading of *Kovel* was “the” standard, tax shelter transactions will continue to occur but lawyers may choose not to consult with accountants (who often know more than lawyers do about tax shelters); and therefore, clients may not get the best advice.¹⁹² Alternatively,

However, as Professor Lonnie Brown stated in the context of compelled waivers “[w]hether real or imagined, that belief alone could prove to be a self-fulfilling prophesy, which is enough to establish the existence of a very real problem.” Brown, *supra* note 63, at 946; Henry, *supra* note 140, at 689. A common argument against the corporate attorney-client privilege is that “businesses are forced by circumstances and impelled by business necessity to resort to lawyers,” and “the benefits of communicating with counsel outweigh the risks.” Brown, *supra* note 63, at 924. However, this is not necessarily true of third party consultation. It may not be worth the risk to the lawyer because discovery that an attorney ignored a consultant’s advice even if it was a logical decision could have drastic consequences in court. On the other hand, if the attorney and corporation have already decided to do something risky or illegal, they likely would not engage the consultant even if the privilege would protect the communication.

¹⁸⁹ See, e.g., GC-F-L-4 at 21.

¹⁹⁰ LP-I-L-25 at 3.

¹⁹¹ See, e.g., GC-F-L-4 at 21 (stating that “[he] would owe it to [his] client to tell them that” and then the client would likely not want the GC to talk to the external PR consultant). Arguably, given the state of the doctrine, attorneys should be making these types of warnings today. Some scholars and practitioners contend that malpractice suits can arise out of nonlegal advice from lawyers. See e.g., John C. Watson, *Litigation Public Relations: The Lawyers’ Duty to Balance News Coverage of Their Clients*, 7 COMM. L. & POL’Y 77 (2002) (finding “a basis in contract and malpractice law for requiring criminal attorney’s to tend to their client’s interest in the court of public opinion as zealously as they do in courts of law.”); Kveton, *supra* note 164 at 32.

¹⁹² Gruetzmacher, *supra* note 12, at 994 (making similar point with respect to attorneys consulting accountants). Since the narrow interpretation denies protection to almost all third party consultants, in those states where courts

consultation might still occur but less openly. For instance, in the drug-recall scenario, the executives at the senior strategy meeting may be more hesitant to share information with the external PR agency.¹⁹³ As one General Counsel explained, “if people are scared to talk in meetings because they are afraid it’s going to be discovered someday then you don’t [get] good advice . . . and you don’t make good decisions if you don’t get good advice.”¹⁹⁴ Essentially, when people are not armed with the full story, decision making is impeded and the risk of liability is increased. Many of the General Counsel Interviewees expounded that “if PR people don’t have a full understanding of a story,” they “can’t make decisions [sic] that are made properly.”¹⁹⁵ For example, PR consultants may sugar-coat something, like a consent decree, that

apply a narrow interpretation of Kovel and deny work product protection for the intangible, attorneys may be unable to adequately prepare for trial. Imwinkelried, *supra* note 10, at 28 (citing commentators that claim rejecting protection to all third party experts “deals a crippling blow to pretrial investigation and makes it virtually impossible to prepare adequately for trial”). Further, attorneys may then prefer to seek advice from biased experts so that if the expert communications are disclosed they have potential to be in the client’s favor. *Id.* at 28. These two points do not resonate as much in the federal context because the work product doctrine may protect the communications at issue since there is a filed cause of action.

¹⁹³ Another potential unanticipated consequence might be to exclude lawyers from engaging in the multi-disciplinary teams to avoid the risk that the lawyer will disclose confidential, strategic legal information that could later be construed as a waiver of the privilege.

¹⁹⁴ LP-NA-L-2 at 16. *See supra* note 34; *see also* GC-I-L-12(S-3) at 6 (“They have to know what’s going on in order to give you good advice.”).

¹⁹⁵ *See e.g.*, GC-I-L-5 (S-2) at 21; GC-P-L-8 (S-27) at 27 (“I don’t think it’s fair to give them only a part of the story, they can’t contribute I don’t think as well if they’re limited.”); GC-P-S-22 at 68 (“If you keep people in the dark, they end up being mismanaged.”). LP-NA-L-2 at 15 (“[Y]ou can’t really have comfortable candid conversation with [the PR consultant] if you know that you may be waiving the privilege.”) *See supra* note 34. Proponents of the corporate attorney-client privilege often assert that “even if” “the modern corporation has no choice but to communicate with attorneys, a corporate privilege still might serve to make those communications that do occur more candid and truthful, as well as to prevent corporate employees from simply refraining from supplying information.” Sexton, *supra* note 2, at 465 (internal quotations omitted); Chambliss, *supra* note 54, at 1755 (“[M]ost lawyers and corporate officials believe that the privilege does in fact promote candor in attorney client communications especially as to potential litigation another sensitive matters.”). As the General Counsel of Johnson and Johnson is reported as stating “without the privilege, you discourage the necessary level of trust and open communication between business people and lawyers that is necessary for good decision making.”

<http://www.metrocorpocounsel.com/current.php?artType=view&artMonth=January&artYear=2008&EntryNo=6130>. A General Counsel Interviewee of a large pharmaceutical company explained “I am a big believer in the privilege. You know when you read some of these opinions on the privilege and they say the privilege prevents people from finding out what’s really going on inside the world. I think they have it completely backwards. The privilege is what allows my clients to come to me in the worst times and tell me honestly, that they have done something that they are worried about.” GC-F-L-4 at 21 This sentiment is supported by the fact that even the two Interviewees that claimed there was less risk of disclosure for M&A deals due to professional courtesy and recognition by some Delaware courts of a “deal privilege,” stated they would be less forthcoming with external PR consultants if the narrow approach were adopted. *See, e.g.*, LP-I-L-21 at 11; GC-I-L-5 (S-2) at 23. *See supra* note 279.

should be addressed more candidly so that regulators do not bring additional charges.¹⁹⁶ Or “they may inadvertently say something they’re not supposed to”¹⁹⁷ that are construed as admissions, false exculpatory statements, or statements later found inconsistent.¹⁹⁸ Whether it is less information sharing or refusal to consult altogether, the effectiveness of the legal advice and the client’s best interests may be at risk.¹⁹⁹

3. May Discourage Corporate Misconduct but Not Enhance Discovery

As discussed above, under the narrow rule, few if any communications with third party consultants can legitimately be predicted to be privileged. Therefore, to its credit, the narrow approach does not enable corporate misconduct nor support a lawyer’s inclination to take a broad approach to the corporate attorney-client privilege. Despite this, however, it is not apparent that discovery will be enhanced, that is, that more accurate information will flow to the public with such a narrow rule.²⁰⁰ For example, general counsels in the PR Study explained that the dialogue

¹⁹⁶ LP-NA-L-2 at 22.

¹⁹⁷ *Id.*; see also GC-I-L-5 (S-2) at 11-12 (explaining that even when a company is innocent of charges, something that is said in the paper might lead to an investigation for internal control problems under rule 404 which “could lead to both civil or regulatory liability”).

¹⁹⁸ Kevin Munigal, *Client Media Campaigns in Criminal Cases*, Essay Draft 6-22-08 (on file with author). Consider the recent Roger Clemens scandal. It is impossible to know what information Clemens shared with his attorney or PR representatives or when. However, it does not appear that PR executives were consulted early on or that when they were consulted, they were given the whole story. Testifying before Congress damaged Clemens reputation, his professional future and could have subjected him to perjury charges. Whether he lied or not, there was the appearance that he lied. Hypothetically, had his attorney wanted to convince Clemens not to testify, he may have been able to do so armed with information a PR executive could supply about the potential ramifications of denying steroid use before Congress after a long period of silence. Alternatively, if the attorney was unsuccessful in convincing Clemens not to testify, he may have helped Clemens decide to make a public denial earlier before the hearings began (if a denial was truthful). Marene Gustin, *Does Your Business Need A Crisis Plan?*, DAILY COURT REVIEW ON THE WEB, <http://www.dailycourtreview.com> (visited 5/12/2008) (“By delaying his press conference in the wake of the Mitchell Report about steroid abuse in major league baseball [Clemens] gave bloggers and the mainstream media time to come to their own conclusions.”). In both situations, the attorney would have provided better legal advice because the business repercussions (gleaned, in part, from communications with the PR executives) would have been incorporated. Then again, it could be that Clemens’ attorney consulted with PR executives and did not receive good advice or was unable to convince Clemens to take good advice.

¹⁹⁹ Another potentially damaging consequence of such a narrow rule is that counsel may try to fill in the gaps – despite not being qualified to do so. This harms the client and could undermine the lawyer’s reputation.

²⁰⁰ Opponents to the corporate attorney-client privilege often support their stance by claiming that more information will be discoverable without a corporate attorney-client privilege. Cf. Alexander, *supra* note 14, at 195 (“In a large corporation, cloaking all such communications with an inflexible privilege may produce a veil of darkness so impenetrable in some cases as to preclude effective discovery of the truth.”).

that occurs between the PR consultant and the attorney balances the attorney's instinct to limit exposure and the PR consultant's desire to divulge.²⁰¹ True, the issue may be spun in the media even if lawyers are not involved. However, because the facts surrounding legal issues are often complicated and hard to communicate to a lay audience, an open dialogue between attorneys and PR consultants may enable more specific and more accurate information to reach the public.²⁰² Denying protection, therefore, may lead to an altogether different zone of secrecy, one in which corporations mouth generalities and hold back specific information or worse, one in which the typical response is "no comment." One General Counsel Interviewee explained the effect a very narrow rule would have had on a prior legal controversy:

It would put a larger wall between PR and Legal. There would be less communication between the people[W]e would have probably fallen back more often on "No Comment." So then the interests of the world would have been less served, presuming that the world has an interest in having information. The world would have gotten less of the story, and frankly more of a misunderstanding of what had actually happened would have been promulgated.²⁰³

The 2001 Fair Disclosure Regulation ("Reg FD") has had a similar effect.²⁰⁴ Reg FD was passed to prevent issuers from selectively disclosing material information to analysts, brokers or journalists even for a legitimate corporate purpose because these select individuals could potentially gain a trading benefit.²⁰⁵ Thus, Reg FD requires an issuer to simultaneously or promptly disclose material information to the public that an issuer purposefully or inadvertently discloses to anyone regarding that issuer or its securities.²⁰⁶ Ironically, although Reg FD requires more disclosure, those disclosures do not necessarily provide more meaningful, accurate

²⁰¹ See, e.g., GC-F-L-4 at 9; GC-F-S-38 at 12.

²⁰² According to many of my interviewees, the media "tends to oversimplify complex issues" and get the facts and details wrong" when left to their own devices. See e.g., LP-NA-L-31 at 21. For further discussion of the role corporate attorneys play in managing media spin around legal issues see generally See Beardslee, *Advocacy Part I*, *supra* note 6.

²⁰³ GC-I-L-5 (S-2) at 20.

²⁰⁴ See *supra* note 54.

²⁰⁵ Barr, *supra* note 54.

²⁰⁶ Securities Exchange Act § 243.100.

information to the public.²⁰⁷ Empirical studies show that estimates by analysts are actually less accurate since Reg FD was passed.²⁰⁸ Analysts that used to rely on early access to non-public information to project earning expectations now do not have that information and, as a result, are “less certain [their] earnings estimates will match the profit” that they report.²⁰⁹ Ironically, a more restrictive privilege rule may not achieve its intended benefit of more disclosure.²¹⁰

Another consideration is the risk that attorneys will be even more hesitant than they already are to put anything into writing when it involves third party consultants.²¹¹ As an interviewee explained, lawyers currently “worry about documents because they last forever and can be taken out of context.”²¹² “Lawyers are more conservative perhaps than they would be if they are giving oral advice. [Written advice] can be discovered so that if you are actually making the arguments in both directions you don’t want the judge to read the downside of the argument.”²¹³ This worry would only increase if the narrow rule was the only rule. “If you knew that every time you put something in writing, you faced a real risk that that communication . . . is not going to be considered privileged by the court, [it would] impact the way you wrote. . . . Anybody that tells you anything to the contrary, isn’t being honest.”²¹⁴ A General Counsel

²⁰⁷ Barr, *supra* note 54 (explaining that Reg FD has increased the amount of information flowing to the public from corporations but that the market is not necessarily better informed).

²⁰⁸ See, e.g., Anup Agrawal et al, *Who is Afraid of Reg FD? The Behavior and Performance of Sell-Side Analysts Following the SEC’s Fair Disclosure Rules*, J. BUS. (Nov. 2006).

²⁰⁹ Jeff D. Opdyke, *The Big Chill: Street Feels Effect of the New Fair Disclosure Rule*, WALL ST. J. (Oct. 23, 2000).

²¹⁰ Indeed, Reg FD may exacerbate this if the narrow rule is the adopted rule. One General Counsel interviewee stated he worries he could “inadvertently get [him]self into a Reg FD situation” if he knew that conversations with external PR consultants could not be privileged except under a translator analogy. GC-I-L-5 (S-2) at 9-10.

²¹¹ Liability often turns on what is provable not on substance. The lawyers may have made the same recommendations and the company the same decisions but a memo that, for example, advises the client against sanctionable action, can ruin a case. *But see*, Brown, *supra* note 63, at 942 (arguing in the context of compelled waiver that “[a] lawyer’s ethical duty of competency combined with fear of malpractice liability or the possibility that some other civil or criminal action will be instituted against him or her seem to provide ample motivation for careful documentation and record-keeping.”).

²¹² LP-NA-L-27 at 6; *id.* at 7 (“urg[ing] clients generally” to “take their advice orally rather than in writing”).

²¹³ *Id.* at 7.

²¹⁴ LP-NA-L-31 at 24; *see also* GC-I-L-6 (S-1) notes on file with author at 5 (“It’s not like you will have a lot of written things that you are sharing if you thought you would lose privilege.”).

Interviewee of a large investment bank said sarcastically “Memory always serves you better than writing.”²¹⁵ Given that depositions, even in good faith, do not yield accurate, complete information, discovery is impaired by the failure to keep an accurate record.²¹⁶

A less restrictive rule might make lawyers more comfortable keeping a record of conversations. As one Law Firm Partner Interviewee remarked “[lawyers] may be more comfortable Clients will get better legal advice. It will facilitate your communication if you know that what you were saying or what you were writing is going to be protected so that you d[on’t] have to be constructing even more protections to make sure that you’ve done what’s necessary to try and maximize the privilege.”²¹⁷ Further, uninhibited consultation between attorneys and third party specialists might help corporations craft disclosures in compliance with Reg FD that are less risky but more forthcoming. Similarly, a better understanding of the tax implications of a transaction gained from an investment banking consultant may enable the lawyers to persuade their corporate clients to provide more detailed disclosure to stockholders. If there is value in the public exchange of information, as the Supreme Court has intimated in cases addressing the First Amendment,²¹⁸ a narrow rule may not suffice.

4. May Not Increase Compliance

Lastly, although such a narrow standard may deter corporate misconduct, lack of third party consultation may lead to less compliance and less socially desirable decisions.²¹⁹ For

²¹⁵ GC-I-L-6 (S-1) notes on file with author at 5.

²¹⁶ “[W]ith respect to what’s orally said in the meeting, I also don’t worry about it frankly too much because you have endless number of meetings, and if you were called to testify as to what happened in the meetings no one will remember terribly well what happened three months ago.” LP-NA-L-27 at 6.

²¹⁷ LP-NA-L-31 at 24.

²¹⁸ *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561-62 (1980) (referring to “the societal interest in the fullest possible dissemination of information”); *see also* *Bates v. State Bar of Arizona*, *supra*, at 374, 97 S.Ct., at 2704 (explaining in the context of commercial speech that “[e]ven when advertising communicates only an in-complete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all”).

²¹⁹ *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 390-394 (1981) (emphasizing that a narrow interpretation of the attorney-client privilege “threatens to limit the valuable efforts of corporate counsel to ensure their client’s

example, when lawyers consult openly with PR executives they better understand the reputational ramifications. This may help the lawyer convince the CEO against taking a certain legally risky action. If a large clothing company is considering contracting with a manufacturing plant that borders on being a sweatshop, after consultation with a PR executive a lawyer may be able to convince the CEO not to contract with the company or to do so in a manner that protects the company from risk of liability and provides a better media platform at the same time.²²⁰ In fact, lawyers often couch legal advice in business consequences.²²¹ Additionally, as a few General Counsel Interviewees pointed out, consultation with a PR specialist may help the attorney determine what a corporation should disclose because a PR expert may better understand what the public would think was material.²²²

compliance with the law”). Proponents of the corporate attorney-client privilege often assert that it helps the flow of information between attorney and client and thus compliance with the law. Alexander, *supra* note 14, at 222. Opponents to the corporate attorney-client privilege often use cases like Enron and World Bank to emphasize how the attorney-client privilege enables corporations to finagle regulations and avoid compliance.

²²⁰ One PR interviewee made this same point. He said that often lawyers will make the argument that a particular transaction or course of action should be pursued because it is legally appropriate, but that he will explain that the company will get highlighted publicly in a way that is significantly disadvantageous and that this would convince senior management to forgo the action. PRI-I-L-19 at 5. For example, in the South it is perfectly legal to engage in mountain top removal to mine the coal even though it is environmentally destructive. After talking with a PR executive, an attorney might successfully argue against the company’s involvement from a reputational standpoint.

²²¹ Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO J. LEGAL ETHICS 465, 478 (2008) (explaining that the general counsels in her study “deployed a variety of techniques, including invoking reputation and ethical considerations to persuade their peers, proposing different, less risky ways to structure transaction”); *In re County of Erie*, 473 F.3d 413, 420 (2d. cir. 2007) (explaining that the “complete lawyer may well promote and reinforce the legal advice given, weight it, and lay out its ramifications by explaining” implementation, alternative measures, and “collateral benefits, risk or costs in terms of expense, politics, insurance, commerce, morals, and appearances”). See also *supra* Part I.

²²² GC-I-L-9 (S-23) at 6; see also GC-F-S-36 at 17 (“I think you have to divulge some confidential information to the PR folks so they can understand what it is. . . . There are certain times when [our company] was a public company, if we had a potential crisis aside from whether we wanted to talk about a PR disclosure, we may have other legal disclosure obligations as part of the SEC or part of the other regulatory environment. . . . So that may force us to take a public position on something, but you can’t really get to that determination without having a fully staffed team that has PR individuals on there to collectively determine that as a group.”); see also *supra* note 36.

This is not to imply that PR executives control the legal decisions but they do have influence. LP/PRE-NA-L-3 at 15. As a PR Interviewee explained, “I mean I cannot say that somebody has ever written me a letter and said, ‘Okay because of what you said we are not going to do this,’ but there have been discussions about both legal and public relations difficulties that could arise from a particular activity of the client and they decide to change or even not to do it.” *Id.* Also, although it was not true for most of the interviewees, some claimed that their companies have very experienced seasoned *internal* PR executives that the lawyers consult with in lieu of external PR consultants. Beardslee, *Advocacy Part I*, *supra* note 6 at X.

Similar benefits may stem from consultation with other types of third party consultants. For example, consultation with the investment bankers handling the company's upcoming merger could help the attorney decide what information should be disclosed to the other corporation. Similarly, an attorney may be better able to assess and convince the client of the risks of a possible restructuring by talking openly with a tax consultant.²²³ Or an attorney may be better able to investigate whether the corporation is complying with the law and recommend how to comply in the future with the help of a third party consultant/investigator like the one in *AIB*.²²⁴ By consulting with these external specialists a lawyer is better able to a) provide the 360 degree counseling clients need and b) play the gatekeeper role.²²⁵ Additionally, when external consultants are part of the internal multi-disciplinary team handling the project, they may be an indispensable source of risk information because part of their role is to help manage and predict risks that internal employees and consultants might overlook.²²⁶

²²³ Not all large corporations have in-house tax specialists.

²²⁴ See *supra* notes 138-142 and accompanying text. The Supreme Court made a similar point when justifying application of the privilege to lower level corporate employees. Absent the protection of the privilege, "the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken. *Upjohn Co. v. United States*, 449 U.S. 383, 393 n.2 (1981).

²²⁵ See *infra* note 358. An attorney is better able to provide the moral counseling often sought by clients when he/she is able to analyze the non-legal aspects to the problem. Burman, *supra* note 125 at 40; Rostrain, *supra* note 221, at 474 ("Several general counsels [in the study] saw themselves as having an expansive gatekeeping role, which involved invoking reputational and other concerns in corporate decision making."); Beardslee, *Multidisciplinary Partnerships*, *supra* note 30, at 34-35 ("General Counsel view themselves as the 'ethics conscience of the corporation.'") (quoting a General Counsel interviewee); Gantt, *supra* note X, at 383; see also Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 25 (1988). For a larger discussion of the ability of an attorney to play a gatekeeping role see Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 986 (2005); Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEORGETOWN J. L. ETHICS 411, 429 (2007); see also Beardslee, *Advocacy in the Court of Public Opinion Part II, How Far Should Corporate Lawyers Go*, __ *Geo. J. L. Ethics* __, Part IV (forthcoming Fall 2009) (arguing that corporate clients want and need attorneys to play a gatekeeper role but admitting that this notion is contested); Rostrain, *supra* note 221, at 474 (explaining that general counsels in her study described their role as that of "gatekeepers and team players at the same time" despite prior research by other scholars).

²²⁶ Rosen, *supra* note 28, at 655 (explaining that project teams can lose their objectivity so "companies rely on outside experts to manage this risk"). See *infra* notes 261-260 and accompanying text.

B. *The Broad Agency Approach is Too Broad*

1. Not In Keeping with the Spirit of the Doctrine

a) *Inconsistent with Attorney-Client Privilege Doctrine*

A broad standard is also not in keeping with the maxim that the attorney-client privilege should be construed narrowly because it impedes discovery.²²⁷ As such, the broad construction of *Kovel* risks not only the search for truth but also the viability of the corporate attorney-client privilege in general. Increased abuses prompt reconsideration of the arguments against applying the attorney-client privilege in the corporate context.²²⁸ Cases where a court views the attorney's involvement in meetings with external consultants as merely a façade to achieve secrecy erode the defensibility of the privilege.²²⁹ Risks to corporate attorney-client privilege protection may exist even if attorneys do not *actually* abuse the privilege because the broad standard in and of itself represents the threat of abuse. Faced with the appearance or potential of impropriety, judges may simply deny coverage

Additionally, courts applying the broad approach are not always careful to limit protection to communications that are based on or might reveal client confidences.²³⁰ As a result they protect all communications between the attorney and consultant if in furtherance of legal advice. For example, in *In re Grand Jury Dated March 23, 2003* [the Martha Stewart Case], the

²²⁷ Murphy, *supra* note 12, at 590-91; Gertsberg, *supra* note 15, at 1455-56; Linas, *supra* note 13, at 421; Haugh v. Schroder Investment Mgt, No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *7 (S.D.N.Y. Apr. 25, 2003).

²²⁸ Rice, *Tobacco*, *supra* note 239; Gertsberg, *supra* note 15, at 1456 (“While a crime/fraud exception exists to pierce the attorney-client privilege, the fact that the privilege was used for illegal purposes reinforces the idea shared by an increasing number of legal professionals, including those in the Department of Justice and the SEC, that the attorney-client privilege should be limited.”).

²²⁹ NXIVM Corp. v. O’Hara, 241 F.R.D. 109, 102 (N.D.N.Y. 2007) (analogizing the use of external lawyer to that of a “mule – with the anticipated effect of concealing all conversations and all actions under the cloak of an attorney-client privilege or work product, without any particular professional involvement on [the attorney’s] part”).

²³⁰ See, e.g., Golden 143, F.R.D. at 518-19; HW Carter & Sons v. William Carter Co., No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *7-8 (S.D.N.Y. May 16, 1995) (privileging all communications between PR consultant, attorney, and client in a discovery suit related to trademark litigation and sale of branded watch). See *supra* notes 68-69 and accompanying text; *but see* United States Postal Service, v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 161 (E.D.N.Y. 1994) (denying protection to scientific studies produced by external consultants because they were not based on client confidences but factual scientific evidence gathered through observation of other data); E.I. du Pont de Nemours & Co., 918 F. Supp. 1524, 1548-49 (M.D. Ga. 1995) (same).

court carefully explained how the consultancy with the external PR consultants facilitated the provision of legal advice and that non-public facts were disclosed.²³¹ However, it shielded *all* communications between the lawyers and PR consultants that were not distributed beyond a “need to know”²³² – as opposed to shielding only those confidential communications that were based on or may disclose client confidences.²³³ Thus, it is not clear that courts applying a broader standard would deny protection to the studies conducted by the external scientists in the drug-recall scenario even though they were conducted for business purposes and were not based on client confidences.²³⁴ Similarly, these same courts might protect both draft press releases in their entirety and all the notes taken by the PR executive in the drug-recall scenario even if parts do not disclose confidential client information or legal advice.

b) Inconsistent with Third Party Attorney-Client Privilege Doctrine

The broadest interpretation of *Kovel* sweeps in more than a careful reading of *Kovel* would permit. The passage that gave birth to the first third party exception stressed that protection should be afforded in circumstances where it was *necessary* or *indispensable* for *effective* legal services.²³⁵ Although the Second Circuit went too narrow in interpreting “necessary” to equate to situations where the attorney cannot understand what the client has already communicated, other courts have gone too wide in interpreting “necessary” to mean merely “helpful” or “facilitating.” The broad approach is like a presumption that the communication with the third party consultant will be protected vs. the original notion that the

²³¹ In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003); *see also*, HW Carter & Sons v. William Carter Co., No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *7-8 (S.D.N.Y. May 16, 1995) (emphasizing confidentiality of conversation between client, lawyer and PR consultants instead of analyzing whether specific communications contained confidential information).

²³² *See supra* note 66 and accompanying text.

²³³ In re Grand Jury Subpoenas, 265 F. Supp. 2d at 331, 334. Perhaps the court was assuming that the normal parameters of the privilege apply. However, since the language it used included but revised the normal attorney-client privilege standard, this is unlikely.

²³⁴ This may be true even if the distribution was beyond a need to know. *See supra* note 15 and accompanying text describing tobacco companies use of third parties to shelter otherwise discoverable communications.

²³⁵ United States v. Kovel, 296 F. 2d 918, 921 (2d Cir. 1961) (emphasis added).

attorney-client privilege is an exception to our broad discovery regime²³⁶ and that communications with third parties waives the privilege (or prevents it from attaching).²³⁷

2. May Promote Informed Decision Making and Compliance but Shield Information

Arguably, a broad approach may promote informed decision making and increased compliance because attorneys can be fairly confident that communications with third party consultants will be protected. Armed with the business consequences, an attorney may be better able to convince senior management not to take a legally risky action that might technically comport with law. However, the words “useful,” “helpful,” or “facilitating” encompass too much and create a large zone of secrecy. For example, in one case the court simply cited *Kovel* and stated that confidentiality was not waived by the presence of the third party consultants during the client-lawyer meeting because the consultants participated in the meeting to help the lawyer render legal advice about how the client should react to the litigation.²³⁸ If such a court were dealing with the drug-recall scenario, it might shield all communications with the external PR agent and all the documents the PR agent created. However, the document that recommends the best media response should not be protected. Although “useful,” it was arguably not necessary to provide legal advice (and was likely motivated more by reputational than legal concerns). Similarly, protecting all the communications during the meeting is over-inclusive.

²³⁶ Paul R. Rice, *The Corporate Attorney-Client Privilege, Loss of Predictability does not Justify Crying Wolfinbarger*, 55 BUS. LAW. 735, 742 (2000).

²³⁷ As discussed below, the harm from this standard is not merely derivative; therefore, a rigorous application of the other factors is not the solution.

²³⁸ *HW Carter & Sons v. William Carter Co.*, No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *7-8 (S.D.N.Y. May 16, 1995).

3. May Enable Corporate Misconduct

It is easier to hide abuse and harder to uncover it when the standard is very broad.²³⁹ Therefore, to a degree, a broad approach encourages corporate misconduct. This is because when corporate actors believe that there is little chance of discovery, they are more apt to misbehave.²⁴⁰ Moreover, a broad approach may signal to attorneys that an aggressive approach to the privilege is acceptable and, therefore, should be pursued to further clients' interests.²⁴¹

Additionally, since it is hard to prove frivolous an argument that something merely facilitated legal advice, this standard combined with the lack of definitive factors to make the business/law distinction, facilitates pre-trial gaming. Corporations often assert privilege for hundreds of documents without adequate support which delays the process and influences negotiations.²⁴² Consequently, the party with the deeper pockets can win the war by papering the

²³⁹ See generally Paul R. Rice, *How the Tobacco Industry Lost its Attorney-Client Privilege*, LEGAL TIMES, May 4, 1998, <http://www.acprivilege.com/articles/article4.html> (last visited on Mar. 15, 2008). This is likely why so many courts adhere to the narrow standard.

²⁴⁰ Cf. Baum, *supra* note 15, at 67 (“If . . . litigation opponents can be denied access to damning information due to the existence of the attorney-client privilege, the corporation might choose to pursue sanctionable actions.”); *id.* at 69 (explaining that “sanctionable actions are desirable by corporations, [when] they produce a higher expected profit, yet they are socially harmful”).

²⁴¹ Think of it in terms of a budget. If your budget is unlimited, you buy different things than if the budget is capped. Susan Koniak made a similar point in her testimony before the United States Senate Committee on the Judiciary on the fall of Enron. She argued that the broadness of the current securities laws “invited” lawyers to “fail to ‘know’ what the facts in front of the lawyer plainly suggest – that the client is committing fraud.” Testimony of Prof. Susan P. Koniak, United States Senate Committee on the Judiciary, Accountability Issues: Lessons Learned From Enron’s Fall”; http://judiciary.senate.gov/hearings/testimony.cfm?id=149&wit_id=135 last visited 2/23/2009 (recommending, *inter alia*, that Congress revise the securities laws to “replace the ‘knowingly’ standard . . . and provide that recklessness will suffice in actions brought by the SEC and by private parties as well.”). Similarly, court decisions applying a broad approach to communications between attorneys and third party consultants may have supported the tobacco attorneys’ aggressive assertion of privilege protection for external studies and communications with outside researchers. Cf. Green, *supra* note 15 (describing tobacco attorneys’ aggressive reading of privilege and attempts to cover up information); *id.* at 423-424, 429 (arguing that the ABA’s position that “‘progressive advocacy’ is important in ‘modern business lawyering’” was “read by many to mean that corporate lawyers may adopt aggressive legal interpretations and exploit legal loopholes” and likely contributed to the attorneys’ “aggressive reading” of the corporate attorney-client privilege).

²⁴² Corporations use privilege wars to their advantage when they can – sometimes to purposefully enable privileged documents to be read by the judge. “I once wrote a letter to a client giving legal advice on a matter in the midst of litigation believing that it was privileged but actually wanting the judge to read it. . . . We listed it on the privilege log and the judge had to read it in order to determine whether or not it was privileged. He found it was privileged and [it was] not produced, but in the meantime he read my arguments as to why I thought my client should win.” LP-NA-L-27 at 6-7. These types of shenanigans likely occur in cases involving third party consultants as well. See,

other party to death even if it might ultimately lose the battle over the privilege claims. Moreover, a broad interpretation, unlike a narrow one, makes false assertions of privilege less obvious, and, therefore, more effective in dissuading opponents from challenges.²⁴³

C. *The Functional Equivalent Test is also too Broad*

1. Not in Keeping with the Spirit of the Doctrine

That PR consultants such as those in the drug-recall scenario can be deemed functional equivalents even though they are hired for a discrete project and remain at (and loyal to) their outside agency creates an opportunity for manipulation. As Professor Rosen points out, many corporations today act as though they have “porous borders” and adopt a team model of organization creating teams around finite projects or crisis.²⁴⁴ They deploy outside consultants on these internal teams in a way that eliminates barriers between employees and non-employees.²⁴⁵ Roles are fluid and team members openly share information and ideas.²⁴⁶ Thus, if courts continue to consider the standard practice, context, corporate climate, and average duration of similar projects and thereby de-emphasize the “continuing position” requirement outlined in *Upjohn*, almost any outside consultant hired by one of these “boundary-less” corporations would qualify as a functional equivalent. For example, the third party consultant that was hired to help the outside law firm conduct the internal investigation in *AIB* might meet a

e.g., Fed Trade Comm’n v. GlaxoSmithKline, 294 F.3d 141, 144 (D.C. Cir. 2002) (whittling thousands of documents to hundreds via court ordered negotiation process, and finally seeking resolution for ninety-one at trial); *Amway v. Procter & Gamble Co.*, No. 1:98-CV-726, 2001 U.S. Dist. LEXIS 4561, at *6 (W.D. MI. Apr. 3, 2001); *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1068 (N.D. Cal. 2002) (reviewing 180 documents for attorney-client privilege).

²⁴³ Baum, *supra* note 15, at 72 (observing that “[c]orporations have an incentive to assert the privilege also when the assertion is false” because “it is costly for plaintiffs to challenge the assertions” and “since the assertion might be true, a positive payoff for the plaintiff is not guaranteed”).

²⁴⁴ Rosen, *supra* note 28, at 643-649 (2002) (analyzing organizational development in corporations and how law firms are re-organizing to serve company teams). Qualitative interviews from my study also confirmed this. See *supra* notes 34-38 and accompanying text.

²⁴⁵ Rosen, *supra* note 28, at 649 (“The distinction between inside and outside blurs with outsiders being part of the decision-making team.”).

²⁴⁶ *Id.* at 650 (“Seeing the company with porous borders means recognizing that transactions with outsiders are not, and need not be, arms-length deals.”).

functional equivalent test.²⁴⁷ Similarly, the external PR consultant brought in to deal with the drug-recall crisis, depending on interactions with the client, might be deemed a functional equivalent of the drug company's employees. As discussed, this has happened.²⁴⁸

It is a theoretical stretch, however, to apply the functional equivalent theory to the external PR consultant in the drug-recall scenario (and thereby protect most if not all the communications in the hypothetical) even though he/she will likely be consulting for many months on the matter.²⁴⁹ The circumstances in which third party consultants are deemed functional equivalents today are likely different than that imagined by the original creators of the functional equivalents theory. Outsourcing the sales force or IT department for an indefinite period of time in order to save on health care costs is very different than hiring a third party

²⁴⁷ See *supra* notes 138-142 and accompanying text. An ironic example is *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999). The client's internal tax counsel met with the investment banker to understand, communicate and help finesse the potential legal and financial risks of the proposal. *Id.* at 138. Had the investment banker ultimately been the banker to oversee the actual transaction (as it usually happens), he would have held an important influential position and likely been the only person in possession of certain information about the transaction. *Sexton*, *supra* note 2, at 498 (describing functional equivalents as holding "extremely sensitive . . . position[s] as financial adviser, reviewer, and agent"). Although only hired temporarily for a finite period of time, he would have been treated like other employees on the team, copied on memos, expected to participate in meetings, and thereby have information important to the lawyer in providing legal services. See generally *Rosen*, *supra* note 28, at 649-651; *McCaugherty v. Siffermann*, 132 F.R.D. 234, 235-239 (ND CA 1990) (applying similar reasoning to protect communications with liquidation consultants). See *supra* notes 109-112 and accompanying text. Like in *Twentieth Century Fox Film Corp. v. Marvel Enterprises*, No. 01-Civ-3016, 2002 WL 31556383, at *2 (S.D.N.Y. Nov. 15, 2002), a court may consider important that this transaction was a one-off. Therefore, he might have been considered a functional equivalent of the corporation's employees.

²⁴⁸ See *supra* notes 114- 116. *Fed Trade Comm'n v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002); see also *In re Copper*, 200 F.R.D. 213, 219-220 (S.D.N.Y. 2001) (The court protected manufacturing and marketing documents shared with external public and government relations consultants because the third party consultants were treated just like the other full time employees that were part of the litigation/legal strategy crisis team).

²⁴⁹ The drug-recall scenario is slightly different than *In re Copper*, where a Japanese run company temporarily hired an outside PR agency to deal with reputation issues related to litigation because it did not have experience dealing with Western media and the company executives struggled with English. *In re Copper*, 200 F.R.D. 213, 216 (S.D.N.Y. 2001). Because "[the company's] internal resources were insufficient to cover the task," and confidential communications between the companies "were made for the purpose of facilitating the rendition of legal service," the court held that it was a functional equivalent of the company. *Id.* at 219-220. Even this case does not exemplify functional equivalency in its truest form because the PR company was not hired as an independent contractor for an ongoing position. It was hired for a discrete crisis and the company lacked sufficient resources to handle it. *Id.*

consultant to aid internal managers in running finite projects or dealing with a specific crisis – especially when the company has dedicated internal staff to the matter.²⁵⁰

True, the team approach to organization cuts both ways. Functional equivalency is supposed to give protection to independent contractors that are treated like any other employee. In a company with porous borders, these temporary external consultants behave and are treated like other employees on the project team. When the team is dissolved, work on the project ends for both internal and external team members. Why, then, should functional equivalency doctrine not bend to changing times, to the new model of organization?²⁵¹ The answer is twofold: a) third parties may potentially serve a gatekeeping function; and b) this test shields information that would be discoverable under an agency theory.

2. May Increase Informed Decision Making and Compliance but Decrease Discovery

As with the broad approach, the functional equivalents exception enables communications with third party consultation to be protected in many circumstances. Therefore, for the same reasons described above, this exception may enhance informed decision making and compliance. However, once the third party consultant is deemed a functional equivalent, the analysis is under *Upjohn*, which may afford even more expansive protection than that provided by the broadest *Kovel* theory.²⁵² This is because the functional equivalent “is” the *defacto* client and, therefore, *all* of the information and advice the functional equivalent shares with the lawyer is considered confidential client information. Moreover, when an “employee” communicates

²⁵⁰ Cf. Rosen, *supra* note 28, at 647-648 (explaining that outsourcing includes not only contingency based hiring of non-employee workers to do basic organizational functions but also professional service consultants for their investment in R&D, varied experience and efficient high quality work).

²⁵¹ This question is salient since, in advocating a standard broader than the narrow approach, I am arguing (to a degree) that third party attorney-client privilege doctrine bend to changing times.

²⁵² Hamilton, *supra* note 67, at 649 (“Upjohn left the door open for the corporate attorney-client privilege’s possible application where there are only tenuous connections between the subject of the communication and the employee’s work-related duties.”). See also *supra* notes 63-67 and accompanying text.

with an attorney, many courts presume that the communication is for legal advice and do not require a strong connection between the information provided and the employee's duties.²⁵³

Today, plaintiffs and the government find it very difficult to elicit information from corporate employees who are scared to talk – especially when corporate counsel is present as is usually the case. Therefore, third parties are a valuable source of information. They know how the corporation is monitored and structured. Additionally, transparency – information about what third party consultants and lawyers are doing – assists regulation.²⁵⁴ Protecting these consultants to the same extent that employees are protected lends less transparency to the public. This, in turn, may reduce confidence in the economy which has been prone to failure lately. The recent sub-prime mortgage scandals and the collapse of key investment banks is a great example.

Application of the functional equivalents test may enable corporations to use attorney involvement to circumvent discovery of sanctionable action.²⁵⁵ For example, external scientists hired to be part of an internal drug R&D team could be deemed functional equivalents and all the studies reflecting health risks could be protected by the attorney-client privilege under *Upjohn* if they aided the lawyer in providing legal advice to the team (and were not distributed beyond a need to know). The company could then more freely ignore these results or fail to disclose them without fear of discovery. Therefore, in the drug-recall hypothetical, the clinical studies could be protected if a court determined its wide distribution was not beyond a “need to know”.

Arguably, this could occur if the scientists are internal employees but shouldn't the corporation

²⁵³ *In re Bieter*, 16 F. 3d 929, 939 (8th Cir. 1994); *see supra* note 252.

²⁵⁴ Although they disagree on the balance to be struck between transparency and a client's right to protect information, both Bruce Green and William H. Simon agree that some level of transparency can facilitate professional regulation. *The Market for Bad Legal Scholarship: William H. Simon's Experiment in Professional Regulation*, 60 STAN. L. REV. 1605, 1612 (2008) (“[T]here is a tension between the regulatory interest in transparency and client confidentiality, which promotes the private and public interest in obtaining effective legal assistance”); William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting As An Example*, 60 STAN. L. REV. 1555, 1561 (2008) (“Secrecy removes another mechanism for lawyer accountability”).

²⁵⁵ *See supra* notes 240- 241 and accompanying text.

shoulder the costs of staffing its needs in order to garner protection?²⁵⁶ In short, because porous borders of corporations make temporary external consultants functional equivalents of the corporation's employees, the functional equivalence test not only collapses with the broadest approach to *Kovel* but may prove even more expansive.

3. May Not Deter Corporate Misconduct

Moreover, external consultants, although appearing to behave and be treated just like the internal team members, may be separate in one key respect. External consultants have different interests than employees and especially upper management.²⁵⁷ Although they have some of the same objectives, they do not necessarily have a commonality of interests. They are part of a different organization that has its own corporate culture.²⁵⁸ These differences can potentially have both negative and positive consequences. On the one hand, the variance in interest and culture between the external consultant and client could influence team members to behave in a way that does not comport with the norms and ethics of the corporate client.²⁵⁹ On the other hand, these differences could serve a very useful function. Outside consultants may not fall prey to same subjectivity as the "real" internal team members.²⁶⁰ Thus, as Rosen points out, they may be able to protect against the risk that the team will lose objectivity because of its propinquity to

²⁵⁶ Also, one could argue that this could result in less use of consultants which may be a bad thing as argued earlier but if the consultation is necessary and the corporation wants to protect it, it can hire the consultant.

²⁵⁷ Those in opposition to the corporate attorney-client privilege often make a similar argument with respect to employees. See, e.g., Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 173-74 (1993) (suggesting that the corporate employees and clients have different interests and, therefore, that employee candor is limited because the privilege only protects the corporation); but see Glynn, *supra* note 195, at 78 ("[I]n many circumstances the entity, its decision makers, and its employees will have mutual interests."). If employees sometimes do not have mutual interests with the corporate entity and decision makers, arguably this might be true for workers that are external to the corporation.

²⁵⁸ Tamar Frankel, *Using the Sarbanes-Oxley Act to Reward Honest Corporations*, 62 BUS. LAW. 161, 161-163 (2006) (arguing that corporations have a culture that is a "social habit" and that the expected form and substance of interaction amounts to the "culture" of the corporation).

²⁵⁹ Depending on the existing culture of the corporate client this could be a positive or a negative impact. But see Joan MacLeod Heminway, *Does Sarbanes-Oxley Foster the Existence of Ethical Executive Role Models in the Corporation?*, 3 J. OF BUS. & TECH. LAW 221 (2008) (contending that "creating or changing the ethical components of culture in a corporation is exceedingly difficult").

²⁶⁰ This is their claimed virtue although more research needs to be done to confirm it.

the project.²⁶¹ A rule that shields communications with external consultants if they are treated like employees encourages clients to treat them like employees and eventually may erode the ability of the external consultant to serve this function. Thus, functional equivalency may inculcate inapposite norms into the corporate culture or prevent gatekeeping.

D. The Doctrine is Unpredictable and Subject to Abuse

1. Covertly Unpredictable

In addition to being substantively off-balance, third party attorney-client privilege doctrine is unpredictable and results in varying interpretation and application. Courts within the same district have applied different interpretations of the Agency exception²⁶² and protection can hinge on which exception theory is applied by the court.²⁶³ Indeed, communications with third party consultants that would be denied protection under a narrow agency theory can prevail under a functional equivalence test. Therefore, protection of third party communication can turn not only on which interpretation of *Kovel* is used but also the choice between agency and functional equivalent theories. A recent case between Labatt and Molson breweries highlights this point.²⁶⁴ Labatt's attorney met with Labatt's PR and advertising agencies²⁶⁵ to ensure "that the content of the advertising placed by the agencies would not undercut the theories expounded in the [related] litigation."²⁶⁶ Applying a narrow agency theory,²⁶⁷ the majority upheld the lower

²⁶¹ Rosen, *supra* note 28, at 655. See *supra* note 226.

²⁶² See, e.g., *HW Carter & Sons v. William Carter Co.*, No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *7-8 (S.D.N.Y. May 16, 1995) (applying a broad approach to *Kovel*); *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (applying a more moderate approach to *Kovel*); *Allied Irish Banks v. Bank of America*, 240 F.R.D. 96, 101, 104-05 (S.D.N.Y. 2007) (adhering to the narrow approach to *Kovel*).

²⁶³ See, e.g., *Willemijn v. Apollo Computer*, 707 F. Supp 1429, 1445-46 (D. Del. 1989) (explaining that difference between patent agent acting as client's constructive employee as opposed to agent of attorney is important and determinative although formalistic).

²⁶⁴ *Dorf & Stanton Communications, Inc. v. Molson Breweries*, 100 F.3d 919 (Fed. Cir. 1996).

²⁶⁵ *John Labatt Ltd. v. Molson Breweries*, No. M885, 1995 U.S. Dist. LEXIS 507, at *3-4 (S.D.N.Y. Jan. 19, 1995).

²⁶⁶ *Id.*

²⁶⁷ Although it is not completely clear from the opinion, it appears that the lower court based its decision in part on a narrow interpretation of *Kovel*. See *Labatt*, 1995 U.S. Dist. LEXIS 507, at *4 ("The documents themselves do not

court's ruling that the handwritten notes taken by the external PR consultant during the meeting were discoverable even though they revealed the litigation strategy.²⁶⁸ The dissent, however, analyzed the case under the functional equivalents theory and concluded that the consultants were functional equivalents of Labatt employees and that the attorney met with them "for the purpose of assuring that the agents take legally correct actions on the client's behalf."²⁶⁹ Thus, the decision can turn on which theory is applied.²⁷⁰

Moreover, there is little guidance on what factors will be considered when applying either exception. Even those courts that claim to apply more stringent tests than the broadest application of *Kovel*, do not isolate key factors to guide future courts or litigants.²⁷¹ As a result, attorneys do not know *ex ante* how the privilege will be applied. For example, over 50% of General Counsel Respondents in the S&P500 PR Study hired external PR consultants to manage a legal controversy in the last three years, yet they are uncertain about what types of information sharing might endanger the attorney-client privilege.²⁷² It did not appear that the interviewees in the PR Study fully comprehended the real state of the doctrine or, understandably, when communications with external PR consultants would be covered by the attorney-client privilege.²⁷³ As mentioned before, given that they believe that it is important to share

indicate either the seeking of legal advice or the confidentiality of their contents."); *see also* Dorf & Stanton Communications, Inc. v. Molson Breweries, 100 F.3d 919, 924-928 (Fed. Cir. 1996) (J. Newman Dissenting).

²⁶⁸ Dorf & Stanton Communications, Inc. v. Molson Breweries, 100 F.3d 919, 923-924 (Fed. Cir. 1996).

²⁶⁹ Dorf & Stanton, 100 F.3d at 928; *Cf.* Murphy, *supra* note 12, at 572 (explaining that the dissent "analyzed the case under a completely different theory").

²⁷⁰ This is not a lone case. As mentioned *supra*, court majorities have deemed external consultants functional equivalents of the corporate client. *See supra* notes 109-116 and accompanying text.

²⁷¹ *See, e.g.*, In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. at 326; United States v. Cote, 456 F.2d 142 (8th Cir. 1972).

²⁷² *See supra* notes 34-38 and accompanying text.

²⁷³ Some of the interviewees mentioned the agency theory and the recent Martha Stewart case in which the court protected communications between the attorney and the external PR consultant. In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003). A handful of the attorney interviewees seemed to be aware that courts do not always side in favor of protection. But none mentioned the functional equivalents theory as a mode for protecting communications with external PR consultants. Indeed, when they talked about the attorney-client privilege, the lawyer interviewees rarely justified arguments for privilege protection in terms of any of the

information with the external consultant to provide the best legal advice, this puts attorneys in an awkward position.²⁷⁴ Unsurprisingly, 47% of survey respondents said they were uncomfortable sharing confidential information with external PR consultants. Thus, those attorneys that believe that the narrow rule is “the” rule today are likely not utilizing the external consultants to their fullest potential and providing the most informed legal advice to their corporate clients.²⁷⁵

Alternatively, some attorneys may take advantage of the lack of clarity of the doctrine and pursue false privilege claims understanding that the costs associated with challenging the assertion are high and the opponent has no dependable way to predict a ruling.²⁷⁶

True, doctrine is often unpredictable and unworkable. However, here it is covertly so. Scholars and courts often present third party doctrine as if it were clear and there were only one standard.²⁷⁷ Although the interviewees seemed to be aware that protection “can be a challenge”

doctrine. Instead, they described tactics they employed that were based on a vague notion they had about what was required for protection. For example, one lawyer interviewee declared that the attorney-client privilege would apply to communications with external PR consultants if there was “baseline agreement of confidentiality and they become agents.” GC-F-S-32 at 17. Another explained, “if [the external PR executives] are part of [the lawyer’s] team as opposed to part of the client’s team, you have more potential that it’s [protected]. . . . It’s more that it’s part of the legal strategy as opposed to the business strategy.” LP-NA-L-2 at 13. These findings are supported by the literature. Glynn, *supra* note 195, at 82 (“[O]ne of the consistent findings in the aforementioned surveys is how little corporate executives, other laypeople, and attorneys understand the scope and, more importantly, limitations of the privilege.”).

²⁷⁴ See *supra* notes 59-60 and accompanying text.

²⁷⁵ The few interviewees that appeared to believe that communications would not be protected were “very careful not to accidentally waive privilege by, for example, having a[n] [external] PR person in on a meeting where confidential information is discussed.” See, e.g., GC-F-S-39 [notes on file with author].

²⁷⁶ Baum, *supra* note 15 at 72-73 (arguing in the context of the attorney-client privilege in general that corporations “have an incentive to assert the privilege [] when the assertion is false” because “it is costly for plaintiff’s to challenge the assertion” and “since the assertion may be true, a positive pay-off . . . is not guaranteed”).

²⁷⁷ Many scholars and courts do not outwardly recognize that there is more than one standard applicable to third party consultation or more than one approach to the agency exception or that application of the exception is complex. See, e.g., Jonathon M. Linas, *Make Me Well-Liked: In re Grand Jury and the Extension of the Attorney-Client Privilege to Public Relations Consultants in High Profile Criminal Cases*, 19 WASH. U. J.L. & POL’Y 397, 407 (2005) (claiming that attorney-client privilege, as it relates to accountants, patent agents, and non-testifying experts “is well-established and poses few problems for attorneys who wish to ensure that their communications with clients will be privileged”); Hantler et al., *supra* note 10, at 25, 29 (claiming attorney-client privilege protects communications with non-testifying experts that assist attorneys in provision of legal services and failing to identify varying ways courts apply the doctrine); Murphy, *supra* note 12, at 570 (explaining only the narrow interpretation and functional equivalents theory); Corcoran, *supra* note 44, at 725 (explaining only the broadest interpretation); Baum, *supra* note 15, at 64 n. 6 (claiming that courts have “done away” with protection of communications with third party consultants “by holding that lawyer communications . . . will only be privileged when the professional

when confidential information is shared with external PR consultants, the majority of interviewees believed they had a “good argument” that communications with external consultants are privileged.”²⁷⁸ In keeping with that, 53% of General Counsel Respondents to the S&P 500 survey in the PR Study appeared to believe that attorney-client privilege law was clear and would protect communications with external PR consultants.²⁷⁹ This is perhaps even more disconcerting than the majority who remain unsure how to safely handle communications with external PR consultants.²⁸⁰ The problem is not simply that application of the privilege is uncertain. Instead, it is that attorneys cannot calculate the risks of exposure and many believe that the risks are lower than they currently are. As the Supreme Court stated in *Upjohn*, “[a]n

acts as an ‘interpreter’ for the lawyer”). Cf. Jones, *supra* note 51, at 423-433 (recognizing that determining whether the privilege applies to an agent is “difficult” under *Kovel* but failing to identify the various interpretations courts have given to *Kovel*); Davis & Beisecker, *supra* note 10, at 589 (Recognizing that “categorization of others as agents for the lawyer has been less clear” but explaining that “[c]ommunications with accountants, administrative practitioners and patent agents have all been protected by the attorney-client privilege where . . . its purpose was to assist the lawyer in rendering legal services to the client”); Joseph W. Martini, Charles F. Willson, Defending Your Client in the Court of Public Opinion, 28 *Champion* 20, 21 (April 2004); see also *supra* note 13. See *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003); *United States v. Alvarez*, 519 F.2d 1036, 1045-46 (3rd Cir. 1975); *Tri-State Outdoor Media Group Inc. v. Official Comm. of Unsecured Creditors*, 283 B.R. 358, 363 (Bankr. M.D. Ga. 2002).

²⁷⁸ GC-C-S-31 at 20. See also GC-F-S-32 at 17 (recognizing that it is not a 100% guarantee especially given the culture of waiver with the government but believing that if there is a “baseline agreement of confidentiality,” the external consultants are agents and communications would be protected by the privilege); GC-P-S-30 at 31 (understanding the issue but believing that communications with external consultants would likely be protected) GC-C-S-28 at 18 (explaining that it “is very hard to generalize but there are very specific strategies on how to preserve and protect the privilege, for example, having counsel, that may be outside counsel, in every discussion). Two mentioned that Delaware courts and M&A lawyers recognize a “deal privilege” protecting communications with external consultants in M&A deals. LP-I-L-21 at 11; GC-I-L-5 (S-2) at 23. It is not clear, however, that there really is any “deal privilege.” In a recent case, a Delaware court held that communications between the corporation and its financial advisors during merger negotiations were not protected by the attorney-client privilege, the work product doctrine, or the rule protecting facts or opinions of non-testifying experts. See generally, *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 2008 WL 3878339 (Del. Ch.). See also note 273.

²⁷⁹ *Id.* Glynn, *supra* note 195, at 81 (“Some of the misunderstandings in particular support the conclusion that executives, employees, and attorneys speak freely because they believe the communications will remain confidential.”).

²⁸⁰ There is other evidence that attorneys are confused and uncertain. *The Privilege and Public Relations Firms in Drug and Device law* (May 11, 2007) (on file with author) available at <http://druganddevice.la.blogspot.com/2007/05/privilege-and-public-relations-firms.html> (last visited Jul. 11, 2007) (discussing the uncertainty around protection of communications with PR consultants and whether it is safer for the attorney to hire the consultant or the client). Glynn, *supra* note 195, at 80-83 (contending that the current attorney-client privilege doctrine is uncertain and that clients do not understand its scope).

uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”²⁸¹

2. Allows Inconsistent and Inequitable Results

In addition to “duplicative work” that wastes time and effort,²⁸² the doctrine’s lack of predictability risks inconsistent and inequitable results. A judge in one court may deny protection to the same communication a judge in another court deems privileged.²⁸³ A system that applies different tests or provides different results for similar actions is not perceived as administering justice – one of the original justifications for the attorney-client privilege itself.²⁸⁴ Although its elasticity enables judges to deny protection when they think attorneys are being used to create a zone of secrecy – arguably a good thing – the third party doctrine enables judges to deny protection based on a bias against certain types of third parties.²⁸⁵ For example, a judge that feels that public relations matters should never be considered integral to the provision of legal services can easily deny protection to external PR consultants.²⁸⁶ The doctrine’s obscurity

²⁸¹ *Id.*

²⁸² *Cf.* Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 73 (1992) (“[A]dherence to precedent increases judicial efficiency by eliminating the duplicative work and the risk of error from incompetence or bias that would result from starting each case anew from first principles.”); *cf.* Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 972 (1995) (“Rules can, in short, be the most efficient way to proceed, by saving time and effort, and by reducing the risk of error in particular cases.”).

²⁸³ *HW Carter & Sons v. William Carter Co.*, No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *7-8 (S.D.N.Y. May 16, 1995) (privileging all communications between PR consultant, attorney, and client); *Haugh v. Schroder Investment Mgt.*, No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *8-9 (S.D.N.Y. Apr. 25, 2003) (denying protection to all communications between PR consultant, attorney, and client).

²⁸⁴ *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (explaining that the privilege was devised “in the interest and administration of justice”) (emphasis added).

²⁸⁵ The current doctrine is vague and conflicting. As such, it enables judges to supplant their own substance and/or political preferences. *See e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1690 (1976). *Cf.* Frederick Schauer, *PLAYING BY THE RULES*, Chapter 5.4 pg 98 (discussing rules as “devices for the allocation of power”).

²⁸⁶ Although hard to prove, in a few case opinions, the language indicates that the judge would *never* believe that communications with PR consultants could aid legal advice. *See, e.g.*, *John Labatt Ltd. v. Molson Breweries*, No. M885, 1995 U.S. Dist. LEXIS 507, at *3-4 (S.D.N.Y. Jan. 19, 1995) (refusing to protect notes taken by external PR consultant during meeting even though notes contained details about the litigation strategy, and legal advice); *Dorf & Stanton Communications, Inc. v. Molson Breweries*, 100 F.3d 919, 924-928 (Fed. Cir. 1996) (J. Newman Dissenting); *see also Calvin Klein I*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (“It may be that the modern client comes to court as prepared to massage the media as to persuade the judge; but nothing in the client’s communications for the former purpose constitutes the obtaining of legal advice or justifies a privileged status.”).

also confers special power to the government. A regulator can more easily “convince” a corporation to waive the privilege when failure to waive might result in more severe charges and the corporation cannot accurately assess the likelihood of privilege protection absent waiver.²⁸⁷

IV. RECOMMENDATIONS

As discussed, the current doctrine that protects communications between lawyers, clients and third party consultants is unpredictable. Worse yet, the two approaches that have emerged are inadequate. The broad approach is too expansive and the narrow approach is too constrictive. So, where should the line be drawn? What communications with third party consultants should be protected? There are some difficulties in answering this question. First, as discussed in Part II.C, there is the difficulty of determining when a communication is for legal as opposed to business advice. Second, answering this question requires bracketing the dispute about whether the attorney-client privilege should be applied to corporations.²⁸⁸ Therefore, the central inquiry of this Article is: How capacious should the corporate attorney-client privilege be? As corporations’ boundaries continue to expand and the use of outside consultants grow, and therefore the need for attorney consultation, should the attorney-client privilege follow suit?

As demonstrated by the analysis of the current approaches to third party privilege doctrine, there is a danger that the attorney-client privilege could become too capacious with respect to communications with third party consultants. It could (as argued with respect to the broad approach) encourage corporate misconduct and provide a huge zone of secrecy in opposition to our open discovery rules. However, if the attorney-client privilege is interpreted in this context too restrictively (like the narrow approach), it may fail to provide its intended

²⁸⁷ See *supra* note 140 an accompanying text. This issue is not limited to the third party context but is exacerbated there because the privilege is already unpredictable in the corporate context. Sexton, *supra* note 2, at 471. Furthermore, large corporations can be haled into almost any state or federal court or both. Cf. Hamilton, *supra* note 67, at 654 (“[I]nconsistent application throughout the nation” makes “structuring a company’s affairs to conform to various privilege regimes a daunting task.”).

²⁸⁸ See *supra* note 14; *but see infra* note X.

benefits like informed decision making and increased compliance. Moreover, it is hard for the privilege to be valuable if attorneys cannot make any logical prediction *ex ante* about which communications will be privileged or at least know by what standard the communications will be judged. Therefore, whatever solution is developed should excel on the criteria identified in Part III. That is, it should be designed to limit corporate misconduct and a zone of secrecy but enable informed decision-making and compliance. Moreover, it should strive to be consistent with the spirit of the doctrine and provide some enhancement in predictability and clarity than that afforded by the current regime. Based on these first principles, the following sections provide a specific proposal for revising the third party corporate attorney-client privilege doctrine and an analysis of the proposal.

A. *Specific Proposal*²⁸⁹

The attorney-client privilege is an exception to the general rule that relevant information should be discoverable.²⁹⁰ It is a *privilege*. Therefore, as communications move father away from the traditional, formal lawyer-client scenario, there should be more concern over the substance and purpose of the communication. Therefore, I recommend a standard that permits more external consultation than does the narrow approach but constricts courts' ability to construe the privilege very broadly and alerts attorneys to confer with consultants with care and deliberation.

²⁸⁹ Although these recommendations are intended for federal courts and third party consultation in the corporate context, they could also be applied to states and the individual context. State attorney-client privilege law is obscure and suffers from similar problems to those discussed here. *Cf.* Brian Hamilton, Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege, 1997 Ann. Surv. Am. L. 629, 633-640 (1997) (surveying state corporate attorney-client privilege after Upjohn). Moreover, should a federal court adopt the proposal in this Article, it may affect state courts because state courts consider how federal courts apply the corporate attorney-client privilege when making their own determinations. *Cf.* Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 191 BYU L. REVIEW 959, 959-960 (1991) (arguing that persuasive federal court opinions, although not binding on state courts, “assert a form of ‘persuasive federalism’” and “explaining that the Upjohn “decision has been widely cited by state courts”).

²⁹⁰ *See supra* 236.

1. One Uniform Standard

I recommend adopting one uniform standard, based on an Agency theory, to analyze whether third party consultation waives the attorney-client privilege. At first it may seem strange to excise the functional equivalency test since it addresses how the third party works in relation to other employees and the agency test addresses how the third party aids the attorney. However, as discussed, the differences between the two exceptions fade in application.²⁹¹ In practice, both theories place the emphasis on “why an attorney was consulted, rather than with whom the attorney communicated.”²⁹² On closer examination, therefore, the agency theory provides a useful limiting principle to prevent the over-broad protection sometimes produced by the functional equivalence test. As explained above, the way functional equivalency is determined by courts enables companies to cover third party consultancy services with the expansive protection afforded by *Upjohn* simply because the corporation hired the third party consultant instead of the attorney. This is easily fixed by applying one Agency-based standard to consultation with any external professional specialist.²⁹³ Thus, any third party consultant that is a professional strategic consultant (e.g., a PR consultant) would be analyzed under an agency theory – even if hired by the client on an on-going basis. A uniform standard ensures that functional equivalency cannot increase the reach of the attorney-client privilege in this context and that decisions do not turn on who hired the consultant.

2. A Nexus Test

As discussed above, the broadest interpretation of *Kovel* threatens to protect all consultations between the lawyer and third party consultant and the narrowest fails to protect

²⁹¹ See *supra* Part CI.

²⁹² *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977) (making this point in support of subject matter test over control test).

²⁹³ By specialists, I only mean third party consultants in the traditional sense. This recommendation does not impact people independently contracted to handle a corporation’s internal IT department or sales force who are not strategic consultants. These types of quasi-employees would still be analyzed under the functional equivalence test.

almost any third party consultation. I recommend requiring a strong nexus between the consultant's service and the legal advice or services ultimately provided to the client. As a few federal courts have mandated,²⁹⁴ the proponent should be required to show how the communication with the third party was *necessary*, or "*indispensable*"²⁹⁵ to the lawyer in providing legal advice or services.²⁹⁶ In other words, it would not be sufficient to demonstrate that the consultation simply helped the attorney but instead that it was *essential* to do something related to being a lawyer like fine tune a legal strategy, ensure compliance, avoid liability, protect a legal defense, administer an estate, or litigate an antitrust issue, etc.²⁹⁷ If the communication was necessary for the attorney's provision of legal advice and services and the

²⁹⁴ See *supra* note 92.

²⁹⁵ *United States v. Kovel*, 296 F. 2d 918, 921 (2d Cir. 1961) (citing 8 Wigmore Evid. § 2301; Annot., 53 A.L.R. 369 (1928)). *Kovel* indicates that to sustain a privilege an accountant must be "necessary," or at least "highly useful," for the effective consultation between the client and the lawyer. *Id.* at 922. (check)

²⁹⁶ Federal courts have infused a standard similar to this one in their opinions. For example, in *Haugh*, the court required that proponents identify "a nexus between the consultant's work and the attorney's" advice or "role in preparing the complaint or case for the court." *Haugh v. Schroder Investment Mgt*, No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *8-9 (S.D.N.Y. Apr. 25, 2003). In *Cavallaro*, the First Circuit interpreted *Kovel* as requiring that the third party be "necessary, or at least highly useful for the effective consultation between the client and the lawyer." 284 F.3d at 240 (requiring "a close nexus to the attorney's role in advocating the client's cause before a court or other decision making body"). In *In Re Grand Jury Subpoenas Dated March 24, 2003*, the court denied protection to certain communications for failure to show "a nexus sufficiently close to the provision or receipt of legal advice." 265 F. Supp. 2d 321, 332 (S.D.N.Y. 2003). In *Attorney General of the U.S. v. Covington & Burlington*, the District Court of the District of Columbia applied a nexus test in reverse. 430 F. Supp. 1117, 1121 (D. D.C. 1977). It denied protection because the firm's activities were "only tangentially related" to the legal matters. *Id.* Here, communication is protected if the consultant's services has a nexus to or is substantially related to the lawyer's advice. Some scholars have also analyzed application of *Kovel* under a similar necessity test. See, e.g., Gruetzmacher, *supra* note 12, at 980 (asking whether attorneys *need* to communicate with accountants when handling complex financial transactions in order to facilitate provision of legal services); Richmond, *supra* note 12, at 399 (explaining that courts "confine [the attorney-client privilege in this context] to its narrowest possible limits" and that under current doctrine, in order to be protected there must be "a clear nexus between the PR consultants' work and the attorney's role in representing the client"); Gertsberg, *supra* note 15, at 1446.

²⁹⁷ Sexton, *supra* note 2, at 490 (1982) (identifying these actions as legal services). I agree with Sexton that, although some courts interpret the privilege to only extend to legal advice, the privilege should and does cover legal services – that is "any action by the attorney requiring peculiarly legal skills." *Id.* at 491. Defining what are "legal" services," however, is an arduous task and is not static. We are a "nimble profession." See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 391-411, 439-66, 606-54 (2d ed. 1985). Lawyers have risen to the changing marketplace and redefined what comprises legal services many times over. Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL SYSTEM 1 (Robert L. Nelson et al. eds., 1992); Daly, *Choosing Wise Men Wisely*, *supra* note 49, at 282 (discussing the profession's ability to change); Sisk *et al*, *supra* note 48, at 7. ("Professional service regarded as non-legal only a few decades ago may be essential elements of effective legal representation today.").

proponent can identify a strong nexus between the consultancy and the attorney's role, then it should be protected.²⁹⁸ If the communication merely helped the company to design a PR campaign, protection should not be afforded.²⁹⁹ On the other hand, if the communication helped ensure that the PR campaign did not create legal liability, induce prosecutors to bring charges, or weaken trial defenses, and it was the only way to accomplish these goals, then it should be protected because there is a strong nexus between the consultation and the legal advice provided. What is necessary is proof that the consultation – whatever type it was – served this purpose.³⁰⁰

To that end, under the rubric recommended in this Article, it does not make sense to consider – as scholars and courts have – the *type* of service or advice the *third party* consultant provides or if they are typical or atypical.³⁰¹ When an attorney consults with an accountant about a restructuring, the fact that the accountant provided typical service or non-legal advice is not relevant. The point of the doctrine is to allow the attorney to take into account non-legal considerations when forming legal opinions.³⁰² Further, that attorneys alone could not have

²⁹⁸ Some courts have attempted to apply a similar test. *See, e.g.*, *Haugh v. Schroder Investment Mgt.*, No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *8-9 (S.D.N.Y. Apr. 25, 2003) (applying similar test). The proposed test is not dissimilar to “substantially related” test like that in the intermediate scrutiny test in constitutional law or that in Rule 1.9. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2002).

²⁹⁹ *See, e.g.*, *Haugh*, 2003 U.S. Dist. LEXIS 14586, at *7; *Calvin Klein I*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000); *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d at 326.

³⁰⁰ *See Haugh*, 2003 U.S. Dist. LEXIS 14586 at *7; *Calvin Klein I*, 198 F.R.D. at 54-55.

³⁰¹ *See supra* notes 144-302 and accompanying text. Analyzing the type of service provided does make sense, however, if the court is applying the functional equivalent exception. For example, if the consultant only provides typical consulting services then it may not be serving as a functional equivalent. *In re Currency Conversion Fee Antitrust Litigation*, MDL No. 1409-M-21-95, 2003 U.S. Dist. Lexis 18636, at *7 (S.D.N.Y. Oct. 21, 2003) (applying a functional equivalents theory and finding significant that consulting company merely provided standard trade services). Similarly, if the consultants provide advice, they are not merely interpreting. *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002) (explaining that the narrow interpretation of *Kovel* “excludes the broader scenario in which the accountant is enlisted merely to give his or her own advice about the client's situation”).

³⁰² *See supra* Part II.A. Further, if the consultants provided legal advice, it would be the unauthorized practice of law. *Murphy*, *supra* note 12, at 586

handled the matter should not prevent establishment of a nexus.³⁰³ The agency exception was devised *because* attorneys sometimes need the help of others to provide competent legal advice.

To be clear, I am not advocating absolute protection of *all* communications between the attorney and the third party consultants that are necessary for the provision of legal advice.

Third party consultants assist lawyers by helping them anticipate the business consequences of their legal decisions. However, this recommendation does not extend the privilege to all business information and advice provided to the lawyer or associated with the lawyer's services.³⁰⁴ The other requirements of the attorney-client privilege apply. Namely, protection would only be afforded to those communications that would directly or indirectly reveal a client confidence or lawyer's legal advice.³⁰⁵ There is justification for shielding information, opinions, and advice of the expert that are based on client confidential information because, as others have pointed out, they provide opposing parties with "strong clues about the absolutely protected information."³⁰⁶ Thus, under the proposed rubric, the external PR consultant's notes in the drug-

³⁰³ Allied Irish Banks, 240 F.R.D. at 108 (concluding that the report and all preparatory work was not motivated by pending litigation or the need for legal advice in part because AIB could not have hired attorneys alone to handle its problems (since its problem was also one of public perception)).

³⁰⁴ Thus, this recommendation is consistent with the policies behind rejection of an accountant-client privilege. First, it does not as the Supreme Court was worried about, "insulate from disclosure a certified public accountant's interpretations of the client's financial statements." *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984) (rejecting accountant-client privilege). Second, it is not a client-consultant privilege but one that applies only when consultancy is necessary for the attorney to provide legal advice – and then only that information that is based on or reveals confidential client information or legal advice is protected. Thus, the conflict that arises when accountants act as both tax advisors and "independent attestors of financial statements" or "protectors of the marketplace" does not exist. IRS Restructuring: Hearings on H.R. 2676 Before Comm. on Fin. of the Senate, 105th Cong. 424 (1998) (prepared statement of Stefan Tucker) (explaining this conflict as one between the obligation to maintain confidentiality and obligation to disclose).

³⁰⁵ *United States v. Neal*, 27 F.3d 1035, 1048 (5th Cir. 1994). See *supra* notes 68-69 and accompanying text.

³⁰⁶ Imwinkelried, *supra* note 10, at 28-31, 45. In his search for a solution to courts' tendency to protect all of a non-testifying expert's information and deny the opposing party the opportunity to depose the expert before trial, Imwinkelried argues that courts should not protect third party consultation even when that information is derived from and may indirectly reveal client confidences. *Id.* He reasons that the attorney-client privilege is based on common law and does not have a derivative evidence component. *Id.* Nonetheless, arguably it is exactly because of the derivative potential that courts have long protected communications between attorneys and clients when they may only indirectly reveal a client confidence. Indeed, some courts apply the privilege to a lawyer's legal advice if it is only based on confidential information because the confidential information, even if not directly revealed, can be derived. See, e.g., *United States v. Neal*, 27 F.3d 1035, 1048 (5th Cir. 1994); *Rattner v. Netburn*, No. 88-Civ-

recall scenario would be protected to the extent they reveal the legal strategies. Obviously, if a party seeking protection cannot make the showing, all communication, including confidential information is discoverable.

To a degree, this recommendation is simply the middle ground between the extremes. Indeed, one of the virtues of this nexus test is that it is consistent with the inclination of some federal courts and scholars.³⁰⁷ Moreover, it addresses the substantive issues with the doctrine. However, it alone leaves litigants and judges without real guidelines for how to determine if the nexus exists and if the communication was necessary and in furtherance of legal as opposed to business advice.³⁰⁸ Furthermore, it may not, on its own, do enough to reign in the use of attorneys as shields against discovery. Therefore, when analyzing whether a nexus exists, courts should *also* consider the following four factors, drawn in part from the doctrine:³⁰⁹

3. Four Factors

First, the court should consider whether the lawyers were not skilled in the area in which they sought expert assistance.³¹⁰ If a company was considering a corporate merger, a court

2080, 1989 U.S. Dist. LEXIS 6876, at *9 (S.D.N.Y. June 20, 1989). *See supra* notes 68-69. Moreover, as Imwinkelried admits, a rule that requires courts to parse communications that were only based on client confidences from those that actually disclose them would be laborious, costly, and time consuming. *Id.* at 48. Lastly, Imwinkelried's point is really not that communications between attorneys and third party experts that indirectly reveal client confidences should not be protected. Instead, it is that the more absolute protection of the attorney-client privilege is not necessary because the work product doctrine will apply. Imwinkelried, *supra* note 10, at 37; *id.* at 49. However, the work product doctrine only applies in the context of litigation and suffers from other inadequacies. *See supra* note 147-169 and accompanying text.

³⁰⁷ *See supra* note 296.

³⁰⁸ As discussed, determining whether a communication is in furtherance of legal as opposed to business advice is difficult and corporate attorneys often dispense both business and legal advice. Solving this problem is outside the scope of this Article. That being said, the factors are designed to aid the court in making the determination.

³⁰⁹ These are not the only factors relevant to determining if there is a nexus, but courts should consider these three factors in addition to other evidence. *See infra* note 361. Multi-factored tests requiring analysis of a nexus between two subjects have been introduced in other areas of law as well. For example, the Supreme Court introduced a nexus test into patent law in 2002. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 740-41 (2002) (explaining that the presumption of prosecution history estoppel can be rebutted by showing that the rationale underlying the amendment bears no more than a tangential relationship to the equivalent in question.).

³¹⁰ Courts have also considered this factor. *See, e.g.* *Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002) (taking into account that attorney had twenty years of experience in trusts and estates and, therefore, might not have needed advice from tax consultant regarding family trust); *cf.* *In re Grand Jury Subpoenas Dated March 24, 2003*,

might not find a nexus for communications between a tax consultant and an outside law partner that has specialized in tax and mergers and acquisitions for twenty years. Importantly, this factor is not meant to uncover abuse but instead to help the court determine necessity.³¹¹

Second, the court should consider the way the communication sought to be privileged was conducted or distributed. It is probative if the communication or document was shared only with “top management and any employee whose opinion would be considered by top management before forming a decision.”³¹² This is a smaller group than that traditionally covered by the Supreme Court’s broad *Upjohn* decision.³¹³ Limiting the distribution in this manner helps

265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (considering that the attorney did not have public relations experience); *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002) (considering “significant [tax] expertise” of in-house counsel in denying privilege protection); Richmond, *supra* note 12, at 499 (explaining that based on doctrine the privilege “is more likely to attach where a client does not have in-house public relations capabilities”). As stated, this recommendation does not affect other types of agents like secretaries or paralegals. This recommendation applies to communications with third party professional specialists that are consulted for their strategic, content-based expertise. Thus, just because an attorney can type does not mean that he or she cannot seek the assistance of his/her secretary in typing his/her briefs.

Some may contend that this recommendation provides incentives to lawyers to be narrow legal specialists. If that is the case, it is in keeping with the trend in legal practice today. *See, e.g.*, Marcy Lerner and Ron Hogan, VIEW FROM THE TOP, LAW FIRM LEADERS Q&A WITH CHAIRMEN AND MANAGING PARTNERS, Vault Inc. (2005) at 99 (“I see continuing consolidation and trend towards specialization in large law firms and also in boutique firms.”); Tora Kay Bikson *et al.*, *The Labor Market in the State of California, Past, Present and Future*, 6 (section II), www.rand.org/pubs/monograph_reports/MR1710/MR1710.sum.pdf (last visited August 5, 2008) (“A defining feature of the legal profession is the scope of specialization within the field.”). Moreover, if a lawyer becomes especially skilled in an area, he or she may be able to competently handle the matter without sharing confidential information with a third party consultant also skilled in that area. Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 WASH. L. REV., 625, 635 (1994) (“The more lawyers know about science, technology, economics, psychology, management and other matters affecting their clients’ interests, however, the more value lawyers will be able to add to their clients’ activities.”). The counter-argument, however, is that this recommendation incents attorneys to be generalists. If attorneys are not specialists in an area, then there is a higher likelihood that consultation with a third party consultant will be viewed as necessary by a court. Further, because the recommendation enables consultation with third party consultants in other disciplines, it allows a lawyer to provide informed legal advice that is not detached from business concerns and is arguably more relevant to corporate clients.³¹¹ On these same lines, a court might also consider the internal staff capability. *Cf.* *In re Copper*, 200 F.R.D. 213, 219-220 (S.D.N.Y. 2001) (deciding external PR consultants were functional equivalents because, *inter alia*, internal PR resources were “insufficient”). That is, if the company has an internal PR group, this may negate the necessity of talking with an external PR consultant. However, those in favor of outsourcing argue that outside consultants do not replace but instead compliment and help train internal staff. Rosen, *supra* note 28, at 648.

³¹² *Hayes v. Burlington N. & Santa Fe Ry. Co.*, 752 N.E. 2d 470, 473 (Ill. App. 2001) (describing similar test for control group test); Sexton, *supra* note 2, at 505 (recommending that confidentiality be preserved “where the attorney shares the information with those empowered to make legal decisions for the corporation”).

³¹³ *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). *Upjohn* required communications be kept “highly confidential” which as discussed *supra* in note 66 has been interpreted as a fairly broad “need to know” standard. *See, e.g.*, *Fed Trade Comm’n v. GlaxoSmithKline*, 294 F.3d 141, 147 (D.C. Cir. 2002) (“The Company’s burden is

show that the communication was primarily in furtherance of legal advice and not to protect non-privileged information from discovery.³¹⁴ As one court explained, it also helps ensure that “the mere receipt of routine reports by the corporation’s counsel will not make the communication privileged.”³¹⁵ Courts should also consider the form of the communication and whether the substance was communicated by other methods to non-lawyer corporate employees. In the drug-recall scenario, the fact that the trials were previously distributed to others in the same form raises the question that perhaps the client was not seeking legal advice from the lawyer about the trials themselves. On the other hand, evidence that other methods were used supports the contention that the attorney involvement was to secure legal services and not to shelter otherwise discoverable information.³¹⁶ In the drug-recall hypothetical, the external PR consultant provided a document to the lawyers that presented public relations advice based on potential litigation strategies. The lawyers used this information to provide legal advice to the client. Assuming the

to show that it limited its dissemination of the documents in keeping with their asserted confidentiality, not to justify each determination that a particular employee should have access to the information therein.”).

³¹⁴ The Supreme Court’s concern that the control group “frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys” is absent here because this recommendation is about lawyers communicating with third party specialists. *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981). Professor Lonnie T. Brown recommends that courts adopt a similar approach to attorney-client privilege law in general. Brown, *supra* note 63, at 953 (defining the “control group” based on Model Rules of Professional Conduct 4.3 because it is “as close as possible to articulating a true corporate analog for the individual client paradigm”). He argues that using this control group “narrow[s] the scope of the corporate attorney-client privilege so as to protect the sort of information that the privilege was originally designed to cover, as well as that which corporations desire most to be kept confidential, such as legal advice from counsel or incriminating communications from senior management to corporate counsel.” *Id.* at 908. Paul Rice, however, argues that the presence or absence of confidentiality does not further or detract from the purpose of the attorney-client privilege and that it is inefficient to inquire into whether distribution was appropriate. Paul Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L. J. 853, 888, 890 (1998). He proposes that the confidentiality component to the attorney-client privilege be abolished in favor of a standard that protects all communications between attorneys and clients regardless of third parties as long as court determines that communication was done in good faith and it is fair to the parties to protect it. *Id.* at 888, 893. This is problematic. First, the proposal greatly expands the privilege. Any third party privy to attorney-client communications could not be compelled to reveal the communication. Second, it enables litigants to pierce the attorney-client privilege based on an equity analysis which would make protection even more equivocal and likely affect behavior *ex ante*.

³¹⁵ *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 610 (8th Cir. 1977).

³¹⁶ *In re Buspirone Antitrust Litigation*, 211 F.R.D. 249, 254 (S.D.N.Y. 2002) (considering this factor in the context of internal employees). *Cf. In re Air Crash Disaster*, 133 F.R.D. 515, 519-20 (N.D. Ill. 1990) ([If the lawyer is acting merely as a custodian, for example, there is no privilege attached to the communication.”).

public relations document was not mass distributed, there is less worry about the potential for abuse than if the general counsel had simply distributed the document as “the” legal advice.

Third, the court should consider, as some courts do, whether there is “contemporaneous documentary proof supporting [either party’s] interpretation of the facts.”³¹⁷ For example, the consultation should relate to the consultant’s specialty *and* contract.³¹⁸ If an accountant provides advice to the lawyer about the accountant’s former client to aid in litigation against the former client, such communication should not be protected. Further, although form should not be elevated over substance, the fact that the lawyer was present at the meeting,³¹⁹ the document specifically requested legal advice,³²⁰ there is a separate bill or retainer agreement for the project, or there is an already existing lawsuit on the matter³²¹ support the proponent’s nexus contention.³²² I acknowledge that this factor is extremely fungible.³²³ However, requiring attorneys to formalize the relationship in some way raises consciousness around the privilege and

³¹⁷ Adlman I, 68 F.3d 1495, 1500 n. 1 (2d Cir. 1995).

³¹⁸ This ensures that ordinary fact witnesses are not designated consultants in order to garner shelter. *See supra* notes 104-108 and accompanying text for more discussion. Alexander, *supra* note 14, at 321 n. 433 (critiquing case because it enables parties to “convert mere witnesses into sources of private information simply by designating them litigation consultants”). Although it has not been followed by all courts, Upjohn requires this type of connection for employees. Upjohn, 449 U.S. at 394-95 (requiring that communications concerned matters within the employees’ corporate duties”); Harper & Row Publishers, Inc v. Decker, 423 F. 2d 487 (7th Cir. 1970). The old subject matter test also required this type of connection. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1977) (explaining that such limits prevent protection to employees that “function[] merely as a fortuitous witness”).

³¹⁹ *But see* In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 332 (S.D.N.Y. 2003) (announcing that privilege could extend to communications between client and third party without presence of attorney if directed by attorney).

³²⁰ Hercules v. Exxon, 434 F. Supp. 136, 144 (D. Del. 1977) (“It is not essential, however, that the request for advice be express. Client communications intended to keep the attorney apprised of continuing business developments, with an implied request for legal advice based thereon, or self-initiated attorney communications intended to keep the client posted on legal developments and implications may also be protected.”).

³²¹ Arguably, this factor would also help prove work product protection. As discussed *supra*, however, because the work product doctrine is distinct from the attorney-client privilege, there are situations where attorney-client privilege protection would be sought in addition to or in lieu of work product protection. *See supra* Part IID.

³²² *Cf.* Adlman I, 68 F.3d at 1500 n. 1 (rejecting attorney-client privilege protection based, in part, on fact that client’s billing statements did not separate accountant consultant’s work done to help lawyer from other accounting and advisory work provided by accountant to client generally).

³²³ Application of this factor may result in manipulation like that described in note 330. However, this is generally true of formal requirements. Moreover, there is a cost to manipulation. It requires multiple people to evade the law which makes it more likely that someone will refuse to cooperate or blow the whistle. Lastly, this factor is one of several. The absence or presence of these formal indicators is not determinative.

its parameters. It requires attorneys to be cognizant of and more diligent about the decision to share confidential information with third party consultants and to delineate when they are wearing their legal hat.³²⁴

Lastly, a court should consider the substance of the law involved. If the legal issue implicates a great deal of facts or is very complex and hinges on highly specialized knowledge (like corporate securities laws) this may support necessity.³²⁵ Additionally, if the cause of action is bound up in the type of services provided by the consultant, this may support a nexus. For example, a nexus between consultation with a PR executive and the provision of legal advice is more substantiated if the case is one of defamation, libel, or slander than one seeking damages for failure to comply with the Consumer's Legal Remedies Act.³²⁶

As long as the litigants know beforehand that the presence of these things will support a nexus, there is no inequity. Importantly, the absence of these things does not necessarily indicate lack of nexus. For example, requests for legal advice can be implied; and one can imagine circumstances where the lawyer would direct the client to relay information directly to the third party consultant and not see the need to be present (and bill the client for the time).³²⁷

³²⁴ Other scholars have recommended attorneys take formal steps to preserve confidentiality and the privilege. *See, e.g., Chambliss, supra* note 54, at 1732 (recommending firm counsel “bill the firm for time spent on in-house advising” to “underscore the[e] separation and the firm’s identity as the client” to preserve privilege when relying on in-house law firm counsel).

³²⁵ This is similar to the agency theory’s original justification. *See infra* notes 74-76 and accompanying text.

³²⁶ *Moses, supra* note 15, at 1836 n. 134 (1995) (“Libel is an area in which spin control may be the basis of the entire case. Libel cases are about damage to public image; the case itself may be designed to resurrect the image of the plaintiff in the public eye. Attorneys want to get the press to pay attention to the plaintiff’s position to arguably advance goals of client.”).

³²⁷ *See supra* note 320; *see In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 331 (protecting communications between client and PR firm when lawyer was not present as long as lawyer directed client to reveal confidential information to PR consultant and it was for purpose of obtaining legal advice from the lawyer); *see also United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1048 (E.D.N.Y. 1976); *see also United States v. Kovel*, 296 F. 2d 918, 922 (2d Cir. 1961) (explaining that lawyer’s physical presence is not necessary). *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1048 (E.D.N.Y. 1976) ([T]here can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer's presence while the client dictates a statement to the lawyer's secretary. . . .”).

There are a few factors courts have considered in the past that should *not* be considered because they serve as artificial distinctions. For example, that there is a prior consulting relationship between the client and the third party consultant should *not* be a factor for or against a nexus.³²⁸ It is precisely because of the prior or existing relationship that the consultant's advice may be valuable. Moreover, the communication should be no less protected simply because the client or in-house attorney rather than the outside attorney hires the consultant.³²⁹ Today, the general counsel is generally the hub of any legal controversy and in charge of the outsourcing decisions – not the external lawyer. Considering who hires the consultant or whether there was a prior consultant relationship puts form over substance.³³⁰ Additionally, it negates the purpose of third party attorney-client privilege doctrine which is to protect communications that are necessary to the lawyer's ability to render legal services (and that directly or indirectly reveal a client confidence or legal advice) regardless of the formal relationship to the client.³³¹

Lastly, the judge need not attempt to determine if the communication would not have occurred *but for* the client's need for legal advice or legal services.³³² Although a positive

³²⁸ *But see* Adlman I, 68 F.3d 1495, 1500 n. 1 (2d Cir. 1995) (emphasizing prior consulting relationship with client); Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002) (“[W]hen a party hires an accountant to provide accounting advice and only later hires an attorney to provide legal advice, it is particularly important for the party to show that the accountant later acted as an agent necessary to the lawyer in providing legal advice.”).

³²⁹ *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 325-26 (S.D.N.Y. 2003); *see also id.* at 331 (explaining that communications would not be privileged if PR firm had been hired by client directly and acknowledging the “artificiality” of this distinction in order protect “effective operation of the privilege”); Gruetzmacher, *supra* note 12, at 989 (explaining that cases that require consultant to be hired by law firm or client to hire law firm first “epitomize form over substance and have done nothing but create uncertainty and confusion in an area of law in which certainty is crucial”).

³³⁰ Indeed, many of my interviewees mentioned that although the General Counsel was the ultimate hiring manager, the lawyers structure it so that the outside law firm hires the external consultant to try to ensure privilege protection. *See e.g.*, GC-I-L-5 (S-2) (explaining that the law firm formally hires the external consultant and attempts to put in the “right” contract language to garner privilege protection; PRE-NA-L-22 at 4 (“Sometimes, more than sometimes, we will be retained by outside council in order to protect privilege. But in most of those cases, well, our contracts with the outside council, the contract will stipulate that the cost will be borne directly by the client.”).

³³¹ *Chore-Time Equipment v. Big Dutchman*, 255 F. Supp. 1020, 1023 (W.D. Mich. 1966) (“The admission of non-lawyers into the field of patent practice is not a sufficient reason ‘for breaking down well recognized and soundly based rules affecting the claim of privilege.’”).

³³² *See, e.g.*, *First Chicago Int'l v. United Exchange Co.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989) (“[C]laimant must demonstrate that the communication would not have been made but for the client's need for legal advice or

answer to this question is fairly strong support for the nexus, it is problematic. As Federal Rule of Evidence 501 urges, the privilege should be interpreted “in light of reason and experience.”³³³ Large corporations conduct business by multidisciplinary teams made up of internal and external consultants.³³⁴ These teams meet for multiple purposes that intertwine. Legal risks cannot be understood independent of business risks.³³⁵ Thus, in many circumstances it would be next to impossible to determine if the communication would not have occurred *but for* the need for legal advice.³³⁶ The nexus test avoids such problems of proof. Consider the drug-recall scenario. That the attorney needed the input from the PR consultants in order to provide the effective legal services is more than plausible,³³⁷ but there was also a business need.³³⁸

B. *Analysis*

1. Zone of Secrecy and Corporate Misconduct

Critics of the corporate attorney-client privilege in general and of its application to third party consultants contend that “corporations will attempt to funnel [more] corporate communications through their attorneys in order to prevent subsequent disclosure.”³³⁹ This risk likely grows with the scope of the doctrine. Further, scholars argue that when corporations know that something will not be discoverable, they are more likely to misbehave.³⁴⁰ These concerns are valid. The

services.”); *see also*, Adlman II, 134 F.3d 1194, 1198 (2d Cir. 1998) (recommending a “but-for” and “because of” test in the work product doctrine context); Sexton, *supra* note 2, at 490; *id.* at 459.

³³³ Fed. R. Evid. 501.

³³⁴ *See supra* notes 28-31 and accompanying text.

³³⁵ Rosen, *supra* note 28, at 659.

³³⁶ Sexton, *supra* note 2, at 492 (“Difficulties of proof are associated with any demonstration of subjective motivation.”). Sexton believes that corporate employees should not have to “demonstrate that the communication would not have been made but for the existence of the privilege” because of the inherent problems of proof associated. *Id.* at 491-492. Still, he argues that in order for the corporate attorney-client privilege to apply, Upjohn requires that the communication to the attorney would not have been made but for the contemplation of *legal services*. I believe these same problems of proof occur with this “but for” test as with the one he argues against.

³³⁷ *See supra* notes 33-40 and accompanying text.

³³⁸ In the work product context, this same type of test proves malleable and unpredictable. *See supra* Part IID.

³³⁹ *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977); *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999) (“Litigants may use secrecy to cover up machinations, to get around the law.”).

³⁴⁰ *See supra* note 240.

public could end up with less information or, worse, it could be misled – as it may have been by tobacco companies.³⁴¹ Admittedly, protection of consultation with third parties as recommended under my proposal might cover up matter that would have been discoverable under a narrow *Kovel* theory.³⁴² For example, it would likely protect the notes taken by the PR consultant in the drug-recall scenario while the narrow interpreter theory would not. Hypothetically, it might also protect discrete scientific studies conducted at the behest of lawyers to determine if current product label disclosure is adequate (presuming the results disclose confidential client communication and/or legal advice).³⁴³ Importantly, this test is not as inclusive as the broadest interpretations of *Kovel* because the proponent has to show not just that the communication was in furtherance of legal services but that it was *necessary* for it. Further, it constricts the availability of blanket protection in those situations where third party consultants, like those in the drug-recall scenario, might be deemed functional equivalents³⁴⁴ because it does away with the functional equivalents test for third party strategic consultants. Because it is narrower than the broad approach, it may discourage the type of aggressive interpretation to the attorney-client privilege by the tobacco lawyers.³⁴⁵

As discussed, under the narrowest interpretation of *Kovel*, none of the communications in the drug-recall scenario would be protected, but under the broadest interpretations of *Kovel* or the

³⁴¹ United States v. Phillip Morris USA Inc., 449 F. Supp. 2d 1, 28 (D.D.C. 2006) (disparaging lawyers for “[taking] shelter behind baseless assertions of attorney client privilege”); *see also supra* note 14.

³⁴² It is difficult to quantify the impact of this recommendation since application varies. As mentioned *supra*, courts within the same district have applied a narrow and broad standard. Moreover, some courts that apply the narrow standard find that it covers third party consultation even when the third party does more than translate. My standard protects any communication that would be protected under the narrowest interpretation of *Kovel*.

³⁴³ Preexisting documents are not subject to attorney-client privilege protection. Brown, *supra* note 63, at 916. Therefore, if studies were already done and ordered for business purpose, the corporation cannot protect them by sending them to the attorney. They are only coverable if the attorney requests them in order to provide legal advice. Further, the underlying facts or results of the study are discoverable by other means. *Id.*

³⁴⁴ Courts have found external PR consultants, like the one in the drug-recall scenario, to be functional equivalents. *See supra* notes 265-266 and accompanying text.

³⁴⁵ *See supra* note 241.

functional equivalence test, all of them could be. Under my test, this is not the case. The documents detailing the external PR executive's recommendation on the best media response would not be protected because they were not necessary for the lawyer to provide legal advice. The clinical trials conducted by the external scientists would also not be protected. Although understanding the drug's side effects is nice to know and the lawyer is likely not a trained scientist, it does not appear that the studies were conducted so that the attorney could provide legal advice back to the client.³⁴⁶ Instead, it seems they were originally conducted to determine the drug's efficacy and were not sent to the lawyer for legal advice. Moreover, they may have been distributed to more than just those employees that can impact the decisions.

As the Supreme Court recognized in *Upjohn*, "the privilege only protects disclosure of communications; it does not protect disclosure of underlying facts by those who communicated with the attorney."³⁴⁷ Thus, plaintiffs, in many cases, will not end up having less access to the information they need to bring suit. They simply will not be able to use the defendant's own words to prove what they should otherwise be able to establish by discovery. The facts are discoverable by other means.³⁴⁸ As the Eighth Circuit explained, when litigants fail to learn that which is privileged, it is often "simply due to their own failure to ask the proper questions."³⁴⁹

2. Compliance, Informed Decision-Making, and the Spirit of the Doctrine

Admittedly, as compared to the narrow approach, my approach presents a cost to the public's access to information. But shielding this information promotes compliance and informed

³⁴⁶ Cf. *Burton v. Reynolds Tobacco Co.*, 177 F.R.D. 491, 497 (D. Kan. 1997) (denying privilege because party did "not point to any specific evidence, however, that the documents were created to give legal advice instead of for general business purposes, nor do the documents themselves evidence the necessary link").

³⁴⁷ *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981); *HW Carter & Sons v. William Carter Co.*, No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *3-4 (S.D.N.Y. May 16, 1995) ("An attorney may not be compelled to disclose communication made to him or her by a client, even where those communication contain purely factual material. Nor may an attorney be compelled to disclose facts that he or she learns from a client. The *client*, on the other hand, may be required to disclose the underlying facts although not the communications to counsel.").

³⁴⁸ See *supra* notes 68-69 and accompanying text.

³⁴⁹ *In re Bieter*, 16 F. 3d 929, 941 (8th Cir. 1994).

decision-making in the same way that protecting attorney-led internal investigations do. That is, an attorney may be better able to investigate whether a corporation is complying with trading laws with the help of an external financial consultant. Or, as I have argued elsewhere, armed with the information that a PR executive can provide about the potential spin of a legal course of action, a lawyer may be better able to counsel the client against doing something that is technically legal but risky.³⁵⁰

However, my approach is less expansive than the broad approaches. It requires that the consultation be necessary to the provision of legal services which is in sync with the spirit of *Kovel*, the original decision to provide an exception for third party consultation. This is likely why some courts and scholars infuse necessity into the standard.³⁵¹ Given that my approach requires necessity and the analysis of factors, my recommendation might reduce corporations' and lawyers' use of external consultants as compared to the broad approach. Because protection will be lost, attorneys will abstain if they do not believe that the communication is necessary to render legal services. This lack of certainty may, therefore, "chill" consultation. Arguably, however, it does so in a way that comports with the spirit of the doctrine. Attorneys will only seek the help of third party consultants when they really, *really* need it – as opposed to when they think it just *might maybe* help them somehow.³⁵² So, for example, had the lawyer already decided to pull the drug, admit responsibility and preemptively settle the cases, but wanted to know how the external PR consultants would handle the PR, he/she would abstain from candid, open consultation with the external PR consultant. John E. Sexton argues against necessity tests

³⁵⁰ See Beardslee, *Advocacy Part I*, *supra* note 6 at X.

³⁵¹ See *supra* note 296.

³⁵² Cf. Sexton, *supra* note 2, 482 (arguing that communications with employees should be privileged when they "reasonably could have believed . . . that the content of the communication related to the legal services").

in the employee context for just this chilling effect.³⁵³ Here, however, the party required to determine whether the communication is important to legal services is the attorney – not the client. Significantly, the chill is not as disconcerting in this context because it is one step removed from the attorney-client privilege sweet spot i.e., attorney-client.³⁵⁴ While this test may force attorneys to make the necessity calculation before they can really know the answer (classic chicken-egg problem), attorneys can and (already do) consult with external third parties hypothetically – without discussing information they want to remain privileged.³⁵⁵ This is not the ideal way to consult with a third party specialist, but it sufficient in those situations where the attorney suspects that consultation would waive the privilege.

Moreover, arguably corporations will still hire external consultants. The difference will be that corporate employees will only share confidential information with them when the attorney believes it is necessary for competent legal advice or when the client believes it is worth the risk regardless.³⁵⁶ That said, given that my proposal does away with the functional equivalence exception for strategic consultants, corporations' propensity to treat external consultants like internal employees may be reduced. However, this may enable third party consultants to perform an informal regulatory function for the corporation. As discussed, third party consultants on internal crisis teams may serve a gate-keeping role.³⁵⁷ Arguably, the less these

³⁵³ Cf. Sexton, *supra* note 2, 482 ([A]n inability to forecast accurately whether a claim of privilege will be recognized by courts will chill communications."). *Id.* at 495.

³⁵⁴ Third party consultants that might have been deemed functional equivalents of the client are not the client. *See* discussion *supra* Parts II.B.3. Therefore, this test does not chill communications between *client* and attorney.

³⁵⁵ Many of the General Counsel interviewees that were concerned about protection of the privilege mentioned that they tried to limit exposure of client secrets by speaking to the external PR consultants hypothetically.

³⁵⁶ Just as attorneys warn corporate clients that they represent the corporate entity and not the officers or employees, the attorney should warn the client of the risks associated with consulting candidly with third party consultants. Bruce A. Green, *Interviewing Client Officers and Employees: Ethical Considerations*, PROF'L LIAB. LITIG. ALERT, WINTER 2005, AT 1, 3 (noting that lawyers do and should provide these types of warnings). *See supra* note 191.

³⁵⁷ *See supra* note 261 and accompanying text.

consultants are treated like and feel like regular employees the lower the risk that they will become less objective and the higher the odds they will be able to play that gate-keeping role.³⁵⁸

3. Predictability/Clarity

Given that my recommendation utilizes one standard it is more predictable than the current doctrine (which incorporates three standards with varying interpretations). That said, the proposed multi-factored nexus test is not nearly as predictable as a bright line rule or a very narrow or very broad interpretation of *Kovel*.³⁵⁹ Moreover, it entails transaction costs.³⁶⁰ However, I contend that it lends sufficient clarity and consistency to the process in a way that maximizes the other, arguably more important, normative criteria.

First, it is not a naked standard. It includes four factors that harness the analysis.³⁶¹ Second, although there is a need for more certainty than that provided by the current regime, attorneys work within a probabilistic universe.³⁶² Therefore, the level of certainty required in order to enable external consultation may be less than that provided by a bright line rule. As Tim

³⁵⁸ The importance of gatekeepers in today's legal corporate environment can not be over emphasized. *See supra* note 225. As Milton Regan explains, law firms are driven by the market and, therefore, external lawyers may be "both less willing and less able to insist that corporate clients give weight to interests beyond those of shareholder wealth maximization." Regan, *supra* note 15, at 938; *Cf.* David B. Wilkins, *Who Should Regulate Lawyers*, 105 HARV. L. REV. 799, 871 (1992) ("Because of the financial and other rewards of a cutting edge corporate legal practice, the fear of liability in this context is not sufficient to deter even clearly questionable conduct let alone legitimate advice that might be made to appear questionable after the fact.").

³⁵⁹ There are obviously costs associated with taking into account the context surrounding the communications. *Cf.* Wilkins, *supra* note 357, at 878 (explaining that "determining contextual differences takes time and can lead to the point where it becomes necessary to treat every case as unique"). However, these costs exist currently under any interpretation of the exceptions and are arguably streamlined with my recommendation.

³⁶⁰ In addition to costs associated with administering the test in court, there will be costs associated with putting together privilege logs. However, many courts already require particularized privilege logs. Moreover, knowing the standard and factors that will be considered by a court may induce attorneys to keep more careful records of communications as a matter of due course which is something they may not do if the rule is extremely vague or narrow. *See supra* notes 211-217 and accompanying text.

³⁶¹ My recommendation harnesses the range of what David B. Wilkins refers to as "substantive tilt." Wilkins, *supra* note 357, at 811; *supra* note 285. The factors work to some extent like rules in that they "allocate the limited decisional resources of individual decision-makers, focusing their concentration on the presence or absence of some facts and allowing them to 'relax' with respect to others." Schauer, *supra* note 285, at 146.

³⁶² Also, they understand that the facts of the controversy are likely to be exposed. GC-NA-L-1 at 28. ("In today's environment, you know, with an employee population of young bright enlightened individuals, it's a rare person who believes that a corporation can keep a secret especially if its got some community or regulatory impact").

Glynn argues, “the level of certainty required” for the privilege to promote candor and communication “most likely varies by client and circumstance.”³⁶³ Based on preliminary findings from the PR Study, it appears that in this context, the possibility of coverage is quite different than the complete absence of it. And the decision to share information is a calculated risk.³⁶⁴ Thus, although attorneys claim they would abstain from consultation if they *know* their communications will not be protected (as under the narrow theory), they do not need definitive protection to justify consultation with third party consultants.³⁶⁵

Third, in addition to adding some clarity that informs behavior *ex ante*, this proposal also informs behavior *post hoc*. Litigants know what type of proof to submit to support a claim of privilege which may decrease frivolous claims. And courts know what factors are important to the analysis. As such, the multi-factored nexus test will lead to better analyzed opinions because it centers the inquiry on the type of service the *attorney* provides as opposed to that provided by third party.³⁶⁶ And, it streamlines analysis. Although many judges write as if there is only one standard, they often spend time justifying the standard they apply.³⁶⁷ Under the multi-factored nexus test, the court will not waste energy justifying the theory it applied. Third, although this multi-factored nexus test does not specifically delineate what is legal from business advice – a

³⁶³ Tim Glynn, *Federalizing Privilege*, 52 AMER. U. L. REV. 59, 80-83 (2002).

³⁶⁴ LP-NA-L-27 at 18 (“It’s all a balance of the risks.”).

³⁶⁵ GC-I-L-5 (S-2) at 20-23 (explaining that he is “more frank in his conversations because of the possibility of coverage” but that there would be less communication and a larger wall between PR and Legal without the possibility of coverage). A minority of interviewees mentioned that although they try to preserve the privilege, there sometimes attorneys are willing to take the risk of exposure in order to get the external advice. GC-C-S-17 at 40; GC-C-L-13(S-28) at 9 (“It’s difficult to speak in generalities, but I would say that although it’s important to protect the privilege that’s not always the driving factor in terms of how you go about things. There are other considerations.”); LP-NA-L-2 at 19 (explaining that sometimes “it’s more important to get good PR legal advice coordinated and privilege be damned.”). However, even in these situations there is the possibility of coverage.

³⁶⁶ Analyses that deny protection because the consultant failed to provide legal advice or special consultancy advice would not occur. *See supra* notes 138-146 and accompanying text.

³⁶⁷ *See, e.g., Tri-State Outdoor Media Group Inc. v. Official Committee of Unsecured Creditors to Tri-State Outdoor Media Group*, 283 B.R. 358, 361-63 (2002) (focusing discussion on *Kovel* and its progeny and distinguishing *Ackert* to justify protecting communications between the law firm and the financial consultant hired by the law firm to help negotiate the financial restructuring.).

likely impossible task³⁶⁸ – it provides some factors to inform the determination and it forces the litigants and judges to be more particular – a rigor currently absent from the analysis. Thus, it prevents judges from hanging their hat on one factor as they sometimes do.³⁶⁹ In those instances, the nexus test may not change the end result, but it would change the quality and depth of analysis. In addition to considering formal documents made *ex ante* to the consultation, courts still have to consider the substance of and circumstances surrounding the actual communications. They have to dig into the facts of the case – which is exactly how the attorney-client privilege should be decided, case by case.³⁷⁰ Therefore, a court will still be able to deny protection if it suspects that attorneys are acting as mules to protect what should be discoverable. Thus, although clarity and predictability are of concern, and any recommendation should strive to increase these dimensions, as this one does, analysis of the attorney-client privilege has always been and should remain intimately tied to the facts of each case.

4. Other Considerations

Likely, those most opposed to my recommendation will question why corporations should not have to shoulder the costs of third party consultation i.e., the risk of reduced privilege protection. They will ask why the attorney-client privilege should change to accommodate corporation's business needs,³⁷¹ why we should encourage attorneys to incorporate non-legal

³⁶⁸ Indeed, as a profession we lack consensus on what are “full and complete legal services,” “good decision making,” and “legal advice.” Therefore, my recommendation unavoidably suffers from some of the same problems associated with the attorney-client privilege in general. The hope is that it will limit the number of times that the privilege is wholly lost by lawyers seeking help from business consultants when necessary to provide fully informed, integrated, legal services to the client.

³⁶⁹ In *Tri-State*, the law firm hired a financial consultant to help negotiate its financial restructuring. *Tri-State*, 283 B.R. at 361. The court decided the attorney-client privilege protected communications between the lawyer and financial consultant based on one factor, the engagement letter. *Tri-State*, 283 B.R. at 363 (finding work-product protection applied but ultimately waived because consultant was a testifying expert witness).

³⁷⁰ *Radiant Burners Inc., v. American Gas Assoc'n*, 320 F.2d 314, 324 (7th Cir. 1963) (explaining that corporate attorney-client privilege matters have to be resolved on a “case-by-case basis”).

³⁷¹ For an argument that the corporate attorney client privilege should expand as the scope of legal practice expands and protect non-legal components of attorney communications that are intertwined with communications made primarily to attain legal advice see generally Sisk et al, *supra* note 48.

considerations in the provision of legal advice. My answer to this is three-fold. First, under my recommendation, corporations do have to shoulder the cost to a degree. If they want complete protection, they have to tighten their “porous borders,” that is, hire the third party consultant.³⁷² They can no longer rely on the functional equivalents test for shelter. Second, as discussed, external consultants may actually play a role in identifying and managing risks for corporations that lawyers may not.³⁷³ If the point of reference is malfeasant corporate directors then third party consultants may be seen as “aiders and abettors.” On the other hand, if the assumption is that the corporate directors desire to comply with the law, protecting some communications between lawyers and third party consultants is more palatable.³⁷⁴ Third, if it is true that lawyers can sometimes provide better legal advice to their clients with open third party consultation, protecting such communication serves the interests of not only clients but also the public and the legal profession. As discussed earlier, in order to stay relevant and continue to add value to clients, lawyers need to approach problems holistically.³⁷⁵

³⁷² Admittedly, this may disadvantage those corporations that are smaller and cannot afford to have internal staff on the matter. That said, this would arguably support the attorneys’ contention that the communication with the external consultant was necessary. *See supra* note 249.

³⁷³ *See supra* note 226 and accompanying text.

³⁷⁴ The general counsels in the PR Study often asserted that they and their clients tried to comply with the law even if there is little risk. *See, e.g.*, GC-F-L-4 (“Because day-to-day we try to comply with the law. As a general counsel of this company I was always involved in important disclosures to the markets because it’s my lawyers’ job to make sure that the statement is as clear and as accurate and balanced for investors as possibly it can be. So, one input is sort of, are we doing this the way SEC structured and unstructured disclosure would have us do it. We try to comply with the law not just because we could get sued if we don’t. My client say to me, use this disclosure consistent with your understanding of the securities law. So, that’s what in-house lawyers do all the time.”).

³⁷⁵ *See supra* Parts I and IIC and note 297. Arguably, this is also important for attorneys’ livelihood. Sisk *et al*, *supra* note 48, at 22 (“An appreciation of the attorney-client privilege as dynamic in nature requires opening our eyes to the changes in the services provided by lawyers as part of legal representation in today’s society.”). Some might contend that my proposal increases the power and influence of the general counsel because the general counsel is the one who decides when it is necessary to talk to external consultants. However, under both the broad and narrow approaches, it is the attorneys that decide when outside consultation is necessary for the provision of legal advice. Moreover, corporations will still have business reasons to seek outside experts.

Although my proposal does not perform better on all criteria as compared to a very broad or very narrow approach, overall it performs as well or better on most. Although still subject to interpretation which might produce varying results, the multi-factored nexus test recommended in this Article will provide slightly more predictable protection to third party consultation in a way that balances the search for truth with the need for confidential communications between attorneys and third party consultants. Unlike the narrow approach, the nexus test embraces the role third party consultation plays in the provision of legal advice to large corporations. Unlike the broad approaches, it prevents the ease with which corporations can funnel communications unrelated to legal services through attorneys for protection. Lastly, this test encourages better, more streamlined analysis. Even if reform fails to change the quality of analysis, a set of norms will be elaborated by common law to guide attorneys' interactions with third party consultants.³⁷⁶

CONCLUSION

In today's increasingly complex, regulated, marketplace, corporations rely on third party consultants to conduct business. Therefore, attorneys sometimes have to consult openly with these third party consultants in order to provide fully informed competent legal advice and services to their corporate clients. My primary thesis is that there should be absolute protection for some exchanges between attorneys and third party consultants. My secondary thesis is that, as a means to that end, the attorney-client privilege doctrine ought be revised so that it protects these exchanges when they are truly necessary but does not create a huge zone of secrecy against discovery. Therefore, this Article makes some specific recommendations on how the attorney-

³⁷⁶ Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) j. Blackmun *dissenting* (arguing for a nexus test over a bright line rule in the context of 10-b5 claims and explaining that “[s]ensible standards of proof and of demonstrable damages would evolve and serve to protect the worthy and shut out the frivolous”). One question left unaddressed is how this recommendation will be implemented. One possibility is that an appellate level court or even the Supreme Court, when presented with the appropriate case, will decide to enact changes to the doctrine similar to that proposed here. The other option is change by legislation.

client privilege could be revised to achieve this end. However, there are likely other adequate means to achieve the same result.³⁷⁷ For example, the work product doctrine could be expanded to cover communications with third party consultants irrespective of the prospect or existence of litigation like it has been in California.³⁷⁸ What is important is that the right result is achieved. I have argued that the right result will flow from a solution that seeks to: increase deterrence, decrease a zone of secrecy, enable informed decision making, increase compliance, comport with the spirit of privilege doctrine, and provide increased clarity over the current regime. However, even if there is disagreement about the importance of these dimensions, there is still value to this exercise. The issues addressed in this Article are connected to larger questions facing the legal profession today such as: What comprises full and complete legal services? How should the distinction between law and business be made? What is the value of the attorney-client privilege given the work product doctrine? And should the corporate attorney-client privilege grow with corporate practice? Moreover, at the very least, this Article identifies issues with the current doctrine. The hope is that it will encourage further discussion and change.

³⁷⁷ Because the attorney-client privilege is an exception to the general rule that all information should be discoverable and was originally confined to communications between attorney and client, some readers might find it difficult to characterize communications between lawyers, clients and third party consultants as attorney-client communications and may be reluctant to use the privilege as the vehicle to protect these communications.

³⁷⁸ See, e.g., CA CIV PRO § 2018.030 (“A writing that reflects an attorneys’ impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.”); *Rumac, Inc., v. Bottomley*, 143 Cal. App. 3d 810, 192 Cal. Rptr. 104, 105(1983) (“There is also no valid reason to differentiate between the writings reflecting the private thought processes of a lawyer acting on behalf of a client at the beginning of a business deal and the thoughts of a lawyer when that business deal goes sour with resultant litigation.”); *Williamson v. Superior Court*, 21 Cal. 3d 829, 834 (1978) (“Accordingly, [the California Code of Civil Procedure] affords a conditional or qualified protection for work product generally, and an absolute protection as to an attorney’s impressions and conclusions.”). One problem with this solution, however, is that it would only protect attorney’s written work.