THE PART & PARCEL PRINCIPLE: APPLYING THE ATTORNEY-CLIENT PRIVILEGE TO EMAIL ATTACHMENTS

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Part and Parcel: *n.* an integral part of a larger whole.[2]

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2. THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("Part," def. P4(b)).

I. INTRODUCTION

That the ballooning of electronically-stored information has dramatically changed the landscape of discovery is a truism of modern practice that almost goes without saying.[3] Nowhere is this more obvious than in the assertion of corporate claims of privilege, where a single critical document from a population of millions could be the crux on which a case turns.[4] It is then unfortunate that the law of privilege has proven so convoluted in its application to the most common of scenarios: documents attached to emails between attorney and client.[5]

Consider the following case: a corporate executive has long harbored concerns that some of the company's international offices could be engaging in behavior that runs afoul of the Foreign Corrupt Practices Act (FCPA)[6] – indeed, the company has historically been the target of several investigations by the Department of Justice, though neither the government nor the company's internal inquiries have uncovered any illegalities. Still, the executive has often consulted with his outside counsel as to what exactly is forbidden by the FCPA. One morning, he comes across a story in the Wall Street Journal detailing

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3. *See generally* Patricia Groot, *Electronically Stored Information: Balancing Free Discovery with Limits on Abuse*, 2009 DUKE L. & TECH. REV. 2 (2009); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 592 (2001) (arguing that "electronic discovery can be predicted, as a general matter, to give rise to burdens and expense that are of a completely different magnitude from those encountered in traditional discovery.").

4. *Cf.* Dukes v. Wal-Mart Stores, Inc., No. 01-cv-2252-CRB (JSC), 2013 U.S. Dist. LEXIS 42740 (N.D. Cal. Mar. 26, 2013) (adjudicating privilege as to a leaked attorney memorandum going to the heart of the employment discrimination claims).

5. *See, e.g.*, Hilton-Rorar v. State & Fed. Commc'ns. Inc., No. 5:09-CV-01004, 2010 WL 1486916, at *6 (N.D. Ohio Apr. 13, 2010) ("E-mails add complexity to the already difficult analysis of the application of the attorney-client privilege."). There are obviously differences amongst the states, so this Article provides a survey of how federal courts have treated the issues, as a state-by-state analysis would far outstrip the scope of this discussion. *Cf.* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 14 (5th ed. 2007).

6. 15 U.S.C. §§ 78dd-1 et seq.

questionable business practices at one of his competitors that have led to a settlement with the Department of Justice. Noticing parallels to his own company's practices, he emails a copy of the story to outside counsel and a few other members of the company's leadership, under a cover email noting that "I'm worried we might be doing similar things – can we discuss whether we have any FCPA exposure here?"

The executive proves prescient, and another government investigation does ensue, during which the Department of Justice seeks production of the attachment. While conceding that the email query itself is privileged, the government argues that the attachment cannot be privileged to the extent it comprises only facts in the public domain (which it does), and was authored by a third party (which it was). The company objects, arguing that disclosing the attachment would compromise the confidentiality of its communication to counsel by revealing the details on which the company sought legal advice. Privately, the company is concerned that the email, if divulged, would be used to imply that top executives were aware that illegal practices might be taking place earlier than the government is alleging, and that revealing even the attachment would lend support to the same damaging insinuation.[7]

This short Article seeks to provide a schema of analysis for the magistrate addressing questions like the above, as well as to offer guidance to the practitioner challenging or facing challenges to claims of privilege over attachments. Part II presents the general distinction under privilege law between facts and communications, starting with the pivotal case of *Upjohn Co. v. United States*.[8] Part III details the particular case of emails and their attachments, surveying and expanding on case law to support a unifying principle – namely that attachments that are "part and parcel" of an inquiry to an attorney seeking legal advice, or the provision of such legal

7. Upjohn Co. v. United States, 449 U.S. 383 (1981), provides a somewhat similar tale regarding the government's attempts to compel the production of factual responses prepared by lower-level employees in the course of a general counsel's internal investigation of FCPA concerns.

8. 449 U.S. 383 (1981).

advice, fall within the bounds of privilege. Part IV sets forth key limitations on the Part & Parcel Principle, and distinguishes cases that might appear contrary at first impression, but can in fact be read in harmony with the Principle as properly limited.

The Article concludes in Part V with a few brief points about the jurisprudential value of the Principle. The reliable application of a single standard is essential to privilege law: "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An 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."[9] The Part & Parcel Principle hews to this mandate by enunciating a clear, readily applicable rule by which clients can evaluate whether their communications with counsel – and the materials around which those discussions resolve – will be protected.[10] Nevertheless, there remain serious questions about the utility of privilege and waiver doctrines that compel corporations into costly concealment of documents.

II. FACTS AND THE COMMUNICATIONS THAT CONVEY THEM

Myriad cases recite the elements of attorney-client privilege: "*(1)* Where legal advice of any kind is sought *(2)* from a professional legal adviser in his capacity as such, *(3)* the communications relating to that purpose, *(4)* made in confidence *(5)* by the client, *(6)* are at his instance permanently protected *(7)* from disclosure by himself or by the legal adviser, *(8)* except the protection be waived."[11] The Part & Parcel

9. *Upjohn*, 449 U.S. at 393.

10. *Cf.* Grace M. Giesel, *The Legal Advice Requirement of the Attorney Client Privilege*, 48 MERCER L. REV. 1169, 1191-92 (1997) (opining that application of attorney-client privilege to facts conveyed for the purpose of obtaining legal advice was uncertain).

11. 8 JOHN HENRY WIGMORE, TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2292 (McNaughton rev. ed. 1961); *e.g.*, United States v. White, 950 F.2d 426, 430 (7th Cir. 1991) (adopting Wigmore's formulation); *see* Alan J. Meese, *Inadvertent Waiver of*

Principle addresses the first and third elements, turning on what constitutes the seeking of legal advice when the literal question for counsel only occupies a small portion of the complete communication. Put another way, to what extent can the narration or provision of relevant facts to counsel merge with the search for advice and thus obtain privilege?

The discussion of this dimension of privilege law, like many others, best begins with *Upjohn Co. v. United States*, as seminal a case as the discipline enjoys.[12] Besides discarding the constrictive "control group" theory of privilege and prescribing the eponymous "*Upjohn* warnings" to corporate employees that the privilege belongs to the company, *Upjohn* adopted a much-quoted formula distinguishing facts from communications of those underlying facts:

> The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney: "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."[13]

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the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis, 23 CREIGHTON L. REV. 513, 515 (1990).

12. *See, e.g.*, JED S. RAKOFF, LINDA R. BLUMKIN & RICHARD A. SAUBER, CORPORATE SENTENCING GUIDELINES § 5.07A[3], at 5-81 (2005); SUSAN J. BECKER, DISCOVERY FROM FORMER AND CURRENT EMPLOYEES 247 (2005).

13. *Upjohn*, 449 U.S. at 395-96 (quoting Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962); *accord* Martin v. Lauer, 686 F.2d 24, 32-33 (D.C. Cir. 1982); Willnerd v. Sybase Co., No. 1:09–CV–500–BLW, 2010 WL 5391270, at *3 (D. Idaho Dec. 22, 2010). That this distinction might seem an empty formality did not escape the Court, which continued: "While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege." *Upjohn*, 449 U.S. at 396.

As *Upjohn* notes, facts are not (and cannot become) privileged *per se*.[14] Abstract information stands as a sort of Platonic ideal; entire fields of inquiry obviously cannot be excluded from litigation by the simple expedient of discussing them with counsel.[15] Conversely, because facts enjoy no inherent privilege, their public availability or dissemination does not waive privilege as to communications with counsel regarding those facts.[16]

The *Upjohn* Court's holding is "practically horn-book law,"[17] and has found little objection.[18] The privilege would be nugatory if clients could be compelled to divulge the factual premises of their inquiries to counsel, withholding only the ultimate question; mind-reading would be unnecessary to discern that a lengthy email relating corporate practices that could violate the FCPA might conclude with a question to counsel as to whether they do. Indeed, even divulging that

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14. *See Upjohn*, 449 U.S. at 395; Pippenger v. Gruppe, 883 F. Supp. 1201, 1208 (S.D. Ind. 1994) ("It is beyond question that the attorney-client privilege does not preclude the discovery of factual information.").

15. *Pippenger*, 883 F. Supp. at 1208 ("A party cannot conceal a fact merely by revealing it to his attorney."); *see* cases cited *infra* note 16.

16. *See* Solomon v. Scientific Am., Inc., 125 F.R.D. 34, 37 (S.D.N.Y. 1988) ("[A]lthough a client may not be questioned about what he told his attorney, he may be questioned about what he knows. Conversely, just as facts cannot be invested with privilege merely by communicating them to an attorney, so the confidentiality of the communication is not destroyed by disclosure of the underlying facts." (citations omitted)); United States v. El Paso Co., 682 F.2d 530, 538-39 n.10 (5th Cir. 1982) ("The attorney-client privilege does not protect against discovery of underlying facts from their source merely because those facts have been communicated to an attorney. The public disclosure of those facts, moreover, does not destroy the privilege with respect to attorney-client communications about those facts.") (citation omitted); United States v. O'Malley, 786 F.2d 786, 793-94 (7th Cir. 1986); Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 855 & n.3 (1998) (discussing the above cases).

17. *Westinghouse*, 205 F. Supp. at 831.

18. *See* Mendenhall v. Barber-Greene Co., 531 F. Supp. 948, 949 n.2 (N.D. Ill. 1981) (plaintiff "asserts that the attorney-client privilege does not extend to the underlying information (the facts) communicated to the attorney but only to the communication itself. That view has no support in the case law.").

counsel was consulted on a particular legal question might fairly be seen as within the privilege under certain circumstances,[19] as clients would not be eager to seek legal advice if their concerns about illegality could be used against them, depriving society of the benefits obtained from attorneys preemptively counseling against misbehavior.[20]

Somewhat less obvious, though no less essential to the privilege, is that the communication of publicly available facts may be protected from discovery. Because *Upjohn*'s reasoning turns on the communication with counsel, the source of the facts being communicated is immaterial: "even if a fact is publicly known, if it is included in a confidential communication from a client to an attorney for the purpose of seeking legal advice, the communication will be privileged."[21] Thus, although a

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19. *See* Am. Standard Inc. v. Pfizer Inc., 828 F.2d 734, 745 (Fed. Cir. 1987) ("It is conceivable that disclosure of the bare fact that counsel was consulted" might in some circumstances justify application of the privilege); Oasis Int'l Waters, Inc. v. United States, 110 Fed. Cl. 87, 100 (Fed.. Cl. 2013) ("The fact of legal consultation may be privileged, however, if its disclosure would 'chill the willingness of citizens to approach a lawyer's office' by indirectly revealing the substance of a privileged communication.").

20. Martin v. Lauer, 686 F.2d 24, 32-33 (D.C. Cir. 1982); Willnerd v. Sybase Co., No. 1:09–CV–500–BLW, 2010 WL 5391270, at *3 (D. Idaho Dec. 22, 2010).

21. United States v. Philip Morris USA, Inc., No. Civ. A.99–2496(GK), 2004 WL 5355972, at *4 (D.D.C. Feb. 23, 2004); *accord* United States v. Cunningham, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982) (stating in dictum that "we do not suggest that an attorney-client privilege is lost by the mere fact that the information communicated is otherwise available to the public. The privilege attaches not to the information but to the communication of the information"); Hydraflow, Inc. v. Enidine Inc., 145 F.R.D. 626, 630 (W.D.N.Y. 1993) (holding that the requisite intent for confidentiality "is not negated by the fact that the information contained in the communication from a client to patent counsel, which is not protected by the privilege, has its source in the public domain."); Nestle Co. v. A. Cherney & Sons, Inc., No. HM79-653, 1980 WL 30337, at *4 (D. Md. Sept. 2, 1980) ("Those imply that a document does not fall outside the attorney-client privilege merely because it contains technical or publicly-obtained information. If the party invoking the privilege can show that the document has some legal significance, then the document may be immune from discovery. More specifically, the *communication* of the publicly-obtained information 'should be privileged to the extent that the communication was treated as

communication must be made in confidence to obtain the privilege, the facts communicated need not themselves be confidential.[22] No less than internal corporate matters, discovery of questions to counsel predicated on public affairs would impermissibly compromise the purpose of the attorney-client privilege – to permit clients freedom in seeking legal advice.[23]

III. THE PART & PARCEL PRINCIPLE

The subject of the present Article arises when the facts being conveyed are not contained in the email itself, but rather in a document attached to the email. Such situations abound in the modern privilege review – contracts sent to counsel for their review and approval, draft press releases submitted for legal vetting, or a troublesome news article given to counsel to advise

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confidential by the client and would tend to reveal a confidential communication of the client.'" (citations omitted)).

22. *In re* Ampicillin Antitrust Litig., 81 F.R.D. 377, 389-90 (D.D.C. 1978) ("It is not necessary that the information be confidential. Under this standard, information the attorney learned from a client would be privileged if it was learned in a confidential client communication. . . . . The communication of this publicly-obtained information, however, should be privileged to the extent that the communication was treated as confidential by the client and would tend to reveal a confidential communication of the client."); Oasis Int'l Waters, Inc. v. United States, 110 Fed. Cl. 87, 104 (Fed. Cl. 2013) ("Just as an attorney's interpretation of a statute, regulation, or contract may be privileged, even though the information underlying the attorney's interpretation is in the public domain, the privilege may apply to defendant's internal requests for legal advice regardless of whether the information that serves as the basis for those requests is confidential."); *In re* Diet Drugs Prods. Liab. Litig., 2000 WL 1545028, at *5 (E.D. Pa. Oct. 12, 2000) ("While the underlying facts discussed in these communications may not be privileged, the communications themselves are privileged."); Yankee Atomic Elec. Co. v. United States, 54 Fed. Cl. 306, 315 (Fed. Cl. 2002); *see also* Astra Aktiebolag v. Andrx Pharm., Inc., 208 F.R.D. 92, 103 (S.D.N.Y. 2002) ("[T]he mere fact that a document contains some public or non-confidential information does not necessarily make the document discoverable."); *In re* Omeprazole Patent Litig., No. M-21-81(BSJ), MDL 1291, 2005 WL 818821, at *8 (S.D.N.Y. Feb. 18, 2005).

23. *See* cases cited *supra* notes 21-22.

on how to lawfully respond.[24] That such attachments are part and parcel of the request implies the Part & Parcel Principle: where attachments comprise an integral part of a confidential communication with counsel for the purpose of obtaining legal advice, both the email and its factual attachments are privileged in their entirety, regardless of the attachments' origin in the public domain, or their later dissemination.[25]

A. Lower Courts' Application of the Principle

Courts have proven receptive to this doctrine, which is effectively compelled by *Upjohn*.[26] Even though an attachment might not be "independently" privileged in other situations, its inclusion in an attorney-client communication brings it within the umbrella of privilege *in that communication*: "Confidential e-mails from a client to his attorney attaching a pre-existing unprivileged e-mail may, nevertheless, be protected."[27] In such a case, the very fact that a request for legal advice incorporates an attachment is privileged.[28] There is no difference in the privilege analysis between the inclusion of facts in the body of an email and their attachment in a discrete document – both are privileged if transmitted as part of a request for legal advice.[29]

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24. *See, e.g.*, *infra* notes 30-38 and accompanying text.

25. *See, e.g.*, *infra* notes 30-38 and accompanying text.

26. *See infra* note 67 and accompanying text.

27. Hilton-Rorar v. State & Fed. Commc'ns. Inc., No. 5:09-CV-01004, 2010 WL 1486916, at *2 (N.D. Ohio Apr. 13, 2010); *accord* Oasis Int'l Waters, Inc. v. United States, 110 Fed. Cl. 87, 99-100 (Fed. Cl. 2013); Rainey v. Plainfield Comm. Consol. Sch. Dist. No. 202, No. 07-C-3566, 2009 WL 1033654, at * (N.D. Ill. Apr. 16, 2009); *see also* Sinclair Oil Corp. v. Texaco, Inc., 208 F.R.D. 329, 332 (N.D. Okla. 2002).

28. *Oasis*, 110 Fed. Cl. at 99-100 ("The fact that a client included a document in a request for legal advice is privileged, however, because it partially reveals the substance of the client's privileged communication to an attorney."); *see also* Am. Standard Inc. v. Pfizer Inc., 828 F.2d 734, 745 (Fed. Cir. 1987).

29. *See* Barton v. Zimmer Inc., No. 1:06-CV-208, 2008 WL 80647, at *5 (N.D. Ind. Jan. 7, 2008) (holding that "the very fact that non-privileged information was communicated to an attorney may itself be privileged, even if that underlying information remains unprotected . . . . [It] is similar to prior conversations or documents that are quoted verbatim in a letter to a party's attorney."); *accord* Dawe v. Corrs. USA, 263 F.R.D. 613, 621 (E.D. Cal.

Privilege does not formulaically depend on the medium and format in which a confidential communication occurs.[30]

Of course, the purpose of the communication must be to secure legal advice, but modern companies often have cause to seek their attorneys' "examination, review, comment, and approval" of pre-existing documents.[31] Whether the document was authored by an attorney or non-attorney is not pivotal, because following *Upjohn*'s reasoning, the Principle can be applied to any sort of factual attachment.[32] Documents accordingly held to be privileged include draft public affairs statements,[33] clients' narratives of details relevant to litigation,[34]

2009); Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 238, 240-41 (E.D. Pa. 2008); Muro v. Target Corp., 243 F.R.D. 301, 307 (N.D. Ill. 2007), *aff'd*, 580 F.3d 485 (7th Cir. 2009).

30. United States v. Keystone Sanitation Co., 885 F. Supp. 672, 677 (M.D. Pa 1994) (Rambo, C.J.) ("Thus, it is the actual content of the document, rather than the type of document, that is privileged."); City of Reno v. Reno Police Protective Ass'n, 59 P.3d 1212, 1218 (Nev. 2002) (evaluating precedent and concluding that emails enjoy privilege so long as they fulfill the requirements); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 cmt. b (2000); *e.g.*, Robinson v. Tex. Auto. Dealers Ass'n, 214 F.R.D. 432, 447 (E.D. Tex. 2003) ("Although the original document was not a communication between attorney and client, [the attorney's] act of sending the pre-existing document to [the client] as the means of providing legal advice constitutes a privileged communication"), *vacated in unrelated part by*, *In Re* Tex. Auto. Dealers Ass'n., No. 03-40860, 2003 WL 21911333 (5th Cir. July 25, 2003).

31. *In re* Vioxx Products Liab. Litig., 501 F. Supp. 2d 789, 811 (E.D. La. 2007) ("If a memorandum was written only to an attorney within the corporation's legal department, with an attachment for examination, review, comment, and approval, we found that the communication and attachment were sent *primarily* for the purpose of obtaining legal advice, and therefore, were protected by the attorney-client privilege"); *see, e.g.*, cases cited *infra* notes 33-39.

32. *See* United States v. ISS Marine Servs., Inc., 905 F. Supp. 2d 121, 128-29 (D.D.C. 2012) ("[T]he mere fact that a document is created by a non-attorney is not dispositive of the privilege question, so long as the communication of the document to counsel was confidential and for the primary purpose of seeking legal advice"). Attorney authorship may mean a document is *independently* privileged, but Part & Parcel Principle analysis does not turn on the provenance of the attachment, but on the cover letter's request for legal advice. *See infra* note 42.

33. *E.g.*, Alexander v. FBI, 186 F.R.D. 154, 162 (D.D.C. 1999).

34. *E.g.*, Solomon v. Scientific Am., Inc., 125 F.R.D. 34, 35, 39

correspondence with the news media and inquiries from third parties,[35] technical specifications,[36] scientific memoranda,[37] and talking points.[38] And one common situation occurs when emails amongst non-attorneys are forwarded to attorneys for review: while the original discussion may not be privileged, the email string provided to counsel for review should be.[39] The criterion is not the source or substance of the facts conveyed, but the client's intent to obtain legal advice based on those factual premises.[40]

As already discussed, the disclosure of bare facts cannot work any waiver of privilege.[41] It follows that even if such an attachment is widely circulated, or later publicized, its inclusion in an attorney-client communication remains privileged *so long as that communication is confidential.*[42] After all, "[i]f the

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(S.D.N.Y. 1988).

35. *E.g.*, Rainey v. Plainfield Cmty. Consol. Sch. Dist. No. 202, No. 07 C 3566, 2009 WL 1033654, at *2 (N.D. Ill. Apr. 16, 2009).

36. *E.g.*, Eastman Kodak Co. v. Agfa-Gevaert N.V., No. 02–CV–6564 T-F., 2006 WL 1495503, at *4-5 (W.D.N.Y. Apr. 21, 2006).

37. *E.g.*, *In re* Vioxx Products Liab. Litig., 501 F. Supp. 2d 789, 811 (E.D. La. 2007).

38. *E.g.*, Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 660 (D. Nev. 2013) (entry no. 46).

39. Muro v. Target Corp., 250 F.R.D. 350, 363 (N.D. Ill. 2007) ("As applied in the e-mail discovery context, the court understands *Upjohn* to mean that even though one e-mail is not privileged, a second e-mail which forwards that prior e-mail to counsel might be privileged in its entirety. In this respect, the forwarded material is similar to prior conversations or documents that are quoted verbatim in a letter to a party's attorney."); *e.g.*, Barton v. Zimmer Inc., No. 1:06-CV-208, 2008 WL 80647, at *5 (N.D. Ind. Jan. 7, 2008); Dawe v. Corrs. USA, 263 F.R.D. 613, 621 (E.D. Cal. 2009); Rhoads Indus., v. Bldg. Materials Corp. of Am., 254 F.R.D. 238, 240-41 (E.D. Pa. 2008).

40. *See In re* Vioxx Products Liab. Litig., 501 F. Supp. 2d 789, 811 (E.D. La. 2007); *see also* cases cited *infra* note 83 (distinguishing between intent to obtain legal and business advice). *See generally* Phillips v. C.R. Bard, Inc., 290 F.R.D. 615 (D. Nev. 2013) (analyzing each entry of a privilege log with reference to whether the communication's purpose was legal).

41. *See supra* note 16 and accompanying text.

42. *See* Solomon v. Scientific Am., Inc., 125 F.R.D. 34, 37-38 (S.D.N.Y. 1988); *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1037 (2d Cir. 1984); Rainey v. Plainfield Cmty. Consol. Sch. Dist. No. 202, No. 07 C 3566, 2009 WL 1033654, at *2 (N.D. Ill. Apr. 16,

confidentiality of a client's communication to an attorney about possible litigation were to be destroyed by the intention that the attorney use the information conveyed in order to assert his client's rights, the privilege would have no meaning."[43] All the more so, courts have held that draft documents sent to counsel for legal review remain privileged even when the client divulges the final copy, because the client's intent throughout is to "to make public only such information as appears appropriate for publication in the context of and according to the lawyer's advice."[44]

One court recently outlined the contours of the Principle particularly well:

> Plaintiff disputes whether attachments to privileged communications with an attorney are also privileged. If legal advice is requested regarding the attachments, the communication with the attorney is privileged. Whether the attachments as independent documents are discoverable is a separate question. For example, there are communications from the media or parents that were forwarded to an attorney for legal advice about how to respond before school officials provided any response. The communications, including any attachments, sent to the attorney are privileged. However, the communications as originally received from the media or parents still

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2009).

Of course, if the attachment itself were independently privileged – for example, a legal memorandum relating counsel's litigation strategy – and were later disclosed, such disclosure could waive the attachment's *independent* privilege in other circumstances. *E.g.*, United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1074 n.6 (N.D. Cal. 2002). It could not, however, waive the pendent "part and parcel" privilege that protects the instance of the document attached to an attorney-client communication, so long as *that communication* remains confidential.

43. *Solomon*, 125 F.R.D. at 37.

44. SEC v. Tex. Int'l Airlines, Inc., 29 Fed.R.Serv.2d 408, 1979 WL 184774, at *1 (D.D.C. Aug. 3, 1979) (citing United States v. Schlegel, 313 F. Supp. 177, 179 (D. Neb. 1970) and Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968)); *see Solomon*, 125 F.R.D. at 37-38; *In re Grand Jury Subpoena*, 731 F.2d at 1037; *Rainey*, 2009 WL 1033654, at *2, *infra* note 45; *see also* U.S. Postal Service v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 163 (E.D.N.Y. 1994). *But see, e.g.*, Schenet v. Anderson, 678 F. Supp. 1280, 1284 (E.D. Mich. 1988) ("The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties"); Apex Mun. Fund v. N-Group Sec., 841 F. Supp. 1423, 1428 (S.D. Tex. 1993).

> must be disclosed to the extent they are responsive to a proper discovery request. Also, when a draft communication is sent for an attorney's advice before being finalized, the draft itself is a privileged document even if the final version is not.[45]

The Principle is really just an inoffensive corollary of well-established privilege law: a communication with counsel seeking legal advice is privileged irrespective of its technological division into multiple digital files.[46]

Properly applied, the Principle does not broadly remove relevant documents from scrutiny, but only shields communications with counsel. Setting aside the Principle, a document that was created only for submission to counsel may not be discoverable at all.[47] It is unobjectionable that the Principle has the same result. As for documents created in the ordinary course of non-legal business, other copies would presumably be saved on local hard drives, attached to unprivileged emails amongst businesspersons, or printed out to paper hard copy, all of which are outside the Principle and ought to be discoverable (unless, of course, some other privilege such as work product applies).[48] And as discussed below, any effort to overextend attorney-client privilege by copying counsel on communications unmotivated by legal inquiry will be vigorously rejected.[49]

B. Part & Parcel in Privilege Logs

In litigation or government investigations involving substantial discovery, assertion of privilege often obliges the

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45. *Rainey*, 2009 WL 1033654, at *2.

46. *See supra* note 30 and accompanying text.

47. *See, e.g.*, Eastman Kodak Co. v. Agfa-Gevaert N.V., No. 02–CV–6564 T-F., 2006 WL 1495503, at *3-*4 (W.D.N.Y. Apr. 21, 2006) (observing that "an invention report *almost always* is a document prepared primarily for legal advice (*i.e.* procuring a patent). Therefore, it is difficult to imagine an invention report that would not be privileged. . . . [D]ocuments that are prepared specifically as an attachment to an invention report are usually prepared seeking the same legal advice or services as the invention report, namely, procuring a patent. In these cases, an attachment to an invention report will also be privileged.").

48. *See infra* Part IV.A.

49. *See infra* Part IV.B.

production of a log itemizing the basis for withholding every document (or category of documents), lest the privilege be waived.[50] Some courts sensibly accept compound claims in which both email and attachments are covered under a single claim of privilege for the communication as a whole.[51] As the communication with counsel is the unit of attorney-client privilege, the privilege is most cogently asserted for the entire communication. Such reasoning might even allow the aggregation of privilege claims for an entire email thread (which is effectively a final email attaching all those prior) without disclosing the substance of the emails forwarded to counsel.[52]

Other courts, however, have insisted that emails and their attachments each have individual entries in logs asserting the claims of privilege.[53] When separate entries are required, the

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50. Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 653 (D. Kan. 2005) ("Fed R. Civ. P. 26(b)(5) requires a party withholding otherwise discoverable information on the basis of privilege to make the claim expressly and to describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the privileged information, will enable the other parties to assess the applicability of the privilege. Normally, this is accomplished by objecting and providing a privilege log for 'documents, communications, or things' not produced." (citations omitted)).

51. *E.g.*, Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 650-52, 656-58, 660 (D. Nev. 2013) (entry nos. 21, 37, 39, 46).

52. *E.g.*, Muro v. Target Corp., 250 F.R.D. 350, 363 (N.D. Ill. 2007), *aff'd* 580 F.3d 485 (7th Cir. 2009); Dawe v. Corrs. USA, 263 F.R.D. 613, 621-22 (E.D. Cal. 2009); *see* United States v. ChevronTexaco Corp., 241 F. Supp. 2d 1065, 1074 n.6 (N.D. Cal. 2002). Most courts, however, have not permitted the aggregation of claims for threads. *E.g.*, Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 238, 240-41 (E.D. Pa. 2008); *In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 812 (E.D. La. 2007). The treatment of email threads and so-called "thread suppression" in discovery is a related but distinct topic from the Part & Parcel Principle. *See generally* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 279-83 (5th ed. suppl. 2012).

53. *E.g.*, Mold-Masters Ltd. v. Husky Injection Molding Sys. Ltd., No. 01 C 1576, 2001 WL 1558303, at *3 (N.D. Ill. 2001) ("It should hardly come as a surprise that an attachment to a document must appear as a separate entry on the privilege log.") (citing cases); O'Connor v. Boeing N. Am., Inc., 185 F.R.D. 272, 280 (C.D. Cal. 1999).

assertions for otherwise unprivileged attachments must refer back to those for the email to counsel, because the privilege of the attachment is pendent upon its integral role in the attorney-client communication.[54] While this two-step process elevates form over substance, such requirements are unobjectionable if they merely create more work for the privilege's proponent; courts have rarely been sympathetic to the burden undertaken by parties wishing to withhold documents from properly-framed discovery requests.[55]

However, the Federal Rules specify that the proponent of privilege must only "describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, *without revealing information itself privileged or protected*, will enable other parties to assess the claim."[56] Therefore, requiring separate log entries for attachments or forwarded emails would violate the Rules to the extent it allows opposing counsel to "gather enough material from the log and already produced materials to discover the topic or contents of material forwarded to counsel."[57] For example, this might be the case if an unprivileged (and therefore produced) attachment was later forwarded to counsel. By combining the unprivileged version of the document with the log information regarding the email thread that was forwarded

54. Such an entry might read "Spreadsheet listing financial data attached to email communicated to outside counsel Jane Smith (see Privilege Log Entry No. 123) in order to obtain legal advice regarding compliance with tax law and obligations."

55. *See, e.g.*, *In re* Universal. Serv. Fund Tel. Billing Practices Litig., 232 F.R.D. 669, 674 (D. Kan. 2005) (finding burden and expense of privilege protocol outweighed by its necessity); Green v. Baca, 219 F.R.D. 485 (C.D. Cal. 2003) (rejecting argument that separating privileged from non-privileged documents was too burdensome); *O'Connor*, 185 F.R.D. at 280 n.13.

56. FED. R. CIV. PRO. 26(b)(5)(A)(ii) (emphasis added); *see* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 6.22, at 1006 (ed. 2012) ("[T]he general nature of the services performed must be identified with sufficient particularity to permit an assessment of the substantive nature of the activity, but not so specific that the substance of confidential communications are directly or indirectly revealed.").

57. *Muro*, 250 F.R.D. at 363.

to counsel, the opposing party could infer the content of the legal request.

Practitioners in individual-entry courts should therefore be mindful of whether the aggregate information demanded for the log would intrude upon the privilege. Parties cannot demand protocols for a privilege log that effectively disclose the substance of protected communications.[58] That said, courts are near-unanimous that the "general subject matters" of legal issues are not privileged, finding such information too abstract to reveal the substance or specific topic of the advice sought and given.[59] Some courts accordingly require identification of a document's general subject matter in a privilege log,[60] though such subjects are very general indeed, with the Second Circuit giving examples of "litigation," "drafting of documents," or "tax advice" as sufficiently vague to avoid offending the privilege.[61]

Regardless of the exact format of the assertion, the Part & Parcel Principle permits for more logically consistent treatment of privilege claims, by looking to the totality of every communication, as well as limiting circumstances in which

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58. *See, e.g.*, Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 238, 240-41 (E.D. Pa. 2008); *cf.* Oasis Int'l Waters, Inc. v. United States, 110 Fed. Cl. 87, 100-01 (Fed. Cl. 2013); Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 653 (D. Kan. 2005) (agreeing that document metadata that reveals the substance of properly redacted information need not be produced); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 cmt. b (2000) (suggesting that both material created by clients and non-clients and transmitted to attorney may enjoy privilege where the two cannot be disentangled from one another).

59. Avgoustis v. Shinseki, 639 F.3d 1340, 1344 (Fed. Cir. 2011) ("Courts have consistently held that the general subject matters of clients' representations are not privileged." (quoting United States v. Legal Servs. for N.Y.C., 249 F.3d 1077, 1081 (D.C. Cir. 2001))); *Oasis*, 110 Fed. Cl. at 100 (citing *Avgoustis* and other cases).

60. *Compare, e.g.*, Currency Conversion Antitrust Litig. v. Bank of Am., N.A., 2010 US Dist. LEXIS 117008, at *10-11 (S.D.N.Y. Nov. 3, 2010) (log description required to describe "general subject matter") *and* Ruran v. Beth El Temple of W. Hartford, Inc., 226 F.R.D. 165, 168-69 (D. Conn 2005) (same) *with In re* Grand Jury Investigation, 974 F.2d 1068, 1071 (9th Cir. 1992) (observing that subject matter descriptions may not be necessary).

61. Colton v. United States, 306 F.2d 633, 636-38 (2d Cir. 1962).

document "families" will be "broken," with a cover email being withheld while its attachment is produced. Such broken families are to be avoided when possible, not merely because of privilege concerns, but because of the potentially misleading nature of partially-produced document families.[62]

IV. DISTINCTIONS AND LIMITATIONS TO THE PRINCIPLE

As powerful a tool as the Part & Parcel Principle is in protecting privilege, it cannot be without limitations. Because the attorney-client privilege can stand athwart the role of courts as arbiters of the complete truth, it may only reach so far as necessary to "encourage free and open discussion by clients in the course of legal representation."[63] The Principle therefore cannot be overextended to shield more information than required to protect the actual attorney-client communication. Some such overextensions appear particularly likely from the case law, and so the following Part clarifies common situations in which the Principle does not apply, or is limited in its application by particular circumstances.

A. Independent Discoverability

The central limitation of the Principle is that transmission of a document to counsel does not make the document "independently" privileged. Attorneys have no magic wand by which they can create attorney-client privilege outside of an attorney-client communication, and thus attachments protected by the Principle may be are independently discoverable in other contexts (though some other privilege could apply).[64] Only the instance of a document attached to a communication with

62. *See* Amy Bowser-Rollins, *Electronic Discovery - Email Family*, LITIGATION SUPPORT GURU (Feb. 21, 2012) http://www.litigationsupportguru.com/electronic-discovery-e-mail-family.

63. *In re* Ampicillin Antitrust Litig., 81 F.R.D. 377, 384 (D.D.C. 1978) (quoting WIGMORE, *supra* note 11); *see* cases cited *supra* note 20.

64. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 (2000) (only communications with counsel are protected); *see also* Fisher v. United States, 425 U.S. 391, 404 (1976) (documents not privileged simply because an attorney possessed them).

counsel is privileged by virtue of attorney-client privilege; other copies of the same document do not acquire an abiding immunity from discovery based on counsel's former or future involvement.[65]

Opinions applying this axiom have, at times, been misunderstood to suggest that even the very attachment to the attorney-client communication must be segregated and produced,[66] which would contravene *Upjohn*'s holding.[67] Inartful language may be at fault. One particularly cited comment comes from *Sneider v. Kimberly-Clark Corp.*, which stated that "[a]ttachments which do not, by their content, fall within the realm of the privilege cannot become privileged by merely attaching them to a communication with the attorney."[68]

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65. *See* Rainey v. Plainfield Cmty. Consol. Sch. Dist. No. 202, No. 07-C-3566, 2009 WL 1033654, at *2 (N.D. Ill. Apr. 16, 2009) ("If legal advice is requested regarding the attachments, the communication with the attorney is privileged. Whether the attachments as independent documents are discoverable is a separate question."); Sinclair Oil Corp. v. Texaco, Inc., 208 F.R.D. 329, 332 (N.D. Okla. 2002) (holding discoverable pre-existing documents "which are available to both the parties and the attorneys but which do not constitute the communications between the client and the attorney"); *see also* Pippenger v. Gruppe, 883 F. Supp. 1201, 1208 (S.D. Ind. 1994) ("Only the communications and advice given are privileged; the underlying facts communicated are discoverable if they are otherwise the proper subject of discovery. . . . A party cannot conceal a fact merely by revealing it to his attorney.").

66. *See, e.g.*, cases cited *infra* notes 68-69.

67. *See* Barton v. Zimmer Inc., No. 1:06-CV-208, 2008 WL 80647, at *5 (N.D. Ind. Jan. 7, 2008) (opining that "under *Upjohn*, the very fact that non-privileged information was communicated to an attorney may itself be privileged, even if that underlying information remains unprotected"); Muro v. Target Corp., 250 F.R.D. 350, 363 n.21 (N.D. Ill. 2007), *aff'd*, 580 F.3d 485 (7th Cir. 2009); *see infra* note 72.

68. Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 4 (N.D. Ill. 1980). Compounding the confusion, the court went on to write that "[t]o permit this result would abrogate the well-established rule that only the communications, not underlying facts, are privileged. Furthermore, since many of the attachments are already matters of public record or communications with outside parties, they cannot be privileged because the requisite confidentiality does not exist. Similarly, attachments containing business, not legal information, cannot be privileged." *Id.* Such language appears to conflate the facts conveyed, which need be neither confidential nor legal in nature, with the communication itself, which must be

Some cases following *Sneider* have fallen into the same pitfall, promulgating a rule that on its face appears contrary to the law, even while recognizing the correct underpinnings of privilege.[69] Other cases citing *Sneider* have rightly underscored the distinction between non-privileged facts and privileged communications of those facts: the pre-existing document is discoverable elsewhere even while the instance of that document sent to counsel is protected.[70]

An over literal application of *Sneider* and similar cases would prove too much and conflict with *Upjohn* and numerous other

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confidential and for legal advice for privilege to apply. *See* cases cited *supra* notes 21-22 and accompanying text (privileged communications may include non-confidential facts), *infra* note 82 and accompanying text (privileged communications may include business information).

69. *See, e.g.*, Mold-Masters Ltd. v. Husky Injection Molding Sys. Ltd., No. 01 C 1576, 2001 WL 1558303, at *3 (N.D. Ill. 2001) ("Since a document with an attachment constitutes two separate documents, a party objecting to the disclosure of a document with an attachment must prove that both the document and the attachment individually satisfy the requirements of the applicable privilege or doctrine. Merely attaching a document to a privileged or protected document does not make the attached document privileged or protected." (citations omitted)); O'Connor v. Boeing N. Am., Inc., 185 F.R.D. 272, 280 (C.D. Cal. 1999); Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 511 (D.N.H. 1996); P & B Marina, Ltd. P'ship v. Logrande, 136 F.R.D. 50, 56 (E.D.N.Y. 1991); Leonen v. Johns-Manville, 135 F.R.D. 94, 98 (D.N.J. 1990); *In re* Asousa P'ship, No. 01–12295DWS, 2005 WL 3299823, at *5 (Bankr. E.D. Pa. 2005).

70. *See, e.g.*, Eastman Kodak Co. v. Agfa-Gevaert N.V., No. 02–CV–6564 T-F, 2006 WL 1495503, at *4 (W.D.N.Y. Apr. 21, 2006) ("While this factual information may be discoverable from other non-privileged sources (e.g. other documents, files and/or depositions), it should not be discoverable in the invention reports"); *see also* Med. Waste Techs. L.L.C. v. Alexian Bros. Med. Ctr., Inc., No. 97 C 3805, 1998 WL 387706, at *5 (N.D. Ill. June 24, 1998) ("However, while the facts of each document are not protected, it is often impossible to separate those facts from the attorney-client communication and/or the attorney work product contained in each document. . . . [T]his court will not order MWT to produce the facts of the privileged documents in redacted form."); Astra Aktiebolag v. Andrx Pharm., Inc., 208 F.R.D. 92, 103 (S.D.N.Y. 2002) (replying to *Sneider* that "the mere fact that a document contains some public or nonconfidential information does not necessarily make the document discoverable."); *In re* Omeprazole Patent Litig., No. M-21-81(BSJ), MDL 1291, 2005 WL 818821, at *8 (S.D.N.Y. Feb. 18, 2005) (same).

courts.[71] The same Illinois district court that decided *Sneider* would later repudiate any reading that would depart from *Upjohn* and deny attachments privilege when they were the subject matter of a communication requesting legal advice:

> [Plaintiff] cites *Sneider v. Kimberly-Clark Corporation*, 91 F.R.D. 1, 4 (N.D. Ill. 1980), for the proposition that attachments to a letter containing confidential communications to counsel do not, by virtue of that attachment, become privileged. [Plaintiff] misreads *Sneider*, which merely stands for the proposition, recognized in *Upjohn*, that non-privileged documents do not become privileged solely by virtue of being transmitted to counsel. *Id.* But as the *Sneider* court recognized, communications of facts are privileged even if the original facts are not. *Id.* Thus, when letters to counsel included certain attachments, the fact that those documents were attached may be privileged, even if the originals are not.[72]

All the same, the imprecise language employed by *Sneider* and its progeny may create a certain amount of unwarranted confusion as to the reliability of the Part & Parcel Principle.[73]

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71. *See, e.g.*, cases cited *supra* notes 21-22, 27-39 and accompanying text.

72. Muro v. Target Corp., 250 F.R.D. 350, 363 n.21 (N.D. Ill. 2007), *aff'd*, 580 F.3d 485 (7th Cir. 2009).

73. Language from *Fisher v. United States*, 425 U.S. 391 (1976), has occasionally been quoted as supporting the putative principle in *Sneider*. *E.g.*, Evergreen Trading, LLC *ex rel* Nussdorf v. United States, 80 Fed. Cl. 122, 137-38 (Fed. Cl. 2007) (opining that *Sneider* and similar holdings "reflect a corollary to the broader rule that a 'pre-existing document which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice.'" (quoting *Fisher*, 425 U.S. at 403-04)). But *Fisher* was a pre-email case whose holding was essentially that non-privileged documents could not be sheltered from discovery merely by physically lodging them with an attorney. *Fisher*, 425 U.S. at 403-05; *see infra* Part IV.B. Read properly, *Fisher* and *Upjohn* do not point in contradictory directions. *See* Gould, Inc. v. Mitsui Mining & Smelting Co., 825 F.2d 676, 679 (2d Cir. 1987) (discussing *Upjohn* and *Fisher* and noting that communications with counsel are protected even while the pre-existing non-privileged documents can be discovered independently from the client's or attorney's files).

That said, there may remain some tension between *Upjohn* and *Fisher* if, for example, a subpoena requested all relevant attorney-held documents

B. Attorney-Funneling and Business Advice

Similarly fundamental is that sending a document to counsel does not *ipse dixit* immunize even that attachment from discovery; the document must be part and parcel of a *genuine* solicitation of *legal* advice. Courts thus routinely deny privilege to communications that "funnel" documents to an attorney in a futile procedural attempt to shield them from scrutiny.[74] (It goes almost without saying that documents lacking privilege may be subject to discovery regardless of an attorney's possession of the documents.)[75] Or as one court put it, "one cannot merely hand over documents to an attorney and have them be protected by the attorney-client privilege."[76] Rather, the client must actually be seeking legal advice in connection with the document.

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provided as part of privileged communications, which would tend to reveal the substance of the communications themselves. For a discussion of such potential issues, see Grace M. Giesel, *The Legal Advice Requirement of the Attorney Client Privilege*, 48 MERCER L. REV. 1169, 1190 n.80 (1997) (citing PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 5:19, at 368-70 (ed. 1993)). But because *Upjohn* postdates *Fisher*, any conflict between the two holdings would have to be resolved in favor of *Upjohn*. *See* Asher v. Texas, 128 U.S. 129, 132 (1888) ("[A] later decision in conflict with prior ones had the effect to overrule them, whether mentioned and commented on or not."); *see generally* Bradley Scott Shannon, *Overruled by Implication*, 33 SEATTLE U. L. REV. 151 (2009).

74. Radiant Burners, Inc. v. Am. Gas Ass'n., 320 F.2d 314, 324 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963) ("Certainly, the privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure."); *accord In re* Allen, 106 F.3d 582, 604 (4th Cir. 1997) (same); *see In re* Air Crash Disaster at Sioux City, Iowa on July 19, 1989, 133 F.R.D. 515, 519 (N.D. Ill. Dec. 3, 1990) ("[I]f the role of counsel is 'minor or perfunctory or was intended merely to immunize the documents from production, the privilege would not apply.'" (quoting SEC v. Tex. Int'l Airlines, Inc., 29 Fed.R.Serv.2d 408, 1979 WL 184774, at *2 (D.D.C. Aug. 3, 1979))); *see also* Searcy v. eFunds Corp., No. 08 C 985, 2009 WL 562596, at *3 (N.D. Ill. Mar. 5, 2009) (merely because some documents in a large category provided to counsel are privileged does not compel the conclusion that all are absent particularized proof as to each).

75. *See* Fisher v. United States, 425 U.S. 391, 403-04 (1976).

76. Med. Waste Tech. L.L.C. v. Alexian Bros. Med. Ctr., Inc., No. 97 C 3805, 1998 WL 387706, at *2 (N.D. Ill. June 24, 1998).

Nonetheless, courts have been wary of demanding express questions from clients unversed in the law as a prerequisite for privilege. Requests for legal advice can be and often are implied by the context.[77] This is particularly so with communication to outside counsel, which numerous courts have *presumed,* absent rebuttal, to be requests for legal advice.[78] In-house counsel generally receives less solicitude, on the theory that they are often called upon to perform business functions rather than legal functions, and thus a specific showing must be made that they are acting in their legal capacity.[79] The same cannot be said of outside counsel, who are typically retained solely for the provision of legal advice.[80]

The question posed to counsel, whether implicitly or

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77. *E.g.*, Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1971) (finding privilege can be based on "an implied request for legal advice"); Astra Aktiebolag v. Andrx Pharm., Inc., 208 F.R.D. 92, 103 (S.D.N.Y. 2002) ("The request for confidential legal assistance need not be expressly stated when the request is implied."); *In re* Omeprazole Patent Litig., No. M-21-81(BSJ), MDL 1291, 2005 WL 818821, at *8 (S.D.N.Y. Feb. 18, 2005) (same); Eastman Kodak Co. v. Agfa-Gevaert N.V., No. 02–CV–6564 T-F, 2006 WL 1495503, at *3 (W.D.N.Y. Apr. 21, 2006) ("Citing a long line of cases, the Federal Circuit found that '[i]t is enough that the overall tenor of the document indicates that it is a request for legal advice or services.'" (quoting *In re* Spalding Sports Worldwide, Inc., 203 F.3d 800, 806 (Fed. Cir. 2000))); Oasis Int'l Waters, Inc. v. United States, 110 Fed. Cl. 87, 98 (Fed. Cl. 2013).

78. *E.g.*, United States v. Chen, 99 F.3d 1495, 1501 (9th Cir. 1996); United States v. ChevronTexaco Corp., 241 F. Supp. 2d 1065, 1073 (N.D. Cal. 2002) ("Communications between a client and its outside counsel are presumed to be made for the purpose of obtaining legal advice.") (citing *Chen*, 99 F.3d at 1501); Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 634 (D. Nev. 2013) (same); *Oasis*, 110 Fed. Cl. at 97-98; Yankee Atomic Elec. Co. v. United States, 54 Fed. Cl. 306, 315 (Fed. Cl. 2002).

79. *E.g.*, *Oasis*, 110 Fed. Cl. at 98; *In re* Vioxx Products Liab. Litig., 501 F. Supp. 2d 789, 799 (E.D. La. 2007); *ChevronTexaco*, 241 F. Supp. 2d at 1076; U.S. Postal Service v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 160 (E.D.N.Y. 1994). *But see, e.g.*, Boca Investerings P'ship v. United States, 31 F. Supp. 2d 9, 12 (D.D.C. 1998) ("There is a presumption that a lawyer in the legal department or working for the general counsel is most often giving legal advice, while the opposite presumption applies to a lawyer . . . who works for the Financial Group or some other seemingly management or business side of the house." (citation omitted)).

80. *See* cases cited *supra* note 78.

explicitly, must still be for legal rather that business advice. Documents sent to counsel for predominantly business or administrative reasons are fair game for discovery.[81] At the same time, keeping counsel apprised of business documents for the purpose of obtaining legal advice remains within the ambit of privilege:[82] the privilege, as usual, turns on the reasonably ascertainable intent of the client.[83] All this also presumes that the communication is from client to attorney: replies from counsel may be subject to a different analysis.

C. Attorney-to-Client Communications

The core of the attorney-client privilege lies in encouraging free and full disclosure by the client, and thus some courts have suggested that "communications from attorney to client are privileged only to the extent that they reveal confidential

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81. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 72 cmt. c (2000) (extending privilege to communication for the purpose of legal advice and "not predominantly for another purpose."); *see, e.g.*, United States v. Motorola, Inc., No. Civ. A.94-2331TFH/JMF, 1999 WL 552553, at *3 (D.D.C. May 28, 1999); W. Trails, Inc. v. Camp Coast to Coast, Inc., 139 F.R.D. 4, 8 (D.D.C. 1991) ("Attorney-client communications concerning business matters are not within the attorney-client privilege.").

82. *See, e.g.*, Simon v. G.D. Searle & Co., 816 F.2d 397, 404 (8th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987) ("Client communications intended to keep the attorney apprised of business matters may be privileged if they embody 'an implied request for legal advice based thereon.'" (quoting Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1971))); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 144 (D. Del. 1977) ("Client communications intended to keep the attorney [generally] apprised of continuing business developments, with an implied request for legal advice based thereon . . . may also be protected.").

83. *See* Lugosch v. Congel, No. Civ: 1:00-CV-0784, 2006 WL 931687, at *14 (N.D.N.Y. Mar. 7, 2006) ("Because of the duality of the advice, a court must assume the very complicated task of inquiring into the subject matter of the communications in order to determine its true character[] . . . . To this extent, a court may have to parse not only the words but their intent in order to glean the authentic purpose of the communication."); U.S. Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 160 (E.D.N.Y. 1994) ("The information-holder's motive for the communication, to the extent that it can be discerned from the document, thus is an important consideration."); *see also* cases cited *supra* note 40.

information furnished by the client."[84] Many courts, however, hold privilege to embrace any legal advice rendered, postulating that such advice inherently reflects the request confidentially commended to counsel.[85] A document sent by counsel that relates to previous conversations with the client should thus fall within the privilege: such a document may simply be one provided by the client for legal review,[86] or it may be a document created, modified, or obtained in response to the client's legal request.[87] For example, consider one court's analysis of an annotated document sent from attorney to client:

> The copy of the document itself is also privileged, despite the fact that it was written by a third party. Although the original document was not a communication between attorney and client, [the attorney's] act of sending the pre-existing document to [the client] as the means of providing legal advice constitutes a privileged communication. The document cannot be disclosed without revealing the substance of his legal advice to her, and therefore, the entire

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84. *In re* Air Crash Disaster at Sioux City, Iowa on July 19, 1989, 133 F.R.D. 515, 518 (N.D. Ill. 1990); *see also* United States v. (Under Seal), 748 F.2d 871, 877 (4th Cir. 1984); Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 254 (D.C. Cir. 1977); Minebea Co. v. Papst, 229 F.R.D. 1, 3 (D.D.C. 2005).

85. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 68 (2000) (extending privilege to communications made "for the purpose of obtaining or providing legal advice"); *e.g.*, United States v. DeFazio, 899 F.2d 626, 635 (7th Cir. 1990) ("Communications from attorney to client are privileged only if they constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence."); United States Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 163 (E.D.N.Y. 1994) (applying privilege "where the documents reveal client confidences or provide legal assistance").

86. *See supra* note 31 and accompanying text; *e.g.*, cases cited *supra* notes 33-39.

87. *E.g.*, Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 660 (D. Nev. 2013) (entry no. 46); Robinson v. Tex. Auto. Dealers Ass'n, 214 F.R.D. 432, 447 (E.D. Tex. 2003), *vacated in unrelated part by In Re* Tex. Auto. Dealers Ass'n., No. 03-40860, 2003 WL 21911333 (5th Cir. July 25, 2003); *see also* Kendall v. Hyannis Restorations Int'l Sales, Inc., 805 N.E.2d 91 (Mass. App. Ct. Mar. 16, 2004); Yankee Atomic Elec. Co. v. United States, 54 Fed. Cl. 306, 315 (Fed. Cl. 2002) (attorney interpretation of public information may be privileged).

> document is privileged. Alternatively, the document would be privileged even if it had not been marked up or sent to the client because disclosing it would reveal the substance of research that was done in order to provide legal advice, and would thus reveal the nature of the legal advice or services being rendered.[88]

Other courts, however, have drawn privilege narrowly in attorney-to-client contexts, opining that "if an attorney learns a fact outside of the attorney-client relationship, that information will not be subject to the privilege,"[89] even if those facts are "interwoven" into legal advice provided.[90] Such holdings appear to confuse the independent discoverability of facts unearthed by counsel with a privileged *communication* of those facts to the client as part of legal advice.[91] Unfortunately, there is little clarity as to whether a more permissive or strict view will prevail in any given case.[92] What is clear is that the scope of privilege for attachments originating from counsel may be narrower than those initially provided by the client. Practitioners should accordingly proceed with caution to the extent their legal work involves the independent collection of

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88. *Robinson*, 214 F.R.D. at 447.

89. United States v. Philip Morris USA, Inc., No. Civ.A.99-2496(GK), 2004 WL 5355972, at *4 (D.D.C. Feb. 23, 2004).

90. United States v. Motorola, Inc., No. Civ.A.94-2331TFH/JMF, 1999 WL 552553, at *2 (D.D.C. May 28, 1999) ("It may also occur that a lawyer may collect facts from other sources and provide the client with an opinion or guidance as to their significance. It is equally clear that these facts, even if interwoven into the legal advice are not protected by the privilege."); *see* Minebea Co. v. Papst, 229 F.R.D. 1, 3 (D.D.C. 2005).

91. *See supra* Part II.

92. *See* Grace M. Giesel, *The Legal Advice Requirement of the Attorney Client Privilege*, 48 MERCER L. REV. 1169, 1188-89 (1997) (comparing courts adopting the broader and narrower view); Thomas W. Hyland & Molly Hood Craig, *Attorney-Client Privilege and Work Product Doctrine in the Corporate Setting*, 62 DEF. COUNS. J. 553, 556 (1995) ("The *Upjohn* Court did not establish a new standard for the privilege but, rather, left determinations to be made on a case-by-case basis.").

Apropos of the next Subpart, the D.C. Circuit is generally particularly exacting on attorney-to-client communications, insisting that they virtually recapitulate confidences obtained from the client in order to obtain privilege. *See, e.g.*, cases cited *supra* note 90.

outside information and its transmission to the client.

D. The Freedom of Information Act and the D.C. Circuit

Application of the Freedom of Information Act (FOIA)[93] has produced a somewhat idiosyncratic body of law largely arising in the District of Columbia Circuit. As FOIA's purpose is to compel the production of government records, privilege defenses are frequently raised under an exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[94] As a general rule, this exemption embraces any privilege or protection that could be asserted in civil litigation, including the attorney-client privilege.[95]

The Court of Appeals for the District of Columbia Circuit, however, has implied that the attorney-client privilege might differ slightly in the FOIA context.[96] A leading case in this line is *Mead Data Central, Inc. v. U.S. Department of the Air Force*, which wrote that "[t]he privilege does not allow the withholding of documents simply because they are the product of an attorney-client relationship, however. It must also be demonstrated that the information is confidential. If the information has been or is later shared with third parties, the privilege does not apply."[97] This holding has been taken up by later circuit decisions to mean that the publicly-available information in a privileged communication must be produced.[98]

Such reasoning seemingly contravenes *Upjohn*, and has been

93. 5 U.S.C. § 552 (2009).

94. *Id.* § 552(b)(5).

95. *See* United States v. Weber Aircraft Corp., 465 U.S. 792, 800 (1984); Badhwar v. U.S. Dep't of the Air Force, 829 F.2d 182, 184 (D.C. Cir. 1987).

96. *See* Burka v. U.S. Dep't of Health & Human Servs., 87 F.3d 508, 517 (D.C. Cir. 1996) ("[T]o justify nondisclosure under Exemption 5, an agency must show that the type of material it seeks to withhold is *generally* protected in civil discovery for reasons *similar* to those asserted by the agency in the FOIA context." (emphases added)).

97. Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 253 (D.C. Cir. 1977) (citations omitted).

98. *See, e.g.*, Tax Analysts v. IRS, 117 F.3d 607, 618-20 (D.C. Cir. 1997); Schlefer v. United States, 702 F.2d 233, 245 (D.C. Cir. 1983); Brinton v. Dep't of State, 636 F.2d 600, 604 (D.C. Cir. 1980).

regarded with skepticism. Some courts have responded by cabining *Mead Data*'s rule to the particular balancing of interests under FOIA.[99] For its part, the Department of Justice has repeatedly advised that *Mead Data* and its progeny are bad law, recommending in 2004 that "the line of FOIA decisions in the Court of Appeals for the District of Columbia Circuit that squarely conflicts with the *Upjohn* analysis should not be followed."[100] In any event, the danger to privileged communications subject to FOIA and involving public information is likely to persist until the District of Columbia Circuit revisits *Mead Data*'s pronouncement and clarifies whether and how it can be applied without violating *Upjohn*.[101]

V. CUI BONO: THE SPECTER OF WAIVER

At its heart, the Part & Parcel Principle may seem an exercise in formality over substance. The utility of withholding attachments readily discoverable elsewhere is arguable, as even *Upjohn* seemed to imply.[102] Weighty treatises have queried the entire premise of corporate attorney-client privilege for analogous reasons:

> *Qui bonum?* Is all of this review of privilege and litigation about privilege in the client's real interest or the lawyer's? . . . . How many of those documents, so assiduously battled over, must in fact be kept confidential lest they harm the client? And if that is the case, an exception or one of the

99. *E.g.*, Zander v. Dep't of Justice, 885 F. Supp. 2d 1, 10-11 (D.D.C. 2012) (discussing at length); Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 71–72 (1st Cir. 2002); *In re* Ampicillin Antitrust Litig., 81 F.R.D. 377, 388 n.21 (D.D.C. 1978).

100. U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE, EXEMPTION 5 (May 2004), *available at* http://www.justice.gov/oip/exemption5.htm; *see also* U.S. DEP'T OF JUSTICE, FOIA UPDATE, Vol. VI, No. 2 (Jan. 1, 1985), *available at* http://www.justice.gov/oip/foia_updates/Vol_VI_2/page3.htm (advising that "agencies should disregard the restrictive, pre-*Upjohn* limitation on the attorney-client privilege applied by the D.C. Circuit in *Mead Data* and *Brinton*.").

101. *See Zander*, 885 F. Supp. 2d at 10.

102. *See supra* note 13.

> infinite varieties of waiver are likely to kick in and compel disclosure.[103]

Epstein hits the proverbial nail on the head with her last comment. There may not always be compelling reasons to insist on the formality of withholding otherwise discoverable attachments sent to counsel for advice for their own sake.[104] However, core documents remain that clients have a powerful interest in withholding, notably those reflecting strategy and plans in ongoing litigation, whose disclosure could compromise the adversarial process.[105] Because of the potential breadth of the "subject matter waiver" doctrine, privilege for these core documents may be surrendered if corporations voluntarily divulge more trivial discussions with counsel on the same topic.[106]

Although some authorities (and recent amendments to the Federal Rules) limit subject matter waiver when disclosure is inadvertent,[107] precedent would not permit a party to

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103. EPSTEIN, *supra* note 5, at 1366, 1368.

104. Consider, however, the example given at the start of this Article, in which disclosure of the attachment might very well work harm to the company's defense.

105. *See* ATTORNEY CLIENT PRIVILEGE IN CIVIL LITIGATION 4-5 (Vincent S. Walkowiak ed., 2008) (providing justification for the privilege based on its role in serving the adversarial system of justice); THEODORE L. KUBICEK, ADVERSARIAL JUSTICE: AMERICA'S COURT SYSTEM ON TRIAL 179-84 (2006) (same); *see also* 153 CONG. REC. H13562-63 (2007) (recognizing the importance of the corporate attorney-client privilege to the adversarial process in the context of the Attorney-Client Privilege Protection Act of 2007).

106. *See* George A. Davidson & William H. Voth, *Waiver of the Attorney-Client Privilege*, 64 OR. L. REV. 637, 650-53 n.50 (1985-1986) (discussing and collecting cases espousing the subject matter waiver doctrine).

107. *See* FED. R. EVID. 502(b) ("When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B)."); *e.g.* Koch Materials Co. v. Shore Slurry Seal, Inc., 208 F.R.D. 109, 120 (D.N.J. 2002) (finding no subject matter waiver from inadvertent production of a few documents). *Contra* WIGMORE, *supra* note 11, § 2290, at 636. *See generally*

deliberately produce unproblematic attorney-client communications on a subject while withholding those it views as desirable to conceal.[108] Yet the penalty for over-disclosure cannot be ascertained *a priori*, as the scope of waiver is decided on a case-by-case basis,[109] and can span years when the subject matter has been under long discussion.[110]

Moreover, attorneys may be incentivized to be overzealous as to assertions, because even the good-faith belief that a document was not privileged can yield a general waiver should the attorney be proven wrong. This is particularly so in the context of this Article, where the distinction between unprivileged facts and a privileged communication relating those facts may be nonobvious. Lawyers who voluntarily produce fact-laden correspondence with a client have found to their dismay that their mistake of law has the effect of waiving privilege for a vast (and more sensitive) universe of documents.[111]

Progressive commentators have called for an end to any

Alan J. Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513, 521-23 (1990); George A. Davidson & William H. Voth, *Waiver of the Attorney-Client Privilege*, 64 OR. L. REV. 637, 640-46 (1985-1986).

108. *See* FED. R. EVID. 502(a) ("[T]he waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together."); *e.g.*, Abbott Labs v. Baxter Travenol Labs., Inc., 676 F. Supp. 831, 832 (N.D. Ill. 1987); Central Soya Co. v. Geo. A. Hormel & Co., 581 F. Supp. 51, 53-54 (W.D. Okla. 1982); Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977); Lee Nat'l Corp. v. Deramus, 313 F. Supp. 224, 227 (D. Del. 1970) ("It would be patently unfair for a client to disclose those instances which please him and withhold all other occasions.").

109. *See In re* Keeper of the Records XYZ Corp., 348 F.3d 16, 23 (1st Cir. 2003); *In re* Grand Jury Proceeding, 219 F.3d 175, 183 (2d Cir. 2000).

110. *E.g.*, SEB, S.A. v. Montgomery Ward & Co., 412 F. Supp. 2d 336, 348 nn.19-20 (S.D.N.Y. 2006).

111. *See, e.g.*, Sinclair Oil Corp. v. Texaco, Inc., 208 F.R.D. 329, 332-33 (N.D. Okla. 2002) (holding that discussion of facts with counsel is privileged, and that although counsel had genuinely believed it was not privileged, the discussion's intentional disclosure "waived the attorney client privilege with respect [to] *all attorney client communications* in the prior state court lawsuit." (emphasis added)).

absolute constraint that attorney-client communications be kept confidential, though this seems unlikely given the weight of history.[112] Epstein observes that a sounder system may well be evolving by contract, whereunder litigants enter into agreements on "claw backs" and admissibility of privileged materials that allow them to protect essential litigation documents while minimizing costly reviews, intricate redactions, and dueling motions to compel.[113] But private parties' workarounds to an unforgiving legal regime – though indicative of the problems in that regime – are hardly the optimal route to reform. Such workarounds, in any event, are limited to the signatories unless endorsed by the court.[114]

Some courts have done just that, relying on the Federal Rules provision that disclosure pursuant to court order need not implicate waiver.[115] Other courts have moved to develop their jurisprudence to limit the breadth of waiver,[116] but still-

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112. *See, e.g.*, Rice, *supra* note 16, at 888-98; Alan J. Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513, 541-43 (1990); *see also* George A. Davidson & William H. Voth, *Waiver of the Attorney-Client Privilege*, 64 OR. L. REV. 637, 650, 653-55 (1985-1986) ("Perhaps the most malignant and ill-considered doctrine concerning waiver of privilege is the rule that disclosing one privileged communication—however inadvertently—constitutes a waiver of all privileged communications on the same subject . . ."); *id.* at 650.

113. EPSTEIN, *supra* note 5, at 1368.

114. *See* FED. R. EVID. 502(e) ("An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.").

115. *See, e.g.*, United States v. Daugerdas, No. S3 09 CR.581 (WHP), 2012 WL 92293, at *2 (S.D.N.Y. Jan. 11, 2012) ("[T]he October 12 Order was entered by this Court to address the precise concern raised by this motion – i.e., that Field would seek to use BDO's privileged documents in a private proceeding. Federal Rule of Evidence 502(d) states: 'A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is not a waiver . . . .' The October 12 Order did exactly that, and Field's motion to unseal the June 14 e-mail would defeat the purpose of the October 12 Order.").

116. *See, e.g.*, Sullivan v. Warminster Twp., 274 F.R.D. 147, 149-54 (E.D. Pa. 2011) (finding no subject matter waiver from attorney investigation publicized prior to litigation); *In re* Keeper of the Records XYZ Corp., 348

changing precedent may push the prudent practitioner to assume the worst. The bench might accelerate this process by continuing to "claw back" draconian rules on subject matter waiver and thus allow litigants to focus on protecting documents that truly need protection to serve the ends of justice.[117] Until such a claw back is fully realized, however, practitioners will need to assiduously assert any instance of privilege, and the Part & Parcel Principle should provide a valuable tool in doing so.

F.3d 16, 24 (1st Cir. 2003) (finding no subject matter waiver resulting from extrajudicial disclosures); *In re* von Bulow, 828 F.2d 94, 102 (2d. Cir. 1987) (same); Weil v. Investment/Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir. 1981) (construing scope of the subject matter waiver from judicial disclosure relatively narrowly).

Until relatively recently, the D.C. Circuit insisted that even inadvertent disclosure generally worked a complete subject matter waiver. *See* Amobi v. D.C. Dep't of Corrs., 262 F.R.D. 45, 52 (D.D.C. 2009). That the circuit now follows the Federal Rules' new amendment prescribing that inadvertent disclosures do not implicate subject matter waiver is heartening, but also illustrates the extent to which some courts have applied waiver doctrine.

117. *Cf.* Alan J. Meese, *Inadvertent Waiver of the Attorney-Client Privilege by Disclosure of Documents: An Economic Analysis*, 23 CREIGHTON L. REV. 513, 536 (1990) ("Failure to protect documents by adopting loose standards of waiver would seem to violate the solid support of the privilege established in *Upjohn*.").