

Supplement to M. Laredo, "The Attorney-Client Privilege in the Business Context in Massachusetts," 87 Mass L. Rev. 143 (Spring 2003)

Marc C. Laredo
Payal Salsburg
Laredo & Smith, LLP
101 Federal Street, Suite 650
Boston, MA 02110
617-443-1100
laredo@laredosmith.com
salsburg@laredosmith.com

The following are updates and/or additional cases for certain topics discussed in M. Laredo, "The Attorney-Client Privilege in the Business Context in Massachusetts," 87 Mass L. Rev. 143 (Spring 2003) ("Article").

What is the Privilege?

In Comm'r of Revenue v. Comcast Corp., 453 Mass. 293, 303 (2009), the Supreme Judicial Court cited Wigmore's definition of the attorney-client privilege as the "classic formulation" of the privilege:

The classic formulation of the attorney-client privilege, which we indorse, is found in 8 J. Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961): "(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."

Who is the Client

States vary in how they define "the client." Article at 146 & n.31-34. When attempting to analyze the question, one must review the relevant case law, statutes, and rules of evidence in each jurisdiction. For example, Texas, a state that had followed the "control group" test, Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 197 (Tex. 1993), now follows the "subject matter" test as a result of an amendment to Texas Rule of Evidence 503. See In re E.I. DuPont de Nemours

& Co., 136 S.W.3d 218, 225 n.3 (Tex. 2004). Arizona's court-created test in Samaritan Found. v. Goodfarb, 862 P.2d 870, 878-79 (Ariz. 1993), is still good law in criminal cases, Roman Catholic Diocese v. Superior Ct., 62 P.3d 970, 973 (Ariz. Ct. App. 2003), but has been replaced by a broader test in civil cases. See Ariz. Rev. Stat. § 12-2234. Florida's Supreme Court has listed a five-part test that builds off the subject matter approach and applies a "heightened level of scrutiny." Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994). Again, since the law and the sources of law vary, a careful analysis is required. See T. Mulroy, "The Attorney Client Privilege and the Corporate Internal Investigation," 1 DePaul Bus. & Com. L.J. 49 (2002); B. Hamilton, "Conflict, Disparity and Indecision: the Unsettled Corporate Attorney-Client Privilege," 1997 Ann. Surv. Am. L. 629.

The First Circuit has noted the important distinction between an individual asserting the attorney-client privilege in his personal capacity as opposed to his capacity as an officer of a corporation. In Re Grand Jury Proceedings, 469 F.3d 24, 26 (1st Cir. 2006) (individual, who was corporation's president but asserted privilege in personal capacity, could not intervene in federal grand jury investigation to assert privilege on behalf of corporation since claim was not brought on behalf of the corporation). The Supreme Judicial Court of Massachusetts is in accord. Chambers v. Gold Medal Bakery, Inc., 464 Mass. 383, 389 (2013) (directors and shareholders of closely-held corporation were not entitled to discovery documents protected under attorney-client privilege or as attorney work product where their interests were adverse to the corporation's interest on the given issue). Similarly, in Clair v. Clair, 464 Mass. 205, 218 (2013), the Supreme Judicial Court held that an executrix did not, by stepping into her brother's shoes for purposes of administering his estate, automatically assume his role as a director of the

companies and was therefore not entitled to access the company's privileged communications with corporation counsel.

In United States v. Jicarilla Apache Nation, 564 U.S. 162, 170-73 (2011), the Supreme Court examined the fiduciary exception to the attorney-client privilege. Broadly stated, “[t]he common law... has recognized an exception to the privilege when a trustee obtains legal advice related to the exercise of fiduciary duties. In such cases, courts have held, the trustee cannot withhold attorney-client communications from the beneficiary of the trust.” Id. at 165. Thus, if legal advice is obtained for a trust at the trust's expense, then the trust beneficiary is entitled to the attorney-client communications; if, on the other hand, the trustee obtains legal advice at its own expense and for its own benefit, the information may be withheld from the beneficiary. Id. at 172-73. Although Jicarilla relates to the relationship between the United States government and Indian tribes, its broad statements regarding the fiduciary exception to the attorney-client privilege are of importance in other contexts.

Public Records

Whether the attorney-client privilege can be used as a shield to resist a request under the public records law, Mass. Gen. Laws ch. 66, § 10, and Mass. Gen. Laws ch. 4, § 7, cl. 26, was resolved by the Supreme Judicial Court in Suffolk Const. Co., Inc. v. Div. of Capital Asset Mgmt., 449 Mass. 444 (2007). The case came before the court on a reported question: “Do the provisions of the public records law, comprised of G.L. c. 66, § 10 and G.L. c. 4, § 7(26), preclude the protection of the attorney-client privilege from records made or received by any officer or employee of any agency of the Commonwealth?” Id. at 445. The court ruled that:

[w]e answer the reported question in the negative. As we discuss more fully below, the attorney-client privilege is a fundamental component of the administration of justice. Today, its social utility is virtually unchallenged. Nothing in the language or history of the public records law, or in our prior

decisions, leads us to conclude that the Legislature intended the public records law to abrogate the privilege for those subject to the statute.

Id. at 445-46. The court added that “[w]e now state explicitly that confidential communications between public officers and employees and governmental entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the normal rules of the attorney-client privilege.” Id. at 449.

In the context of the “policy deliberation exemption” of G.L. c. 4, § 7(26)(d), the Supreme Judicial Court clarified in DaRosa v. City of New Bedford, 471 Mass. 446, 448 (2015) that opinion work product prepared in anticipation of litigation or for trial by or for a party or that party’s representatives falls within the scope of the exemption and is therefore outside the definition of “public records” for purposes of discovery. Likewise, fact work product prepared in anticipation of litigation or trial falls within the scope of exemption (d). However, where fact work product is a reasonably completed study or report or, if it is reasonably completed, where it is not interwoven with opinions or analysis leading to opinions, the latter subset is subject to discovery. Id. Exemption 5 to the Freedom of Information Act, 5 U.S.C. § 552 likewise protects certain communications with in-house counsel. New Hampshire Right to Life v. U.S. Dept. of Health and Human Servs., 778 F.3d 43, 54 (1st Cir. 2015) (mere reliance on counsel’s conclusions does not necessarily involve reliance on counsel’s analysis; without more, one cannot presume that the agency’s actions in accord with counsel’s view necessarily adopts that view as the agency’s “policy”).

What Communications are Privileged

In Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 619 (2007), the Supreme Judicial Court ruled that while “the identity of an attorney’s client and the source of payment for legal fees are not normally protected by the attorney-client privilege... details in

billing statements may reveal confidential communications between client and attorney.” Thus, detailed billing statements may be communications that are protected by the privilege.

Documents that are not confidential in nature, such as routine real estate documents, are not privileged. In Re Grand Jury Subpoena (Mr. S.), 662 F.3d 65, 71-72 (1st Cir. 2011). But while many such documents may, in fact, not be privileged, the First Circuit cautioned that “there is no flat rule exempting all communications between a title attorney and a client from the reach of the attorney-client privilege. It takes little imagination to conceive instances in which a particular communication regarding a real estate closing may satisfy all of the requirements of the attorney-client privilege.” Id. at 72 n.3.

The Supreme Judicial Court addressed the distinction between legal and business advice (in this case tax advice) in the Comcast case and recognized “the difficulty of drawing a line between ‘legal’ advice and ‘tax or accounting’ advice....” 453 Mass. at 311. In Comcast, an in-house attorney, who was “free to seek advice on Massachusetts tax law from a Massachusetts attorney... chose to obtain tax advice on Massachusetts tax law from Massachusetts accountants....” Id. Thus, those communications were not protected by the privilege.

In a case decided by the United States Court of Appeals for the First Circuit, Miss. Pub. Emps’ Ret. Sys. v. Boston Scientific Corp., 649 F.3d 5, 30-31 (1st Cir. 2011), the court rejected claims that because attorneys directed that communication be made through counsel and that communications “focused on ways to prevent similar mistakes in the future,” the communications at issue were not privileged. Indeed, the court held that “this type of information was highly relevant to BSC’s potential liability and consequently directly related to providing legal advice to BSC’s management.” Id. at 30-31. Likewise, directing that communications go through counsel was merely a way of protecting the privilege. Id. at 31.

Joint Defense Arrangements

In Hanover Ins., the Supreme Judicial Court “also formally recognize[d] the longstanding use and validity of joint defense agreements, an exception to waiver of the attorney-client privilege under the common interest doctrine.” 449 Mass. at 610. “[T]he common interest doctrine ‘extend[s] the attorney-client privilege to any privileged communication shared with another represented party’s counsel in a confidential manner for the purpose of furthering a common legal interest.’” Id. at 612 (citations omitted).

In its ruling in Hanover Ins., the Supreme Judicial Court, after reviewing the importance of the attorney-client privilege, “adopt[ed] the principle of Restatement (Third) of the Law Governing Lawyers § 76(1) as the law of the Commonwealth.” Id. at 617. The Restatement (Third) of the Law Governing Lawyers § 76(1) (2000) provides that:

[i]f two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

Id. at 614. The court also noted that (a) the client does not need to give express consent to create a joint defense agreement (Id. at 617); (b) the agreement does not need to be in writing (Id. at 618); and (c) the clients do not need to have identical interests; rather “a common interest that is no more than a joint effort to establish a common litigation defense strategy” is sufficient. Id.

Presence of Third Parties and Agents of an Attorney

In Comcast, the Supreme Judicial Court addressed the applicability of the Second Circuit’s opinion in United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). The SJC took a narrow view of Kovel, analogizing the role of the accountant to an interpreter, and holding that it “applies only when the accountant’s role is to clarify or facilitate communications between

attorney and client.” Comcast, 453 Mass. at 307-08. Though the court held that the attorney-client privilege was limited, it did accord work product protection to the accountants’ work. Id. at 311-19. In contrast, in United States v. Textron, Inc., 577 F.3d 21, 26 (1st Cir. 2009) (en banc) the First Circuit ruled that tax accrual work papers were required by statute and used for audits and so were *not* work product. See also Lluberres v. Uncommon Prods., LLC., 663 F.3d 6, 24-25 (1st Cir. 2011) (assuming, without deciding, that Kovel applies in the First Circuit and holding that “the source and nature of the information” determines the applicability of the Kovel doctrine).

The Supreme Judicial Court reiterated in DeRosa v. City of New Bedford that while the derivative attorney-client privilege can shield communications of a third party employed to facilitate communication between the attorney and client, that assistance must be “nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications.” 471 Mass. at 463. In comparing the types of assistance covered by the derivative attorney-client privilege to the services of a translator, the court clarified that the privilege does not apply simply because an attorney’s ability to represent a client is improved, even substantially, by the assistance of the third party. Id.

Two Superior Court opinions by Judge Gants address whether the attorney-client privilege applied to emails between a company employee and his private attorney sent using the company’s computer system. Transocean Capital Inc. v. Fortin, 21 Mass. L. Rptr. 597, *5 (October 20, 2006) (Gants, J.); Nat’l Econ. Research Assocs., Inc. v. Evans, 21 Mass. L. Rptr. 337, *5 (Aug. 3, 2006) (Gants, J.)

In Evans, an employee used his company’s laptop computer to access his personal email account and, through that account, exchanged email with his personal attorney. Unbeknownst to

the employee, these communications were captured on his laptop's hard drive and, after the computer was returned to his employer, retrieved by the employer's expert computer consultant (but not reviewed by the company's counsel pending the court's guidance). The court ruled that because the company's employee manual warned employees that their emails could be reviewed by the company, if the emails had been sent from the employee's *work* email, they would not have been privileged. Here, however, the employee used his personal email address. Since the employee manual did not say that the company would monitor such communications if used with company equipment, the communications were privileged.

In Fortin, the employee used his company email address to communicate with his counsel. Applying its holding in Evans, the court held that the communications were privileged because the company did not have its own employee manual and the employee handbook used by the third party that it retained to handle its human resources had not been specifically adopted by the company.

Whether one is an "agent" for purposes of the attorney-client privilege depends on the nature of the relationship between the attorney and the purported agent. For example, when a university appointed an independent investigator to examine issues concerning a student's suicide, the investigator's communications with the university's counsel were not privileged because the investigator, who was an independent contractor not subject to the university's direction or control was not acting as an agent of the university. Carpenter v. M.I.T., 19 Mass. L. Rptr. 339, *4 (May 17, 2005) (Connolly, J.).

Crime-Fraud Exception

In order to successfully challenge the attorney-client privilege on the basis of the crime-fraud exception, the challenger must show “(1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity.” In Re Grand Jury Proceedings, 417 F.3d 18, 22 (1st Cir. 2005), cert. denied, 546 U.S. 1088 (2006) (citations omitted). The court held that:

it is enough to overcome the privilege that there is a reasonable basis to believe that the lawyer’s services were used by the client to foster a crime or fraud. The circuits -- although divided on articulation and on some important practical details -- all effectively allow piercing of the privilege on something less than a mathematical (more likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud. This is a compromise based on policy but so is the existence and measure of the privilege itself.

Id. at 23; see also United States v. Gorski, 807 F.3d 451, 461 (1st Cir. 2015) (attorney-client privileged documents required to be produced under the crime-fraud exception where corporate officer engaged a law firm to revise the company’s corporate structure to fraudulently qualify for, and obtain, government contracts).

In a 2009 case, In the Matter of a Grand Jury Investigation, 453 Mass. 453, 459 (2009), the court held that the attorney-client privilege applied to threatening messages left by a client on an attorney’s answering machine and therefore the attorney could not be compelled to testify about those messages. In Purcell v. Dist. Attorney for the Suffolk Dist., 424 Mass. 109, 113-14 (1997), however, the attorney acted permissibly in initially disclosing the messages to the judge consistent with Massachusetts Rule of Professional Conduct 1.6.

Waiver

A party who “chooses to inform another of the advice provided by counsel” waives the privilege. Transocean Capital, Inc. v. Fortin, 21 Mass. L. Rptr. 597, *5 (October 20, 2006) (Gants, J.). In Fortin, a party disclosed the advice he had received from counsel in an email. The court noted that:

[i]f Fortin had simply stated, as he had in the previous sentence of this email, that Fortin had decided to pursue a particular course after consultation with counsel, he would not have waived the privilege, because he would not have communicated the substance of the advice he received from counsel. By choosing to describe that advice, he waived his right to protect the advice under the privilege because the advice, having been communicated to a third party, was no longer confidential.

In Global Investors Agent Corp. v. Nat’l. Fire Ins. Co. of Hartford, 76 Mass. App. Ct. 812, 816-20 (2010), the court reaffirmed that if a party’s claim focuses on advice of counsel, then the privilege is waived as to that advice. However, there are two limits on that rule: (a) it is not a “blanket waiver of the entire attorney-client privilege in the case” and there is no “waiver unless it is shown that the privileged information sought to be discoverable is not available from any other source.” Id. at 817-8 (citations omitted). Where a corporation claims that an officer breached his fiduciary duty in connection with a proposed sale of life insurance policies owned by the corporation, the corporation waives the attorney-client privilege as to communications with corporate counsel about the proposed sale by putting those communications “at issue.” Clair v. Clair, 464 Mass. at 220.

In McCarthy v. Slade Assocs., Inc., 463 Mass. 181, 191-93 (2012), the Supreme Judicial Court continued to recognize that an “at issue” waiver of the attorney-client privilege might come into play where a statute of limitations defense is asserted by a party, and is met by the opposing party’s reliance on the discovery rule. In affirming its prior decision in Darius v. Boston, 433 Mass. 274 (2001), the court clarified that the assertion of the statute of limitations

defense and the discovery rule do not, by themselves, permit the parties to invade into the attorney-client relationship in order to “locate a statement by the client that might contradict a statement or position she has taken in the particular case,” but such discovery may be allowed where the defendants can show a “substantial need” for work product material and that the information sought is not available from any other source. *Id.* at 192.

In Bacchi v. Mass. Mut. Life Ins. Co., a federal district court held that merely asserting good faith as an affirmative defense does not waive the attorney-client privilege where the defendant intends to establish its defense by showing that its conduct was actually lawful, and does not intend to rely on counsel’s opinion or advice. 110 F. Supp. 3d 270, 277 (D. Mass. 2015). In the context of asserting a good faith affirmative defense, the court applied a three factor test to determine whether there has been an “implied waiver” of the privilege: (1) whether the proponent of the privilege took some affirmative step such as filing a pleading; (2) whether the affirmative act put the privileged information at issue by making it relevant to the case; and (3) whether upholding the privilege would deny the opposing party access to information vital to its case. *Id.* In balancing the plaintiff’s right to discover “truly relevant and vital information” with the defendant’s right to protect privileged information that is not “germane,” the court found it sufficient to find an implied waiver if the defense relies on facts “that can only be tested or rebutted if the adversary is given access to the privileged material.” *Id.* In other words, where the defendant intends to show good faith reliance by arguing that “it took the same types of steps that other similar situated entities would take if they were proceeding in good faith” and thus relies on objective facts, there is no need to invade counsel’s advice or thoughts to assess whether the defendant subjectively had a good faith basis to follow said guidance. *Id.* at 278.

Inadvertent Disclosure

Three Superior Court cases highlight the fact-intensive nature of the inquiry as to whether the privilege has been waived via an inadvertent disclosure. In Charm v. Kohn, 27 Mass. L. Rptr. 421, *1 (September 30, 2010) (Fabricant, J.), the court reaffirmed the “consensus” that “a client does not lose the benefit of the attorney-client privilege for an otherwise privileged communication through inadvertent disclosure if the client proves that he and his counsel took reasonable steps to preserve the confidentiality of the particular communication.” Here, an attorney sent an email communication and copied his client with a “bcc.” Id. at *2. The client, in turn responded with a “reply all.” Id. The court held that the waiver was inadvertent although it noted that “[t]he question is close.” Id. at *5-6. The court’s summary is an apt reminder: “reply all is risky. So is bcc.” Id. at *6.

In Mira v. O’Brien, 16 Mass. L. Rptr. 707, *1 (Oct. 2003) (Gants, J.), a privileged letter to plaintiff’s counsel, *William O’Brien*, was mistakenly produced to defendant *Daniel O’Brien*. The court ruled that disclosure was inadvertent and the privilege was not waived. However, the court further held that if “the inadvertently disclosed letter contained information that established the falsity of the testimony at trial,” it could be used for impeachment purposes. Id. at *2. In contrast, in McMahon v. Universal Golf Constr. Corp., 20 Mass. L. Rptr. 59, *4 (Sept. 8, 2005) (Agnes, J.), the privilege was waived where the number of documents being produced was not large, the document in question had not been segregated or reviewed by an attorney, and the disclosing party “did not act quickly to rectify its mistake once it became aware that a document had been inadvertently produced and, in fact, did not notice the disclosure at all until opposing counsel marked it as an Exhibit at least two months later.”

Disputes Involving Attorneys and Their Former Employers

When an attorney is involved in litigation with a former employer, disclosure of materials previously prepared or reviewed by the attorney raises complicated issues of the right to discovery versus professional obligations to preserve confidences and maintain the privilege. In Grieco v. Fresenius Med. Case Holdings, Inc., 23 Mass. L. Rptr. 588, *2-5 (Feb. 20, 2008) (Neel, J.), the court attempted to balance these competing interests. In Grieco, the court held that the question of whether such documents were discoverable was different than whether they could be used by an in-house attorney in litigation against his former employer, an issue addressed in two prior Supreme Judicial Court cases, GTE Prods. Corp. v. Stewart, 421 Mass. 22 (1995) and GTE Prods. Corp. v. Stewart, 414 Mass. 721 (1993) (a separate issue in Grieco was whether Rule 1.6 of the Massachusetts Rules of Professional Conduct changed the GTE holdings). The Fresenius court held that: “where former in-house counsel sues his or her former employer, the attorney-client privilege is not violated when the employer is required to produce to the plaintiff privileged documents which the plaintiff either authorized or received while acting as in-house counsel.” Id. at *3. Disclosure to the plaintiff’s attorneys also was permissible. Id. at *5.

Verdrager v. Mintz, Levin et al., 474 Mass. 382 (2016) is particularly instructive in the situation where a law firm is faced with a lawsuit from a former attorney employee who surreptitiously accessed the firm’s document management system for items that might support her claims. In Verdrager, a former employee brought suit against her former law firm employer and several of its attorneys alleging gender discrimination and retaliation. Id. at 384-85. The firm claimed that the plaintiff was terminated, not for discriminatory reasons, but for cause because she searched for, accessed, copied, and forwarded certain documents from the firm’s internal computer system to her personal email address in violation of her ethical duties as an

attorney. Id. at 394. The former employee claimed, however, that her self-help discovery constituted protected activity in aid of her claims under G.L. c. 151B, § 4. Id. at 410. The Supreme Judicial Court generally agreed but only to the extent that the employee's actions are reasonable in the totality of the circumstances. Id. at 411. Considering the totality of the circumstances by applying the seven factors identified in Quinlan v. Curtiss-Wright Corp., 8 A.3d 209 (N.J. 2010), the SJC was not persuaded that "where, as here, the plaintiff is an attorney, such that some of the documents at issue may be subject to the rules of attorney-client confidentiality and privilege, the plaintiff's actions should thereby be stripped of the protections afforded other employees by G.L. c. 151B." Id. at 412. In other words, despite claims that such documents might have contained attorney-client privileged information, that fact in itself is not dispositive in the Quinlan analysis. Id.

Litigation Disputes Concerning the Privilege

One Superior Court Justice has noted that "[o]ur rules of civil procedures do not expressly impose on the party withholding documents any additional obligation. Nonetheless, the use of privilege logs by parties withholding documents in this context is a common feature of Massachusetts discovery practice." Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's London, 17 Mass. L. Rptr. 665, *8 (May 21, 2004) (Agnes, J.) (subsequent proceedings at 449 Mass. 621 (2007)). In Allmerica, the court required the use of a privilege log and held that:

as a general rule a privilege log should include a list of individual documents accompanied by the date of each document, its author, the addressee or recipient, a description of its contents sufficient to describe its character as privileged, and the particular privilege asserted. In keeping with the view of the drafters of the federal rules, this general rule is not hard and fast and some flexibility is permitted when the character of a group or category of documents as privileged is evident.

Id.

In cases involving public claims of privilege, the Supreme Judicial Court has stated that “we emphasize that public officials seeking the protection of the attorney-client privilege are required to produce detailed indices to support their claims of privilege...” Suffolk Const., 449 Mass. at 460.

In Comcast, the Supreme Judicial Court set forth the standard of review for privilege decisions of a trial court. Comcast, 453 Mass. at 302. The court held that:

In general, we uphold discovery rulings “unless the appellant can demonstrate an abuse of discretion that resulted in prejudicial error.” Buster v. George W. Moore, Inc., 438 Mass. 635, 653, 783 N.E.2d 399 (2003), citing Solimene v. B. Grauel & Co., 399 Mass. 790, 799, 507 N.E.2d 662 (1987). Where the attorney-client privilege is concerned, however, our review is more textured. On appeal from any decision on a privilege claim, we review the trial judge’s rulings on questions of law de novo. We generally review a judge’s fact findings, at least after a bench trial, for clear error. See Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996). Where, as here, we are dealing with a motion to compel and the motion judge’s findings are based solely on documentary evidence, we do not accord them any special deference. Cf. Cavallaro v. United States, 284 F.3d 236, 245 (1st Cir. 2002) (under Federal law findings of motion judge on a documentary record reviewed for clear error). We review discretionary judgments for abuse of discretion. See Matter of a Grand Jury Investigation, 437 Mass. 340, 356, 772 N.E.2d 9 (2002) (evidentiary ruling where privilege at issue). Mixed questions of law and fact, such as whether there has been a waiver, generally receive de novo review. See 2 P.R. Rice, Attorney-Client Privilege in the United States § 11.36, at 234-236 & nn. 43-46 (2d ed. 1999) (surveying Federal jurisprudence and concluding that appellate courts generally review mixed questions of law and fact de novo).

Id. at 302-03 (footnote omitted).

In In re Grand Jury Proceedings, 802 F.3d 57 (2015), the First Circuit provided guidance on properly objecting to a Rule 45 subpoena seeking privileged documents. The court agreed with the Courts of Appeals for the Second Circuit and the District of Columbia in imposing a requirement that “the information required under [Rule 45] be provided to the requesting party within a reasonable time, such that the claiming party has adequate opportunity to evaluate fully the subpoenaed documents and the requesting party has ample opportunity to contest the claim.”

Id. at 68. While Rule 45 does not require the subpoenaed party to produce a privilege log in order

to oppose the invocation of the crime-fraud exception, where the subpoenaed party affirmatively seeks an *in camera* inspection of its privileged documents, its failure to produce a privilege log (that might enable the court to make a document-by-document ruling) waives the party's right to seek such an inspection.

Lawyers Seeking Legal Advice

A law firm facing a legal malpractice action brought by a current client may find itself stuck between a rock and a hard place in protecting its privileged communications with in-house counsel in connection with the litigation. In RFF Family P'ship, LP v. Burns & Levinson, LLP, 465 Mass. 702, 723 (2013), the Supreme Judicial Court held that communications between firm attorneys and in-house counsel are protected by the attorney-client privilege so long as four conditions are met: (1) the law firm must designate, either formally or informally, an attorney or attorneys within the firm to represent the firm as in-house or ethics counsel, so that there is an attorney-client relationship between the in-house counsel and the firm when the consultation occurs; (2) where a current outside client threatens litigation against the law firm, the designated in-house counsel must not have performed any work on the particular client matter at issue or a substantially related matter; (3) the time spent by the attorneys in the confidential communications with in-house counsel may not be billed or charged to any outside client; and (4) the communications must be made in confidence and kept confidential. Where all four conditions are met, the disclosure of the law firm attorneys' communications with ethics counsel undermines the goal served by the privilege while providing little to no benefit to advancing the interests of the client. Id.