The Attorney-Client Privilege in the Business Context in Massachusetts

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Introduction

The attorney-client privilege protects confidential communications — between a client or prospective client and an attorney — made for the primary purpose of obtaining legal advice or assistance. Except in a few limited circumstances, the attorney cannot reveal these confidential communications to a third party or in the course of any legal proceeding. The applicability of the attorney-client privilege is usually fought out in the courtroom. The underlying communications that are the subject of those disputes, however, may occur far earlier, oftentimes before either a cause of action comes into existence or litigation is ever contemplated.

Every lawyer who interacts with businesses, whether in private practice, as in-house counsel or as a government attorney, needs to understand the creation and the scope of the privilege in the business context. This article will provide an overview of Massachusetts law in this area, including a general discussion of the privilege, conflict of laws issues, individuals within the organization who are considered to be part of the client for privilege purposes, practical issues relating to the privilege, the inapplicability of the privilege in certain circumstances and litigation issues involving the privilege.

What is the Privilege

The attorney-client privilege is a well-established concept that has been the subject of an abundance of cases and commentary.[1] "One of the oldest,"[2] if not "the oldest of the privileges for confidential communications known to the common law,"[3] the privilege has been described as "among the most hallowed privileges of Anglo-American law."[4] As with other privileges, such as those between physician-patient, husband-wife and clergyperson-penitent, the attorney-client privilege is designed to further important societal goals by ensuring confidentiality of communications between a lawyer and his or her client. It "fosters compliance with the law by 'encouraging clients to seek an attorney's advice and to be truthful with the attorney, which, in turn allows the attorney to give informed advice; the attorney-client privilege [thus] serves the public interest and the interest of the administration of justice.'"[5] The Supreme Judicial Court has recognized that while the privilege creates "'an inherent tension with society's need for full and complete disclosure of all relevant evidence' that is the price that society must pay for the availability of justice to every citizen...."[6] Yet, notwithstanding its significance, Massachusetts courts also have held that "the attorney-client privilege is strictly construed."[7]

1. *See* P. Liacos, M. Brodin and M. Avery, *Handbook of Massachusetts Evidence*, § 13.4 (7th ed. 1999); Restatement (Third) of the Law Governing Lawyers §§ 73-86.

2. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) ("The attorney client privilege is one of the oldest recognized privileges for confidential communications.").

3. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). In an 1833 decision, the Supreme Judicial Court referred to the privilege as a "well known rule of evidence. . . ." Hatton v. Robinson, 31 Mass. 416, 421, 14 Pick. 416 (1833).

4. In the Matter of a Grand Jury Investigation, 437 Mass. 340, 351 (2002).

5. *Id.* (citations omitted).

6. In the Matter of a John Doe Grand Jury Investigation, 408 Mass. 480, 482 (1990) (citations omitted).

7. *In re* Reorganization of Elec. Mut. Liability Ins. Co., 425 Mass. 419, 421 (1997).

The privilege arises from the relationship (or prospective relationship) between an attorney and his or her client (or potential client). An attorney-client relationship comes into existence "when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance."[8] Once the attorney-client relationship exists, the privilege applies.

The privilege "extends to all communications made to an attorney or counselor, duly qualified and authorized as such, and applied to by the party in that capacity, with a view to obtain his advice and opinion in matters of law, in relation to his legal rights, duties, and obligations."[9] The privilege applies both to communications by the client to the attorney and to communications by the attorney to the client and neither can be compelled to reveal what was communicated.[10] However, "the privilege extends only to *communications* and not to facts."[11] Thus, while the privilege shields the communications, it does not allow a person to "refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."[12]

The attorney-client privilege applies not just to existing clients but also to prospective clients with whom a formal attorney-client relationship is never established.[13] The Supreme Judicial Court has held that for conflict of interest purposes, an attorney-client relationship could be "established through preliminary consultations, even though the attorney is never formally retained and the client pays no fee."[14] Whether an attorney-client relationship is created will depend on the particular circumstances of the communication.[15]

Other aspects of the privilege also are noteworthy. For example, the privilege belongs to the client, not the attorney, although the attorney should seek to protect the privilege in the absence of instructions from the client to the contrary.[16] Moreover, the attorney-client privilege applies to *all* communications between attorney and client that are made in confidence and for the purpose of seeking legal advice, not just those communications made "in anticipation of litigation."[17] The attorney-client privilege even survives the death of the client.[18]

8. Devaux v. American Home Assurance Co., 387 Mass. 814, 818 (1983) (citation omitted), *quoted in* Federal Deposit Ins. Corp. v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000).

9. *Hatton*, 31 Mass. at 421, *quoted in Ogden*, 202 F.3d at 461. The federal courts in Massachusetts use a similar test, although set forth somewhat differently. The United States Court of Appeals for the First Circuit has used the test articulated by Wigmore:

> (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.

Cavallaro v. United States, 284 F.3d 236, 245 (1st Cir. 2002), *quoting* 8 J.H. Wigmore, *Evidence*, §2292, at 554 (McNaughton rev. 1961) (additional citation omitted). In United States v. United Shoe Machine Co., 89 F. Supp. 357, 358-59 (D. Mass. 1950), the United States District Court for the District of Massachusetts framed the privilege analysis as follows:

> [T]he privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or legal services or (ii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

10. *See* Colonial Gas Co. v. Aetna Cas. & Sur. Co., 144 F.R.D. 600, 604 (D. Mass. 1992).

11. *Upjohn*, 449 U.S. at 395 (emphasis in original), *quoting* Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962).

12. *Id*. at 396.

13. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1959) (one of the elements of the attorney-client privilege is that "[t]he asserted holder of the privilege is or sought to become a client. . .").

14. Bays v. Theran, 418 Mass. 685, 690 (1994).

15. See E. Kelly Bittick, Jr. and Marc C. Laredo et.al., *The Legal Beauty Contest: Recommendations and Proposed Guidelines For Preliminary Interviews Between Attorneys and Prospective Clients*, A Report of the Subcommittee on Attorney-Client Privilege and Work Product, Committee on Pretrial Practice and Discovery, The Litigation Section of the A.B.A. (Victor F. Souto ed., 1996).

16. *See* Symmons v. O'Keeffe, 419 Mass. 288, 298 n.8 (1995); In the Matter of a John Doe Grand Jury Investigation, 408 Mass. 480, 483 (1990); Mass. Rules of Prof'l Conduct 1.6 (attorneys are required to preserve the confidences and secrets of their clients).

17. Mass. R. Civ. P. 26(b)(3). In contrast, the attorney work product doctrine (which protects the work of an attorney from disclosure to his or her opponent in litigation), only applies to work done "in anticipation of litigation." *Id*.

18. Swidler & Berlin v. United States, 524 U.S. 399 (1998); In the Matter of a John Doe Grand Jury Investigation, 408 Mass. 480 (1990) (holding privilege survived the death of Charles Stuart and therefore his attorney could not be compelled to testify about his conversations with Stuart before a grand jury investigating the death of Stuart's wife).

Which Law Governs Questions of Attorney-Client Privilege

One of the first questions involved in any analysis of an attorney-client privilege issue is which jurisdiction's law applies. Ordinarily, that should not create a problem. In the typical Massachusetts state court case where the communication at issue involves a Massachusetts entity and took place in the commonwealth, Massachusetts law will control. The answer is not as clear, however, when the case is in federal court or the underlying communication took place in whole or in part outside of Massachusetts.

Privilege in the federal courts is governed by the Federal Rules of Evidence. Federal Rule of Evidence 501 provides that:

> [E]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.[19]

In both federal criminal cases and in federal civil cases involving a federal question, federal attorney-client privilege law will control.[20] However, in federal civil cases based upon state law claims, the federal courts apply the law of the forum state.[21] Thus, in such cases, if the communications at issue occurred in Massachusetts, its law applies.

The more difficult analyses arise when the potentially privileged communication took place in whole or in part outside of Massachusetts or involved the internal affairs of a non-Massachusetts entity. Massachusetts state appellate courts have not yet addressed choice of law issues in this situation.[22]

Attorneys must exercise care in engaging in potentially privileged communications that take place in whole or in part outside of Massachusetts.[23] Sensitive situations, such as internal corporate investigations, may require research *before* the communication takes place regarding the law of the particular forum(s) where the communication will occur or where the action is likely to be brought. In such circumstances, it may be

19. Fed. R. Evid. 501.

20. The federal standard is set forth in *Upjohn*, which is discussed *infra*. A more detailed discussion of the federal law on the attorney-client privilege is beyond the scope of this article.

21. *See* FDIC v. Ogden Corp., 202 F.3d 454, 460 (1st Cir. 2002) ("We look to Massachusetts law to determine the scope of both the asserted privilege and the exception in this case"); Command Transp., Inc. v. U.S. Line (USA) Corp., 116 F.R.D. 94, 95 (D. Mass. 1987); *see generally* Bruce I. McDaniel, *"Situations In Which Federal Courts Are Governed By State Law Of Privilege Under Rule 501 of the Federal Rules of Evidence,"* 48 A.L.R. Fed. 259 (1980).

22. Some guidance may be found in general rules regarding conflict of law analyses. For example, Massachusetts treats statutes of limitation questions as substantive rather than procedural and therefore focuses on the jurisdiction that has the most significant relationship with the matter. New England Tel. & Tel. Co. v. Gourdeau Constr. Co., Inc., 419 Mass. 658 (1995); *see* Bushkin Assoc., Inc. v. Raytheon Co., 393 Mass. 622, 631-36 (1985); *but see* Ghana Supply Comm'n. v. New England Power Co., 83 F.R.D. 586, 589 (1979) (Massachusetts considers questions of privilege to be procedural). The result might also depend upon whether the privileged communications concern a corporation's internal affairs since a recent Supreme Judicial Court ruling held that the law of the state of incorporation is controlling on internal affairs issues. Harrison v. NetCentric Corp., 433 Mass. 465, 472 (2001) (generally "the law of the State of incorporation governs claims concerning the internal affairs of a corporation. . . .)". In *Harrison*, the court held that the breach of fiduciary duty claim would be governed by Delaware law (the state of incorporation) even though "the plaintiff's stock and non-competition agreements provide that they are governed by Massachusetts law. . . ." *Id.* at 472 n.10. What impact, if any, the *Harrison* ruling has on privilege questions remains to be seen.

The Restatement (Second) of Conflicts of Laws § 139 provides one method of analysis that could be used in the absence of Massachusetts authority. It provides that:

> §139. Privileged Communications
>
> (1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.
>
> (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

The comments to the Restatement add that "[t]he state which has the most significant relationship with a communication will usually be the state where the communications took place . . . which is the state where an oral interchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing." Restatement (Second) of Conflicts of Laws, §139, Comment e.

23. Given the ease of communications via telephone, e-mail, facsimile and regular mail, communications often cross state borders.

appropriate to structure the communication so that it can be protected, to the extent possible, under the law of the jurisdiction with the most favorable law regarding preservation of the privilege.

Who is the Client

Another important question that an attorney (whether in-house, government or outside counsel) engaged in a matter involving any organizational client must ask is: Who is the client? Typically, the client is the entity itself. The entity, however, acts through individuals, including, among others, its directors, officers and employees. With that said, the question then is: Who is part of the entity for privilege purposes?

A. Members of the entity

Massachusetts law (discussed below) is not as well developed as federal law on identifying who the client is. The leading federal case regarding the attorney-client privilege in the organizational context is *Upjohn Co. v. United States*.[24] Although the *Upjohn* Court did not establish bright-line rules concerning the attorney-client privilege in the corporate context, it nevertheless established the framework for the future development of the corporate attorney-client privilege. In *Upjohn*, a corporation conducted an internal investigation into certain "questionable payments" to foreign governments.[25] As part of the investigation, the corporation's attorneys prepared a questionnaire, which was to be completed by its foreign managers.[26] The Internal Revenue Service then sought production of these questionnaires as well as memoranda and notes of employee interviews conducted by the corporation's in-house and outside counsel.[27]

The Court held that the communications were privileged, noting that they "were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel."[28] In so ruling, the Court did not establish "a broad rule or series of rules to govern all conceivable future questions in this area. . . . "[29] The Court did, however, reject the so-called "control group test" used by the Sixth Circuit Court of Appeals, which had held that only communications between senior management (those responsible for the corporation's actions) and counsel were privileged.[30]

While *Upjohn* provides some general guidance under federal law, such uniformity is lacking in the state courts. Although this topic is beyond the scope of this article, it is important to note that state courts vary greatly in how they construe the attorney-client privilege in the corporate context.[31] Some use the control test rejected in *Upjohn*.[32] Other states use the so-called "subject matter test," which "focuses on the nature of the communication — not the status of the communicator. Under it, an employee, within or without the control group, can make a privileged communication to corporate counsel if it is made at the direction of his superiors and if the subject matter upon which advice is sought is in the employee's performance of his duties."[33] Still other jurisdictions have adopted variants of these approaches or other tests.[34]

The law in Massachusetts is unclear as to who is in-

24. 449 U.S. 383 (1981).

25. *Id*. at 386-87.

26. *Id*. at 386.

27. *Id*. at 387-88.

28. *Id*. at 394.

29. *Id*. at 386.

30. *Id*. at 390-93.

31. *See, e.g.*, Southern Bell Tel. & Tel. Co. v. Deason, 632 So.2d 1377 (Fla. 1994); National Tank Co. v. Brotherton, 851 S.W.2d 193, 197-200 (Tex. 1993); Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870, 875-80 (1993); Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 502-05, 277 S.E.2d 785, 790-92 (1981); Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 111-20, 432 N.E.2d 250, 254-58 (1982); Rossi v. Blue Cross of Greater New York, 73 N.Y.2d 588, 591-94, 540 N.E.2d 703, 704-06, 542 N.Y.S.2d 508, 509-11 (1989).

32. States that continue to adhere to the control group test rejected in *Upjohn* include Illinois and Texas. *See Consolidation Coal*, 89 Ill.2d at 111-20, 432 N.E.2d at 254-58; *National Tank Co.*, 851 S.W.2d at 197-200. Under the control group test, only communications between a corporation's key employees and counsel are privileged.

33. *Samaritan Found.*, 862 P.2d at 875. Georgia is an example of a state that has adopted a form of the subject matter test. *Marriott Co.*, 277 S.E.2d at 790-92; *see* Southern Guar. Ins. Co. of Georgia v. Ash, 192 Ga. App. 24, 383 S.E.2d 579, 581-84 (1989).

34. For example, the Arizona Supreme Court has ruled that:

> all communications initiated by the employee and made in confidence to counsel, in which the communicating employee is directly seeking legal advice, are privileged. In contrast, where an investigation is initiated by the corporation, factual communications from corporate employees to corporate counsel are within the corporation's privilege only if they concern the employee's own conduct within the scope of his or her employment and are made to assist counsel in assessing or responding to the legal consequences of that conduct for the corporate client.

Samaritan Found., 862 P.2d at 872-73. The Florida Supreme Court, adopting a variant on the control group analysis, has held that communications by counsel with other employees beyond the control group also would be privileged in certain circumstances. Southern Bell Tel. and Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994); *see* Baisley v. Missisquoi Cemetery Ass'n, 167 Vt. 473, 708 A.2d 924 (1998).

cluded in the entity for privilege purposes.[35] Two recent decisions of the Supreme Judicial Court indicate that it may adopt a relatively limited inclusion policy. In *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, a case that arose out of a sanction against plaintiff's counsel for engaging in *ex parte* communications with employees of the defendant, the Supreme Judicial Court ruled that plaintiff's counsel could communicate *ex parte* with certain employees within the defendant organization.[36] The court held that only the following groups of corporate persons could not be contacted *ex parte*: "those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation."[37] The court, without further explanation, noted in dicta that its decision "may reduce the protection available to organizations provided by the attorney-client privilege...."[38] In a subsequent case involving former employees of an organization, the Supreme Judicial Court ruled that "[b]eing a 'witness' . . .does not establish that the . . .employee was involved in supervising, planning, or directing the events and practices" at issue.[39] The court expressly declined to reach the question in *Patriarca* of whether *ex parte* communications with former employees are ever restricted, holding that it "is a question that invites input from the organized bar through the rule making process."[40] Left unanswered by these decisions is how broadly or narrowly the Supreme Judicial Court will construe the definition of organization for privilege purposes.[41]

B. *Multiple representation within the entity*

Privilege issues also arise when an attorney represents both the organization and one of its constituents in the same or related matters.[42] Constituents of a corporation are its "[o]fficers, directors, employees and shareholders. . . ."[43] Rule 1.13(e) of the Massachusetts Rules of Professional Conduct allows counsel for the organization to simultaneously represent others affiliated with the organization (such as employees) subject to the general rules governing the representation of multiple parties.[44] Even if the same attorney can jointly represent an individual and an organization, that attorney should always consider whether separate representation is appropriate for the individual so that the individual may communicate freely with his or her own attorney and that attorney then could independently represent the individual's interests. Counsel must make it clear to constituents whom he or she represents and this issue may need to be periodically reevaluated as a matter progresses. It even may be necessary to secure separate counsel to ensure that a constituent can validly consent to multiple representation. Where appropriate, counsel should advise all parties of any potential or actual conflict of interest in writing and obtain written consent for any continued representation of an individual as part of an organization.[45]

C. *Former employees*

The extent to which the privilege applies to communications with former employees is unclear. The federal courts have generally ruled that communications by counsel with former employees of the corporation are protected by the attorney-client privilege.[46] Pre-*Messing*, one federal magistrate in the District of Massachusetts predicted that Massachusetts will follow federal precedent in this area and deem communications with former employees

35. In a pre-*Upjohn* case, the Supreme Judicial Court had recognized that "the attorney-client privilege may extend to communications from the client's agent or employee to the attorney." Ellingsgard v. Silver, 352 Mass. 34, 40 (1967).

36. 436 Mass. 347.

37. *Id*. at 357.

38. *Id*. at 358.

39. Patriarca v. Center For Living & Working, Inc., 438 Mass. 132, 139 (2002).

40. *Id*. at 140-41.

41. A cogent argument can be made that notwithstanding the court's decisions in *Messing* and *Partriarca*, a lower level employee's communications with a corporate counsel still should be privileged in many instances even though it would be permissible for opposing counsel to speak with that employee *ex parte*. Without the ability to keep these communications confidential, the entity will be greatly hampered in conducting an *Upjohn* type of investigation and the important policy of encouraging full disclosure to counsel will be weakened.

42. Such an event may arise, for example, when both a corporation and one of its officers are named as defendants in a lawsuit.

43. Mass. Rules of Prof'l Conduct 1.13 Comment [1].

44. Mass. Rules of Prof'l Conduct 1.13(e).

45. Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 522, *cert. denied*, 493 U.S. 894 (1989). Multiple representation issues may be particularly difficult in the close corporation setting. Oftentimes, counsel for the corporate entity also will have rendered legal services to individual shareholders. In fact, counsel for the corporation may have had an attorney-client relationship with one or more shareholders before the corporate entity was ever formed.

46. *See* Admiral Ins. Co. v. United States Dist. Court for the Dist. of Arizona, 881 F.2d 1486, 1492-93 (9th Cir. 1989) (affirming that the attorney-client privilege extends to communications between counsel and a company's former employees); Miramar Constr. Co. v. The Home Depot, Inc., 167 F. Supp. 2d 182 (D.P.R. 2001); Command Transp., Inc. v. Y.S. Line (USA) Corp., 116 F.R.D. 94, 95-97 (D. Mass. 1987); Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36, 41 (D. Mass. 1987) ("In some circumstances, the communications between a former employee and a corporate party's

privileged.[47]

As discussed above, the Supreme Judicial Court's rulings in *Messing* and *Patriarca* left open privilege issues in the corporate context. It can be argued, however, that the same rationale that would apply the privilege to low-level employees in certain circumstances applies equally to similarly situated former employees. The better policy would be to extend the privilege to communications with former employees if communications with them would be privileged had they remained employees. Simply because someone has left the organization should not eviscerate the privilege as to events that occurred during the course of employment.

D. Who exercises the privilege on behalf of the entity

The privilege belongs to the organization and "[t]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals."[48]

Important issues may arise when the company's ownership is transferred or the company ceases to function or exist. For example, when an entity files for bankruptcy, the privilege gets transferred to the bankruptcy trustee when, and if, appointed.[49] If new management or directors take over a company, the privilege belongs to the current, not former, management team.[50] If there is a sale or transfer of a company's stock, then the privilege goes with the entity that bought it.[51] In each case, the current trustee or management team has the right to exercise or waive the privilege for all corporate communications, even those that pre-date their tenure.[52]

A more difficult question arises when the transfer of control is in the form of an asset purchase agreement. In such cases, the old company may continue to exist but is no longer active. The better policy is that the privilege accompanies the assets. Counsel handling such a transaction should draft the transaction documents accordingly.[53]

A corporate official may face especially significant difficulties in attempting to assert an individual privilege regarding communications with corporate counsel. The corporation's privilege belongs to its management and not to any particular individual. If the corporation waives the privilege then "[t]he default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption."[54]

The First Circuit has cited the following test with approval:

> First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And fifth, they must show that the substance of their conversations with

counsel may be privileged."); *but see* Henderson v. National RR. Passenger Corp., 113 F.R.D. 502, 510 (N.D. Ill. 1986). The *Miramar* court held that *Upjohn* extended to communications with former employees but not to communications with independent contractors. *Miramar*, 167 F. Supp.2d at 184-85. The Colorado Supreme Court, however, in a case involving an independent contractor working for the government, ruled that independent contractors were included within the organization under *Upjohn*. Alliance Constr. Solutions, Inc. v. Dep't of Correction, 54 P.3d 861 (Colo. 2002).

47. *Command Transp., Inc.*, 116 F.R.D. at 95-97 (holding that attorney-client privilege extended to communications with former employees).

48. Commodities Futures Trading Comm'n. v. Weintraub, 471 U.S. 343, 348-49 (1985); Jarosz v. Union Prod., Inc., 1997 Mass. Super. LEXIS 30 (Oct. 10, 1997).

49. *Weintraub*, 471 U.S. at 349; *see* FDIC v. Ogden Corp., 202 F.3d at 458 (treating FDIC as successor in interest to bank for privilege purposes (without analyzing the issue) and allowing FDIC to control waiver of privilege). Thus, if there is privileged information that would harm the entity or its constituents, bankruptcy may not be an appropriate course of action.

50. *Weintraub*, 471 U.S. at 349. *In re* Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001).

51. *Weintraub*, 471 U.S. at 349.

52. *See Id*. at 358.

53. Other constituent groups within the organization may claim the right to review otherwise privileged material even though such material would be shielded from third parties. *See* Symmons v. O'Keeffe, 419 Mass. 288, 299 (1995) (ruling that a law firm had "properly invoked the attorney-client privilege on behalf of" a corporate client by refusing to turn over the firm's bills for legal services to the plaintiffs, even though they were both directors and shareholders of the corporation).

54. *In re* Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001); *see* Lavallee v. Shandor, 2000 Mass. Super. LEXIS 518 (Sept. 8, 2000) ("An individual can assert the attorney-client privilege if s/he can show that s/he maintained a separate attorney-client relationship with such attorney unrelated to the matter at hand."); Levine v. Marshall, 1997 Mass. Super. LEXIS (July 18, 1997) (employee must have explicit express or implied agreement to be represented in individual capacity).

> [counsel] did not concern matters within the company or the general affairs of the company.[55]

The court went on to hold that: "a corporation may unilaterally waive the attorney-client privilege with respect to any communications made by a corporate officer in his corporate capacity, notwithstanding the existence of an individual attorney-client relationship between him and the corporation's counsel."[56]

E. Governmental entities

It is not clear whether a Massachusetts governmental entity has the same attorney-client privilege with its counsel that a private organization does.[57] For example, in a related context, the Supreme Judicial Court has held that materials that may be protected under the attorney work-product doctrine "are not protected from disclosure under the public records statute unless those materials fall within the scope of an express statutory exception...."[58] The better view is that a government entity should be able to have an attorney-client privilege to the same degree as private organizations.[59] The same policy considerations that underlie the attorney-client privilege in the private entity context apply equally to the public sector.

What Communications are Privileged

The line between business advice, which is not protected by the attorney privilege, and legal advice, which is protected, often becomes quite blurred. This is a particular problem for in-house counsel who must strive, where possible, to distinguish between business advice and advising the entity or its individual constituents on legal matters. One Massachusetts Superior Court provided the following analysis:

> One factor which must be evaluated in order to determine whether an attorney communicated in his professional capacity as a lawyer is whether the task could have been readily performed by a nonlawyer — as when facts are gathered for business decisions. A related factor is whether the function that the attorney is performing is a lawyer-related task such as: applying law to a set of facts; reviewing client document based upon the effective laws or regulations; or advising the client about status or trends in the law... Thus, there is a distinction between a conference with counsel, and a business conference at which counsel was present. Documents which do not ordinarily qualify for the privilege are: business correspondence; interoffice reports; file memoranda; and minutes of business meetings.[60]

Practical Issues Concerning The Scope of the Privilege

A. Internal investigations

The *Upjohn* Court recognized the importance of an organization's ability to conduct internal investigations and supported the role of confidential communications with the attorney in such situations. Recently, the Supreme Judicial Court addressed the issue of whether the *Upjohn* protections extend to a private school's internal investigation involving allegations of child abuse and held, in *In the Matter of A Grand Jury Investigation*, that the attorney-client privilege did not apply to an attorney-directed internal investigation into sexual abuse at the school because of the school's statutory obligation under Massachusetts General Laws chapter 119, section 51A to disclose such information to the government.[61] The court held that "a quintessential element of the attorney-client privilege — the

55. *In re Grand Jury Subpoena*, 274 F.3d at 571, *quoting In re* Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir. 1986); see Dean Foods Co. v. Pappathanasi, 2003 Mass. Super. LEXIS 83 (March 25, 2003).

56. *In Re Grand Jury Subpoena*, 274 F.3d at 573.

57. District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 632 n.2 (1985); Vigoda v. Barton, 348 Mass. 478, 485-86 (1965); Kiewit-Atkinson-Kenny v. Massachusetts Water Resources Auth., 15 Mass. L. Rptr. 101, 2002 Mass. Super. LEXIS 304 (August 19, 2002) (reported to Appeals Court question of whether "privilege applies to matters otherwise made public by G.L. c. 66, Sec. 10."); Porcaro v. Town of Hopkinton, 12 Mass. L. Rptr. 154, 2000 Mass. Super. LEXIS 356 n. 3 (July 18, 2000) ("The question whether a public client is entitled to the benefit of an attorney-client privilege is not, perhaps, fully established."); Brossard v. University of Massachusetts, 1998 Mass. Super. LEXIS 679 (Sept. 29, 1998).

58. General Electric Co. v. Dept. of Envtl. Protection, 429 Mass. 798, 801 (1999).

59. Moreover, individual government officials may not enjoy the same rights to confer with government counsel and establish a personal attorney-client relationship as members of private organizations have with the organization's lawyer. The United States Courts of Appeal for both the District of Columbia Circuit and the Eighth Circuit, for example, have ruled that the attorney-client privilege does not apply in a criminal case when the government is the client and the attorneys are government attorneys. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir.), *cert. denied sub nom.*, Office of the President v. Office of Indep. Counsel, 525 U.S. 996 (1998); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.), *cert. denied sub nom.*, Office of the President v. Office of Indep. Counsel, 521 U.S. 1105 (1997).

60. National Employment Serv. Corp. v. Liberty Mut. Ins. Co., 3 Mass. L. Rptr. 221, 1994 Mass. Super LEXIS 84 (Dec. 12, 1994), *quoting* Oil Chem. & Atomic Workers Int'l Union v. American Home Prods., 790 F. Supp. 39, 41 (D.P.R. 1992) (citations omitted).

61. In the Matter of A Grand Jury Investigation, 437 Mass. 340, 351-56.

expectation of confidentiality in the results of the investigation — is absent in this case. The teachers and school officials involved in the internal investigation knew, or should have known, that they would have no 'right to keep secret' any information disclosed by the internal investigation concerning possible abuse victims under the age of eighteen years."[62] In balancing the competing policy interests of statutory reporting requirements against the attorney-client privilege, the court ruled in favor of the former.

The court's holding may undercut the ability of a Massachusetts organization to conduct certain types of internal investigations. While the court, citing *Upjohn*, recognized the importance of such investigations and their goal of "frank disclosure," its holding may have the effect of discouraging investigations into allegedly illegal conduct, if that conduct may be the subject of a mandatory reporting requirement.[63] Although this case involved allegations of child abuse, it is not difficult to envision the legislative creation of a host of mandatory reporting requirements in other areas. Thus, the laudatory purpose of such investigations may be limited or lost.[64] Moreover, the requirement that the underlying facts of alleged sexual abuse be reported should not make the communications to counsel discoverable since, under the privilege, the communications are the subject of the privilege, not the facts themselves. The court's ruling may well deter private entities from conducting the types of internal investigations the privilege is meant to encourage. Hopefully, any future legislation will balance these competing policy concerns.

B. Joint defense arrangements

Two types of situations often result in multiple parties having a shared defense. The first occurs when a single attorney or law firm represents more than one party, thus making the parties joint clients. The First Circuit has held that "[i]n determining whether parties are 'joint clients,' courts may consider multiple factors, including but not limited to matters such as payment arrangements, allocation of decisionmaking roles, requests for advice, attendance at meetings, frequency and content of correspondence, and the like."[65] While the benefits of such an arrangement (if ethically permissible), including reduced costs and a single strategy, are readily apparent, the parties risk the confidentiality of their attorney-client communications because, the privilege is "inapplicable to disputes between joint clients."[66] This is true even if one of the parties made the communication without the other party being present.[67] Thus, when the same attorney or law firm simultaneously represents multiple parties, it should be presumed that there is no privilege, as between the parties, as to any communications that either one has with counsel.

It also is common in many business litigation cases involving multiple defendants for the parties, even if represented by separate counsel, to nevertheless engage in a joint defense strategy. Such cases may include situations such as class actions where multiple parties are accused of similar wrongdoing or claims against an entity and a number of its constituents where it has been determined that the constituents' interests are sufficiently distinct from the entity's interest that separate counsel is required. The attorney-client privilege applies to those joint defense communications. "[W]hen defendants have engaged separate counsel who work together in a common defense, information exchanged between those counsel, or between the clients and the counsel, is privileged to the extent that the exchange is part of an ongoing and joint defense strategy."[68] Thus, communications at a joint defense meeting of multiple clients and their counsel should be protected.

In joint defense situations, it is important to carefully consider the extent of the joint defense arrangement. For example, while there may be a commonality of interest at certain times, those interests might later diverge sufficiently so as to lead to a determination that the privilege no longer applies.[69] Certainly, the better practice is to consider the issue of the scope of the joint defense arrangement before the communications take place rather than when responding to a discovery motion. A carefully crafted joint defense agreement often may be appropriate and helpful in this regard.

C. Presence of third parties

The general rule is that the presence of third par-

62. *Id*. at 352.

63. *Id*. at 351.

64. In reaching its decision, the court also relied on the fact "that the school touted its internal investigation to the public in an effort to explain and defend its actions." *Id*. at 354.

65. *Ogden*, 202 F.3d at 461; *see* Massachusetts Eye and Ear Infirmary v. QLT Phototherapeutics, Inc., 167 F. Supp. 2d 108, 115-17 (2001) (discussion by discovery master of federal and Massachusetts law on attorney-client privilege with joint clients in patent case).

66. *Ogden*, 202 F.3d at 461; *see* Beacon Oil Co. v. Perelis, 263 Mass. 288, 293 (1982); Thompson v. Cashman, 181 Mass. 36 (1902); Holland v. Fisher, 3 Mass. L. Rptr. 167, 1994 Mass Super. LEXIS 12 (Dec. 21, 1994).

67. Holland v. Fisher, 1994 Mass Super. LEXIS 12 (1994).

68. American Automobile Ins. Co. v. J. P. Noonan Transp., Inc., 2000 Mass. Super LEXIS 548 (Nov. 16, 2000) (lengthy discussion of joint defense doctrine that concludes that it "is fully consistent with the principles upon which the attorney-client privilege rests in Massachusetts and, in fact, is part of Massachusetts common law.").

69. *Id*.

ties destroys the privilege. However, at times, attorneys need the assistance of third parties in order to render advice or assistance to their clients.[70] In these limited circumstances, the presence of individuals such as technical experts, accountants and investigators, does not necessarily destroy the attorney-client privilege.[71]

The example of accountants is instructive. There is no accountant-client privilege under Massachusetts law.[72] However, courts have recognized that, in certain instances, there is an exception to the rule regarding third parties when they are "employed to assist a lawyer in rendering legal advice."[73]

The leading case in this area is *United States v. Kovel*.[74] The *Kovel* rule is that if the purpose of the communication is to seek legal and not accounting advice, and "the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer...." the privilege is not destroyed.[75] Although under *Kovel* it does not matter whether the client or the attorney hires the accountant, the better practice is to have the attorney retain the accountant.[76] Likewise, it is preferable for outside counsel rather than in-house counsel to retain the third party so that the third party will be considered the agent of the attorney and not the client. Although the Massachusetts appellate courts have not yet ruled on this issue, it is reasonable to assume that Massachusetts would follow *Kovel*, at least for accountants.[77] Whether the same analysis will apply to other third parties used by the attorney in rendering legal services to the entity is an open question and may depend on the particular facts of the case.

Inapplicability of the Privilege

There are several situations where the privilege is or may be inapplicable, including when the communication is in furtherance of a crime or fraud, the privilege is waived or there is an inadvertent disclosure of otherwise privileged material.

A. Crime-fraud exception

Attorney-client communications in furtherance of a crime or a fraud are not privileged. In such situations the privilege does not apply because a lawyer's services may not be used to aid criminal conduct.

In *Purcell v. District Attorney For The Suffolk District*, the Supreme Judicial Court addressed the scope of this exception.[78] In *Purcell*, an individual, in the course of consulting with an attorney, made threats to burn down a building. The attorney (permissibly) relayed this information to the police. Later, the district attorney subpoenaed the attorney to compel him to testify; the attorney moved to quash the subpoena. The *Purcell* court ruled that the attorney did not have to testify because when an individual consults an attorney and states his intent to commit a crime, the crime-fraud exception "applies only if the client or prospective client seeks advice or assistance in furtherance of criminal conduct."[79] Thus, the attorney-client privilege applies "to communications concerning possible future, as well as past criminal conduct, because an informed lawyer may be able to dissuade the client from improper future conduct and, if not, under the ethical rules may elect in the public interest to make a limited disclosure of the client's threatened conduct."[80]

The Supreme Judicial Court subsequently considered the "crime-fraud exception" in *In the Matter of A Grand Jury Investigation*.[81] The court held that the exception did not apply "to the disputed attorney-client communications and draft correspondence" concerning victims who were over the age of 18 at the time the communications were made because, as of that date, it "was not a crime" not to report those charges.[82] In con-

70. The attorney's regular employees, such as paralegals, legal assistants, and law clerks, all are considered to be acting for or on behalf of the attorney for privilege purposes and thus their presence or knowledge of confidential communications does not destroy the privilege. United States v. Kovel, 296 F.2d 918, 921-22 (2nd Cir. 1961); *see* United States v. United Shoe Machine Co., 89 F. Supp. at 358-59 ("[T]he privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate. . . .").

71. *But see* Commonwealth v. Senior, 433 Mass. 453, 455-57 (2001) (hospital's agents not part of defense team for privilege purposes when they tested the defendant's blood because no such expectation "ever expressly communicated" to the employees.).

72. There is a very limited privilege under federal law. 26 U.S.C. § 7525; *see* Cavallaro v. United States, 284 F.3d 236, 246 n.5 (1st Cir. 2002).

73. *Cavallaro*, 284 F.3d at 247.

74. 296 F.2d 918 (2nd Cir. 1961).

75. *Kovel*, 296 F.2d at 922, *quoted in Cavallaro*, 284 F.3d at 247.

76. Having the attorney hire the accountant will not, however, in and of itself, make the communication privileged. *Cavallaro*, 284 F.3d at 247. In *Cavallaro*, the communications at issue were not privileged because the accounting firm was not retained to assist in the rendering of legal advice. *Id.* at 247-48.

77. *See Id.* at 247 n.6 ("We will assume that this circuit would adopt the *Kovel* test or a similar standard, as so many other circuits have done, but we need not decide the question.")

78. 424 Mass. 109 (1997).

79. *Id*. at 115.

80. *Id*. at 116.

81. *In the Matter of A Grand Jury Investigation*, 437 Mass. at 360-63. Prior to considering the crime-fraud issue, the court ruled that the school's internal investigation documents were not privileged. *See supra* at 364.

82. *Id*. at 360.

trast, the court held that the crime-fraud exception applied to otherwise privileged documents concerning "the school's internal investigation and any facts that the investigation may have turned up regarding reportable abuse, or . . . the school's awareness of evidence of abuse of students who were, at the time that the school learned of the abuse, under the age of eighteen years. . ." because "the school sought or intended to use its attorney's advice to evade its mandatory reporting requirements. . . ."[83] Still, the exception is limited and only will apply if conduct is "criminal" or "'intentionally tortious' in nature."[84] The court ruled that the trial court properly relied on a prosecutor's ex parte affidavit in making this determination.[85]

B. Waiver

Although the client always can explicitly waive the privilege, the privilege also may be waived implicitly by the client's conduct. The Supreme Judicial Court has recognized that a party "may implicitly waive the attorney-client privilege, at least partly, by injecting certain claims or defenses into a case."[86] To date, the court has not yet established a bright-line rule as to what constitutes "implicit waiver."[87] The court, however, has cautioned that even if there is a waiver because something is "at issue," it is a "limited waiver" and "not tantamount to a blanket waiver of the entire attorney-client privilege in the case."[88] Moreover, there is no waiver "unless it is shown that the privileged information sought to be discovered is not available from any other source."[89]

Waivers may occur in a variety of situations. For example, if a client alleges wrongdoing on the part of his or her attorney, "the attorney-client privilege may be treated as waived at least in part, but trial counsel's obligation may continue to preserve confidences whose disclosure is not relevant to the defense of the charge of his ineffectiveness as counsel."[90] A party may assert that it relied upon the advice of counsel as a defense to a claim of wrongdoing. Raising such a defense poses a dilemma to the client and its counsel because, by doing so, the client also waives the attorney-client privilege as to the communications at issue.[91] As the Supreme Judicial Court has held, "a party may resist discovery on the basis of privilege, but may not at the same time rely on the privileged communications or information as evidence at trial. Conversely, a party may waive the privilege and then offer the communications or information as evidence. These are mutually exclusive courses of action. . . ."[92] A party also may waive the privilege through his or her testimony.[93] However, as with a waiver through a pre-litigation course of conduct or assertion of a claim or defense, a waiver of the privilege only occurs when privileged communications are the direct subject of the testimony.[94]

In *Darius v. City of Boston*, the plaintiffs claimed, in responding to a motion to dismiss on statute of limitations grounds, that they had not learned "that the defendants caused their child's injuries" until after they had consulted with their attorney.[95] The Supreme Judicial Court ruled that the privilege had not been waived because the issue was what they knew as of a certain date and not what their lawyer had communicated to them.[96]

Waiver can also occur through disclosure to another party, such as a government agency.[97] For example, in *United States v. Massachusetts Institute of Technology*, the university had turned over certain billing statements and minutes to the Department of Defense as part of that agency's requirement that such records be made available to it.[98] When the In-

83. *Id*. at 361-62. The court noted that "[t]he school's knowledge . . . does not in itself trigger the crime-fraud exception." *Id*. at 362.

84. Buster v. George W. Moore, Inc., 438 Mass 635, 654 (2003).

85. *Id*. at 357-60.

86. Darius v. City of Boston, 433 Mass. 274, 277 (2001). Merely filing a lawsuit does not automatically waive the privilege. Greater Newburyport Clamshell Alliance v. Public Serv. Co. of New Hampshire, 838 F.2d 13, 17-20 (1st Cir. 1988); Sorenson v. H&R Block, Inc., 197 F.R.D. 206, 208 (D. Mass. 2000) (no "enmeshing" of "privileged information and important evidence for the defense" so as to cause waiver of privilege); Ploof v. Cornu-Schaab Properties, Inc., 1 Mass. L. Rptr. 292, 1993 Mass. Super. LEXIS 232 (1993). The privilege is waived only if the "the privilege holder relies on the privileged material in asserting its claim." *Ploof*. It also may "be deemed waived where it will diminish, in a meaningful way. . . [a party's] ability to defend the instant action." *Id*.

87. *Darius*, 433 Mass. at 278-79.

88. *Id*. at 283.

89. *Id*. at 284.

90. Commonwealth v. Brito, 390 Mass. 112, 119 (1983).

91. This defense also may raise ethical concerns for counsel if litigation counsel or her firm was the attorney who rendered the advice. *See* Mass. Rules of Prof'l Conduct 3.7.

92. G.S. Enterprises, Inc. v. Falmouth Marine, Inc., 410 Mass. 262, 270-71 (1991).

93. Commonwealth v. Birks, 435 Mass. 782, 789 (2002) (trial court did not err in ruling that testimony on direct examination as to communications between witness and his counsel as to what his counsel had told him the deal with the Commonwealth would be did not constitute waiver of privilege which would allow for cross-examination as to other communications between witness and his lawyer).

94. *Id*.

95. *Darius*, 433 Mass. at 277.

96. *Id*. at 279-80.

97. United States v. Massachusetts Inst. of Tech., 129 F.3d 681 (1st Cir. 1997).

98. *Id*. at 683.

ternal Revenue Service sought these same documents, the university refused to produce them.[99] The court rejected the university's stance, ruling that the university had "chose to place itself in this position by becoming a government contractor."[100] Thus, this case suggests that, in certain circumstances, the privilege can be waived as part of a contractual arrangement.

C. Inadvertent disclosure

In the attorney-client privilege area, mistakes occur when an attorney (or someone working on the attorney's behalf, such as a paralegal or legal assistant) inadvertently discloses the contents of an otherwise privileged communication. Such errors may be as simple as a misdirected e-mail or facsimile, the failure to remove a privileged document from a large-scale document production or an overheard conversation.[101]

Generally, Massachusetts courts have sided with the erring attorney. If the attorney has taken "reasonable precautions to ensure confidentiality" he or she should be able to successfully claim that the privilege should apply to inadvertently disclosed documents.[102] However, if the errors are not inadvertent or if counsel does not demonstrate the reasonable level of initial care then the privilege may be waived.[103]

Litigating Disputes Concerning the Privilege

A. Discovery requests, privilege logs and evidentiary objections

The attorney-client privilege is waived if not asserted in a prompt and timely fashion. Thus, in the course of discovery, the privilege must be asserted in response to document requests or interrogatories and, in depositions, at the time the question is asked and before the answer is given.[104]

In civil proceedings, interrogatories and requests for the production of documents often are met with a boilerplate objection on the grounds of attorney-client privilege. This objection may be part of a general objection, a specific objection in response to a particular interrogatory or document request, or both. If confronted with such an objection, counsel for the party seeking the information should first initiate the appropriate discovery conference to ferret out the substance of the claim.

When documents are withheld on the grounds of attorney-client privilege, it is common, at least in more complex cases, for the party claiming the privilege to prepare a privilege log. Indeed, in federal courts in Massachusetts, such a process may be mandatory, at least after a demand for such a log has been made, since the United States Court of Appeals for the First Circuit has held that "[a] party that fails to submit a privilege log is deemed to waive the underlying privilege claim."[105]

Massachusetts state court practice is less rigid on this point. In such cases, particularly smaller ones, the parties may agree, implicitly or explicitly, not to create a privilege log (perhaps because of the time and expense associated with preparing such logs). Absent such agreement, a party faced with an attorney-client privilege claim should insist on the creation of such a log (recognizing, of course, that he or she will then be faced with a similar task).

Logs must be sufficiently descriptive to allow a court to understand the reasons why each document is allegedly privileged by "requiring a party who asserts a claim of privilege to do the best that he reasonably can to describe the materials to which his claim adheres."[106] A general privilege log will be deemed insufficient and will constitute grounds, in and of itself,

99. *Id*.

100. *Id*. at 686.

101. *See generally* F. Libby, *Inadvertent Waiver Of The Attorney-Client Privilege And Work Product Doctrine In The First Circuit*, 41-DEC B.B.J. 16 (November/December 1997); H. Staudenmaier and S. Vrotos, *The Inadvertent Disclosure Of Privileged Documents: Current State Of The Law*, 10 Committee on Business and Corporate Litigation, Business Law Section, American Bar Association Newsletter 3 (Fall 2002).

102. In the Matter of the Reorganization of Elec. Mut. Liability Ins. Co., Ltd. (Bermuda), 425 Mass. 419, 422 (1997); *see* Commerce & Industry Ins. Co. v. E.I. duPont de Nemours and Co., 2000 Mass. Super. LEXIS 680 (Dec. 11, 2000) (inadvertently produced documents deemed still privileged). For example, communicating by e-mail does not waive the privilege. *See* M. Pearlstein and J. Twombly, *Cell Phones, Email, And Confidential Communications: Protecting Your Client's Confidences*, 46-FEB B.B.J. 20 (January/February 2002); Massachusetts Bar Association Ethical Opinion 00-1 (permitting use of e-mail to communicate confidentially with client); American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 99-413 (allowed the use of unencrypted e-mail in communicating with clients); *see also* D. Hricik, *Lawyers Worry Too Much about Transmitting Client Confidences by Internet E-mail*, 11 Georgetown J. Legal Ethics 459 (1998); *but see* P. Jarvis and B. Tellan, *High-Tech Ethics and Malpractice Issues*, *Symposium Issue Of The Professional Lawyer* 51 (1996) (concerns regarding unencrypted e-mail).

103. *See In the Matter of the Reorganization of Elec. Mut. Liability Ins. Co., Ltd. (Bermuda)*, 425 Mass. at 422-23.

104. Rule 30(c) of the Massachusetts Rules of Civil Procedure allows counsel to instruct a witness not to answer "where necessary to assert of preserve a privilege or protection against disclosure. . . ." This is an exception to the general rule limiting interference with the conduct of a deposition. MASS. R. CIV. P. 30(c).

105. *In re Grand Jury Subpoena*, 274 F.3d 563, 576 (1st Cir. 2001).

106. *Id*.

to reject a privilege claim.[107] However, "[p]rivilege logs do not need to be precise to the point of pedantry."[108] Parties should create the log with some care to avoid the risk that it will be deemed insufficient and the privilege automatically waived.

B. Motion and trial practice

Unlike many other discovery disputes, disagreements concerning the scope and applicability of the attorney-client privilege are important and may involve complex legal analysis. Parties litigating matters of attorney-client privilege should make sure that the issues are carefully framed so that the trial court will understand (a) the importance of the information being sought or the need for the privilege to be upheld and (b) the particular aspect of the privilege at issue. Affidavits or documentary evidence often may be necessary regarding the particular facts at issue. Unlike with many other discovery disputes, interlocutory appellate practice may be appropriate, particularly if a lower court rules that the testimony or documents are not privileged, because of the irreparable consequences that may flow from such a decision.[109]

In order to preserve the privilege, a party should take all reasonable steps to ensure that potentially privileged information is not disclosed. For example, a party may fear that its opponent will divulge privileged material in a paper filed with the court. In such circumstances, a motion to seal may be appropriate.[110] A motion in limine should be used in most instances to address evidentiary issues at trial concerning the attorney-client privilege so that the court will have an opportunity to analyze the issue and not interrupt the trial. Certainly, issues concerning documents, particularly in civil cases, should be handled in this manner.

Conclusion

Every attorney who works with organizational clients must be familiar with the basic principles regarding the attorney-client privilege and its application in the organizational context. The scope of the attorney-client privilege varies from state to state and counsel must always examine which state's law will apply before engaging in sensitive communications with persons whose communications may not be protected, such as lower-level or former employees.

Attorneys must identify their client(s) and make clear to individual corporate constituents, preferably in writing, whether or not they are being represented in their individual or corporate capacity and that the privilege (with some limited exceptions) belongs to the corporation and can be waived by it. Attorneys must recognize the problems that may occur if third parties are present at a meeting or receive otherwise confidential communications and how this can destroy the privilege. Care should be taken in conducting internal investigations and in other sensitive situations where it is likely that someone will challenge a privilege claim.

While the general parameters of the attorney-client privilege are relatively clear, each situation may present its own unique issues that could affect the applicability of the privilege. The privilege exists for the protection of the client so the client can freely exchange information with and receive legal advice from its counsel. It is the attorney's job to take all necessary measures to preserve and uphold the privilege whenever possible.

107. Maine v. United States Dept. of the Interior, 298 F.3d 60, 72 (1st Cir. 2002).

108. S*ee* American Automobile Ins. Co. v. J.P. Noonan Transp., Inc., 2000 Mass. Super. LEXIS 548 (2000) (privilege log insufficient).

109. *See Patriarca*, 438 Mass. at 133 (example of an interlocutory appeal of a discovery issue).

110. Siedle v. Putnam Inv., Inc., 147 F.3d 7 (1st Cir. 1998).