Evidence Skills

William S. Boyd School of Law
Spring, 2022

Special Topics: Evidence Skills

Law 790-1012
Room BSL 105
Monday, 6:15 p.m., to 8:05 p.m.

April 18, 2022

v.8

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Candace Carlyon has over three decades of experience, including representation of a myriad of constituencies in commercial reorganization and credit restructuring. Candace is a tenacious litigator, representing clients in complex commercial litigation matters, including fraud, contract, deficiency, business disputes and receiverships. She also conducts mediations and serves as a pro tem short trial judge for the Eighth Judicial District Court. She has been certified as a Commercial Bankruptcy Specialist by the American Board of Certification since 1994, and is a past chair of that organization. She has been recognized in Best Lawyers in America since 1996, and has held an A-V rating, the highest available, since 1989.

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Privileges in a nutshell

1 Evidentiary Foundations § 7.02 (2020)

> We can summarize the current law of privileges for confidential relations in this fashion: *In certain types of proceedings, the holder has certain privileges with respect to privileged information unless (1) the holder has waived the privilege, or (2) there is an applicable exception to the privilege's scope*.

Federal Rule of Evidence 501

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

> the United States Constitution;
> a federal statute; or
> rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Federal law or state law

Transfirst Holdings, Inc. v. Magliarditi,, 2016 WL 3067437, at *2 (D. Nev. May 31, 2016)

> Federal Rule of Evidence 501 provides that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed.R.Evid. 501. "Where there are federal question claims and pendent state law claims present, the federal law of privilege applies." *Agster v. Maricopa Cty.*, 422 F.3d 836, 839-40 (9th Cir. 2005).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Article V as submitted to Congress contained thirteen Rules. Nine of those Rules defined specific non-constitutional privileges which the federal courts must recognize (i.e. required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). ...

The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases.

Notes of Conference Committee, House Report No. 93–1597

... state privilege law will usually apply in diversity cases.

There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, Federal privilege law will apply to evidence relevant to the federal claim or defense. See Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942).

In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law. As Justice Jackson has said:

> A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state.

D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 471 (1942) (Jackson, J., concurring).

What relationships are protected?

1 Evidentiary Foundations § 7.02 (2020)

There are now statutes and decisions recognizing privileges for the following relations, among others: attorney-client, physician-patient, psychotherapist-patient, accountant-client, social worker-client, penitent-clergy, parent-child, and between spouses. *See generally* 1 E. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES, Ch. 6 (3d ed. 2017). In *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996), the Supreme Court recognized a psychotherapist-patient privilege, extending to licensed clinical social workers.

What is confidential?

1 Evidentiary Foundations § 7.02 (2020)

Confidentiality entails two elements: (1) physical privacy; and (2) an intent on the holder's part to maintain secrecy. If third parties are present to the holder's knowledge, the courts usually hold that the communication is not confidential. For practical business reasons, however, the courts have allowed clerks and secretaries to be present without destroying confidentiality; the courts realize that attorneys and physicians use assistants to conduct their professional work.

In a minority of jurisdictions, the presence of family members and friends will not negate confidentiality so long as they are present to support the person consulting the attorney or physician. Even if there was physical privacy at the time of the communication, the communication is unprivileged if the holder intended subsequent disclosure outside the circle of confidence.

Who holds the privilege?

1 Evidentiary Foundations § 7.02 (2020)

> ...the client is the holder of the attorney-client privilege, the patient the holder of the physician-patient privilege, and the penitent the holder of the penitent-clergy privilege. Most jurisdictions consider both spouses holders of the spousal privilege.
>
> If the original holder of the privilege becomes mentally incompetent, that person's guardian or conservator becomes the successor holder of the privilege. In some jurisdictions, if the original holder dies, the personal representative such as the executor or heir automatically becomes a successor holder of the privilege. Finally, the holder's agent may sometimes assert the privilege on the holder's behalf. The client may authorize the attorney to claim the attorney-client privilege for the client at a particular hearing.

Attorney-client privilege

What is the attorney-client privilege?

Swidler & Berlin v. U.S., 524 U.S. 399, 401, 403 (1998)

Petitioner, James Hamilton, an attorney, made notes of an initial interview with a client shortly before the client's death. The Government, represented by the Office of Independent Counsel, now seeks his notes for use in a criminal investigation. We hold that the notes are protected by the attorney-client privilege. ... The attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981); *Hunt v. Blackburn,* 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888). The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn, supra,* at 389, 101 S.Ct. at 682.

The issue presented here is the scope of that privilege; more particularly, the extent to which the privilege survives the death of the client. ...

Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981)

The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961).

Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980): "The lawyer–client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

Classic attorney-client privilege

U.S. v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982)

The classic test for application of the attorney-client privilege is set forth in *United States v. United Shoe Machinery Corp.,* 89 F.Supp. 357, 358-59 (Mass.1950):

> The 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 (ii) legal services or (iii) 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.

When does the attorney-client privilege begin?

U.S. v. Rowe, 96 F.3d 1294, 1296 (9th Cir. 1996)

> The attorney-client privilege can exist only after a client consults an attorney, 24 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5473, at 105–08 (1986), "for the purpose of facilitating the rendition of professional legal services." *Id.* at 110.

Preliminary discussions with attorney (protected)

In re Auclair, 961 F.2d 65, 69 (5th Cir. 1992)

> A now venerable rule emanating from the privilege is that "communications made in the course of preliminary discussions with a view to employing the lawyer are privileged though employment is not ... accepted." As one court explained: "No person could ever safely consult an attorney for the first time ... if the privilege depended on the chance of whether the attorney after hearing the statement of facts decided to accept employment or decline it." *Denver Tramway Co. v. Owens,* 20 Colo. 107, 36 P. 848 (1894).
>
> No less may be said for persons who consult an attorney together as a group with common interests seeking common representation.

$1.00 on the dashboard -- not required

Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1317 (7th Cir. 1978)

A professional relationship is not dependent upon the payment of fees nor, as we have noted, upon the execution of a formal contract.

[**Footnote 6**: Allman v. Winkelman, 106 F.2d 663, 665 (9th Cir. 1939), Cert. denied, 309 U.S. 668, 60 S.Ct. 608, 84 L.Ed. 1014 (1940) ("lawyer's advice to his client establishes a professional relationship though it be gratis"); Fort Meyers Seafood Packers, Inc. v. Steptoe and Johnson, 127 U.S.App.D.C. 93, 94, 381 F.2d 261, 262 (1967), Cert. denied, 390 U.S. 946, 88 S.Ct. 1033, 19 L.Ed.2d 1135 (1968) (attorney's fees paid by third party: "If appellant is not obligated to pay appellees for their services, it does not follow that there was no attorney-and-client relation"); Dresden v. Willock, 518 F.2d 281, 286 (3d Cir. 1975) ("The fact that Dresden was to be paid by receiving stock in the enterprise did not change the nature of the (attorney-client) relationship"); E. F. Hutton & Co. v. Brown, 305 F.Supp. 371, 388 (S.D.Tex.1969) (Relation of attorney and client "is not dependent on the payment of a fee").]

So you need an attorney and a client, right?

U.S. v. Mullen & Co., 776 F. Supp. 620, 621 (D. Mass. 1991)

> It is well settled that there is no accountant-client privilege at common law. *Couch v. United States,* 409 U.S. 322, 335, 93 S.Ct. 611, 619, 34 L.Ed.2d 548 (1973); *United States v. Arthur Young & Co.,* 465 U.S. 805, 817, 104 S.Ct. 1495, 1502, 79 L.Ed.2d 826 (1984). Under limited circumstances, however, communications made to an accountant may still be privileged. *See Summit Ltd. v. Levy,* 111 F.R.D. 40, 41 (S.D.N.Y.1986) ("although no privilege attaches specifically to an accountant/client communication, such matters may be withheld if they meet the traditional requirements of the attorney/client privilege").
>
> More specifically, the attorney-client privilege may apply to confidential communications made to an accountant when the client is under the mistaken, but reasonable, belief that the professional from whom legal advice is sought is in fact an attorney. *United States v. Boffa,* 513 F.Supp. 517, 523 (D.Del.1981) ("the rationale behind the privilege equally supports the theory that the privilege should be extended to those who make confidential communications to an individual in the genuine, but mistaken, belief that he is an attorney").

Confidentiality

Presence of attorney staff during communications with client -- OK

von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 146 (2d Cir. 1987)

> The attorney-client privilege is founded on the assumption that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively. *Fisher v. United States,* 425 U.S. 391, 403 (1976). We have recognized that an attorney's effectiveness depends upon his ability to rely on the assistance of various aides, be they "secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts." *United States v. Kovel,* 296 F.2d 918, 921 (2 Cir.1961). "[T]he privilege must include all the persons who act as the attorney's agents." 8 Wigmore, Evidence § 2301 (McNaughton rev. 1961) (*quoted in United States v. Kovel, supra,* 296 F.2d at 921).

Confidential communications between a lawyer and the lawyer's agent does not waive attorney-client privilege

U.S. v. Christensen, 828 F.3d 763, 802–803 (9th Cir. 2015)

A communication from the attorney to the client that does not contain legal advice may be protected if it "directly or indirectly reveal[s] communications of a confidential nature by the client to the attorney." *In re Fischel*, 557 F.2d 209, 212 (9th Cir. 1977) (holding that attorney-client privilege did not protect attorney's summaries of client's business transactions). Further, a communication from the attorney to a third party acting as his agent "for the purpose of advising and defending his clients" also may be protected if it reveals confidential client communications. *United States v. Judson*, 322 F.2d 460, 462 (9th Cir. 1963); *see also United States v. Jacobs*, 322 F.Supp. 1299, 1303 (C.D. Cal. 1971); Paul R. Rice, *Attorney-Client Privilege in the United States* § 3:3 (2014) (explaining that "courts have extended the privilege to confidential communications ... from the attorney to the agent, and from the agent to the attorney (provided that the communications not from the client reveal prior confidences of the client)"). The government does not dispute that communications between a lawyer and a private investigator retained by that lawyer to assist the lawyer's representation of a client may be covered by the privilege.

Joint defense agreements (a special case)

In re Grand Jury Proceedings, 417 F.3d 18, 21–22 (1st Cir. 2005)

> Familiarly, the attorney-client privilege—somewhat simplified—is a privilege of a client to refuse to testify or to have his counsel testify as to confidential communications between the two made in connection with the rendering of legal representation, *see Cavallaro,* 284 F.3d at 245; *see also Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); 8 Wigmore, *Evidence* § 2292 (McNaughton rev.1961).
>
> It extends as well to communications made within the framework of a joint defense arrangement. *In re Grand Jury Subpoena,* 274 F.3d 563, 572 (1st Cir.2001); *United States v. Bay State Ambulance and Hosp. Rental Serv., Inc.,* 874 F.2d 20, 28 (1st Cir.1989).

Joint defense agreements (three elements)

Matter of Bevill, Bresler & Schulman Asset Mgt. Corp., 805 F.2d 120, 126 (3d Cir. 1986)

> The joint defense privilege protects communications between an individual and an attorney for another when the communications are "part of an on-going and joint effort to set up a common defense strategy." *Eisenberg v. Gagnon,* 766 F.2d 770, 787 (3d Cir.), *cert. denied sub nom., Weinstein v. Eisenberg,* 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290 (1985). In order to establish the existence of a joint defense privilege, the party asserting the privilege must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived. *In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974,* 406 F.Supp. 381 (S.D.N.Y.1975).

Joint defense agreement should be express

U.S. v. Weissman, 195 F.3d 96, 98-99 (2d Cir. 1999)

> At this June 16th meeting, Weissman made damaging admissions regarding his own conduct. The parties disagree as to whether a joint defense agreement ("JDA"), pursuant to the common interest rule, was in existence or discussed during that meeting. ... In *United States v. Schwimmer,* 892 F.2d 237 (2d Cir.1989), *cert. denied,* 502 U.S. 810, 112 S.Ct. 55, 116 L.Ed.2d 31 (1991), we stated that a claim resting on the common interest rule requires a showing that "the communication in question was given in confidence and that the client reasonably understood it to be so given." *Id.* at 244. In determining whether there was an explicit JDA in the instant case, the district court was presented with conflicting testimony by respected attorneys whose professional reputations were at stake. The district court relied primarily on the testimony of Drewsen and Craco in determining that no JDA was discussed during the June 16th meeting.

Direct communications between clients (no joint defense privilege)

U.S. v. Austin, 416 F.3d 1016, 1019, 1021-1022 (9th Cir. 2005)

> In its October 5, 2004 order, the Court explained that courts have generally held that the joint defense privilege does not cover conversations among defendants made outside counsel's presence. The Court also found that, even assuming that the joint defense privilege could protect these inmate-to-inmate conversations, the joint defense privilege did not protect the discussions in question because they were not made at an attorney's behest or for the purpose of seeking legal advice or communicating confidential work product. ... We find that the joint defense privilege also raises an "important issue" under *Cohen* because "[it] is an extension of the attorney-client privilege." *United States v. Henke,* 222 F.3d 633, 637 (9th Cir.2000); *see Waller v. Financial Corp. of America,* 828 F.2d 579, 583 n. 7 (9th Cir.1987). The joint defense privilege, in fact, protects not only the confidentiality of communications passing from a party to his or her attorney but also "from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *United States v. Schwimmer,* 892 F.2d 237, 243 (2d Cir.1989) (citation omitted); *see Henke,* 222 F.3d at 637 ("A joint defense agreement establishes an implied attorney-client relationship with the co-defendant ..."). As such, the issue before us is an important issue separate from the merits of the action.

What is protected by attorney-client privilege?

The attorney-client privilege protects *communications* (not *facts* known to the client)

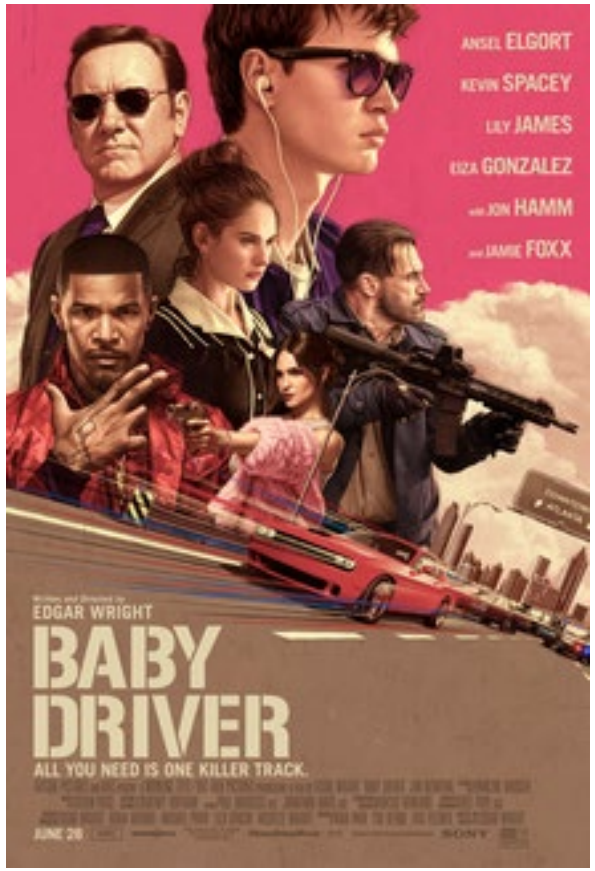
Upjohn Co. v. U.S., 449 U.S. 383, 395–396 (1981)

The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

> "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Philadelphia v. Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (q2.7).

See also *Diversified Industries*, 572 F.2d., at 611; *State ex rel. Dudek v. Circuit Court*, 34 Wis.2d 559, 580, 150 N.W.2d 387, 399 (1967) ("the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer").

"Hey, counselor! Here is the gun I just used to shoot that ugly fellow. Keep it for me."



City of Philadelphia, Pa. v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)

In these cases it is the client, a corporation and a party to the suit, who is being interrogated. Wigmore's classic statement of the rule relating to the privilege may be accepted as law, and it is not questioned that the attorney-client privilege protects the client as well as the attorney. However, it is evident that the objections are based upon a fundamental misconception of just what it is the disclosure of which is forbidden by the rule.

The point which the defendants appear to have missed is that the protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?,' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

What is a communication?

1 Evidentiary Foundations § 7.02 (2020)

What is a “communication”? Oral and written statements fall within the definition of “communication.” However, in the case of some privileges, many jurisdictions use extraordinarily broad definitions of “communication.” In the case of the statutory physician-patient privilege, many jurisdictions extend the privilege to any information the physician gains by examining the patient. The physician could not testify about the patient’s physical condition even though the observation of the patient’s physical condition is not a “communication” in the conventional sense of the term. Moreover, several jurisdictions use a broad definition of communication in the spousal privilege. These jurisdictions sometimes privilege any information one spouse gains from the other spouse by virtue of the marital relation. In some cases, the courts have applied the spousal privilege when one spouse witnessed the other spouse bury incriminating evidence in the backyard. The second spouse is relying upon marital privacy when he or she performs the act in the other spouse’s presence, and the courts reason that the marital privacy deserves legal protection. The privilege protects only the communication, not the underlying facts.

Communications includes client's communications and items provided to attorney

In re Spalding Sports Worldwide, Inc., 203 F.3d 800, 805-806 (Fed. Cir. 2000)

> Accordingly, the central inquiry is whether the communication is one that was made by a client to an attorney for the purpose of obtaining legal advice or services. *See Genentech, Inc. v. United States Int'l Trade Comm'n,* 122 F.3d 1409, 1415, 43 USPQ2d 1722, 1727 (Fed.Cir.1997) (citing *American Standard Inc. v. Pfizer Inc.,* 828 F.2d 734, 745, 3 USPQ2d 1817, 1824 (Fed.Cir.1987)). In determining whether the attorney-client privilege applies, we first note that Spalding's invention record [Bovitz: regarding a patent invention record] constitutes a communication to an attorney. .. . We therefore hold that an invention record constitutes a privileged communication, as long as it is provided to an attorney "for the purpose of securing primarily legal opinion, or legal services, or assistance in a legal proceeding." *Knogo Corp. v. United States,* 213 USPQ 936, 940, 1980 WL 39083 (Ct.Cl. Trial Div.1980) (rejecting the characterization of patent attorneys as mere "conduits" to the PTO); *see also Sperry v. Florida,* 373 U.S. 379, 383, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963) ("[T]he preparation and prosecution of patent applications for others constitutes the practice of law."). Spalding's invention record meets that test.

The attorney-client privilege does not protect identification of the attorney's client

Reiserer v. U.S., 479 F.3d 1160, 1162, 1165 (9th Cir. 2007)

> Kenneth Reiserer was an attorney whose practice included tax planning services. The IRS alleged that he was involved in an abusive tax arrangement known as offshore employee leasing (OEL). ... When Reiserer refused to provide a customer list, the IRS, on April 8, 2004, served a third-party summons on Bank of America. The summons requested documents from January 1, 1993, to April 7, 2004, relating to accounts maintained by Reiserer's law firm, including his client trust accounts and the accounts of three domestic employee-leasing companies. Reiserer petitioned to quash the summons and the IRS moved to enforce it. ...
>
> It is well settled that there is no privilege between a bank and a depositor. *Harris v. United States,* 413 F.2d 316, 319–20 (9th Cir.1969) (involving production of all checks deposited into or withdrawn from an attorney's trustee account). ... To the extent those documents disclose the identity of Reiserer's clients, the attorney-client privilege does not protect that information. "[T]he attorney-client privilege ordinarily protects neither a client's identity nor information regarding the fee arrangements reached with that client." *United States v. Horn* (*In re Horn*), 976 F.2d 1314, 1317 (9th Cir.1992).

Corporations are people, too

Upjohn Co. v. U.S., 449 U.S. 383, 389–390 (1981)

> Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation. *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336, 35 S.Ct. 363, 369, 59 L.Ed. 598 (1915), and the Government does not contest the general proposition.

Corporate communications to in-house lawyers may be protected by attorney-client privilege

Neuder v. Battelle P. N.W. Nat. Laboratory, 194 F.R.D. 289, 293 (D.D.C. 2000)

As a threshold matter, the attorney-client privilege applies to "in-house" counsel just as it would to any other attorney. *See NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 154, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1974). The magistrate judge correctly cautioned the parties that "a corporate client should not be allowed to conceal a fact by disclosing it to the corporate attorney." … Moreover, the magistrate judge correctly determined that the analysis in *Marten v. Yellow Freight* pertains to the facts of this case. ...
Marten provides:

> [T]he mere attendance of an attorney at a meeting does not render everything done or said at that meeting privileged. For communications at such meetings to be privileged, they must have related to the acquisition or rendition of professional legal services. The mere fact that clients were at a meeting with counsel in which legal advice was being requested and/or received does not mean that everything said at the meeting is privileged. *The party seeking to assert the privilege must show that the particular communication was part of a request for advice or part of the advice,* and that the communication was intended to be and was kept confidential. To be privileged, the communication must relate to the business or transaction for which the attorney has been retained or consulted.

Who speaks for the corporate client?

1 Evidentiary Foundations § 7.02 (2020)

When is the communication deemed a communication between the corporate client and the corporate counsel? Some jurisdictions limit the corporate attorney-client privilege to communications between corporate counsel and the members of the corporate "control group," the narrow circle of directors, officers, and high-ranking employees needing direct access to corporate counsel. However, in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), the Court made it clear that it favors a broader test. Under the *Upjohn* or subject-matter test, a communication between any employee and the corporate counsel constitutes a corporate attorney-client communication if the employee is divulging information that he or she gained in the course of performing employment duties. Today many courts extend the privilege beyond technical employees and apply it to "functional" employees, persons who are technically independent contractors who serve as depositories for the corporation's business information. In part, due to health care costs, many corporations have outsourced essential business functions that were previously handled inhouse.

A corporate attorney does not represent the corporation's officers and employees

Moore v. Bd. of Trustees of Illinois Community College Dist. No. 508, 2010 WL 4703859, at *2 (N.D. Ill. Nov. 8, 2010)

> When, as here, the parties involve an organization with in-house counsel, communications between the general counsel and an organizational employee are protected only when the employee is seeking legal advice on behalf of the entity itself. *See Upjohn,* 449 U.S. at 394; *Banks v. Office of Senate Sergeant–at–Arms,* 241 F.R.D. 376, 382 (D.D.C.2007); *see also United States v. Segal,* No. 02–CR–112, 2004 WL 830428, at *2 (N.D.Ill. April 16, 2004) ("[A]corporation cannot assert a claim of privilege when one of its officers sought personal legal advice, even if that officer sought it from the corporation's general counsel.").

What about communications for legal and non-legal services?

Moore v. Bd. of Trustees of Illinois Community College Dist. No. 508, 09 C 4479, 2010 WL 4703859, at *3 (N.D. Ill. Nov. 8, 2010)

> ... the Court must first determine the scope of the attorney-client privilege as it applies to Judge Bourgeois, who served in the dual roles of general counsel and ethics officer for City Colleges. It is well established that when an attorney provides both legal and non-legal services to a client, the legal aspect must predominate in the communication under review in order for it to be protected by the attorney-client privilege, *Allendale Mut. Ins. Co.,* 152 F.R.D. at 137 ("[T]he privilege will not apply where the legal advice is incidental to business advice."). Unfortunately, Judge Bourgeois' dual role as in-house counsel and ethics officer does not easily lend itself to this traditional analysis because it is not clear from the parties' briefs whether her ethics role was legal or non-legal in nature.

Communications with an attorney must be incident to the lawyer's advice

1 Evidentiary Foundations § 7.02 (2020)

When does a communication occur “incident to the relationship”? It is not enough that the communication occur between an attorney and his or her client. The client must be consulting the attorney in his or her professional capacity, *qua* attorney. The incidence requirement necessitates that the court examine the purpose of the communication.

Why did the client consult the attorney? If the client was seeking legal information or advice, the communication satisfies the incidence requirement; the communication need not occur incident to pending or threatened litigation.

Some communications from attorney to client are not protected (not of a confidential nature)

U.S. v. Gray, 876 F.2d 1411, 1413, 1415 (9th Cir. 1989)

> Raymond M. Gray (Gray) appeals from the judgment entered following his conviction for failure to appear for sentencing. ... Gray seeks reversal on the following grounds ...The district court should not have allowed his former attorney to testify that he informed Gray of the date of his sentencing hearing ... Gray alleges that the district court impermissibly allowed his attorney, Robinson, to testify that he informed Gray of his sentencing date. He contends that the information was a confidential communication protected by the attorney-client privilege. The district court's conclusion that communication of a defendant's obligation to appear is not protected by the attorney-client privilege is a mixed question of law and fact which this court reviews independently and without deference to the district court. ... We have held that information concerning a defendant's obligation to appear for sentencing is not "of a confidential nature" and therefore, is not protected by the attorney-client privilege. United States v. Freeman, 519 F.2d 67, 68 (9th Cir.1975). An attorney's testimony regarding the fact that the client was informed of the hearing date "simply relate[s] to whether [the attorney] advised his client of the court's order to appear." Id.

Neuder v. Battelle P. N.W. Nat. Laboratory, 194 F.R.D. 289, 292 (D.D.C. 2000)

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). "Communications from attorney to client are shielded if they rest on confidential information obtained from the client." *In re Sealed Case,* 737 F.2d 94, 98 (C.A.D.C.1984). As a corollary, however, "when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged." *See id.*

Attorney-client privilege covers a lawyer's investigations

U.S. v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996)

> Prior to *Upjohn,* "in claiming the protection of the attorney-client privilege [t]he corporation ha[d] the burden of showing that the communication was made for the purpose of securing *legal* advice...." *In re Grand Jury Subpoena,* 599 F.2d 504, 510 (2d Cir.1979) (quoting *Weinstein's Evidence* ¶ 503(b)[04], at 503–45 (emphasis in original)). Where the attorney was asked for business (as opposed to legal) counsel, no privilege attached. *Id.* (citing *Valente v. Pepsico,* 68 F.R.D. 361, 367 (D.Del.1975)). *Upjohn* did not eliminate this distinction. What it did do is make clear that fact-finding which pertains to legal advice counts as "professional legal services." *See, e.g., In re Woolworth Corp. Sec. Class Action Litig.,* No. 94–CIV–2217 (RO), 1996 WL 306576 (S.D.N.Y. June 7, 1996) (*Upjohn* precludes finding that fact-gathering by lawyers on behalf of corporate client is business, not legal, service).

Nature of attorney services (not protected)

Nguyen v. Excel Corp., 197 F.3d 200, 206 (5th Cir. 1999)

> Inquiry into the general nature of the legal services provided by counsel does not necessitate an assertion of the privilege because the general nature of services is not protected by the privilege. [Footnote 13: United States v. White, 887 F.2d 267, 271 (D.C.Cir.1989) ("A general assertion lacking substantive content that one's attorney has examined a certain matter is not sufficient to waive the attorney-client privilege."); 3 WEINSTEIN'S FEDERAL EVIDENCE § 503.14[5][f], at 503–51.]

Waiver

Attorney-client privilege (waiver by failure to object)

Nguyen v. Excel Corp., 197 F.3d 200, 206, (5th Cir. 1999)

> A corporate client has a privilege to refuse to disclose, and prevent its attorneys from disclosing, confidential communications between its representatives and its attorneys when the communications were made to obtain legal services. A client waives the attorney-client privilege, however, by failing to assert it when confidential information is sought in legal proceedings.
>
> [Footnote 12: FED. R. CIV. P. 26(b)(5) ("When a party withholds information otherwise discoverable under these rules by claiming that it is privileged ..., the party shall make the claim expressly...."); United States v. Sanders, 979 F.2d 87 (7th Cir.1992) (failing to object to question about communication waives the attorney-client privilege); Hollins v. Powell, 773 F.2d 191 (8th Cir.1985) (same); 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2016.1, at 228–29 (2d ed. 1994) ("Failure to assert the privilege objection correctly can mean the privilege is waived.... In the deposition context, ... the objection should ordinarily be asserted when a question seeking privileged material is asked...").]

1 Evidentiary Foundations § 7.04 (2020)

P Mr. Harris, ISN'T IT A FACT THAT when you first spoke with your family attorney, Mr. Riley, you told him that you were going 35 miles an hour?

O Your Honor, I object to that question on the ground that it calls for information protected by the attorney-client privilege.

P Your Honor, may we approach the bench?

J Yes.

P Your Honor, I concede that this communication would ordinarily be privileged. However, I contend that the defendant has already waived the privilege. I would request that the court reporter read back the last question and answer on direct examination.

J Very well.

CR It'll take me just a second to find the passage. Yes, here it is. My notes show that the last question was: "What was your speed just before the collision?" The last answer was: "I was going at a safe rate of speed. That's what I told my attorney when I first discussed the accident with him, and it's the same story I'm telling today. That's the truth."

P This shows that on direct examination, the defendant expressly referred to his previous conversation with his attorney about the collision. That reference waives the privilege.

J I agree. The objection is overruled.

P Mr. Harris, let me repeat the question. ISN'T IT TRUE THAT you told your attorney that you were going 35 miles an hour?

W Yes.

Client sharing attorney's advice with another (waiver)

Maday v. Pub. Libraries of Saginaw, 480 F.3d 815, 821 (6th Cir. 2007)

> Yet here, Maday was relating the substance of her conversations with a prior attorney to the social worker. This is a clear example of voluntary disclosure of privileged information to a third party and, as such, any attorney-client privilege Maday may have enjoyed as to this conversation was waived. *See, e.g., United States v. Collis,* 128 F.3d 313, 320 (6th Cir.1997) ("A client can waive the privilege by voluntarily disclosing his attorney's advice to a third party."). In sum, Maday's argument that the social-worker- and attorney-client privileges should be combined is unavailing in a situation where, as here, both privileges have clearly been waived.

Voluntary disclosure can effect a broad waiver

U.S. v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982)

> Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege. Any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter. *In re Sealed Case,* 676 F.2d 793, 808-09 (D.C.Cir.1982). In *Sealed,* the court stated that when a party reveals part of a privileged communication to gain an advantage in litigation, the party waives the attorney-client privilege as to all other communications relating to the same subject matter. Selective disclosure for tactical purposes waives the privilege. *Id.* at 818. In *United States v. Cote,* 456 F.2d 142, 144 (8th Cir.1972), the Eighth Circuit held that where taxpayers revealed the substance of their attorney's tax advice on their amended tax return, they waived the attorney-client privilege as to the details underlying that reported data. *See also Garfinkle v. Arcata Nat. Corp.,* 64 F.R.D. 688 (S.D.N.Y.1974) (where defendant injected his counsel's opinion letter as a defense, plaintiff was entitled to probe into the circumstances surrounding issuance of the letter and could not be limited to the letter itself.)

Bankruptcy trustee as successor to attorney-client privilege (waiver)

In re Grand Jury Subp. Duces Tecum, 112 F.3d 910, 921 (8th Cir. 1997)

> A client discussing an issue with a lawyer cannot know, for example, whether a bankruptcy trustee will later waive the privilege, *see Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 358, 105 S.Ct. 1986, 1995–96, 85 L.Ed.2d 372 (1985), or whether the lawyer's assistance will later become an issue in a proceeding, *see* Restatement § 130(1), or whether the lawyer and client will later become involved in a dispute, *see* Restatement § 133, any of which may result in disclosure of the conversation.

Waiver by intentional disclosure of attorney-client communications

Nguyen v. Excel Corp., 197 F.3d 200, 207–208 (5th Cir. 1999)

> Excel waived the attorney-client privilege by selectively disclosing confidential communications. When relayed to a third party that is not rendering legal services on the client's behalf, a communication is no longer confidential, and thus it falls outside of the reaches of the privilege. Therefore, a client implicitly waives the attorney-client privilege by testifying about portions of the attorney-client communication. As discussed above, the Excel executives testified about privileged attorney-client communications. They testified about the directions that they provided their attorneys, and they testified about the legal research undertaken by their attorneys.

"Reliance on advice of counsel" defense

Placing the attorney's advice "at issue" (waiver)

Steelcase Inc. v. Haworth, Inc., 954 F. Supp. 1195, 1198-1199 (W.D. Mich. 1997)

> Certainly, a defendant asserting an advice-of-counsel defense must be deemed to have waived the privilege as to all communications between counsel and client concerning the subject matter of the opinion. ... Likewise, the privilege must be deemed waived concerning all documents in the client's hands that refer or relate to counsel's opinion or represent information relayed to counsel as a basis for the opinion. Furthermore, the privilege is waived as to all information provided *by the client* to the attorney, regarding the subject matter of the opinion. In this regard, the scope of the waiver is "broad," to the extent that it is necessary to shed complete light upon the alleged infringer's state of mind. By the same token, the scope of the waiver appears narrow, as it pertains to the attorney's state of mind. Especially irrelevant is discovery addressed to the "legal correctness" of the opinion. *See Ortho,* 959 F.2d at 944. ... By asserting advice-of-counsel as a defense to willful infringement, Haworth has waived the attorney-client privilege that would otherwise be applicable to communications between attorney and client concerning the subject matter, all documents referring to counsel's opinions, and all documents in the possession of Haworth bearing upon its state of mind.

Confidentiality disclaimers in e-mail

Brett Cenkus, ***Email Confidentiality Disclaimers: Annoying But Are They Legally Binding?***
https://cenkuslaw.com/annoying-email-confidentiality-disclaimers (2021)

> Overall, email disclaimers are unlikely to have much benefit. And, they carry some risks and tradeoffs. So, while they make lawyers feel comfortable that they've mitigated risk in some manner, the reality is more nuanced. In place of using standard email footer notices, consider the following three safety precautions: Give employees specific email training and update reminders to teach them to be cautious when sending emails and to think them through carefully before pressing SEND; Train employees to always double-check the list of recipients before sending an email; Instruct employees who send a misdirected email to immediately send a clarifying email and to call the accidental recipient to clear up the mistake and ask the recipient to destroy the email. Email disclaimers are of little consequence. Courts are more concerned to see that you have taken adequate precautions to avoid malpractice.
> In *Charm v. Kohn*, the court found that an attorney upheld his fiduciary duty to his client, even though attorney-client privilege had been (inadvertently) broken. The court came to this conclusion because the client's attorney remedied a reply-all mishap by taking quick corrective action in communicating with all parties immediately to remedy the mistake. "Good lawyering" by taking quick corrective action will go much further in a judge's book than a few words attached to the bottom of a page.

https://www.mcsweeneys.net/articles/alright-fine-ill-add-a-disclaimer-to-my-emails (September 29, 2011)

IMPORTANT DISCLAIMER: This email does not create an attorney-client relationship. Probably. If it does, it will have said it does. Although it could have created an attorney-client relationship without explicitly saying so because the law is tricky like that, and the authoritative statements in this disclaimer are not as authoritative as they look. … This email may contain confidential and/or legally privileged information. If it does, and you are not the intended recipient, then the sender hereby requests that you notify him of his mistake and destroy all copies in your possession. The sender also concedes that he is very, very stupid and obviously should not be operating an electronic-mail machine without supervision.

Federal Rule of Evidence 502

Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

Federal Rule of Evidence 502

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.

When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

Federal Rule of Evidence 502

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).

Federal Rule of Civil Procedure 26(b)(5)(B)

Privilege log

Discovery Scope and Limits ...

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*
(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
(i) expressly make the claim; and
(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.
(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Federal Rule of Evidence 502

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

Federal Rule of Evidence 502

(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

Federal Rule of Evidence 502

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

Federal Rule of Evidence 502

(f) Controlling Effect of this Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

Federal Rule of Evidence 502

(g) Definitions. In this rule:

(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and

(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Explanatory Note on Evidence Rule 502 (2007)

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

Attorney-client privilege survives the death of the client

Swidler & Berlin v. U.S., 524 U.S. 399, 407, 410 (1998)

> Despite the scholarly criticism, we think there are weighty reasons that counsel in favor of posthumous application. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime. ...
>
> It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this. While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation—thoughtful speculation, but speculation nonetheless—as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney. In an area where empirical information would be useful, it is scant and inconclusive.

Swidler & Berlin v. U.S., 524 U.S. 399, 405, f.n. 2 (1998)

About half the States have codified the testamentary exception by providing that a personal representative of the deceased can waive the privilege when heirs or devisees claim through the deceased client (as opposed to parties claiming against the estate, for whom the privilege is not waived). See, *e.g.,* Ala.Rule Evid. 502 (1996); Ark.Code Ann. § 16–41–101, Rule 502 (Supp.1997); Neb.Rev.Stat. § 27–503, Rule 503 (1995).

These statutes do not address expressly the continuation of the privilege outside the context of testamentary disputes, although many allow the attorney to assert the privilege on behalf of the client apparently without temporal limit. See, *e.g.,* Ark.Code Ann. § 16–41–101, Rule 502(c) (Supp.1997). They thus do not refute or affirm the general presumption in the case law that the privilege survives.

California's statute is exceptional in that it apparently allows the attorney to assert the privilege only so long as a holder of the privilege (the estate's personal representative) exists, suggesting the privilege terminates when the estate is wound up. See Cal.Code Evid.Ann. §§ 954, 957 (West 1995). But no other State has followed California's lead in this regard.

The attorney work-product doctrine

Upjohn Co. v. U.S., 449 U.S. 383, 397–398 (1981)

This doctrine was announced by the Court over 30 years ago in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Id.*, at 510, 67 S.Ct., at 393. The Court noted that "it is essential that a lawyer work with a certain degree of privacy" and reasoned that if discovery of the material sought were permitted "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 511, 67 S.Ct., at 393–394. The "strong public policy" underlying the work–product doctrine was reaffirmed recently in *United States v. Nobles*, 422 U.S. 225, 236–240, 95 S.Ct. 2160, 2169–2171, 45 L.Ed.2d 141 (1975), and has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3).

WebXchange Inc. v. Dell Inc., 264 F.R.D. 123, 128 (D. Del. 2010)

Under the attorney work-product doctrine, documents prepared by counsel or at counsel's direction in preparation for trial or in anticipation of litigation are not discoverable absent a showing of substantial need, undue hardship, or inability to obtain their equivalent by other means. *Pfizer Inc. v. Ranbaxy Lab. Ltd.,* C.A. No. 03–209–JJF, 2004 WL 2323135, at *2 (D.Del. Oct. 7, 2004); Fed.R.Civ.P. 26(b)(3).

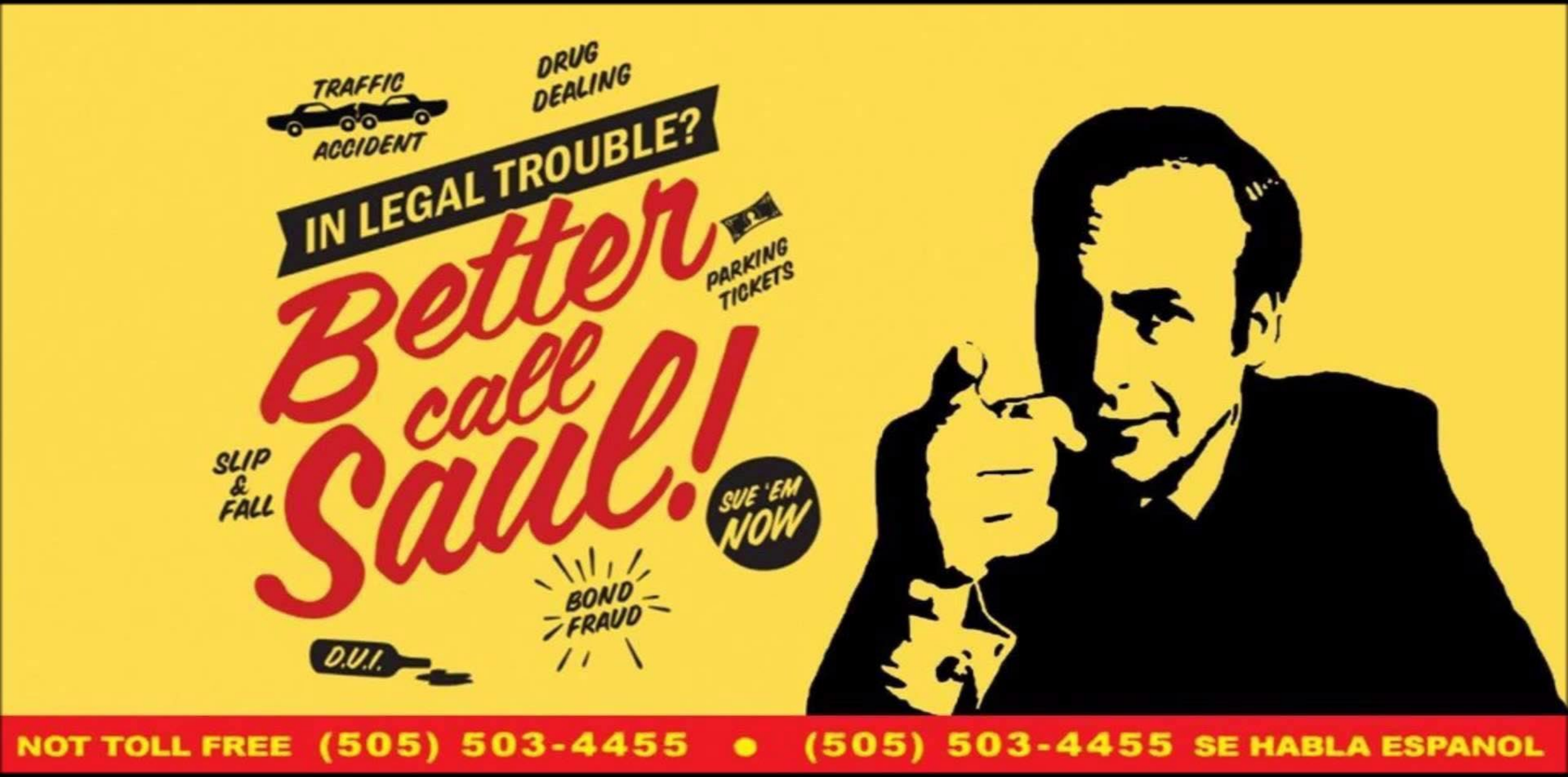
The party claiming protection of the doctrine bears the burden of demonstrating that the documents were prepared by or for counsel in preparation for trial or in anticipation of litigation. *Novartis Pharm. Corp. v. Abbott Lab.,* 203 F.R.D. 159, 163 (D.Del.2001).

Attorney's research is protected by attorney-client privilege and the work-product doctrine

Nguyen v. Excel Corp., 197 F.3d 200, 206 (5th Cir. 1999)

> A client's specific request to an attorney and pertinent information related thereto fall within the reaches of the privilege. Additionally, the research undertaken by an attorney to respond to a client's request also falls within the reaches of the privilege.

Crime-fraud exception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In re Grand Jury Proceedings, 417 F.3d 18, 22-23 (1st Cir. 2005)

The crime-fraud exception—one of several qualifications to the attorney-client privilege—withdraws protection where the client sought or employed legal representation in order to commit or facilitate a crime or fraud. Specifically, courts have required the privilege challenger to present evidence: "(1) that the client was engag[ed] 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." *Violette,* 183 F.3d at 75. Like the privilege itself, the exception, where employed in a federal criminal case, is effectively a creature of federal common law. *See* Fed.R.Evid. 501. This means that federal judges start with a core of common precedent reflecting the privilege but also have power to refine and adjust both the substance and procedure in light of reason and experience. ... The process of development is far from over. It is often hard to determine whether the attorney-client relationship has been misused by the client for crime or fraud without seeing the document, or hearing the testimony, as to which the privilege is claimed. To overcome this problem (as well as other privilege problems) judges have sometimes been willing to review privileged materials by themselves *in camera* and then decide whether the other side is entitled to it. ... As we read the consensus of precedent in the circuits, 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.

In re Napster, Inc. Copy. Litig., 479 F.3d 1078, 1090 (9th Cir. 2007), ***abrogated by Mohawk Industries, Inc. v. Carpenter***, 558 U.S. 100 (2009) ["whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine ... they do not"]

> Notwithstanding its importance, the attorney-client privilege is not absolute. The "crime-fraud exception" to the privilege protects against abuse of the attorney-client relationship. *Hodge & Zweig,* 548 F.2d at 1355. As the Supreme Court wrote in *Clark v. United States,* 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993 (1933), "The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." *Id.* at 15, 53 S.Ct. 465. A party seeking to vitiate the attorney-client privilege under the crime-fraud exception must satisfy a two-part test. First, the party must show that "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." *In re Grand Jury Proceedings,* 87 F.3d at 381 (internal quotation marks omitted). Second, it must demonstrate that the attorney-client communications for which production is sought are "sufficiently related to" and were made "*in furtherance of* [the] intended, or present, continuing illegality." *Id.* at 382–83 (internal quotation marks omitted) (emphasis added); *see also In re Richard Roe, Inc.,* 68 F.3d 38, 40 (2d Cir.1995). The attorney need not have been aware that the client harbored an improper purpose. Because both the legal advice and the privilege are for the benefit of the client, it is the client's knowledge and intent that are relevant. *In re Grand Jury Proceedings,* 87 F.3d at 381–82; *see also Chen,* 99 F.3d at 1504. The planned crime or fraud need not have succeeded for the exception to apply.

U.S. v. Zolin, 491 U.S. 554, 565–566 (1989)

We consider first the question whether a district court may *ever* honor the request of the party opposing the privilege to conduct an *in camera* review of allegedly privileged communications to determine whether those communications fall within the crime-fraud exception. We conclude that no express provision of the Federal Rules of Evidence bars such use of *in camera* review, and that it would be unwise to prohibit it in all instances as a matter of federal common law.

At first blush, two provisions of the Federal Rules of Evidence would appear to be relevant. Rule 104(a) provides: "Preliminary questions concerning the qualification of a person to be a witness, *the existence of a privilege,* or the admissibility of evidence shall be determined by the court.... In making its determination it is not bound by the rules of evidence *except those with respect to privileges.*" (Emphasis added.) Rule 1101(c) provides: "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings." Taken together, these Rules might be read to establish that in a summons-enforcement proceeding, attorney-client communications cannot be considered by the district court in making its crime-fraud ruling: to do otherwise, under this view, would be to make the crime-fraud determination without due regard to the existence of the privilege.

U.S. v. Zolin, 491 U.S. 554, 556 (1989)

> The ... issue concerns the testimonial privilege for attorney-client communications and, more particularly, the generally recognized exception to that privilege for communications in furtherance of future illegal conduct—the so-called "crime-fraud" exception. The specific question presented is whether the applicability of the crime-fraud exception must be established by "independent evidence" (*i.e.,* without reference to the content of the contested communications themselves), or, alternatively, whether the applicability of that exception can be resolved by an *in camera* inspection of the allegedly privileged material.

Attorneys have the duty to protect attorney-client communications

In re Search Warrant Issued June 13, 2019, 942 F.3d 159, 173 (4th Cir. 2019), ***as amended*** (Oct. 31, 2019)

> ... lawyers are obliged to protect the attorney-client privilege to the maximum possible extent on behalf of their clients. *See Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967) (recognizing that lawyer has duty to invoke claim of privilege on client's behalf); Model Rules of Prof'l Conduct r. 1.6(a), (c) (Am. Bar Ass'n 1983) (explaining that lawyer owes duty of confidentiality to client and must prevent unauthorized disclosure of confidential information). That proposition underlies the Law Firm's uncontested standing to pursue the legal positions it advances in this appeal. *See Fisher v. United States*, 425 U.S. 391, 402 n.8, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976) ("[I]t is universally accepted that the attorney-client privilege may be raised by the attorney[.]"); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1354-55 (4th Cir. 1984) (emphasizing that a lawyer "is entitled to raise [a claim of] privilege on behalf of his ... client").

The attorney-client privilege belongs to the client, so the client can waive it

U.S. v. Farrell, 921 F.3d 116, 135–36 (4th Cir. 2019)

> Additionally, as the district court explained, "in the attorney[-]client privilege context, the privilege belong[s] to the client, not the lawyer." ... Accordingly, Harryman and Forman were entitled to waive any such privilege, if one had existed at the time of their taped conversations with Farrell.

Spousal privilege(s)

Adverse spousal testimonial privilege

U.S. v. Bad Wound, 203 F.3d 1072, 1075 (8th Cir. 2000)

Federal courts recognize two distinct marital privileges under Rule 501 of the Federal Rules of Evidence: the marital confidential communication privilege and the adverse spousal testimony privilege. *See United States v. Jackson,* 939 F.2d 625, 627 (8th Cir.1991).

Under the adverse spousal testimony privilege, the privilege at issue in this case, an individual "may be neither compelled to testify nor foreclosed from testifying" against the person to whom he or she is married at the time of trial. *Trammel v. United States,* 445 U.S. 40, 53, 100 S.Ct. 906, 914, 63 L.Ed.2d 186 (1980); *see also Jackson,* 939 F.2d at 627. The privilege therefore rests with the testifying spouse, who may waive the privilege without the consent of the defendant spouse. *See Trammel,* 445 U.S. at 53, 100 S.Ct. 906.

"Ball of Fire" 1941

K.L. Jamison, ***The 'Honey-Do' List: Spousal Privilege***, https://www.usconcealedcarry.com/blog/the-honey-do-list-spousal-privilege/

> In the movie Ball of Fire, a gangster attempts to force Barbara Stanwyck to marry him, with the objective of the nuptials being to prevent Stanwyck from testifying against him. The gangster could have saved the trouble of a fistfight with Gary Cooper, but then we would have lost an entertaining movie. ... The general rule is that a spouse may testify against the other if he or she wants. In fact, investigations frequently rely on betrayed wives for direction. An Ohio man dragged his girlfriend from her apartment by her hair and forced her to marry him, thinking this would prevent her from testifying against him in a different disorderly act. He was wrong.

Trammel v. U.S., 445 U.S. 40, 46, 51–53 (1980)

In Hawkins v. United States, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958), this Court considered the continued vitality of the privilege against adverse spousal testimony in the federal courts. There the District Court had permitted petitioner's wife, over his objection, to testify against him. With one questioning concurring opinion, the Court held the wife's testimony inadmissible ...

The *Hawkins* rule stands in marked contrast to these three privileges. Its protection is not limited to confidential communications; rather it permits an accused to exclude all adverse spousal testimony. As Jeremy Bentham observed more than a century and a half ago, such a privilege goes far beyond making "every man's house his castle," and permits a person to convert his house into "a den of thieves." 5 Rationale of Judicial Evidence 340 (1827). It "secures, to every man, one safe and unquestionable and every ready accomplice for every imaginable crime." *Id.*, at 338. ...

... we conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification—vesting the privilege in the witness-spouse—furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.

Depends on valid, existing marriage at time of trial

U.S. v. Marashi, 913 F.2d 724, 729 (9th Cir. 1990)

To determine the scope and application of evidentiary privileges in federal criminal cases, we must turn to federal common law. *See* Fed.R.Evid. 501.

The common law recognizes two separate privileges arising out of the marital relationship. The first, which we have called the "anti-marital facts" privilege, prohibits one spouse from testifying against another during the length of the marriage. *United States v. Bolzer,* 556 F.2d 948, 951 (9th Cir.1977).

Because Smith testified after she divorced Marashi, this privilege does not apply.

Marital communications privilege

Transfirst Holdings, Inc. v. Magliarditi, 2016 WL 3067437, at *3 (D. Nev. May 31, 2016)

Federal common law recognizes two marital privileges. "The first, usually called the 'adverse spousal testimony' privilege, allows a spouse to refuse to testify adversely to his or her spouse." *United States v. Griffin*, 440 F.3d 1138, 1143 (9th Cir. 2006) (citing *Trammel v. United States*, 445 U.S. 40, 53 (1980)). It applies only in criminal actions. *Trammel*, 445 U.S. at 52 (stating the privilege "permits an accused to exclude all adverse spousal testimony").

"The second, usually called the 'marital communications' privilege, protects from disclosure private communications between spouses." *Griffin*, 440 F.3d at 1143-44. "The privilege (1) extends to words and acts intended to be a communication; (2) requires a valid marriage; and (3) applies only to confidential communications, i.e., those not made in the presence of, or likely to be overheard by, third parties." *United States v. Montgomery*, 384 F.3d 1050, 1056 (9th Cir. 2004) (citing *United States v. Marashi*, 913 F.2d 724, 729–30 (9th Cir. 1990)). "[E]ither spouse may assert the privilege to prevent testimony regarding communications between spouses." *Id.* at 1058-59. However, "[t]he claim of privilege must be made and sustained on a question-by-question or document-by-document basis." *United States v. Christensen*, 801 F.3d 970, 1007 (9th Cir. 2015). Failure to object to waives the martial communication privilege. *United States v. Vo*, 413 F.3d 1010, 1017 (9th Cir. 2005).

***U.S. v. Marashi*,** 913 F.2d 724, 729–30 (9th Cir. 1990)

The second, so-called "marital communications" privilege, bars testimony concerning statements privately communicated between spouses. *In re Grand Jury Investigation of Hugle,* 754 F.2d 863, 864 (9th Cir.19T5); *United States v. Lustig,* 555 F.2d 737, 747 (9th Cir.1977), *cert. denied,* 434 U.S. 926, 98 S.Ct. 408, 54 L.Ed.2d 285, 434 U.S. 1045, 98 S.Ct. 889, 54 L.Ed.2d 795 (1978).

The non-testifying spouse may invoke the privilege, *Hugle,* 754 F.2d at 864, even after dissolution of the marriage, *Lustig,* 555 F.2d at 747. Thus, Marashi may attempt to invoke it. The confines of the marital communications privilege are easy to describe. First, the privilege extends only to words or acts intended as communication to the other spouse....

Second, it covers only those communications made during a valid marriage ... unless the couple had irreconcilably separated, *see United States v. Roberson,* 859 F.2d 1376, 1381 (9th Cir.1988). Third, the privilege applies only to those marital communications which are confidential. That is, the privilege does not extend to statements which are made before, or likely to be overheard by, third parties. *See, e.g., Pereira,* 347 U.S. at 6, 74 S.Ct. at 361–62 (statements to, or in presence of, third parties); *Lefkowitz,* 618 F.2d at 1318 (same); *United States v. McCown,* 711 F.2d 1441, 1452–53 (9th Cir.1983) (husband's request that wife write check to purchase gun at pawn shop not confidential because no indication husband intended to keep request secret from friends living in same house).

Crimes against family (exception)

U.S. v. Breton, 740 F.3d 1, 12 (1st Cir. 2014)

> ... we agree with our sister circuits and the vast majority of states that the "offense against spouse" exception to the marital communications privilege must be read to cover an offense against a child of either spouse in order to further the privilege's underlying goals of promoting marital and family harmony. Accordingly, we find that the district judge did not err by recognizing an exception to the marital communications privilege for offenses against a spouse's child. We further hold that the district judge did not abuse his discretion by applying this exception to the statements at issue here. Breton sought to exclude Paradis's testimony about what he said to her after she turned the laptop over to police, including that she had "screwed everything up," "he was going to go to jail and lose his job," and he "should have sh[o]t [her]." Breton says that even if the district judge appropriately adopted an exception to the marital communications privilege for crimes committed against a spouse's child, the judge should not have permitted Paradis to testify about these statements because they were not related to a crime against his and Paradis's child. We disagree.

Two other privileges

Clergy-communicant (priest-penitent)

In re Grand Jury Investigation, 918 F.2d 374, 381 (3d Cir. 1990)

> The history of the proposed Rules of Evidence reflects that the clergy-communicant rule was one of the least controversial of the enumerated privileges, merely defining a long-recognized principle of American law. Although most of the nine privileges set forth in the proposed rules were vigorously attacked in Congress, the privilege covering communications to members of the clergy was not. S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 333 (4th ed. 1986). Indeed, virtually every state has recognized some form of clergy-communicant privilege.

Nev. Rev. Stat. Ann. § 49.255 (West)

A member of the clergy or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to the member of the clergy or priest in his or her professional character.

In re Grand Jury Investigation, 918 F.2d 374, 385-386 (3d Cir. 1990)

> The threshold criterion for deciding whether the privilege should attach—the criterion that the communication be made to a clergyperson—is clearly satisfied. Pastor Knoche is an ordained Lutheran minister. ... The government is correct in observing that the traditional clergy-communicant privilege protected a penitential relationship in which a person privately confessed his or her sins to a priest, in order to receive some form of church sanctioned discipline or absolution.

WebXchange Inc. v. Dell Inc., 264 F.R.D. 123, 128 (D. Del. 2010)

... emails were made to M. Meera and S. Shankar in their spiritual capacities, and that as Hindu gurus, M. Meera and S. Shankar are able to provide blessings regarding business and legal matters. ...

The clergy-communicant privilege "protect[s] communications made (1) to a clergyperson (2) in his or her spiritual capacity (3) with a reasonable expectation of confidentiality." *In re Grand Jury Investigation,* 918 F.2d 374, 384 (1990). "The presence of multiple parties, unrelated by blood or marriage, during discussions with a member of the clergy may, but will not necessarily, defeat the condition that communications be made with a reasonable expectation of confidentiality for the privilege to attach." *Id.* at 386. The necessary inquiry is whether the third party's presence is *essential to* and *in furtherance of* the communication to the clergyperson. *Id.* (emphasis added).

Given that Defendants do not challenge M. Meera's or S. Shankar's qualifications as clergy (D.I. 151, at 5), the threshold criterion that the withheld communications be made to clergypersons is satisfied.

Psychotherapist-patient

Jaffee v. Redmond, 518 U.S. 1, 9–10 (1996)

> ... the question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh the need for probative evidence...." 445 U.S., at 51, 100 S.Ct., at 912. Both "reason and experience" persuade us that it does. ... Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." *Ibid.* Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Nev. Rev. Stat. Ann. § 49.215 (West)

As used in NRS 49.215 to 49.245, inclusive:

1. A communication is “confidential” if it is not intended to be disclosed to third persons other than:
   (a) Those present to further the interest of the patient in the consultation, examination or interview;
   (b) Persons reasonably necessary for the transmission of the communication; or
   (c) Persons who are participating in the diagnosis and treatment under the direction of the doctor, including members of the patient's family.

2. “Doctor” means a person licensed to practice medicine, dentistry or osteopathic medicine or chiropractic in any state or nation, or a person who is reasonably believed by the patient to be so licensed, and in addition includes a person employed by a public or private agency as a psychiatric social worker, or someone under his or her guidance, direction or control, while engaged in the examination, diagnosis or treatment of a patient for a mental condition.

3. “Patient” means a person who consults or is examined or interviewed by a doctor for purposes of diagnosis or treatment.

Final words from Candace Carlyon