**6.4: Applying the Attorney-Client Privilege**

*Pay no mind to what they say, it doesn’t matter anyway, our lips are sealed.*[[1]](#footnote-0)

The fiduciary duty of confidentiality protects confidential communications between attorneys and their clients, as described in the Model Rules of Professional Conduct. While the attorney-client privilege also protects certain confidential communications between attorneys and their clients, it is not described in the Model Rules of Professional Conduct. The duty of confidentiality imposes a fiduciary duty on attorneys to maintain the confidentiality of private information about their clients obtained in the course of representation. By contrast, the attorney-client privilege is a common law doctrine that creates an evidentiary privilege for certain confidential attorney-client communications, specifically communications for the purpose of obtaining or providing legal advice.

The attorney-client privilege was created by the courts, and its scope is defined by the courts. Accordingly, the attorney-client privilege differs from jurisdiction to jurisdiction. However, the Restatement of the Law Governing Lawyers describes the paradigmatic form of the attorney-client privilege.

[**Federal Rule of Evidence 501: Privilege in General**](https://www.law.cornell.edu/rules/fre/rule_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.

**Restatement (Third) of the Law Governing Lawyers § 68 (2000): Attorney-Client Privilege**

Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked with respect to:

1. a communication
2. made between privileged persons
3. in confidence
4. for the purpose of obtaining or providing legal assistance for the client.

**Restatement (Third) of the Law Governing Lawyers § 69 (2000): “Communication”**

A communication within the meaning of § 68 is any expression through which a privileged person, as defined in § 70, undertakes to convey information to another privileged person and any document or other record revealing such an expression.

**Restatement (Third) of the Law Governing Lawyers § 70 (2000): “Privileged Persons”**

Privileged persons within the meaning of § 68 are the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation.

**Restatement (Third) of the Law Governing Lawyers § 71 (2000): “In Confidence”**

A communication is in confidence within the meaning of § 68 if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person as defined in § 70 or another person with whom communications are protected under a similar privilege.

**Restatement (Third) of the Law Governing Lawyers § 72 (2000): Legal Assistance as the Object of a Privileged Communication**

A communication is made for the purpose of obtaining or providing legal assistance within the meaning of § 68 if it is made to or to assist a person:

1. who is a lawyer or who the client or prospective client reasonably believes to be a lawyer; and
2. whom the client or prospective client consults for the purpose of obtaining legal assistance.

**Who is a “Privileged Person”?**

[***State v. Spell*, 399 So. 2d 551 (La. 1981)**](https://scholar.google.com/scholar_case?case=15745139911672320382)

**Summary:** Ronald Jenkins was an inmate who worked in the prison law library. Defendant Thomas Spell told Jenkins that he killed Ricky Mire. Jenkins testified at Spell’s trial, and Spell was convicted. Spell argued that his statements to Jenkins were protected by the attorney-client privilege. The Louisiana Supreme Court held that the attorney-client privilege did not apply, because Jenkins was not an attorney and did not claim to be an attorney.

JASPER E. JONES, Justice Ad Hoc.

Thomas Rhuel Spell was charged by grand jury indictment with the crime of second degree murder of Ricky Mire. On December 20, 1979, defendant was convicted before a jury of twelve by a vote of eleven to one. The defendant was sentenced to life imprisonment without eligibility for parole, probation, or suspension of sentence for forty years.

Defendant appealed his conviction. While the case was pending on appeal, defendant filed a motion for new trial based upon a contention that he had discovered new evidence which, if it had been introduced at trial, would probably have changed the verdict of guilty. The defendant's new trial motion contended that the new evidence could not have been discovered by him before or during the trial. This court remanded the case to the trial court for a hearing on defendant’s motion for a new trial.

Following a hearing on the new trial motion the trial court denied the new trial. The case is now before this court on the merits of the appeal which were not considered before the remand.

The evidence at trial reflected the following facts:

On November 12, 1975, at about 4:00 p. m., Anthony Broussard was driving his car in the south part of Crowley, La. in the Parish of Acadia when he was stopped by defendant. Defendant asked Broussard to take him for a ride, and Broussard agreed to the request. Shortly after Broussard and defendant commenced their ride they observed Ricky Mire walking down the street. Defendant had Broussard stop and defendant went and talked to Mire. Mire returned to Broussard’s car with defendant and got into the car with Broussard and defendant.

At defendant's direction Broussard drove to an isolated area in Crowley near a dried-up drainage canal and stopped. Mire and defendant got out of the car, and while Mire was standing near the front of the vehicle, defendant secured the car keys from Broussard, opened the trunk of the car and removed from it a tire tool. Mire and defendant then walked out of sight in the direction of the drainage ditch. Defendant carried the tire tool with him as he left the vehicle. Soon after defendant and Mire disappeared from view Broussard got out of the car and went in search of them and found them a short distance away, apparently over the drainage ditch levee. Broussard observed defendant push Mire who was in front of him. Broussard then returned to his car. After the elapse of about ten minutes defendant returned to Broussard’s vehicle without Mire and advised Broussard not to ask any questions and to return him to his car which he had left at the point where he had entered Broussard's vehicle.

Broussard did not see the tire tool in defendant’s hands when he returned to the car, but he heard defendant drop it upon the floor. When the pair arrived back at defendant’s car, defendant got out of Broussard’s car and the tire tool was not left in Broussard’s vehicle. Broussard did not see defendant take the tire tool out of his car.

At about 5:00 p.m. that afternoon, three horseback riders found Mire in the drainage ditch apparently unconscious with his head and face covered with blood. There was a lot of blood on the ground near Mire. They notified the sheriff’s office who obtained an ambulance and carried Mire to a Crowley hospital where his head was bandaged in the emergency room. The parish coroner arrived at 6:30 p. m. and observed that Mire was in a critical condition and ordered his immediate transfer to a Lafayette hospital where Mire died at 9:35 p. m. that night.

Mire’s body was returned to Crowley and examined by the parish coroner who testified he died from several head injuries that appeared to have been caused by a blunt instrument with a sharp end.

ASSIGNMENT OF ERROR

Defendant contends that the trial judge erred in admitting over his objection the testimony of Ronald Jenkins that defendant had told him he had killed the victim. Defendant contends that these inculpatory statements were made to Jenkins in confidence and were therefore inadmissible. Jenkins, an inmate of the prison, was assigned to the law library to help other prisoners with their legal problems by writing letters, preparing pleadings, and otherwise giving them whatever advice he could. Defendant contends that the information was a privileged communication because Jenkins was acting as an attorney in the law library at the Dixon Correctional Institute when the inculpatory statements were made to him by defendant. Defendant cites no authority for his contention.

Jenkins was not an attorney and did not hold himself out as a lawyer. Defendant knew that Jenkins was a fellow inmate in the prison and was not an attorney. He voluntarily gave the information to Jenkins. The communication is not subject to the attorney-client privilege. In the case of *State v. Lassai*, the court rejected the contention that a communication given by the defendant to a counselor at a drug abuse center was privileged where communications to certified social workers are classified as privileged communication. The court there said:

Nor does the record disclose a privilege which would prevent the evidentiary use of an admission by defendant to the director of counseling at the Euterpe Center; it was not shown that she was a social worker, and for that reason R.S. 37:2714 is not applicable. Privileges are narrowly construed, and will not be extended to the counselor solely because she was “in the same position” as a physician or social worker.

Defendant’s inculpatory statements to Jenkins were not subject to any privilege.

**Questions:**

1. What if Jenkins had been an imprisoned attorney?
2. Can Jenkins effectively provide legal advice to the prisoners if their communications with him are not privileged?

[***Jones v. US*, 828 A. 2d 169 (DC App. 2003)**](https://scholar.google.com/scholar_case?case=10644459553449064657)

**Summary:** The police contacted Stacy Jones about the murder of Darcie Silver, and asked for a DNA sample. Jones called his girlfriend, Tina Ducharme, an attorney employed by the federal government, and asked her for advice. Later, Jones was arrested and charged with murder. Ducharme testified at the trial. Jones argued that their telephone conversation was protected by the attorney-client privilege. The trial court disagreed, and the appellate court affirmed.

TERRY, Associate Judge:

After a jury trial, appellant was convicted of first-degree burglary, first-degree sexual abuse, first-degree felony murder, and second-degree murder. On appeal he contends that the trial court erred when it ruled that the attorney-client privilege did not require the exclusion of testimony about a conversation that appellant had with his girlfriend (at the time), who was an attorney employed by the federal government. We affirm on the merits, and remand for the sole purpose of vacating a redundant conviction.

I

On Saturday, March 23, 1996, at about 10:00 a.m., Metropolitan Police officers found Darcie Silver dead in her apartment after they received a call from her concerned co-workers reporting that she had failed to show up for work. The medical examiner determined that the cause of death was asphyxia by strangulation; other injuries indicated that she might also have been smothered. In addition, there were burns around her genital area; pieces of burned newspaper were found in the vicinity of her crotch. A vaginal swab revealed the presence of male deoxyribonucleic acid (DNA). In addition, investigators found semen stains on Ms. Silver’s nightgown and on a denim jacket recovered from her apartment. The DNA evidence was later matched to appellant through testing by the FBI.

A police investigation revealed that on Friday evening, March 22, Ms. Silver had dinner with a co-worker from her job at Bread & Circus, a supermarket in the Georgetown area of the city. She returned to her apartment at approximately 10:00 p.m. and spoke to her father on the telephone from 10:47 p.m. on Friday until 12:03 a.m. on Saturday.

Two neighbors in Ms. Silver’s apartment building heard a knocking at the front door of the building at about 2:30 a.m. on Saturday. One of the neighbors looked out a window and saw a “stocky” man with a fair to medium complexion at the door. This description was similar to that of appellant, who is a weightlifter and bodybuilder. Both neighbors heard the man respond to the building intercom using the name “Darcie.” They then heard him say that he had locked himself out of his apartment and needed to borrow a telephone. The intercom made a buzzing noise, which unlocked the front door, and the man walked upstairs to the area of Ms. Silver’s apartment. About fifteen minutes later, one neighbor heard a “crash” coming from Silver’s apartment, and the other heard a loud “thump.”

II

Appellant’s primary argument on appeal is that the court erred when it ruled that the attorney-client privilege did not attach to a conversation that he had with his girlfriend at the time, Tina Ducharme, who was also a lawyer.

After Darcie Silver was murdered, the police interviewed several employees, including appellant, at the Bread & Circus store where Ms. Silver worked. The police requested hair and blood samples from appellant, but he declined to give them. He told the police that his girlfriend was a lawyer and that he “wanted to talk to her first and he even invited them to come to his house to talk to them if they wanted to, but only in her company.” Later appellant called his girl friend, Tina Ducharme, a lawyer who worked for the federal government. At the time, she was away on business in San Diego. Appellant left a message at her hotel there, and she returned his call some time thereafter.

During their telephone conversation, appellant told Ms. Ducharme about the police interview at Bread & Circus. Defense counsel moved to exclude any testimony from Ms. Ducharme about that conversation. At a pre-trial hearing on the motion, Ms. Ducharme testified that appellant “told me that the police had been by his work and had questioned him and several other people who used to work with Darcie and had asked for blood samples from several individuals.” Ms. Ducharme’s response to appellant’s concern was that “obviously he didn’t have to provide the police with a sample if they didn’t have a warrant.” She also asked him, however, “why he wouldn’t, since it would clear the air. Obviously he didn't have anything to do with it or didn’t have anything to be concerned about. I didn't understand why he wouldn’t just go ahead and do it.” Appellant also told her that “he had been in Darcie’s apartment before, and he questioned whether or not some fingerprints of his would be remaining in the apartment,” particularly on some drinking glasses. Ms. Ducharme replied with the “common sense advice” that “probably Darcie had washed her glasses in the intervening amount of time.” Finally, appellant asked “what if he had gone to the bathroom and left some sperm in there?” Ms. Ducharme laughed and commented that “unless he was masturbating in her bathroom, I really didn't think that would be a concern.” Ms. Ducharme testified that appellant never said anything about her representing him in a criminal matter, nor did she intend to advise appellant as a lawyer, adding, “I wasn't qualified to advise anyone on criminal matters.” Appellant, in fact, had never asked her to perform any legal work on his behalf. Besides, she said, she was barred by a regulation from representing any private individual “either criminally or civilly” because she was a government lawyer. Further, she believed the conversation was a typical call between boyfriend and girlfriend: “when either of us had a problem, we would call the other person to ask their advice or tell them about it.”

Appellant’s account of the conversation was different. He stated that he telephoned Ms. Ducharme because he “wanted to know what kind of position I would be putting myself in by giving hair and blood samples.” Appellant said that he called her “because she’s an attorney” and that he “was seeking legal advice.” He testified, “I never thought she could be subpoenaed or anything because she was an attorney.” On the basis of his prior experience with other attorneys, appellant believed their conversation would remain confidential.

At the close of the hearing, the court ruled that the conversation was not protected by the attorney-client privilege. Accepting Ms. Ducharme’s version of the conversation as credible, the court found appellant’s testimony incredible because he “kept switching around on the witness stand as if he was waiting on which way to go.” In addition, the court ruled that the only thing Ms. Ducharme “said as a lawyer” was that appellant did not have to give the police hair and blood samples, which he had already elected not to do. Otherwise, said the court, the types of questions appellant asked Ms. Ducharme were “what if” questions that were more scientific than legal:

They were questions about—they’re scientific questions. And she wasn’t a criminal lawyer to begin with. What if I used a glass, would the fingerprints still be there? Not a legal question. What if I went to the bathroom, would I have semen there? That’s not a legal question. None of these were legal questions. The only legal question in this thing he already knew the answer to.

As a result, the court refused to allow appellant to invoke the attorney-client privilege, and Ms. Ducharme’s testimony about the telephone conversation was later introduced into evidence at trial.

In the case at bar, the court heard testimony about the nature and substance of the conversation between appellant and his one-time girl friend, Ms. Ducharme. It made a credibility determination about the contents of the conversation and a factual finding that Ms. Ducharme was not acting as an attorney, but as a friend. On this record we see no reason to depart from our usual standard of review for factual findings by a trial court; *i.e.*, we must uphold that court's determination of the facts unless it is “plainly wrong or without evidence to support it.” In particular, a trial court's “findings of fact relevant to the essential elements of a claim of attorney-client privilege will not be overturned unless clearly erroneous.” This standard of review places a heavy burden on appellant. Because appellant has not shown that the trial court’s factual findings were clearly erroneous or, in the words of our statute, “plainly wrong,” we uphold the court’s rejection of his claim of privilege.

The attorney-client privilege is the oldest of the established privileges for confidential communications. Its main purpose is to encourage full and frank communication between attorneys and their clients. Nevertheless, courts construe the attorney-client privilege narrowly to protect only those purposes which it serves. Thus the privilege applies only in the following circumstances:

(1) where legal advice of any kind is sought (2) from a professional legal advisor 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.

The burden of proving that the attorney-client privilege shields a particular communication from disclosure rests with the party asserting the privilege. This means that the party asserting the privilege must clearly show that the communication was made “in a professional legal capacity.” “In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance.”

Whether a purpose is significantly that of obtaining legal assistance or is for a nonlegal purpose depends upon the circumstances, including the extent to which the person performs legal and nonlegal work, the nature of the communication in question, and whether or not the person had previously provided legal assistance relating to the same matter.

In the case of someone seeking advice from a friend who is also a lawyer, the lawyer-friend must be giving advice as a lawyer and not as a friend in order for the privilege to attach. The nature of the relationship is a factual question for the trial court to decide.

Finally, the relationship between attorney and client hinges on the client’s intention to seek legal advice and his belief that he is consulting an attorney. In this case the government argues that the conversation in question was not privileged because Ms. Ducharme was not a criminal lawyer; because, as a government employee, she was barred by a regulation from representing appellant—or any other individual—in a private capacity; and because she believed that she was speaking to appellant as his girlfriend and not as a lawyer.[[2]](#footnote-1) These arguments fall short, however, because the intent of the person seeking advice is assessed from that person's viewpoint, not that of the attorney. The issue ultimately is what appellant believed when he was seeking advice and whether his belief about the confidentiality of the conversation was reasonable. Thus Ms. Ducharme’s understanding of the conversation and of why appellant had called her is relevant only to whether appellant reasonably believed he was consulting her as an attorney, with the protections that such a relationship provides.

Guided by these principles, we agree with the trial court that appellant failed to make the clear showing necessary to establish that his conversation with Ms. Ducharme was within the protection of the attorney-client privilege. We note that the trial court found appellant’s testimony incredible, in part, because he appeared to have tailored his testimony to fit the legal standard for the privilege, which counsel and the court had discussed in front of him during the hearing. The court said to defense counsel:

It's the court's observation that appellant is very bright. And I was especially fond of his answer to counsel’s last question about whether he heard me. Then counsel and I had this legal discussion, at which time your client then answered the question, he didn’t understand the concept. It’s as if we helped him answer the question, the two of us.

In addition, the court ruled that the questions appellant asked Ms. Ducharme were not “legal” questions. The court noted that appellant knew his rights when he refused to provide blood and hair samples to the police. According to Ms. Ducharme, whose testimony the court expressly credited, appellant did not inquire about his right not to give samples without a warrant, but instead asked “scientific” questions about whether or not his fingerprints might remain on a glass or whether his semen and hair might be discovered in the bathroom.

While such concerns about “bad facts” might fall within the privilege if they were expressed in a communication within a clearly established attorney-client relationship, we conclude, like the trial court, that appellant failed to establish that, as a matter of fact, such a relationship existed between him and Ms. Ducharme. We see no reason to upset the court’s conclusion, which rested largely on its determination that Ms. Ducharme was credible and that appellant was not. We find no error in that determination.[[3]](#footnote-2)

**Questions:**

1. Why did the court hold that the communications at issue were not protected by the attorney-client privilege?
2. If Jones had been speaking to hired or appointed counsel, would the communications at issue have been protected by the attorney-client privilege?

**What is a “Communication”?**

[***In re Grand Jury Proceedings*, 791 F. 2d 663 (8th Cir. 1986)**](https://scholar.google.com/scholar_case?case=9282765832974649934)

BRIGHT, Senior Circuit Judge.

Janet Cheetham appeals from the district court’s denial of her motion to quash a subpoena requiring her testimony before a grand jury investigating one of her clients. We affirm.

I. BACKGROUND.

A grand jury is investigating John Doe on suspicion of bank and credit card fraud. As part of its investigation, the grand jury seeks photographs and handwriting exemplars of Doe for comparison with signatures used on the fraudulent documents.

The Immigration and Naturalization Service has produced documents purporting to bear the signatures and photograph of Doe. These documents also bear the signature of Cheetham attesting that she prepared the documents. Cheetham represented Doe in INS matters unrelated to the grand jury proceedings, and does not represent Doe in the grand jury investigation.

The grand jury subpoenaed Cheetham to testify regarding the authenticity of Doe’s signatures and photograph on the INS documents. Cheetham brought a motion to quash before the magistrate, which was denied. She appealed to the district court, which also denied her motion and ordered her to testify.[[4]](#footnote-3) Cheetham brings this appeal, contending that the district court erred in concluding that her testimony would not be protected by the attorney-client privilege, and in not requiring the Government to prove the need for her testimony through affidavit.

II. DISCUSSION.

The common law rule of attorney-client privilege[[5]](#footnote-4) extends only to confidential communications from a client to his or her attorney. Confidential communications encompass that information communicated on the understanding that it would not be revealed to others, and to matters constituting protected attorney work product. The identity of one’s client usually falls outside the scope of the attorney-client privilege. Moreover, matters existing in the public eye, such as a person’s appearance and handwriting, are generally not confidential communications because they were not exposed on the assumption that others would not learn of them. Indeed, in this case, Doe voluntarily revealed his signatures and photograph to the INS.

Cheetham contends that the attorney-client privilege should apply here because the information sought might tend to incriminate her client. She argues that any information gained by an attorney in her relationship with a client is privileged if exposure of the information might become a link in a chain of evidence connecting her client with a crime. Cheetham asserts that she gained the information sought by the grand jury during her legal relationship with Doe, and that her testimony could provide the necessary link between Doe and the fraudulent scheme.

We disagree. It is true that certain information ordinarily outside the privilege may become privileged if, by revealing the information, the attorney would necessarily disclose confidential communications. Nonprivileged information is not suddenly transformed into confidential communications, however, whenever it becomes relevant to a criminal investigation or prosecution of a client. We conclude that the information sought by the grand jury does not constitute confidential communications protected by the attorney-client privilege.

**When is a Communication “In Confidence”?**

[***Hofmann v. Conder*, 712 P. 2d 216 (Utah 1985)**](https://scholar.google.com/scholar_case?case=4699607678763476432)

PER CURIAM.

This matter comes before the Court in an extraordinary proceeding to prohibit the district court from compelling petitioner’s hospital nurse to testify about statements she overheard petitioner make to his attorney. The trial court made no findings of fact, although it prepared a memorandum decision. It appears from that decision that the controlling issue on which the trial court decided the matter was a legal one, namely, the standard determining when the presence of a third party during communications between a lawyer and client results in a waiver of the attorney-client privilege. We hold that the trial court erred in deciding that the attorney-client privilege applies only if the presence of a third person, who overhears a confidential communication, is “necessary for urgent or life-saving procedures.” The proper standard is whether the third person’s presence is reasonably necessary under the circumstances.

The record establishes that the presence of petitioner’s hospital nurse was reasonably necessary under the circumstances. The threshold question of whether the communication was intended to be confidential was not ruled on by the trial court, or at least the judge’s decision gives us no indication of his having made any factual findings on that question. Although there are ambiguities in the record, the totality of the circumstances surrounding petitioner’s communications to his attorney require the inference that the communication was intended to be confidential and within the protection of the statutory privilege. Immediately before the communication, petitioner had requested the presence of his attorney, he had stated that he would not make a statement to the police that night, and he had acquiesced in the request of his attorney that the police and hospital security personnel not only leave the room but also go far enough away to be out of earshot. Given his helpless physical condition and the intensive nature of the hospital care he had been receiving throughout the evening and during this incident, we cannot infer that petitioner intended his communications to his attorney to be public. Since the presence of the hospital nurse was reasonably necessary under all the circumstances, the privilege was not waived because of that presence.

The order of the trial court is vacated, and this matter is remanded for the entry of a protective order preventing the disclosure by the witness of confidential communications overheard by her.

ZIMMERMAN, Justice (dissenting).

I agree that Judge Conder applied the wrong standard in concluding that the presence of the nurse made the attorney-client privilege unavailable. A third person’s presence should not avoid an otherwise available privilege if the third person’s presence is reasonably necessary under the circumstances. The evidence indicates that the nurse’s presence was reasonably necessary for Hofmann’s well-being.[[6]](#footnote-5)

I disagree with the result reached by the Court, however, and would uphold the ruling below, because I conclude that petitioner has not met the threshold requirement for claiming an attorney-client privilege — petitioner has failed to establish that the communication between the client and the attorney was intended by the client to be confidential. “The mere fact that the relationship of attorney and client exists between two individuals does not ipso facto make all communications between them confidential. The circumstances must indicate whether by implication the communication was of a sort intended to be confidential.” I think the Court slights this inquiry. By failing to carefully consider the question of the client’s intent, courts may shield from scrutiny communications that the privilege was not created to protect.

There is evidence in the record sufficient to establish that the attorney thought the communication was at least private and perhaps confidential. However, I find the record very sparse on the question of the client’s intention. Although the client was available to give an affidavit in support of his claim of privilege, the record is strangely devoid of direct evidence as to the client’s state of mind at the time of the communication. As for the facts and circumstances in the record that constitute indirect evidence of his intent, I find them ambiguous at best. All persons must give evidence, unless they establish a recognized justification for refusing to do so. Petitioner has the burden of establishing that the communication was privileged. On the present state of the record, I conclude that petitioner has not carried this burden. Therefore, I would uphold the trial court’s refusal to find the communication privileged.

**Communication for the Purpose of Legal Advice**

[***In the Matter of a Grand Jury Investigation*, 453 Mass. 453 (Mass. 2009)**](https://scholar.google.com/scholar_case?case=7900600263656411903)

SPINA, J.

This case requires us to decide whether the attorney-client privilege applies where a client leaves messages on his counsel’s telephone answering machine threatening to harm others and the attorney discloses those communications in order to protect those threatened.

The salient facts are not in dispute. Attorney John Doe was representing Michael Moe, a father, in a care and protection proceeding in the Juvenile Court. On November 8, 2007, two days after an adverse ruling by a Juvenile Court judge, Moe left six messages on Attorney Doe’s answering machine between 1:08 A.M. and 1:24 A.M. Moe indicated that he knew where the judge lived and that she had two children. In the fourth message, a voice that Attorney Doe recognized as Moe’s wife stated that she and Moe were going to “raise some hell.” In the fifth message, Moe stated that “some people need to be exterminated with prejudice.” Attorney Doe subsequently erased the messages from the answering machine.

During the following week, Attorney Doe observed that Moe had become “more and more angry,” and on November 13, 2007, he filed a motion to withdraw as Moe’s counsel, which was subsequently allowed. Concerned for the safety of the judge and her family, he disclosed the substance of the messages to the judge.

On November 21, 2007, Attorney Doe was interviewed by a State trooper regarding the substance of the messages, but declined to sign a written statement.

A District Court complaint alleging threats to commit a crime and intimidation of a witness subsequently issued against Moe. The Commonwealth then initiated grand jury proceedings and filed a motion to summons Attorney Doe before the grand jury. That motion was allowed. On December 21, 2007, Attorney Doe, citing the attorney-client privilege, moved to quash the summons. A judge in the Superior Court denied Attorney Doe’s motion, reasoning that Attorney Doe and Moe had not carried their burden of demonstrating that the attorney-client privilege applied “because they failed to show that the messages were left in an attempt to obtain legal services.” Attorney Doe filed a motion to reconsider, requesting, *inter alia*, an evidentiary hearing. The motion was denied. The Commonwealth and Attorney Doe submitted a joint request to report the decision to the Appeals Court. The Superior Court judge reported the case, and we transferred the case here on our own motion.

Neither party disputes that Attorney Doe could, consistent with rule 1.6, disclose the substance of Moe’s messages. Rule 1.6 provides, in pertinent part:

(a) A lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1 (b), or Rule 8.3 must reveal, such information: (1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm."

While nothing in rule 1.6 (b) required Attorney Doe to disclose Moe’s communications to the judge or police, he had discretion to do so. However, the ethical permissibility of Attorney Doe’s disclosure does not resolve the distinct issue presented here: whether Attorney Doe can be compelled to testify before the grand jury.

Evidentiary privileges “are exceptions to the general duty imposed on all people to testify.” We accept such privileges “only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” The attorney-client 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.” A party asserting the privilege must show that (1) the communications were received from the client in furtherance of the rendition of legal services; (2) the communications were made in confidence; and (3) the privilege has not been waived.

The Commonwealth contends that the attorney-client privilege does not apply because Moe’s communications were not made “for the purpose of facilitating the rendition of legal services.” In making this argument, the Commonwealth implicitly asks us to reconsider a portion of our discussion in the *Purcell* case.

In *Purcell*, the client was discharged as a maintenance man at the apartment building in which his apartment was located and had received an order to vacate his apartment. During consultation with an attorney, the client stated an intent to burn the apartment building. The attorney disclosed these communications to police and criminal charges were brought against the client. When the prosecutor subpoenaed the attorney to testify at trial, the attorney filed a motion to quash, which was denied. The central issue in that case was whether the crime-fraud exception to the attorney-client privilege applied. We concluded that the communications would not fall within the crime-fraud exception unless the district attorney could establish facts by a preponderance of the evidence showing that the client's communication sought assistance in or furtherance of future criminal conduct.

Recognizing that whether the attorney-client privilege applied at all was open on remand, we also considered whether a communication of an intention to commit a crime, if not within the crime-fraud exception, could be considered a communication for the purposes of facilitating the rendition of legal services. We held that a “statement of an intention to commit a crime made in the course of seeking legal advice is protected by the privilege, unless the crime-fraud exception applies.” We reasoned that a gap between the crime-fraud exception and the applicability of the privilege “would make no sense,” because the attorney-client privilege was premised on the benefits of unimpeded communication between attorney and client, and noted that “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.”

The limited disclosure adverted to in the *Purcell* case occurred here. Concerned for the safety of the judge, her family, and a social worker, Attorney Doe disclosed Moe’s communications to the judge and law enforcement authorities to protect them from harm.

We discern no reason to depart from the *Purcell* decision, and hold that Moe’s communications were made in furtherance of the rendition of legal services and thus protected by the attorney-client privilege. The Commonwealth’s argument to the contrary essentially raises an issue of germaneness. Scholars, commentators, and courts have formulated a number of tests for determining the germaneness of a client's communication. However, none of these formulations appears to give clients breathing room to express frustration and dissatisfaction with the legal system and its participants. The expression of such sentiments is a not uncommon incident of the attorney-client relationship, particularly in an adversarial context, and may serve as a springboard for further discussion regarding a client’s legal options. If a lawyer suspects that the client intends to act on an expressed intent to commit a crime, the lawyer may attempt to dissuade the client from such action, and failing that, may make a limited disclosure to protect the likely targets. Requiring the privilege to yield for purposes of a criminal prosecution not only would hamper attorney-client discourse, but also would discourage lawyers from exercising their discretion to make such disclosures, as occurred here, and thereby frustrate the beneficial public purpose underpinning the discretionary disclosure provision of rule 1.6. Furthermore, any test to ascertain the germaneness of an ostensibly threatening communication on a case-by-case basis would make the privilege’s applicability uncertain, rendering the privilege “little better than no privilege.” Warning clients that communications deemed irrelevant to the matter for which they have retained counsel will not be protected not only may discourage clients from disclosing germane information, but also may disincline clients to share their intentions to engage in criminal behavior. In the latter circumstance, a lawyer’s ability to aid in the administration of justice by dissuading a client from engaging in such behavior is impaired. The lawyer also may never receive the very information necessary for him or her to determine whether to make a limited disclosure to prevent the harm contemplated by the client.

In sum, we reaffirm that a client’s communications to his lawyer threatening harm are privileged unless the crime-fraud exception applies. Because the Commonwealth does not assert that Moe’s communications come within the crime-fraud exception, they were privileged. The order denying Attorney Doe’s motion to quash is hereby vacated and the case is remanded to the Superior Court for further proceedings consistent with this opinion.

[***Keating v. McCahill*, Civil Action No. 11-518 (E.D. Pa. 2012)**](https://scholar.google.com/scholar_case?case=14673119390025089465)

**Summary:** Equisoft hired Keating as a management consultant. Soon afterward, Keating quit Equisoft and joined Capgemini. Equisoft hired Synnott, a Canadian lawyer, to provide legal advice. After consultation with Synnott, Equisoft sent a letter to Capgemini making certain demands. After receiving the letter, Capgemini fired Keating, who filed a tort action against Equisoft, asserting several claims. During discovery, Equisoft produced certain documents, as well as a privilege log listing relevant documents not produced. Keating filed a motion to compel those documents. The court found that some of the documents were protected by the attorney-client privilege or the work product doctrine, and others were not.

GENE E.K. PRATTER, District Judge.

Plaintiff Daniel Keating has objected to Defendants Equisoft, Inc., Thomas McCahill, and Luis Romero’s assertion of attorney-client privilege and work product protection over certain documents in the Defendants' privilege log. The parties have submitted twenty-five documents — twenty-four produced with redactions and one withheld in full — to the Court for an *in camera* review to determine whether the communications at issue are shielded from disclosure by the attorney-client privilege and/or the work product doctrine.

For the reasons that follow, the Court finds that the twenty-four redacted documents may remain redacted as presented to the Court, but Equisoft shall produce the one unproduced document in redacted form as more fully set forth below.

I. FACTUAL BACKGROUND

Mr. Keating, a management consultant in the software industry, alleges that in late November 2009, his consulting business, the Keating Consulting Group, Inc., entered into a three month consulting services contract with Equisoft, Inc. The consulting services contract was terminable at-will by either party with 30 days written notice. Mr. Keating also entered into a Non-Solicitation Agreement, a Confidentiality Agreement, and an Intellectual Property Agreement with Equisoft, Inc.

Approximately halfway through the term of the consulting agreement, Mr. Keating was offered and accepted a position with Capgemini Financial Services USA, Inc. and entered an employment agreement with Capgemini on January 14, 2010. The next day, Mr. Keating traveled to Equisoft’s Pennsylvania offices to give Mr. McCahill, Equisoft, Inc.’s Life Insurance Division President, the required 30 days notice pursuant to the contract. On January 21, 2010, Mr. Keating began working for Capgemini.

In the immediate wake of Mr. Keating giving his notice, Mr. McCahill and certain members of Equisoft’s senior management convened to address the issues posed by Mr. Keating's resignation. These individuals included the Equisoft CEO Mr. Romero, Equisoft Vice President and COO Steeve Michaud, and then-Equisoft General Manager for Philadelphia Operations William O’Donnell. Equisoft hired Bernard Synnott, a Canadian attorney to advise senior management on issues relating to Mr. Keating’s resignation. Mr. Michaud was responsible for communicating with Mr. Synnott on behalf of Equisoft, and “relayed questions, information, comments, and advice from Mr. Synnott to senior management, and conveyed questions, information and comments from the senior management to Mr. Synnott."

From January 18, 2010 to February 8, 2010, Messrs. Michaud, O’Donnell, and Romero activity assisted Mr. Synnott in formulating strategy and drafting a demand letter to effectuate that strategy. On February 8, 2010, Mr. Synnott sent the final version of this demand letter to Mr. Keating and Capgemini representatives threatening litigation if Mr. Keating continued to work for Capgemini. Three weeks after he began his new job, on February 16, 2010, Mr. Keating was terminated by Capgemini.

In September 2010, Mr. Synnott received a letter from Mr. Keating's attorney, Heather Sussman, Esq., threatening to commence litigation if Equisoft did not comply with various demands. For the remainder of September 2010, Messrs. Michaud, O’Donnell, and Romero assisted Mr. Synnott in evaluating Ms. Sussman’s demand letter and drafting a response, which was sent on September 24, 2010.

On January 25, 2011, Mr. Keating filed this lawsuit, asserting that his termination from Capgemini was the result of Equisoft’s unlawful actions. He claims tortious interference with his contractual relationship with Capgemini and his prospective economic advantage, defamation via slander and libel, intentional infliction of emotional distress, and prima facie tort.

After Mr. Keating served his initial document requests, the Defendants provided Mr. Keating with a privilege log. On October 17, 2011, one week after Equisoft provided Mr. Keating with their privilege log, Mr. Keating filed a motion to compel requesting that Equisoft produce every document on its privilege log not already produced because (1) Mr. Synnott, a foreign attorney, is not “a member of the bar of a court” as, Mr. Keating claims, is necessary for the attorney-client privilege to apply, (2) the attorney-client privilege cannot apply where the challenged communications do not include a lawyer as a sender or a recipient, and (3) the work product doctrine cannot apply where the documents at issue were not prepared by an attorney or his representative.

Since the filing of that motion — which was mooted by Order of the Court — the parties have reduced the universe of documents in dispute from 253 to 25. Twenty-four of these disputed documents have been produced in redacted form, and one document has been withheld in its entirety. These 25 documents have been submitted to the Court for an *in camera* review to determine whether the attorney-client privilege and/or the work product doctrine shields them from disclosure. Along with the documents submitted for judicial review, Equisoft submitted affidavits from Mr. Synnott, Mr. Romero, Mr. O’Donnell, and Mr. Michaud in support of its assertion of privilege and work product protection.

II. LEGAL STANDARDS

A. Attorney-Client Privilege

Federal courts sitting in diversity, as in this case, apply the law of the host state to determine privilege. Thus, Pennsylvania law governs the privilege issues in this case. In order for the attorney-client privilege to apply in Pennsylvania, the following conditions must be met: “(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; (3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purposes of committing a crime or tort; and (4) the privilege has been claimed and is not waived by the client.” Here, only the second and third elements are in dispute.

The Pennsylvania rule that the lawyer must be “a member of the bar of a court” does not limit the privilege to members of the Pennsylvania bar. Rather, “the privilege applies to communications to a person whom the client reasonably believes to be a lawyer. Thus, a lawyer admitted to practice in another jurisdiction or a lawyer admitted to practice in a foreign nation is a lawyer for the purposes of the privilege.”

The attorney-client privilege protects the communications themselves, not the underlying facts. The privilege may cover documents that “while not involving employees assisting counsel, still reflect confidential communications between client and counsel or subordinates of counsel for the purposes of either (1) providing legal services or (2) providing information to counsel to secure legal services. The privilege applies to both corporations and natural persons. The “scope of an individual’s employment is highly relevant to the question of maintenance of confidentiality,” and “the privilege is waived if the communications are disclosed to employees who did not need access to them.”

However, “a document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds.” Where a corporate client is involved, “privileged communications may be shared by non-attorney employees in order to relay information requested by attorneys.” “Documents subject to the privilege may be transmitted between non-attorneys so that the corporation may be properly informed of legal advice and act appropriately.” “Drafts of documents prepared by counsel or circulated to counsel for comments on legal issues are considered privileged if they were prepared or circulated for the purpose of giving or obtaining legal advice and contain information or comments not included in the final version.”

Because the privilege obstructs the truth-finding process, it should be “applied only where necessary to achieve its purpose.” And because the privilege promotes the “dissemination of sound legal advice,” it applies only where the advice is legal in nature, and not where the lawyer provides non-legal business advice. Thus, “the party asserting the privilege bears the burden of proving that it applies to the communications at issue” and “Federal Rule of Evidence 501 requires the federal courts, in determining the nature and scope of an evidentiary privilege, to engage in the sort of case-by-case analysis that is central to common-law adjudication.”

B. Work Product Doctrine

Federal Rule of Civil Procedure 26(b)(3) outlines work product protection in diversity cases. In order to come within the qualified immunity from discovery created by Rule 26(b)(3) three tests must be satisfied. The material must be: (1) “documents and tangible things;” (2) “prepared in anticipation of litigation or for trial;” and (3) “by or for another party or by or for that other party’s representative.”

“Work-product immunity protects only documents and tangible things prepared in anticipation of litigation or for trial, such as memoranda, letters, and e-mails.”

Documents are prepared in anticipation of litigation when “in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.” The preparer’s anticipation of litigation must be objectively reasonable. Generally, a reasonable anticipation of litigation requires existence of an identifiable specific claim or impending litigation at the time the materials were prepared.

As Rule 26(b)(3) makes clear, the materials themselves need not be prepared by a lawyer or a lawyer’s representative to qualify for work product protection. Rather, “the focus of the rule seems to be on whether the work was done in anticipation of litigation by the person preparing the work.” Indeed, the fact that the documents sought for discovery do not include legal advice is, “as a matter of law, irrelevant provided they were prepared in anticipation of litigation.”

A party claiming work product protection bears the initial burden of showing that the materials in question were prepared in anticipation of litigation. A party seeking disclosure of documents claimed as work product must demonstrate substantial need for the materials in the preparation of his case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

III. DISCUSSION

Seven documents contain all of the redacted material at issue, as the redacted material in the other eighteen documents is fully duplicated within these seven. Equisoft argues that attorney-client privilege and the work product doctrine shield each of these documents from disclosure. Accordingly, the Court will analyze each of these documents in turn.

A. Document 96

Document 96 is a February 2010 string of e-mails between Mr. Michaud and Mr. O’Donnell regarding the February 8, 2010 demand letter.[[7]](#footnote-6) Equisoft produced the document to Mr. Keating but redacted two e-mails in the chain: a February 6, 2010 e-mail from Mr. Michaud to Mr. O’Donnell, and Mr. O’Donnell's February 7, 2010 response.

Mr. Michaud attests that the material redacted from his February 6, 2010 e-mail is “advice that he received from Mr. Synnott regarding the demand letters” to be sent to Mr. Keating and Capgemini. After careful *in camera* review of the redacted e-mail, the Court concludes that Mr. Michaud’s e-mail relayed Mr. Synnott’s legal advice and strategy regarding the demand letters to Mr. O'Donnell, and, accordingly, is privileged and may remain withheld except as redacted. To require disclosure of this e-mail would reveal client communications and legal advice from counsel.

Mr. O’Donnell affirms that his February 7, 2010 e-mail “consists of his opinion regarding the legal advice from Mr. Synnott that Mr. Michaud relayed to him regarding the demand letters.” He further asserts generally, that he “often conveyed questions, information, and comments, to Mr. Michaud with the understanding that he would relay them to Mr. Synnott.”

Unlike Mr. Michaud’s e-mail, the Court does not conclude that Mr. O’Donnell’s e-mail is a privileged communication. As an initial matter, without the disclosure of the underlying communication from Mr. Synnott via Mr. Michaud, Mr. O’Donnell’s e-mail does not contain any confidential information and does not divulge any legal advice from Mr. Synnott. Rather, it merely indicates Mr. O’Donnell’s agreement with the redacted advice of counsel communicated to him via Mr. Michaud. Additionally, although Mr. O’Donnell has indicated in a general sense that he had the “understanding” that Mr. Michaud would relay all of his comments to Mr. Synnott relating to Mr. Keating in the month of September, Equisoft has not offered evidence that this particular communication was made for the purpose of securing either an opinion of law, legal services, or assistance in a legal matter.

Nevertheless, the work product doctrine shields Mr. O’Donnell’s e-mail from disclosure. Although it does not qualify as “core or opinion work product that encompasses the mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation which is generally afforded near absolute protection from discovery,” Mr. O’Donnell’s e-mail most certainly qualifies as a document prepared by a party “because of” or in anticipation of litigation. Moreover, Mr. Keating has made no claim of substantial need or undue hardship that would justify disclosure notwithstanding the work product claim.

Accordingly, the Court finds that protection attaches to Mr. Michaud’s February 6, 2010 e-mail, and that the work product doctrine shields Mr. O’Donnell’s February 7, 2010 e-mail from disclosure.

B. Document 202

Document 202 is a September 2010 string of e-mails between Mr. Michaud and Mr. O’Donnell regarding revisions to a draft of Equisoft’s September 2010 letter. Equisoft produced the document to Mr. Keating but redacted two e-mails in the chain: a September 15, 2010 e-mail from Mr. Michaud to Mr. O’Donnell, and Mr. O’Donnell’s September 15, 2010 response.

Mr. Michaud attests that his e-mail “discloses requests that Mr. Romero and he made to Mr. Synnott regarding Ms. Sussman’s demand letter and Mr. Synnott’s response thereto.” Based upon the text of the e-mail, the Court discerns no particular “requests” Mr. Romero and Mr. Michaud made of Mr. Synnott. The redacted portion of Mr. Michaud’s e-mail merely reflects Mr. Michaud’s opinion about whether the draft letter incorporates his and Mr. Romero's communications to counsel. The e-mail does not divulge the communications themselves. Accordingly, the Court concludes that the redacted portion of Mr. Michaud’s e-mail is not shielded by the attorney-client privilege.

However, the work product doctrine does shield Mr. Michaud's e-mail from disclosure because it is a document prepared by a party in anticipation of litigation, and Mr. Keating has made no claim of substantial need or undue hardship that would justify disclosure.

Regarding Mr. O’Donnell's redacted response, Mr. O’Donnell affirms that the redacted portion of his e-mail “consists of his comments regarding a draft that he reviewed of Mr. Synnott’s response to Ms. Sussman’s demand letter,” and that his intent was for Mr. Michaud to relay some or all of his comments to Mr. Synnott.”

Here, Mr. O’Donnell’s statement that he intended for “some or all” of his comments to be relayed to Mr. Synnott is unhelpful in the Court's review because it offers no specifics as to which of his comments he intended for Mr. Michaud to forward to Mr. Synnott. However, the text of the redacted e-mail and the other e-mails on the chain make clear that Mr. O’Donnell intended his comments to be forwarded to Mr. Synnott. Indeed, in a 12:10 p.m. e-mail on September 15, 2010 in the chain, Mr. Michaud indicated to Mr. O’Donnell his intention “to give Mr. Synnott their feedback later today.” Mr. O’Donnell’s e-mail, a mere five hours later, was clearly sent with the intention that it be sent along to Mr. Synnott.

However, even if the attorney-client privilege does not apply to Mr. O’Donnell's e-mail, the work product doctrine protects the redacted portion of Mr. Michaud’s e-mail from disclosure because it is a document prepared by a party in anticipation of litigation. Once again, Mr. Keating has made no claim of substantial need or undue hardship that would justify disclosure.

Accordingly, the Court finds that the privilege attaches to the redacted portions of both Mr. Michaud’s and Mr. O'Donnell’s e-mails.

C. Document 207

Document 207 is a September 2010 string of e-mails between Mr. Michaud and Mr. O’Donnell with an attached draft letter from Mr. Synnott to Mr. Keating’s attorney. Equisoft produced the document to Mr. Keating but redacted a portion of Mr. Michaud's 11:39 a.m. e-mail on September 17, 2010, and the entirety of the attachment

Mr. Michaud attests that the redacted portion of his September 17, 2010 e-mail is “advice he received from Mr. Synnott regarding the timing of his response to Ms. Sussman's demand letter,” and that, consistent with his responsibilities, he relayed this information from Mr. Synnott to the other senior management, in this case, Mr. O’Donnell. After careful *in camera* review of the redacted portion of the e-mail, the Court concludes that Mr. Michaud’s e-mail relayed Mr. Synnott’s legal advice and strategy to Mr. O’Donnell regarding the demand letters. Accordingly, the document is privileged and may remain redacted.

Turning to the attached draft letter, Mr. O’Donnell affirms that it “consists of his proposed revisions to a draft that he reviewed of Mr. Synnott’s response to Ms. Sussman’s demand letter,” and that “his intent was for Mr. Michaud to relay some or all of his revisions to Mr. Synnott.”

First, the draft letter authored by Mr. Synnott is protected by the attorney-client privilege as “drafts of documents prepared by counsel are considered privileged if they were prepared or circulated for the purpose of giving or obtaining legal advice and contain information or comments not included in the final version.” Here, the draft document contains both information and comments not contained in the final version.

Second, Mr. O’Donnell’s proposed revisions to the attached letter were clearly intended to be communicated to Mr. Synnott through Mr. Michaud for the purpose of securing either an opinion of law, legal services or assistance in the legal matter. Although Mr. O'Donnell's statement that he intended for “some or all” of his comments to be relayed to Mr. Synnott is unhelpful in the Court’s review, that is of no moment. Accordingly, the Court concludes that Mr. O’Donnell’s proposed revisions to Mr. Synnott’s draft are protected by the attorney-client privilege.

Third, the attached letter as a whole is shielded from disclosure by the work product doctrine. The attachment was a draft document prepared by counsel in reasonable anticipation of litigation. That the draft was sent to Mr. O’Donnell through Mr. Michaud does not remove it from the protection of the work product doctrine. Regardless, Mr. Keating has not established a substantial need for the materials to prepare his case or undue hardship in obtaining the substantial equivalent of the materials by other means.

Accordingly, the Court finds that the privilege attaches to Mr. Michaud’s e-mail, and both the attorney-client privilege and the work product doctrine shields the attachment from disclosure.

D. Document 215

Document 215 is a September 2010 string of e-mails between Mr. Michaud and Mr. O’Donnell regarding revisions to a draft of Equisoft’s September 2010 letter responding to Mr. Keating’s attorney. The document includes eight e-mails, four of which contain redactions.

Mr. Michaud’s 11:39 a.m. e-mail on September 17, 2010 is a duplicate of the redacted e-mail in Document 207. Accordingly, the Court concludes that this e-mail is privileged and may remain redacted for the same reasons as described above.

Mr. O’Donnell affirms that the redacted portion of his 10:04 a.m. e-mail on September 20, 2010 “consists of his comments regarding a draft that he reviewed of Mr. Synnott’s response to Ms. Sussman’s demand letter,” and that “his intent was for Mr. Michaud to relay some or all of this information to Mr. Synnott.”

After careful *in camera* review of the redacted portions of Mr. O’Donnell’s e-mail, the Court cannot conclude that Mr. O’Donnell's 10:04 a.m. e-mail is shielded from disclosure by the attorney-client privilege. As discussed above, Mr. O’Donnell’s statement that he intended for “some or all” of his comments to be relayed to Mr. Synnott is unhelpful in the Court’s review. The text of the e-mail and the chain as a whole does not indicate that Mr. O’Donnell intended Mr. Michaud to communicate his comments to Mr. Synnott for the purpose of securing either an opinion of law, legal services or assistance in a legal matter. If anything, as indicated by the unredacted portion of the e-mail, Mr. O’Donnell is soliciting a response from Mr. Michaud, as he noted, “Let me know what you think.” Thus, this communication is not protected by the attorney-client privilege.

Mr. Michaud attests that the redacted portion of his 10:11 a.m. e-mail on September 20, 2010 “consists of his opinion regarding Mr. O’Donnell's comments on and proposed revisions to a draft of Mr. Synnott’s response to Ms. Sussman’s demand letter.” The redactions also “consist of his opinion regarding litigation threatened by Ms. Sussman in her demand letter and the effect Mr. Synnott’s would have on that threatened litigation.”

Upon careful *in camera* review of Mr. Michaud'’ e-mail, the Court is not persuaded that the redacted portions of Mr. Michaud’s e-mail are shielded from disclosure by the attorney-client privilege. The redactions merely reflect Mr. Michaud’s own opinion about Mr. O’Donnell’s comments, and there is no evidence that Mr. Michaud intended this opinion to be communicated to Mr. Synnott. Also, the redacted portion does not divulge any communications between counsel and client. The Court is not persuaded that when one non-lawyer (Mr. Michaud) gives his opinion to a second non-lawyer (Mr. O’Donnell) about the second non-lawyer’s comments about a lawyer’s draft document, that the communication is protected under the attorney-client privilege. Accordingly, the Court concludes that the redacted portion of Mr. Michaud’s e-mail is not protected by the attorney-client privilege.

Finally, Mr. O’Donnell attests that the redacted portion of his 10:15 a.m. e-mail on September 20, 2010 “consists of his opinion regarding the litigation threatened by Ms. Sussman in her demand letter and the effect Mr. Synnott’s response would have on that threatened litigation,” and that “his intent was for Mr. Michaud to relay some or all of this information to Mr. Synnott.”

Once again, Mr. O’Donnell’s statement that he intended for “some or all” of his comments to be relayed to Mr. Synnott is unhelpful in the Court’s review. Likewise, it does not appear from the text of his e-mail or the other e-mails on the chain that Mr. O’Donnell intended for the redacted portion of the communication to be communicated to Mr. Synnott for the purpose of securing either an opinion of law, legal services or assistance in a legal matter. Accordingly, the Court concludes that the redacted portion of Mr. Michaud's e-mail is not protected by the attorney-client privilege.

Even though the attorney-client privilege does not apply to the redacted portions of these communications, the work product doctrine shields the redacted portions of this e-mail chain from disclosure. The redacted statements were committed to documents and were prepared by a party in anticipation of litigation. Mr. Keating has made no claim of substantial need or undue hardship that would justify disclosure.

E. Document 226

Document 226 is a September 2010 string of e-mails between Mr. Michaud and Mr. O’Donnell regarding revisions to a draft of Equisoft’s September 2010 letter responding to Mr. Keating's attorney. The document includes eight e-mails, six of which contain redactions.

Mr. Michaud attests that his two redacted e-mails to Mr. O’Donnell on the e-mail string “consist of his opinion about Mr. O’Donnell's comments on a draft of Mr. Synnott’s response to Mr. Sussman’s demand letter.” Mr. O’Donnell affirms that his three redacted e-mails to Mr. Michaud and one redacted e-mail to himself on the e-mail string “consist of his comments regarding a draft that I reviewed of Mr. Synnott’s response to Mr. Sussman’s demand letter,” and that his “intent was for Mr. Michaud to relay some or all of his comments to Mr. Synnott.”

The redacted information in Mr. O’Donnell's September 21, 2010 e-mails at 10:16 a.m., (2) 10:21 a.m., and (3) 10:21:49 a.m. contain substantive revisions to Mr. Synnott’s draft letter and were clearly intended to be communicated to Mr. Synnott through Mr. Michaud for the purpose of securing either an opinion of law, legal services, or assistance in the legal matter. Indeed, in Mr. Michaud’s 8:49 p.m. e-mail of the previous day, he included a revised version of the letter he sent to Mr. Synnott, and told Mr. O’Donnell that the lawyer “will call me to discuss the changes.” Also, after providing all of his substantive changes, Mr. O’Donnell asked Mr. Michaud to “call him after he talks with the lawyer.” Accordingly, in light of the factual background and the content of the letters, it seems that Mr. O’Donnell intended the redacted portion of these e-mails to be communicated to Mr. Synnott for the purpose of obtaining legal advice. Thus, the Court concludes that these three e-mails are protected by the attorney-client privilege.

The Court does not find, however, that the remaining redacted material in the e-mail string is protected by the attorney-client privilege. Regarding the redacted material in Mr. Michaud's September 21, 2010 e-mails at 10:49 a.m. and 1:31 p.m., as with Mr. Michaud's 10:11 a.m. e-mail on September 20, 2010 from Document 215, the Court is not persuaded that Mr. Michaud providing his opinion to Mr. O’Donnell about Mr. O’Donnell’s comments about a lawyer’s draft document is protected under the attorney-client privilege. This is especially true, where, as here, the Court cannot discern what “opinion” about Mr. O’Donnell's comments, if any, Mr. Michaud is communicating. Mr. Michaud’s two e-mails in this string do not divulge anything about Mr. Synnott’s underlying communications in the draft letter, or anything about Mr. O’Donnell’s comments about the letter. Accordingly, the Court concludes that the redacted portions of Mr. Michaud’s e-mails are not shielded by the attorney-client privilege.

However, the work product doctrine does shield the redacted portions of Mr. Michaud’s e-mails from disclosure. The redacted statements clearly qualify as a document prepared by a party in anticipation of litigation. Mr. Keating has made no claim of substantial need or undue hardship that would justify disclosure.

Finally, the redacted information in Mr. O’Donnell’s 10:53 a.m. e-mail on September 21, 2010 is not protected from disclosure by the attorney-client privilege because there is no indication that he intended his redacted statements to be communicated to Mr. Synnott and the statement does not request an opinion of law, legal services, or assistance in a legal matter. However, this document is entitled in work product protection for the same reasons as Mr. Michaud’s e-mails.

Accordingly, the Court finds that the attorney-client privilege and/or the work product doctrine shields the redacted portions of these documents from disclosure.

F. Document 240

Document 240 is a September 2010 string of e-mails between or among Mr. Michaud, Mr. O’Donnell, and Mr. Synnott regarding revisions to Equisoft’s September 2010 draft letter to Mr. Keating’s attorney. Equisoft produced the document to Mr. Keating but redacted Mr. Synnott’s 10:30 a.m. e-mail on September 22, 2010 to Mr. Michaud, and Mr. Michaud’s 12:15 p.m. e-mail to Mr. O'Donnell.

Mr. Michaud has affirmed that Mr. Synnott’s letter to him “consists of Mr. Synnott’s comments regarding a draft of his response to Ms. Sussman’s demand letter,” and his e-mail to Mr. O'Donnell “consists of his comments regarding that draft of Mr. Synnott’s letter and the timing of the sending of the final version.”

Mr. Synnott’s e-mail to Mr. Michaud is protected by the attorney-client privilege because it is a communication from an attorney to a client “relating to a fact of which the attorney was informed by his client for the purpose of securing either an opinion of law, legal services or assistance in a legal matter.”

The redacted portion of Mr. Michaud’s e-mail to Mr. O’Donnell is not protected by the attorney client privilege, however, because, as noted above, the personal opinion or comments from a non-lawyer to another non-lawyer about communications from a lawyer are not protected under the attorney client privilege. Rather, only the communications to or from the attorney are protected. Accordingly, Mr. Michaud’s e-mail is not shielded from disclosure by the attorney-client privilege.

However, the work product doctrine does shield the redacted portions of Mr. Michaud’s e-mail from disclosure. The redacted statements are contained in a document prepared by a party in anticipation of litigation. Mr. Keating has made no claim of substantial need or undue hardship that would justify disclosure.

Accordingly, the Court finds that the privilege attaches to Mr. Synnott's e-mail, and the work product doctrine shields Mr. Michaud’s e-mail from disclosure.

G. Document 253

Document 253 is a November 17, 2010 Executive Summary presented to the Equisoft Board of Directors, the last paragraph of which reports on Ms. Sussman’s September 2, 2010 demand letter and provides Mr. Synnott’s assessment regarding the probability of litigation. Equisoft has withheld the entire document — the final paragraph on work product and attorney-client privilege grounds and the rest because it is irrelevant to the subject lawsuit.

As an initial matter, the Court agrees that all but the last paragraph of this document is completely irrelevant to the subject lawsuit. Accordingly, it need not be disclosed.

With respect to the one relevant paragraph of the document, Mr. Michaud asserts that “along with Mr. Romero and Equisoft Finance Director Aurora Ciugulan,” he prepared the document for Equisoft’s seven board of directors, Equisoft’s Chief Information Officer Nicolas Ledoux, Equisoft Lead Architect Stephane Boutros, and Equisoft VP for Financial Products Jonathan Georges. Mr. Michaud asserts that “the final paragraph recounts Mr. Synnott’s assessment of the probability of Mr. Keating commencing litigation against Equisoft.”

The evidence submitted to the Court is insufficient to establish that the attorney-client privilege protects this document from disclosure. First, Mr. Michaud and Mr. Romero have attested that beyond the named individuals, they are “not aware of any further distribution of the document.” Indeed, Equisoft has not and cannot argue that Document 253 was seen only by the individuals discussed above. Regardless, even if the document was limited to these individuals, many of them were outside the group of senior management who Equisoft has indicated was responsible for making strategic decisions related to the legal issues involving Mr. Keating.

Moreover, contrary to Mr. Michaud’s assertions, only the final sentence of the Executive Summary — rather than the final paragraph — recounts Mr. Synnott’s assessment of the probability of Mr. Keating commencing litigation against Equisoft. The remainder of the paragraph merely recounts underlying facts that are not shielded by the attorney-client privilege. Nothing in the Executive Summary or in any of the supporting affidavits suggests that Mr. Synnott drafted these underlying facts. In fact, Mr. Michaud attested that he, not Mr. Synnott, prepared the final paragraph of the document. Only the last sentence offers any assessment by Mr. Synnott of the probability of litigation. Accordingly, the Court cannot conclude that Document 253 is fully shielded from disclosure by the attorney-client privilege.

Nor can the Court conclude that the work product doctrine shields this document from disclosure. Mr. Michaud asserts that “he prepared the final paragraph because of potential litigation with Mr. Keating,” but a document “falls within the scope of the work-product doctrine only if it was prepared primarily in anticipation of future litigation.” “Documents created in the ordinary course of business, even if useful in subsequent litigation, are not protected by the work-product doctrine.” Here, the Court cannot conclude that the executive summary was prepared primarily in anticipation of litigation. To the contrary, the purpose of the document was to update the board of directors on various issues facing the company, including the demand letter sent by Mr. Keating.

Accordingly, the Court finds that the last paragraph of Document 253 must be disclosed, but the remainder of the document may remain redacted on the basis of attorney-client privilege.

IV. CONCLUSION

In light of the foregoing, the twenty-four documents that Equisoft has redacted on the basis of attorney client privilege and/or the work product doctrine may remain redacted as presented to the Court in Equisoft's March 23, 2012 submission, but Equisoft shall produce Document 253 in redacted form as discussed above.

1. The Go-Gos, *Our Lips Are Sealed*, Beauty and the Beat (1981). [↑](#footnote-ref-0)
2. During the evidentiary hearing, defense counsel attempted to impeach Ms. Ducharme with her grand jury testimony. Before the grand jury, Ms. Ducharme initially testified that she gave appellant advice “as a lawyer,” but then stated a few moments later that appellant had called her “as his girlfriend.” The trial court presumably considered this discrepancy but nevertheless found Ms. Ducharme credible. [↑](#footnote-ref-1)
3. The government argues that even if there was error in the admission of the conversation, the error was harmless because the case against appellant was strong, noting in particular the DNA evidence and the testimony of the two neighbors. Given our conclusion that the conversation between appellant and Ms. Ducharme was not protected by the attorney-client privilege, we need not reach this issue. [↑](#footnote-ref-2)
4. Cheetham was ordered to answer these specific questions:

   1. Do you know John Doe?
   2. When did you first meet him?
   3. How many times have you met with him in person?
   4. Would you recognize him if you saw him again?
   5. Did you (or someone from your office) prepare Exhibits 1-5 [the INS documents] at his request?
   6. Is the photograph on Exhibits 1 and 2 a true likeness of John Doe?
   7. Did you witness John Doe sign his name on Exhibits 1-5?
   8. If not, do you know who, if anyone, witnessed the signature?

   [↑](#footnote-ref-3)
5. Cheetham seeks to invoke the Texas statutory attorney-client privilege as controlling in this action. The “Texas Rule” provides that “an attorney shall not disclose any other facts which came into knowledge of such attorney by reason of such relationship.” However, questions of privilege are governed by the common law as interpreted by federal courts in the absence of a relevant Supreme Court rule, federal statute, or constitutional provision. We therefore apply the common law rule in this action, and not the Texas Rule. [↑](#footnote-ref-4)
6. I also conclude that the privilege is not lost if a third person whose presence is not otherwise justified overhears a confidential attorney-client communication without the client’s knowledge, so long as reasonable precautions were taken to protect against overhearing. However, because the nurse’s presence was justified, the reasonableness of the precautions taken to exclude third parties has no bearing on the question before us. [↑](#footnote-ref-5)
7. Neither Mr. Michaud nor Mr. O’Donnell are attorneys, and they are the only individuals copied on either of the redacted e-mails or any e-mails in the string. Unless otherwise indicated, the same is true for the other documents in question. However, each of the individuals in the senior management of the Company, as well as Mr. Synnott, have affirmed that Mr. Michaud “was responsible for communicating with Mr. Synnott on behalf of the company,” and “often relayed questions, information, comments, and advice” from Mr. Synnott to the control group. Because a document “need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds,” provided it “reflects confidential communications between client and counsel for the purposes of (1) providing legal services or (2) providing information to counsel to secure legal services,” the absence of an attorney copied on the e-mails in question does not necessarily defeat the assertion of the attorney client privilege. Also, as noted above, the Court is not persuaded that simply because Mr. Synnott is admitted to practice law only in foreign jurisdictions that he is not “a member of the bar of a court" for the purposes of the attorney-client privilege and the work product doctrine. Therefore, the Court will treat Mr. Synnott as an attorney (which he, indeed, is) for the purposes of this analysis. [↑](#footnote-ref-6)