**6.5: Corporate Privilege**

When an attorney represents an organization, the default position of the law is that the client is the organization, and not its agents. However, an attorney representing an organization can form an attorney-client relationship with one or more agents of the organization, in addition to or instead of the organization itself, by explicit agreement. For example, an attorney could represent a particular agent of the organization, or a component of the organization, like its board of directors.

When an attorney-client relationship exists between an attorney and an organization, the attorney-client privilege may protect communications between the attorney and the organization. As a practical matter, the privilege may protect communications between the attorney and certain agents of the organization. Courts must determine whether the privilege applies to communications with particular agents and about particular subjects.

When an attorney represents an organization, the attorney-client privilege belongs to the organization, not its agents. Accordingly, only the organization can waive the privilege. While an agent of the organization must effectuate the waiver, agents may waive the privilege only for the benefit of the organization, not for their own personal benefit or the benefit of any third-party. In addition, the organization may waive the privilege without the consent of the agent or agents who participated in the communication.

Of course, the agents of an organization may form an attorney-client relationship with their own attorney, in which case their communications with their attorney may also be protected by the attorney-client privilege. But the agents of an organization may not personally claim the privilege in relation to communications they made as agents of the organization.

While the attorney-client privilege may protect communications between an attorney representing an organization and the agents of that organization, it does not necessarily protect all such communications, only those for the purpose of providing legal advice. And it does not necessarily protect communications with all agents. A small minority of states apply the “control group” test, which provides that the privilege only protects communications with the management of the organization. But most states and the federal courts apply the “*Upjohn*” test adopted by the Supreme Court, under which the privilege can protect communications with any agent, so long as the communication was for the purpose of providing legal advice, including the collection of information for the purpose of providing legal advice.

**The “*Upjohn*” Test for Corporate Privilege**

[***Upjohn Co. v. United States*, 449 U.S. 383 (1981)**](https://scholar.google.com/scholar_case?case=5153750416071396937)

**Summary:** The Supreme Court held that the attorney-client privilege applies to an organization’s attorney’s communications with its agents: 1) when a communication is made to the organization’s counsel that is acting in their capacity as counsel (and not as business consultants, for example); 2) at the direction of management for the purpose of securing legal advice from counsel; 3) concerning a subject within the scope of employment; and 4) when the agent knows that the purpose of the communication is for the organization to procure legal advice.

JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. With respect to the privilege question the parties and various amici have described our task as one of choosing between two “tests” which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn’s foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants so informed petitioner Mr. Gerard Thomas, Upjohn’s Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn’s General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn’s Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed “questionable payments.” As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to “All Foreign General and Area Managers” over the Chairman’s signature. The letter began by noting recent disclosures that several American companies made “possibly illegal” payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as “the company's General Counsel,” “to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government.” The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as “highly confidential” and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments. A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons demanding production of:

All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.

The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company’s foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries.

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney-client privilege, but agreed that the privilege did not apply “to the extent that the communications were made by officers and agents not responsible for directing Upjohn’s actions in response to legal advice for the simple reason that the communications were not the ‘client’s.’” The court reasoned that accepting petitioners’ claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a “zone of silence.” Noting that Upjohn’s counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was within the “control group” could be made. In a concluding footnote the court stated that the work-product doctrine “is not applicable to administrative summonses.”

II

Federal Rule of Evidence 501 provides that “the privilege of a witness shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.” The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 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. “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.” The purpose of the privilege is “to encourage clients to make full disclosure to their attorneys.” This rationale for the privilege has long been recognized by the Court. 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, and the Government does not contest the general proposition.

The Court of Appeals, however, considered the application of the privilege in the corporate context to present a “different problem,” since the client was an inanimate entity and “only the senior management, guiding and integrating the several operations, can be said to possess an identity analogous to the corporation as a whole.”

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1:

A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

In the case of the individual client the provider of information and the person who acts on the lawyer’s advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—”officers and agents responsible for directing the company’s actions in response to legal advice” —who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem “is thus faced with a ‘Hobson's choice’. If he interviews employees not having ‘the very highest authority’, their communications to him will not be privileged. If, on the other hand, he interviews only those employees with ‘the very highest authority’, he may find it extremely difficult, if not impossible, to determine what happened.”

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney’s advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation’s policy.

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, “constantly go to lawyers to find out how to obey the law,” particularly since compliance with the law in this area is hardly an instinctive matter. The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying “test” will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a “substantial role” in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability.

The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, “Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the company with respect to the payments.” Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees’ corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as “the company's General Counsel” and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued “in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation.” It began “Upjohn will comply with all laws and regulations,” and stated that commissions or payments “will not be used as a subterfuge for bribes or illegal payments” and that all payments must be “proper and legal.” Any future agreements with foreign distributors or agents were to be approved “by a company attorney” and any questions concerning the policy were to be referred “to the company’s General Counsel.” This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered “highly confidential” when made, and have been kept confidential by the company. Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad “zone of silence” over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

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 communications to his attorney.

Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*: “Discovery was hardly intended to enable a learned profession to perform its functions on wits borrowed from the adversary.”

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. While such a “case-by-case” basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow “control group test” sanctioned by the Court of Appeals in this case cannot, consistent with “the principles of the common law as interpreted in the light of reason and experience,” govern the development of the law in this area.

**Questions:**

1. Which agents of an organization can be parties to privileged communications?
2. When is a communication with an agent of an organization not privileged?
3. Is the *Upjohn* test for corporate privilege too narrow, too broad, or just right?

[***Matter of Bevill, Bresler & Schulman Asset Manag.*, 805 F. 2d 120 (3d Cir. 1986)**](https://scholar.google.com/scholar_case?case=16630521128997515654)

**Summary:**

SEITZ, Circuit Judge.

This appeal arises out of two related proceedings currently before the district court: the Chapter 11 reorganization of Bevill, Bresler & Schulman Asset Management Corporation (AMC) and the liquidation of Bevill, Bresler & Schulman, Inc. (BBS) under the Security Investor Protection Act (SIPA). Intervenors John D. Rooney and Robert L. Bevill, two principals of the corporations, appeal the order of the district court directing Gilbert Schulman, president of AMC, and Hellring, Lindeman, Goldstein, Siegal & Greenberg, counsel for BBS, to respond to questions posed in depositions by the trustees for AMC and BBS. The order permits the trustees to discover the substance of certain meetings that took place between the law firm and the principals of the corporations before the Chapter 11 petition was filed. Because Rooney and Bevill allege that the district court's order violates their attorney-client privilege, we have jurisdiction.

I.

We turn first to the facts as narrated by the district court. Gilbert Schulman first became aware that AMC was in financial difficulties on March 19, 1985, when Robert Bevill telephoned him in Greece. After talking again with Bevill on the following day, Schulman flew back to the United States. According to Schulman, he was unable to obtain any information about AMC until he consulted with Hellring, Lindeman on March 25, 1985.

Between March 25, 1985 and April 7, 1985, Schulman met with Hellring, Lindeman almost daily. Other principals of BBS and AMC, including Bevill and Rooney, were present at some of these meetings.

When Schulman first met with Hellring, Lindeman, he explained that he was seeking both personal and corporate legal advice. In his deposition, he testified that with regard to the March 26th meeting:

I stated to Mr. Hellring and Mr. Goldstein that I had arranged for Mr. Bevill to come down and meet them and at that point I had said to them that “Possibly you will represent me, possibly you will represent Mr. Bevill and me, possibly you will represent the firms,” but I was definitely seeking personal legal advice at that time.

On March 31, 1985, Hellring, Lindeman was retained to represent BBS. In addition, it continued to consider whether it would represent the principals of BBS. On April 4, 1985, Hellring, Lindeman informed the principals that they should obtain separate counsel.

On April 7, 1985, AMC filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Code. A trustee was subsequently appointed by the district court. On April 8, the SEC filed a civil complaint in the district court alleging fraud against AMC, BBS, and the principals of the corporations, including appellants. In addition, the SEC began a criminal investigation, and there is currently a grand jury investigation into the affairs of the two corporations. On May 8, the district court placed BBS under a SIPA receivership and the SIPA trustee commenced a liquidation proceeding.

On May 13, 1985, the counsel for the AMC trustee began to depose Schulman. By the consent of the parties, this deposition was conducted as a joint proceeding in the AMC Chapter 11 proceeding, the BBS SIPA liquidation, and the SEC proceeding. The AMC trustee sought to depose Schulman as to the substantive communications between Hellring, Lindeman and the principals, and indicated that the trustee had waived AMC's attorney-client privilege. Schulman's counsel instructed Schulman not to answer the questions. Counsel for the other principals also instructed Schulman not to respond, asserting the existence of a joint defense privilege.

On May 21, 1985, the deposition of Schulman resumed, and the AMC trustee began questioning Schulman about the circumstances surrounding the meetings with counsel, including the dates of the meetings, who was present, and whether the discussions involved personal or corporate matters. Once again, counsel for the other principals objected on the grounds of a joint defense privilege.

The AMC and BBS trustees and the SEC subsequently filed motions with the district court for an order directing the principals and Hellring Lindeman to respond to a series of questions as to the circumstances surrounding the meetings. In opposition to these motions, Rooney filed an unsworn affirmation with the district court stating that he met with counsel for personal advice and with the expectation that the communications would be confidential. He further stated that he would not have met with counsel without the assurance of confidentiality.

After a hearing, the district court ordered Bevill, Rooney, Schulman, Robert Levine, another principal, and Hellring, Lindeman to answer written interrogatories about the scope of counsel's representation. Bevill and Rooney refused to answer the interrogatories on the ground of the fifth amendment. Schulman stated that he attended all meetings except the March 31st meeting for the purpose of securing personal legal advice. Levine concurred in this statement, and also stated that the participants in the meetings were engaged in a joint defense effort. Schulman, however, has asserted in a letter to the BBS trustee from his counsel that he was never part of a joint defense.

Hellring, Lindeman confirmed in their answers to the interrogatories that the principals had sought both personal and corporate legal advice at the meetings that occurred from March 25th through April 4th. In a letter to the BBS trustee, it further explained its understanding of its representation:

Our firm was initially consulted on Monday, March 25, 1985. On that date and during the week of March 25, 1985 we were consulted by officials of Bevill, Bresler & Schulman, Inc. on a confidential and privileged basis for the purpose of personal representation as well as corporate representation of Bevill, Bresler & Schulman, Inc. and other companies.

We were not retained until Sunday, March 31, 1985 on which date we agreed to represent Bevill, Bresler & Schulman, the broker/dealer and its affiliated broker/dealer companies and to consider further the matter of representation for the individuals and other corporations.

During the next few days we continued to be consulted by officials of Bevill, Bresler & Schulman, Inc. on a confidential and privileged basis for purposes of personal representation and to consider the need therefor.

Within a few days of March 31, 1985 we advised each individual official to retain separate and individual counsel.

The trustees, relying on their waiver of the corporations’ attorney-client privileges, moved for an order directing Schulman and Hellring, Lindeman to testify about the substance of the meetings insofar as they related to the affairs of the two corporations and Schulman's activities as a director or officer of the corporations. Bevill and Rooney opposed the motions based on their attorney-client privileges and a joint defense privilege.

After hearing argument from counsel on the trustees' motions, the district court, in an oral opinion, granted the motions in part. The court held that a corporate officer must satisfy the following test to assert a personal claim of attorney-client privilege as to communications with corporate counsel:

First, they must show they approached counsel for the purpose of seeking legal advice. Second, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with counsel were confidential. And, fifth, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.

The court rejected Rooney’s claim that he consulted with counsel for the sole or primary purpose of securing personal legal advice, finding such a claim unsupported by the evidence. It then turned to the principals’ contention that the corporate communications were indistinguishable from those that related to their personal legal problems, and that, therefore, all communications are privileged. The court agreed with Bevill and Rooney insofar as the trustees sought to obtain information about meetings prior to March 31st when Hellring, Lindeman agreed to represent BBS. The court thus held that these communications were privileged. The trustees do not appeal this ruling.

It, however, rejected the appellants claim of a blanket privilege for those meetings that occurred after March 31st. It found that once Hellring, Lindeman agreed to represent BBS, it was to BBS that the lawyers owed any duty. Further, based on counsel’s knowledge of BBS and AMC when the bankruptcy petition was filed, the court found that “it is obvious that immediately after March 31, 1985, Hellring, Lindeman turned its attention to the affairs of its corporate clients.” Finally, the court stated that the only personal advice that had been identified was that relating to separate representation.

The court also rejected Bevill’s and Rooney’s claim of a joint defense privilege, finding that they did not bear their burden of showing that a joint defense in fact existed.

The district court ordered Hellring, Lindeman to testify as to all communications about the corporations and the roles and functions of the officers that took place after the law firm agreed to represent BBS. It further held that no questions could be asked concerning separate representation or the officers' potential personal liabilities, unless the communications also related to the business and assets of the corporations or the roles of the principals in the corporations. Finally, the court stated that Hellring, Lindeman could submit any communications it was doubtful about to the court for in camera inspection. This appeal followed.

II.

Bevill and Rooney claim that the district court’s order directing disclosure of the substantive communications with counsel between March 31st and April 4th violates their attorney-client privilege. In addition, Bevill claims that such disclosure is barred by the joint defense privilege.

Privileges in federal court are “governed by the principles of common law as they may be interpreted in light of reason and experience.” Whether there is a valid claim of privilege is decided on a case-by-case basis. Although the applicability of a privilege is a factual question, determining the scope of a privilege is a question of law, subject to plenary review.

A.

The purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in observance of the law and administration of justice.” This privilege applies to corporations as well as individuals. As the Supreme Court has recognized, however, “the administration of the privilege in the case of corporations presents special problems. As an inanimate entity, a corporation must act through agents.”

In this case, we address the relationship between a corporation’s waiver of its privilege and the individual directors’ assertion of a claim of personal attorney-client privilege with respect to counsel consulted on both a personal and corporate basis after the counsel has been retained by the corporation. The parties agree that the trustees had the power to waive the corporations’ attorney-client privilege regarding prebankruptcy communications with counsel. They also agree that the directors or officers may have an individual attorney-client privilege apart from those of the corporations. The dispute centers on whether the individuals’ assertion of an attorney-client privilege can prevent the disclosure of corporate communications with corporate counsel when the corporation’s privilege has been waived.

As we understand appellants’ position, they claim that the district court erred as a matter of law in holding that communications related to their role as corporate officers were not privileged. They contend that because their personal legal problems were inextricably intertwined with those of the corporation, disclosure of discussions of corporate matters would eviscerate their personal privileges. They therefore assert that a blanket privilege should be applied to all communications with counsel between March 31st and April 4th.

The appellants’ argument, however, does not pay sufficient attention to the fact that under existing law, any privilege that exists as to a corporate officer’s role and functions within a corporation belongs to the corporation, not the officer. Because a corporation can act only through its agents, a corporation’s privilege consists of communications by corporate officials about corporate matters and their actions in the corporation. A corporate official thus may not prevent a corporation from waiving its privilege arising from discussions with corporate counsel about corporate matters.

The two decisions cited by appellants, *In re Citibank v. Andros* and *Diversified Industries, Inc. v. Meredith*, do not support their position that they may assert their personal privilege over the corporation's waiver with regard to corporate matters. Rather, these two cases simply recognize that an individual officer may have an individual claim of attorney-client privilege with regard to communications with corporate counsel.

Moreover, we find that appellants' position is contrary to the public policies identified by the Supreme Court. The *Weintraub* Court found that permitting a bankrupt corporations’ management to assert the corporation's privilege against the bankruptcy trustee would defeat the Bankruptcy Code’s goal of uncovering insider fraud. To provide a blanket privilege regarding all discussions of corporate matters on the basis of an assertion of personal privileges by the officers would prevent the trustee from investigating possible misconduct by the officers and permit the officers to “use the privilege as a shield against the trustee’s efforts.”

The test adopted by the district court does not invade the personal privilege of the officers because they do not have an attorney-client privilege with regard to communications made in their role as corporate officials. Moreover, the district court has not precluded the possibility that appellants may assert their personal privilege as to matters not related to their role as officers of the corporation. First, the order directs that no questions could be asked regarding the need for separate representation. Second, the court allowed for the possibility that appellants could demonstrate that some of the communications after March 31st were personal and protected communications relating to the principals’ personal liabilities, except insofar as they were related to their role as corporate officers. Finally, the district court held that it would review *in camera* any communication over which there was a question whether it was personal or corporate in nature.

In light of the foregoing analysis, we find that the district court’s order properly defined the extent to which the principals were entitled to bar discovery of communications with counsel based on their individual attorney-client privileges.

**Questions:**

1. Under the commonly used *Bevill* standard, agents of an organization seeking to prove either a joint or separate attorney-client relationship with the organization’s attorney must establish that: 1) the employee approached the corporation’s attorney for legal advice; 2) the employee made it clear that the request had to do with matters that arose in his or her individual capacity; 3) the attorney understood this request and advised on the matter even though there was a potential for conflict; 4) these communications were confidential; and 5) the subject matter of the communication did not concern a more general corporate matter. How frequently do you think agents will be able to satisfy these criteria?

**The “Need to Know” Standard**

**Summary:**

[***FTC v. GlaxoSmithKline*, 294 F. 3d 141 (D.C. Cir. 2002)**](https://scholar.google.com/scholar_case?case=2848554231762596877)

GINSBURG, Chief Judge:

In the course of investigating whether a manufacturer of drugs listed its patents properly in the compilation maintained by the Food and Drug Administration, the Federal Trade Commission issued a subpoena directing the company to produce documents relating to a particular drug. When the company resisted, claiming the attorney-client privilege shields the documents, the Commission repaired to the district court, which enforced the subpoena. We reverse the decision of the district court because the court both relied upon an argument to which the company had no opportunity to respond and ruled erroneously that, by failing to keep confidential the contents of the documents, the company had waived the attorney-client privilege.

I. Background

GlaxoSmithKline manufactures paroxteine hydrochloride hemihydrate under the brand name Paxil, the annual sales of which in the United States exceed $1 billion. Several companies have applied to the Food and Drug Administration for permission to sell generic versions of Paxil when GSK’s patents expire. The Federal Trade Commission is investigating whether GSK, in an attempt to prevent or delay competition from generic versions of Paxil, has abused the process for listing its patents in the FDA’s compilation of “Approved Drug Products with Therapeutic Evaluations.”

The Commission issued a subpoena directing GSK to produce two types of documents. First, the Commission sought all documents concerning Paxil that the United States District Court for the Northern District of Illinois had directed GSK to disclose when GSK had sued two manufacturers of generic pharmaceuticals for infringement of its patents — the so-called Chicago documents. Second, the Commission wanted all “documents related to the manufacturing and marketing of Paxil, the listing and use of any patents regarding Paxil, and any filings with the FDA regarding Paxil.” GSK and the Commission resolved their differences over the inclusion or exclusion of thousands of documents, but because GSK declined to produce hundreds of others — primarily on the ground that they were shielded by the attorney-client privilege — the Commission petitioned the district court to enforce the subpoena.

The parties then agreed upon a procedure for presenting their positions to the district court. First, each would submit its contentions about the Chicago documents. If the court compelled GSK to produce those documents, then the parties would contest the second category of documents as follows. The Commission would “identify for GSK every responsive (and allegedly privileged) document that the Commission sought to have produced and the reason(s) why each privilege claim was invalid." GSK would then either produce the document or list it in a “privilege log identifying any documents as to which it continued to assert privilege.” Accordingly, only after the Commission had informed GSK of its objections to the Company's claims of privilege would the parties seek judicial resolution. At that final stage the court would either call for oral argument or resolve summarily “any issues submitted to it in connection with the FTC’s enforcement petition.”

The district court did enforce the subpoena with respect to the Chicago documents. The parties then resolved through negotiation their disputes about the disclosure of hundreds more documents, leaving unresolved the status of only 91. GSK asserted that all 91 documents were protected by the attorney-client privilege and that 34 of them were protected also by the privilege for attorney work product. The Commission told GSK it considered the assertions of privilege invalid for two reasons: (1) GSK had forfeited its claim to confidentiality by disseminating all 91 documents widely both within GSK and to consultants and other third-parties; and (2) the decision in *Apotex* estopped GSK from asserting that the 34 documents were attorney work product, that is, were prepared in anticipation of litigation. In response to these objections, GSK compiled a privilege log describing each of the 91 documents, and the parties presented their arguments to the district court.

In its opening brief to the district court, the Commission raised the two objections it had previously presented to GSK. The Commission also introduced in that brief a new argument: Regardless whether *Apotex* foreclosed the Company’s claim of attorney work product, GSK’s privilege log “failed to provide facts demonstrating that the documents were created in anticipation of litigation.” When GSK objected that the Commission had not made this argument during pre-motion negotiations, the Commission withdrew the argument. It explained in a Stipulation approved by the district court that it had “inadvertently failed to provide GSK with the agreed advance notice regarding the grounds for challenging the documents.”

GSK submitted its responsive brief to the district court and attached thereto the Company’s privilege log and the affidavit of Charles Kinzig, GSK’s Vice President and Director of Corporate Intellectual Property. For each document, the log described the contents; listed the author, intended recipients, and date of creation; and noted whether the author or intended recipients were attorneys. A supplement to the log indicated the title or titles of each person therein named who was not an attorney. The Kinzig Declaration stated that the documents had been disseminated to various “teams” of company employees and contractors, and explained the duties of each team. According to Kinzig, all the teams were “involved in seeking or giving legal advice and/or gathering and recording information in anticipation of or preparation for litigation.” The Kinzig Declaration states also that every employee and contractor named in the privilege log was “bound not to disclose confidential information to persons outside GSK” without receiving permission from a high-ranking official of the Company.

The Commission then filed a reply brief in which it made yet another argument for the first time: The attorney-client privilege does not shield the documents because they contain no confidential information.

The district court ordered GSK to produce the 91 documents. The court rejected GSK’s claims of attorney-client privilege on the grounds that (1) “GSK had not sustained its burden of demonstrating that the relevant documents were distributed on a ‘need to know’ basis or to employees that were ‘authorized to speak or act’ for GSK," and (2) the Company had “failed to provide sufficient evidence that the information contained therein is confidential.” The court rejected GSK’s claims of attorney work product for the reason withdrawn by the Commission, namely, that “GSK failed to set forth objective facts that support the corporation’s assertion that the relevant documents were created in anticipation of litigation.” Having determined that “even if GSK is not precluded from asserting the privilege for attorney work product, it has failed to satisfy its burden of showing the applicability of the doctrine to the relevant documents,” the district court found it unnecessary to resolve whether the decision in Apotex estopped GSK from claiming otherwise. GSK sought and we granted a stay pending appeal.

II. Analysis

GSK contends the district court erred both by rejecting its claims of privilege based upon arguments the Commission did not raise properly and by misapplying the standard for determining whether a corporation has kept confidential the contents of a communication. The Commission defends the decision of the district court and argues that GSK is collaterally estopped in any event, by reason of the *Apotex* litigation, from claiming the 34 documents are attorney work product.

The district court held that GSK failed to establish either of two prerequisites for recognition of the attorney-client privilege — that the documents contain confidential information and that they have been kept confidential. As the Company points out, during the parties’ negotiations the Commission did not dispute that the documents contain confidential information. The Commission did not even raise the argument in its opening brief before the district court, waiting instead until its reply brief and thereby depriving GSK of any opportunity to respond.

The Commission had agreed, pursuant to the Scheduling Stipulation approved by the district court, to inform GSK of its reasons for disputing the Company's claims of privilege before asking the court for a ruling. The Commission therefore was bound not to put before the district court any objection not first raised with its adversary. Accordingly, the district court abused its discretion when it ruled against GSK based upon an argument that was raised not only in violation of the Scheduling Stipulation but so belatedly that the Company had no chance to respond to it.

The question that remains is whether the district court erred in ruling that GSK failed to satisfy the second prerequisite for attorney-client privilege — that the documents have been kept confidential. GSK contends that this issue, too, was raised in a manner that deprived the Company of an opportunity to respond. We think not. The Commission took the position in its negotiations with GSK that the Company had lost its claim of privilege by disseminating the documents widely. This argument put the Company on notice that it needed to establish it had kept the documents confidential. The Commission renewed the point in its opening brief to the district court thus: “In view of the breadth of distribution and GSK’s failure to carry its burden of establishing that each and every recipient had a demonstrable ‘need to know,’ GSK’s assertions of attorney-client privilege must fail." And the Company joined this argument on the merits before the district court. Having defended as sufficient the evidence it submitted to the district court on this point, GSK may not now claim it was unfairly surprised by the argument.

Although the district court was correct to entertain the Commission’s second argument, it erred in resolving the legal issue. The applicable standard is, as the district court recognized, whether “the documents were distributed on a ‘need to know’ basis or to employees that were ‘authorized to speak or act’ for the company.” The Company’s privilege log and the affidavit of Charles Kinzig establish that GSK circulated the documents in question only to specifically named employees and contractors, most of whom were attorneys or managers and all of whom “needed to provide input to the legal department and/or receive the legal advice and strategies formulated by counsel.” The affidavit also states that each intended recipient was bound by corporate policy or, in the case of the contractors, by a separate understanding, to keep confidential the contents of the documents. The Company’s submission thus leads ineluctably to the conclusion that no document was “disseminated beyond those persons who, because of the corporate structure, needed to know its contents.”

The district court faulted GSK for not having explained “why any, let alone all, of the employees received copies of certain documents,” and the Commission likewise claims on brief that GSK should have shown why each individual in possession of a confidential document “needed the information therein to carry out his/her work.” These demands are overreaching. The Company’s burden is to show that it limited its dissemination of the documents in keeping with their asserted confidentiality, not to justify each determination that a particular employee should have access to the information therein. Not only would that task be Herculean — especially when the sender and the recipient are no longer with the Company — but it is wholly unnecessary. After all, when a corporation provides a confidential document to certain specified employees or contractors with the admonition not to disseminate further its contents and the contents of the documents are related generally to the employees’ corporate duties, absent evidence to the contrary we may reasonably infer that the information was deemed necessary for the employees’ or contractors’ work. We do not presume, therefore, that any business would include in a restricted circulation list a person with no reason to have access to the confidential document — that is, one who has no “need to know.”

Moreover, we can imagine no useful purpose in having a court review the business judgment of each corporate official who deemed it necessary or desirable for a particular employee or contractor to have access to a corporate secret. It suffices instead that the corporation limited dissemination to specific individuals whose corporate duties relate generally to the contents of the documents. As we have seen in this case, the privilege log and the Kinzig Declaration together establish that GSK did just that, and the Company thereby demonstrated its entitlement to the attorney-client privilege. The FTC has proffered nothing to the contrary.

Our conclusion that the documents are protected by the attorney-client privilege extends also to those communications that GSK shared with its public relations and government affairs consultants. The Kinzig affidavit notes that GSK’s corporate counsel “worked with these consultants in the same manner as they did with full-time employees; indeed, the consultants acted as part of a team with full-time employees regarding their particular assignments” and, as a result, the consultants “became integral members of the team assigned to deal with issues that were completely intertwined with GSK’s litigation and legal strategies.” In these circumstances, “there is no reason to distinguish between a person on the corporation’s payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice.”

**Questions:**

1. Why does it matter for the attorney-client privilege whether an agent of an organization “needed to know” about a communication?
2. How demanding is the “need to know” standard?
3. When does an agent of an organization fail to satisfy the “need to know” standard?

**Independent Contractors**

[***Steinfeld v. IMS Health Inc.*, No. 10 Civ. 3301 (S.D.N.Y. 2011)**](https://scholar.google.com/scholar_case?case=15852452936440038846)

**Summary:**

PAUL E. DAVISON, Magistrate Judge.

By letter dated October 31, 2011, Plaintiff seeks an order compelling Defendant to produce certain documents containing communications shared between attorneys for Defendant and a compensation consulting firm and its principal, Steven Root. Defendant’s offer to produce the documents at issue for *in camera* inspection was accepted and that material has been reviewed.

IMS retained Root as an independent equity compensation consultant.[[1]](#footnote-0) He advises IMS directors and counsel on matters involving the company’s executive compensation and benefits plans and disclosure obligations. On this basis, Defendant contends that the communications shared between counsel for IMS and Root are protected by the attorney-client privilege. Defendant relies upon the theory announced by the Eighth Circuit in *In re Bieter Co.*, and which a small number of district courts within this circuit have recognized. Under this authority, the privilege is extended in certain narrow instances to protect “communications between a corporation’s attorney and outside agents or consultants to the corporation who act as the functional equivalent of a corporate employee.” Defendant specifically argues that Root was the functional equivalent of an IMS employee because he “contributed to the rendering of legal advice in communications with the client's outside counsel,” was “necessary to such communications,” and “possessed information needed by IMS counsel in order to render legal advice” to their client.

Generally, the presence of third parties waives entitlement to the attorney-client privilege. While, as discussed below, certain exceptions apply, courts should be cautious when expanding the privilege’s application. The party asserting entitlement to the privilege bears the burden of proof.

Because the cases relied upon by counsel in this matter are extremely fact-specific, I first discuss *Bieter* and other cases applying its functional equivalence test.

In *Bieter*, a two-man partnership formed for purposes of developing farm land. A third-party real estate consultant was retained who worked out of the company's office for several years. The consultant's primary duty was to secure tenants for the development project. He also worked directly with architects, other consultants, and attorneys on matters related to the project and its ensuing litigation. He appeared on behalf of the company at public hearings and was viewed by the public as a representative of the company. Accordingly, the court determined that “there was no principled basis to distinguish the consultant’s role from that of an employee, and his involvement in the subject matter of the litigation makes him precisely the sort of person with whom a lawyer would wish to confer confidentially in order to understand the company’s reasons for seeking representation.”

In *In re Copper Market Antitrust Litigation*, a Japanese corporation retained a public relations firm as an independent consultant after a corporate executive disclosed information which prompted government investigations and litigation. The corporation had no experience with, or other employees who could deal with, public relations communications in the English-speaking, Western media. The PR firm issued press statements on behalf of the corporation and otherwise communicated with the Western press as an agent of the corporation. In the course of preparing and making its communications and statements, the firm consulted with the corporation's in-house and outside counsel. The firm also had the authority to make independent decisions on the corporation's behalf with respect to public relations matters. Accordingly, the court determined that the firm was the functional equivalent of a corporate employee.

In *Twentieth Century Fox Film Corporation v. Marvel Enterprises*, a studio contracted with individuals as independent contractors to perform movie production services. The film produced became the subject of ensuing litigation. The court held that the contractors were the functional equivalent of employees because “the sporadic nature of employment in the motion picture industry dictates the use of independent contractors over employees.”

In *In re Adelphia Communications Corporation*, an independent credit counseling firm was retained as an independent contractor. An employee of the contractor worked full-time at the corporation for three years. He held substantial responsibility with respect to the corporation's relations with another company. He also became the primary contact person between the corporation and the other company, and was given authority to make decisions and to speak on behalf of the corporation. In addition, the employee of the contractor sought legal advice from the corporation's counsel as part of his job duties. Accordingly, the court held that this individual was “the functional equivalent of a corporate employee.”

In *American Manufacturers Mutual Insurance Company v. Payton Lane Nursing Home*, an independent construction management contractor was retained by a company for purposes of overseeing the daily operations of a construction project. The company itself did not send its own employees to the construction site, nor did it employ staff with construction experience. The contractor was given authority to speak for, and to make decisions on behalf of, the company relating to the construction project. This included negotiating with contractors and pursuing payments. The contractor also sought legal advice from the company’s attorney regarding the construction project. Accordingly, the court held that the contractor served as the company's “eyes and ears” and was therefore the functional equivalent of an employee.

In contrast, in *Export-Import Bank of the United States v. Asia Pulp and Paper Company*, a Singapore corporation retained an independent financial consultant to help the corporation restructure its debt. The corporation did not have employees of its own with experience in restructuring. The consultant negotiated on behalf of the corporation and communicated the corporation’s positions to creditors. Although the corporation provided the consultant with office space in its building, the office was not used. Additionally, the court determined that the consultant did not spend a sufficient amount of his time working with corporation. Accordingly, the court held that the party asserting entitlement to the attorney-client privilege failed to meet its burden to show that the consultant was “so fully integrated into the corporation’s hierarchy as to be a de facto employee.”

In this case, Defendant has failed to meet its burden to show that Root is the functional equivalent of an IMS employee. First, there is no indication that IMS uses independent contractors instead of employees because its business is sporadic. Second, there is no evidence that Root has ever appeared on behalf of IMS, corresponded with third parties as a representative of IMS, or has been viewed by others as an employee of IMS. *In camera* review of the documents at issue reveals that Root frequently signed his emails as the managing director of his consulting firm and submitted memoranda on his own firm’s letterhead.

Third, Defendant offers nothing to suggest that Root was so physically present that he functioned as a de facto employee. For example, there is nothing to indicate that Root has ever maintained an office at IMS or otherwise spent a substantial amount of his time interacting with, and working on behalf of, the corporation.

Fourth, Defendant offers nothing to show that IMS lacked the internal resources necessary for an employee to perform Root’s services. Indeed, as in camera review tends to confirm. Root participated as part of a “team” of IMS employees and outside counsel.

Fifth, the evidence presented does not reveal that Root exercises any measure of independent decision-making authority within this team. Instead, it appears that Root’s role was to provide suggestions, comments, and (non-legal) advice.

Finally, Defendant has failed to show that Root has ever sought out legal advice from IMS’s attorneys as part of his work with the corporation. Rather, the communications reviewed indicate that it was Root who offered advice and suggestions to counsel and the team in general.

Root’s status vis-a-vis Defendant is simply distinguishable from the situations in those cases that have followed Bieter. Root is not, therefore, the functional equivalent of an IMS employee.[[2]](#footnote-1) Accordingly, Plaintiffs request to compel production Is GRANTED. Defendant is directed to produce to Plaintiff the documents shared with Mr. Root or his firm no later than December 16, 2011.

**Former Employees**

[***US v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554 (E.D. Pa. 2004)**](https://scholar.google.com/scholar_case?case=16454197582781893277)

SCUDERI, United States Magistrate Judge.

After consideration of a Motion to Compel Testimony From Susan Elliott filed by the United States Government, the Response of Defendants, Merck-Medco Managed Care, LLC, Plaintiffs Reply, and Medco Defendants’ Sur-Reply, it is hereby ORDERED that the Motion is GRANTED, as follows:

In the instant motion, Plaintiffs seek to compel additional testimony from Susan Elliott, a former employee of Medco Defendants. Plaintiffs deposed Ms. Elliott on July 28, 2004, at which time she testified that she did not have her own attorney, and that she was not represented by counsel for Medco Defendants. Counsel for Medco Defendants confirmed that they did not represent Ms. Elliott. Nevertheless, counsel for Medco Defendants asserted the attorney-client privilege and instructed Ms. Elliott not to answer any questions concerning communications between Medco Defendants and Ms. Elliott in preparation for her deposition, or concerning communications that occurred during breaks in her deposition. Ms. Elliott complied with all instructions not to answer such questions.

Statements made under oath by Ms. Elliott at her deposition clearly differed from statements she previously made regarding certain activities which are material to this case. As a result, Plaintiffs seek additional testimony from Ms. Elliott regarding four (4) specific categories of questions:

1. Statements made by Medco Defendants’ counsel to Ms. Elliott regarding the nature of the case;
2. Statements made by Ms. Elliott to Medco Defendants’ counsel regarding her conversations with Government investigators;
3. Descriptions and/or summaries of witness testimony provided to Ms. Elliott by counsel for Medco Defendants; and
4. Conversations between counsel for Medco Defendants and Ms. Elliott while she was under oath during the deposition.

Plaintiffs argue that they are entitled to question Ms. Elliott on these topics because her communications with corporate counsel had the potential to “affect, influence or change” Ms. Elliott’s testimony.

Medco Defendants oppose the current motion, arguing that all of the communications at issue between Ms. Elliott and counsel for Medco Defendants are protected by the attorney-client privilege because the privilege should be applied in the same way for former employees as for current employees.

In *Upjohn Co. v. United States*, the Supreme Court held that a corporation’s attorneys’ conversations with current corporate employees could be covered by the attorney-client privilege. The privilege applies when the conversations: (1) were made to the corporate counsel, acting as such; (2) were made at the direction of corporate supervisors for the purpose of securing legal advice from counsel; (3) concerned matters within the scope of the employees’ corporate duties; and (4) the employees were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. In a concurring opinion, Chief Justice Berger opined that the attorney-client privilege should be extended to protect communications between corporate counsel and former employees. Nevertheless, the Supreme Court in *Upjohn* left open the question of whether communications between corporate counsel and former employees were included within the privilege.

As noted by the parties, the Third Circuit has not addressed the question left open by the Supreme Court in *Upjohn*. Moreover, although this Court has acknowledged that the *Upjohn* privilege may apply to former employees as well as current employees, that case is factually distinguishable and did not specifically address whether corporate counsel’s communications with a former employee are privileged as to the four discrete topics at issue in the instant motion.

Fortunately, other federal courts have addressed the present issue under similar circumstances. In *Infosystems, Inc. v. Ceridian Corp*., the District Court for the Eastern District of Michigan extended the privilege over former employees, but limited it to communications which themselves were privileged and which occurred during the employment relationship. The Court explained that the willingness of former employees to provide information is generally unrelated to directions from former corporate superiors and, therefore, “counsel’s communications with a former employee of the client corporation generally should be treated no differently from communications with any other third-party fact witness.” In *City of New York v. Coastal Oil New York, Inc.*, the District Court for the Southern District of New York confronted the same issue presented here, namely, whether plaintiffs’ counsel should be permitted to question a former employee of the defendant corporation about conversations he had with corporate defense counsel in preparation for his deposition, as well as conversations that may have occurred during a recess in the deposition. The Court concluded that, because corporate counsel did not represent the former employee and there was no evidence that the conversations occurred for the purpose of legal advice, the record did not contain any basis for an assertion of the attorney-client privilege. In so holding, the District Court in *Coastal Oil* explicitly followed the reasoning of *Peralta*.

In *Peralta*, the District Court for the District of Connecticut rejected a defendant corporation's attempt to utilize the attorney-client privilege to block all questions about communications between corporate counsel and a former employee. Instead, the court limited the privilege to communications that either: (1) concerned knowledge obtained or conduct that occurred during the course of the former employee's employment; or (2) related to communications which were themselves privileged and which occurred during the employment relationship. Importantly, the court specified that the attorney-client privilege would not apply in certain specific circumstances, such as to information given by corporate counsel to the former employee regarding the testimony of other witnesses, or to discussions between the former employee and corporate counsel during breaks in a deposition. These are virtually the same circumstances present here. Moreover, the court in *Peralta* explained that allowing limited discovery regarding such communications was particularly necessary “given their potential to influence a witness to conform or adjust her testimony to such information, consciously or unconsciously.” The identical concern is present here.

The Court is persuaded by the reasoning set forth in the aforementioned cases, as well as both the reasoning and the practical solutions set forth by the District Courts in *Peralta* and *Coastal Oil*. The Court is aware of potential difficulties in separating facts developed during litigation, which are not privileged pursuant to the aforementioned case law, and facts known by the employee as a result of her employment, which likely would be privileged. However, as the court in *Peralta* made clear, the line to be drawn is not difficult: if the communication sought to be elicited relates to Ms. Elliott’s conduct or knowledge during her employment with Medco Defendants, or if it concerns conversations with corporate counsel that occurred during her employment, the communication is privileged; if not, the attorney-client privilege does not apply.

As a result of the foregoing - and because it is apparent that the communications between Ms. Elliott and Medco Defendants’ may have influenced her testimony - Plaintiffs’ motion is granted. However, Plaintiffs may obtain additional testimony from Ms. Elliott only regarding the four specific avenues of inquiry previously discussed, and in a manner consistent with the limitations set forth above.

**Questions:**

1. Although Root is an attorney, Defendant acknowledges that IMS retained him as a compensation consultant and not as a legal advisor. [↑](#footnote-ref-0)
2. To the extent Defendant separately argues the privilege applies because Root acted as an agent of IMS who had information necessary for counsel to render legal advice to IMS, Defendant has similarly failed to meet its burden of proof. An attorney's communications with a third party will be privileged “if the third party's role is limited to helping a lawyer give effective advice by explaining concepts to the lawyer.” Here, Root’s role was simply more expansive than this. He did not explain unfamiliar concepts to counsel, but instead provided the “team” with suggestions and advice on what actions may be undertaken. Such communications are not privileged. [↑](#footnote-ref-1)