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Evidence: Attorney-Client Privilege & (and) Work Product Doctrine

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EVIDENCE: ATTORNEY-CLIENT PRIVILEGE & WORK PRODUCT DOCTRINE

INTRODUCTION

The attorney-client privilege is the oldest privilege of the common law.[1] It provides protection to confidential communications between a client and his attorney by prohibiting disclosure of communications relating to legal advice or opinion.[2] As the Supreme Court stated, this privilege is necessary "to encourage full and frank communication between attorneys and their clients."[3] The work-product doctrine affords protection to materials prepared by an attorney in anticipation of trial.[4] Like the attorney-client privilege, the work product doctrine prevents disclosure of information related to the client's case. The work product doctrine encourages careful and thorough research by the attorney, without fear an adversary will use their work.[5] It protects the attorney as he finds facts and devises strategy, whereas the attorney-client privilege protects the client. The liberal discovery rules of both civil procedure and

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1. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

2. *See* Michael J. Chepiga, *Federal Attorney-Client Privilege and Work Product Doctrine*, 583 PLI LITIG. 473, 476 (1998) (discussing the federal courts' recent interpretation and application of the attorney-client privilege); *see also Upjohn*, 449 U.S. at 390 (articulating 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").

3. *Upjohn*, 449 U.S. at 389. One aspect of the attorney-client privilege to receive a substantial amount of attention over the last year concerns governmental attorney-client privilege. *See generally* Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 475 (1998) (arguing the United States government controls the same type of attorney-client privilege that exists for a corporation). The issue has arisen numerous times during the Independent Counsel's investigation of President William Jefferson Clinton's administration. *See id.* In a case of first impression, the District of Columbia Circuit held the Deputy White House Counsel could not assert the attorney-client privilege to avoid responding to a grand jury if he possessed information relating to possible criminal violation. *See In re* Lindsey, 148 F.3d 1100, 1102 (D.C. Cir. 1998). In *Swindler & Berlin v. United States*, 118 S. Ct. 2081 (1998), the Supreme Court rejected the Independent Counsel's argument that the attorney-client privilege should not protect confidential communications when the client has died and the communications relates to a criminal proceeding. *See Swindler & Berlin*, 118 S. Ct. at 2084. The Supreme Court reaffirmed well over a century of case law by stating the attorney-client privilege survives the death of a client. *Cf. id.* at 2087.

4. *See* Hickman v. Taylor, 329 U.S. 495, 511 (1947). The Second Circuit recently expanded the work product definition. *Cf.* United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998). In *Adlman*, the Second Circuit held the work product doctrine may protect a document prepared by a party if the document is intended to help in making a business decision which turns on the party's appraisal of the probable result of litigation expected to result from the transaction. *See id.* at 1197; *cf.* Harvey Kurzweil et al., *Second Circuit Interprets and Potentially Expands Work Product Protection*, 12 INSIGHTS, JULY 1998 at 27 (stating that the "practical effect of the Adlman decision is the work product doctrine may protect certain advisory or opinion materials created by non-lawyers for the purpose of advising whether to undertake contemplated business transactions").

5. *See* Emily Jones, *Keeping Client Confidences: Attorney-Client Privilege and Work Product Doctrine in Light of* United States v. Adlman, 18 PACE L. REV. 419, 433 (1998) (describing the policy considerations supporting the attorney-client privilege).

evidence conflict with both privileges.[6] Although the attorney-client privilege may serve as a "roadblock to the truth," at least on an intermediate level, society has subordinated the search for truth to a preferred value of full, confident, candid, confidential legal representation of a client.[7]

This survey examines how the United States Court of Appeals for the Tenth Circuit dealt with several important issues implicating the attorney-client privilege and work product doctrine during the survey period.[8] Part I addresses the controversial areas of implied subject matter waiver of the attorney-client privilege and the effect of subsequent litigation upon the work product doctrine. In *Frontier Refining, Inc., v. Gorman-Rupp Co.*,[9] the Tenth Circuit approved the *Hearn*[10] test to analyze issues of implied subject matter waiver[11] and decided that the work product doctrine affords protection to subsequent litigation.[12]

Part II of this survey analyzes a corporation's ability to assert attorney-client privilege, as well as a corporate employee's ability to assert an individual attorney-client privilege with corporate counsel. In *Grand Jury Subpoenas v. United States*,[13] the Tenth Circuit held a finite, individual, attorney-client privilege existed between a corporate officer and corporate counsel.[14] In *Grand Jury Proceedings v. United States*, a case derived from the same activities as *Grand Jury Subpoenas*, the Tenth Circuit held a corporate officer may assert an individual attorney-client privilege for documents related to corporate activities when the officer's personal rights are at issue.[15] Finally, in *Sprague v. Thorn Americas, Inc.*,[16] the court held the corporation's attorney-client privilege protected documents prepared by in-house counsel for management.[17]

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6. *See id.* at 425.

7. T. Maxfield Bahner & Michael L. Gallion, *Waiver of Attorney-Client Privilege Via Issue Injection: A Call for Uniformity*, 65 DEF. COUNS. J. 199, 199–200 (1998).

8. This survey period addresses cases decided by the United States Court of Appeals for the Tenth Circuit between September 1, 1997, and August 31, 1998.

9. 136 F.3d 695 (10th Cir. 1998).

10. *See infra* note 26 and accompanying text.

11. *See Frontier*, 136 F.3d at 701.

12. *See id.* at 703–04.

13. 144 F.3d 653 (10th Cir. 1998).

14. *See Grand Jury Subpoenas*, 144 F.3d at 659.

15. *See* Grand Jury Proceedings v. United States, 156 F.3d 1038, 1041–42 (10th Cir. 1998).

16. 129 F.3d 1355 (10th Cir. 1997).

17. *See Sprague*, 129 F.3d at 1370.

I. WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND THE EFFECTS OF SUBSEQUENT LITIGATION UPON WORK PRODUCT

A. *Background*

1. Attorney-Client Privilege

The attorney-client privilege, which protects communications between attorneys and clients, can be defeated by two general categories of waiver: (1) actual or expressed waiver and (2) implied subject matter waiver.[18] Actual or express waiver occurs when confidential communications are revealed to third parties, outside the attorney-client relationship.[19] Implied waiver occurs when communications protected by the attorney-client privilege are divulged or injected as part of a claim or defense in litigation.[20] The concept of issue injection waiver seems relatively straightforward; clients waive the privilege if they affirmatively plead a claim or defense that puts the privilege at issue.[21] Yet, jurisdictions have had tremendous difficulty applying a test in a uniform manner.[22] Three main tests have emerged: (1) the automatic waiver rule,[23] (2) the balancing test,[24] and the (3) *Hearn* test.[25] The majority—accepted *Hearn* test, a three-part conjunctive test, provides a waiver of the attorney-client privilege when

> (i) assertion of the privilege is the result of some affirmative act by the asserting party, such as filing suit; (ii) through the affirmative action, the asserting party has placed the protected information at issue by making it relevant to the case; and (iii) application of the privilege would deny the opposing party access to information vital to its defense.[26]

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18. *See* Bahner & Gallion, *supra* note 7, at 199–200.

19. *See id.* at 200. The requirement of confidentiality is an essential part of the privilege. *Cf.* Leathers v. United States, 250 F.2d 159, 166 (9th Cir. 1957). A "corporation must show that the allegedly privileged documents were available to corporate employees only on 'a fairly firm "need to know" basis.'" *In re* Grand Jury Proceedings, 466 F. Supp. 863, 870 (D. Minn. 1979).

20. *See* Bahner & Gallion, *supra* note 7, at 200.

21. *See id.* at 201.

22. *See id.*

23. *See id.* (citing Independent Prods. Corp. v. Loew's, Inc., 22 F.R.D. 266, 276–77 (S.D.N.Y. 1958)). The automatic waiver rule holds a party who puts forth a claim, counterclaim, or affirmative defense injecting an issue into the forefront of the litigation automatically waives all corresponding privileges. *See Independent Prods.*, 22 F.R.D. at 276–77.

24. *See* Bahner & Gallion, *supra* note 7, at 202 (citing Greater Newburyport Clamshell Alliance v. Public Serv. Co., 838 F.2d 13 (1st Cir. 1988)). The balancing test weighs the need for discovery of the confidential information against the need to protect the confidentiality of the communication. *See Clamshell Alliance*, 838 F.2d at 20.

25. *See* Bahner & Gallion, *supra* note 7, at 202–03 (citing Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975)).

26. *Id.* (citing *Hearn*, 68 F.R.D. at 581).

A fourth approach, the anticipatory waiver test, has recently gained limited approval.[27]

2. Work Product Doctrine

Since its beginning in the seminal case *Hickman v. Taylor*,[28] an immense body of judicially-created law has sprung from the work product doctrine.[29] The work product doctrine was codified into Rule 26 of the Federal Rules of Civil Procedure.[30] Rule 26 states that a party may obtain discovery of documents "prepared in anticipation of litigation" only upon showing a substantial need for the materials and an inability to acquire the materials from a different source without undue hardship.[31] The rule, however, is silent on the question of whether materials prepared in anticipation of one litigation are protected in subsequent litigation.[32] Federal common law governs subsequent litigation because of Rule 26's silence on that issue.[33] Federal circuits are split on application of the doctrine in subsequent litigation.[34] In 1983, the Supreme Court addressed this issue in *Federal Trade Commission v. Grolier, Inc.*[35] The Court held the work product doctrine codified in the Freedom of Information Act[36] protects attorney work product "from mandatory disclosure without regard to the status of litigation for which it was prepared."[37]

B. *Tenth Circuit Case*

1. *Frontier Refining, Inc., v. Gorman-Rupp Co.*[38]

a. *Facts*

Frontier ran a refinery in Cheyenne, Wyoming.[39] In June 1992, four of Frontier's contractors were severely burned when a fire erupted in the slop system of the refinery where they were working.[40] Gorman-Rupp

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27. *See id.* at 201 (citing Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 863–64 (3d Cir. 1994)). This test provides that the privilege is waived when parties asserting claims or defenses compel them "inevitably to draw upon a privileged communication at trial in order to prevail." *Id.* at 204 (quoting Smith v. Cavanaugh Pierson Talley, 513 So. 2d 1138, 1145 (La. 1987)).

28. 329 U.S. 496 (1947).

29. *See* John M. Palmeri & Thomas B. Quinn, *Work Product in Subsequent Litigation: The Tenth Circuit Enters the Fray*, 27 COLO. LAW. 79, 79 (1998).

30. *See id.*

31. FED. R. CIV. P. 26(b)(3).

32. *See id.*

33. *See* Palmeri & Quinn, *supra* note 29, at 79.

34. *See id.*

35. 462 U.S. 19, 22–23 (1983).

36. 5 U.S.C. § 552(b)(5) (1994).

37. *See Grolier*, 462 U.S. at 28.

38. 136 F.3d 695 (10th Cir. 1998).

39. *See Frontier*, 136 F.3d at 697.

40. *See id.*

manufactured two of the centrifugal pumps used in Frontier's slop system.[41] Three of the injured contractors filed lawsuits against Frontier.[42] Frontier settled all three suits, while its insurance company settled the claim brought by the fourth contractor.[43] Joe Teig, of Holland & Hart, served as Frontier's counsel in defense of all four claims.[44] Following settlement of the claims, Frontier hired new counsel and filed indemnification lawsuits against Gorman-Rupp.[45] During the discovery process, Gorman-Rupp filed a discovery motion seeking production of Joe Teig's files from his representation of Frontier in the underlying suits.[46] The district court granted the motion and ordered production of Holland & Hart's documents and a deposition of Joe Teig.[47] Joe Teig and Holland & Hart unsuccessfully attempted to appeal the order on the first day of trial.[48] At the conclusion of the trial, the jury returned a verdict for Gorman-Rupp, and Frontier appealed.[49]

b. *Decision*

Frontier argued that the lower court erred when it held that Frontier had waived its attorney-client and work product privileges by bringing an indemnity action against Gorman-Rupp.[50] Wyoming law controlled the outcome of this issue.[51] Because Wyoming lacked applicable law on waiver of attorney-client privilege, the Tenth Circuit decided how it believed Wyoming would act.[52] The court held that Wyoming would apply an intermediate approach regarding waiver of the attorney-client privilege based on the *Hearn* test.[53] Three elements are necessary to establish implied waiver under the *Hearn* test.[54] The third element requires a demonstration that the privilege would deny the opposing party "vital" information relevant to its defense.[55] The court held, based on the "avail-

41. *See id.*

42. *See id.*

43. *See id.* at 697–98. The claims were settled for respective amounts of $8.25 million, $6.75 million, $3.50 million and $750,000. *See id.*

44. *See id.* at 698.

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.* at 699.

50. *See id.* The Tenth Circuit noted it would not overrule the discovery ruling absent an abuse of discretion; however, the court would review the "underlying factual determinations for clear error and review de novo purely legal questions." *Id.*

51. *See id.* Under Rule 501 of the Federal Rules of Evidence, state law is determinative in diversity cases concerning issues of privileges. *See* FED. R. EVID. 501.

52. *See Frontier*, 136 F.3d at 700.

53. *See id.* at 701.

54. *See id.*; *cf. supra* note 26 and accompanying text (describing the *Hearn* test).

55. *Frontier*, 136 F.3d at 701.

ability of other sources for evidence[,]" the third element for waiver of the privilege was not established.[56]

For Frontier to win its indemnity claim against Gorman-Rupp, Frontier had to show the underlying settlements with the injured contractors were reasonably made in good faith.[57] Frontier also had to prove Gorman-Rupp was responsible for the fire.[58] Gorman-Rupp contended that they were permitted to see the privileged communications made by Frontier's attorneys in the underlying claims to determine the motivation and reasonableness of the settlements.[59]

The Tenth Circuit decided Gorman-Rupp had other resources available for these questions without the use of Joe Teig's communications.[60] For example, the testimony of two attorneys for the plaintiffs in the underlying claim indicated that Mr. Teig admitted Frontier had no explanation for its negligence claims.[61] Also, Gorman-Rupp was free to interview any employee of Frontier who could shed light on Frontier's reasoning for settling.[62] Thus, the court decided that the privileged information was not vital and the trial court had abused its discretion in ruling to the contrary.[63]

The Tenth Circuit reversed the district court, holding that the work product doctrine applied even though Frontier had prepared the pertinent information in preparation of the underlying claims, and not in anticipation of the present suit.[64] The Tenth Circuit decided the district court's ruling, "which failed to extend the work product doctrine merely because the relevant materials were prepared in anticipation of other, albeit related litigation, [was] against the great weight of well-reasoned authority."[65] In its decision, the court determined the appropriate starting point for a decision on this issue was Rule 26(b)(3) of the Federal Rules of Civil Procedure.[66]

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56. *Id.*

57. *See id.*; *cf.* Schneider Nat'l, Inc. v. Holland Hitch Co., 843 P.2d 561, 579 (Wyo. 1992) (describing circumstances under which indemnification is permitted). Under Wyoming law, the party seeking indemnification must show the underlying settlement was reasonably "made in good faith to discharge a potential or actual liability." *Id.*

58. *See Frontier*, 136 F.3d at 701.

59. *See id.*

60. *See id.* at 701–02.

61. *See id.* at 702.

62. *See id.*; *cf.* Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 415–16 (D. Del. 1992) (stating waiver is not justified simply to aid the adversary or to uncover the adversary's motivations for acting).

63. *See Frontier*, 136 F.3d at 702.

64. *See id.*

65. *Id.*

66. *See id.* Contrary to the attorney client privilege, "the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in Fed. R. Civ. P. 26(b)(3)." *Id.* at 702 n.10. Rule 26(b)(3) states:

The Tenth Circuit noted that the Supreme Court, in dicta, recognized that Rule 26(b)(3) protects materials prepared for "any litigation or trial as long as they were prepared by or for a party to the subsequent litigation."[67] Additionally, every circuit to address the issue concluded, to some extent, that the work product doctrine may survive in subsequent litigation.[68] For the reasons set out above, the Tenth Circuit concluded that the work product doctrine extends to subsequent litigation.[69] Yet, the court refused to decide whether subsequent litigation must be closely related to the underlying litigation, because the indemnity action in *Frontier* was "unquestionably 'closely related' to the underlying suit between Frontier and the injured contractors."[70]

Since the court held the work product doctrine extended to subsequent litigation, relevant materials in the instant case were not discoverable by Gorman-Rupp unless they could show a substantial need for the material and an inability to obtain substantially equivalent material without undue hardship.[71] Rule 26(b)(3) does not allow for discovery of an attorney's work product unless the discovering party shows substantial need and undue hardship.[72] As the court explained in its analysis of waiver of the attorney-client privilege, Gorman-Rupp failed to show both substantial need for the work product materials and an undue burden if the materials were not produced.[73] The Tenth Circuit reversed the district court's decision and concluded the district court erred in compelling discovery of the Holland & Hart materials and ordering Teig to submit to deposition.[74]

> [A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

FED. R. CIV. P. 26(b)(3).

67. *Frontier*, 136 F.3d at 703 (quoting Federal Trade Comm'n v. Grolier Inc., 462 U.S. 19, 25 (1983)). The Tenth Circuit has recognized it considers itself bound to the Supreme Court's dicta almost as fervently as to its outright holding if it "is recent and not enfeebled by later statements." *Id.* (quoting Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996)).

68. *See id.*

69. *See id.*

70. *Id.*

71. *See id.* at 704.

72. *Cf. id.*

73. *See id.*

74. *See id.* at 704–05. In an unpublished decision, the Tenth Circuit affirmed the district court's holding that the attorney-client and work product protections were waived by selective disclosure of protected materials. *See* Quark, Inc. v. Harley, 1998 WL 161035, at *2–*3 (10th Cir. 1998). The Tenth Circuit's opinion correlates with most circuits' treatment of subject matter waiver "as an all-or-nothing proposition." Chepiga, *supra* note 2, at 496. Under the subject matter waiver theory, when an individual voluntarily discloses a portion of privileged communications, the privilege is waived as to all privileged communication on that subject matter. *See, e.g.*, *In re* Grand Jury

C. *Other Circuits*

Regarding implied subject matter waiver, the D.C. Circuit follows a balancing test, weighing the need for the privileged information versus the need for protection of the confidential information to analyze implied waiver.[75] Both the Eighth and First Circuits apply some type of balancing test as well.[76] A majority of federal circuits, including the Second,[77] Fifth,[78] Seventh,[79] Ninth,[80] and Eleventh,[81] favor the *Hearn* test. The Third Circuit follows the anticipatory waiver test.[82]

Numerous circuits find an implicit waiver when a client relies on attorney advice as a defense.[83] In *United States v. Workman*,[84] the Eight Circuit held that the attorney-client privilege cannot be used "as both a shield and a sword"—a defendant cannot rely on an attorney's advice as a defense without allowing the prosecution to look at the essence of the advice.[85] In *Glenmede Trust Co. v. Thompson*,[86] the Third Circuit found an implied waiver when a trust company asserted reliance on advice of counsel as an affirmative defense to a claim for breach of fiduciary duty.[87] In *United States v. Bilzerian*,[88] the Second Circuit held that a defendant in a securities fraud case impliedly waived the attorney-client privilege when he asserted reliance on advice of attorney as a defense.[89]

Every circuit that has addressed subsequent litigation has concluded, at least to some extent, that the work product doctrine extends to subsequent litigation. The Third Circuit suggests the doctrine should apply only to closely-related, subsequent litigation, although it has declined to expressly so hold.[90] Meanwhile, the Fourth and Eighth Circuits extend the

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Proceedings, 78 F.3d 251, 255 (6th Cir. 1996) (noting disclosure of some communications on a subject matter waives privilege as to all communications on that subject matter).

75. *See* Bahner & Gallion, *supra* note 7, at 202 (citing Black Panther Party v. Smith, 661 F.2d 1243, 1267 (D.C. Cir. 1981)).

76. *See id.*; *cf.* Greater Newburyport Clamshell Alliance v. Public Serv. Co. 838 F.2d 13, 20 (1st Cir. 1988); Sedco Int'l S.A. v. Cory, 683 F.2d 1201, 1206 (8th Cir. 1982).

77. *Cf.* United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991).

78. *Cf.* Conkling v. Turner, 883 F.2d 431, 434 (5th Cir. 1989).

79. *Cf.* Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095, 1098 (7th Cir. 1987).

80. *Cf.* Home Indem. Co. v. Lane, 43 F.3d 1322, 1326 (9th Cir. 1995).

81. *Cf.* Cox v. United States Steel & Carnegie, 17 F.3d 1386, 1419 (11th Cir. 1994).

82. *Cf.* Smith v. Kavanaugh, 513 So. 2d 1138, 1146 (La. 1987).

83. *See, e.g.*, United States v. Workman, 138 F.3d 1261, 1263–64 (8th Cir. 1998); Glenmede Trust Co. v. Thompson, 56 F.3d 476 (3d Cir. 1995); United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991).

84. 138 F.3d 1261 (8th Cir. 1998).

85. *Workman*, 138 F.3d at 1264.

86. 56 F.3d 476 (3d Cir. 1995).

87. *See Glenmede Trust Co.*, 56 F.3d at 478.

88. *See Bilzerian*, 926 F.2d at 1292.

89. *See id.* at 1289.

90. *See In re* Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979).

privilege to all subsequent litigation, related or not.[91] Finally, at least three circuits, the Second, Fifth, and Sixth, recognize that the work product doctrine extends to subsequent litigation, but have either declined to decide, or have failed to discuss, whether the doctrine extends only to closely-related, subsequent litigation.[92]

D. *Analysis*

The Tenth Circuit's analysis of implied subject matter waiver is not reflective of federal law, but of a federal court interpreting what a Wyoming state court would do. Being one of the more conservative circuits throughout the years, it is not surprising the Tenth Circuit held the *Hearn* test would apply. The *Hearn* test remains the majority approach, as it has for more than two decades, and is recognized by critics as striking the most equitable balance.[93] Although the Tenth Circuit does not expressly hold the *Hearn* test applicable in federal cases, based on *Frontier*,[94] it seems likely that it would.

Commentators note that determining the scope of a waiver can be difficult due to varied interpretations by circuit courts regarding when an implied waiver occurs.[95] A strong argument is made that "[t]hese inconsistencies . . . serve as compelling justification for the Supreme Court to assure litigants predictability and consistency by adopting a uniform standard for determining the scope" of when the attorney-client privilege is implicitly waived.[96] Inherent in the attorney-client privilege is its goal of promoting full and frank communication with a client and the need for certainty and predictability in its application.[97]

The Tenth Circuit joins the majority of circuits by holding work product remains protected in subsequent litigation. In *Hickman v.*

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91. *Cf., e.g.*, United States v. Pfizer, Inc., 560 F.2d 326, 335 (8th Cir. 1977); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 484 (4th Cir. 1973) (holding the clear command of the second sentence of Rule 26(b)(3) directing courts to "protect opinion work products against disclosure" was applicable to all work product materials referred to in the first sentence of Rule 26(b)(3), and therefore no showing of substantial need or undue hardship could justify the compelled disclosure of an attorney's opinion work product).

92. *Cf., e.g., In re* Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (recognizing two approaches and refusing to choose between the two); United States v. Leggett & Platt, Inc., 542 F.2d 655, 660 (6th Cir. 1976) (stating that were the work product doctrine an unpenetrable protection against discovery, courts would be less willing to apply it to work produced in anticipation of other litigation); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 557 (2d Cir. 1967) (noting the existence of little authority restricting work-product protection "to materials prepared in connection with the very litigation in which the discovery is sought).

93. *See* Bahner & Gallion, *supra* note 7, at 202–03.

94. Frontier Refining, Inc., v. Gorman-Rupp Co., 136 F.3d 695 (10th Cir. 1998).

95. *Cf., e.g.*, Jennifer A. Hardgrove, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard that Will Afford Guidance to Courts*, 1998 U. ILL. L. REV. 643, 643 (1998) (proposing a three-part test to guide the Supreme Court in articulating a uniform test).

96. *Id.*

97. *Cf.* Bahner & Gallion, *supra* note 7, at 200.

Taylor,[98] the Supreme Court recognized attorneys should be able to litigate without fear that adversaries might discover their work,[99] thus encouraging lawyers to prepare early and thoroughly for trial without the threat that an opponent may discover their thoughts and impressions. Protection of work product in subsequent litigation furthers this goal and is consistent with *Hickman*. The Tenth Circuit, however, stopped short of holding that work product remains protected in unrelated litigation.[100]

In *Frontier*, the Tenth Circuit emphasized the underlying purpose of the work product doctrine.[101] The purpose of the doctrine is to encourage thorough and independent investigation by attorneys and is furthered by protection of the work product in all subsequent litigation, related or not. Thus, the Tenth Circuit would likely hold attorneys' work product should remain protected even after resolution of the litigation for which it was prepared.

II. CORPORATE ATTORNEY-CLIENT PRIVILEGE

A. *Background*

The attorney-client privilege is not limited to individuals; corporations can assert the privilege as well.[102] Yet, applying the attorney-client privilege to a fictional entity such as a corporation is not easy, because a fictional entity is unable to interact with its attorney except through its corporate personnel.[103] The attorney-client privilege has become a hot topic in corporate America today.[104] This is due in part to the growth in the number of corporations[105] and the "vast and complicated array" of federal regulations governing the businesses of corporations.[106] The combination causes disharmony. On the one hand, corporations are trying to insulate confidential communications, and on the other, the government is seeking disclosure through the use of a multitude of corporate rules and regulations.[107]

98. 329 U.S. 495 (1947).
99. *See Hickman*, 329 U.S. at 510–11.
100. *Cf.* Frontier Ref., Inc. v. Gorman-Rupp Co., 136 F.3d 695, 703 (10th Cir. 1998).
101. *See Frontier*, 136 F.3d at 704.
102. *Cf.* United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915).
103. *See* Brian M. Smith, *Be Careful How You Use It or You May Lose It: A Modern Look at Corporate Attorney-Client Privilege and the Ease of Waiver in Various Circuits*, 75 U. DET. MERCY L. REV. 389, 394 (1998).
104. *See id.* at 389–90.
105. *See id.* at 390.
106. *Id.* at 389 (citing Upjohn Co. v. United States, 499 U.S. 383, 392 (1981)).
107. *See id.* at 390.

In *Upjohn v. United States*,[108] the Supreme Court faced the question as to whether employees of a corporation could assert the attorney-client privilege on behalf of the corporation.[109] The *Upjohn* Court refused to draft a definitive set of rules to decide when the attorney-client privilege applies in the corporate context and stated that courts should engage in a case-by-case analysis to determine the applicability of the attorney-client privilege.[110] Yet, Chief Justice Burger, in his concurring opinion, set forth a standard to provide guidance for the attorney-client privilege in the corporate setting:

> [A]s a general rule, a communication is privileged at least when . . . an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.[111]

Since the Supreme Court's historic decision in *Upjohn*, lower courts have had difficulty in establishing when a corporate agent has standing to assert the attorney-client privilege.[112] This is due, in large part, to the limited guidance provided by the *Upjohn* decision.[113] While the majority of jurisdictions follow the requirements outlined in *Upjohn*, namely that all corporate agents may fit the role of being a client, other jurisdictions are unwilling to give credence to the test.[114] One reason for the inconsistencies among jurisdictions is Rule 501 of the Federal Rule of Evidence, which requires federal courts to apply state law when determining the existence of the attorney-client privilege.[115] The following two related

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108. 449 U.S. 383 (1981). The Supreme Court rejected the use of the "control group" test to determine if an attorney-client privilege existed for a corporate employee. *See Upjohn*, 449 U.S. at 397.

109. *See id.* at 386. The control group consisted of those in a position to control or take substantial part in a decision about the corporation may require the advice of an attorney. *See id.* at 390.

110. *See id.* at 396.

111. *Id.* at 402–03 (Burger, C.J., concurring).

112. *See* Smith, *supra* note 103, at 395.

113. *See id.* The application of the attorney-client privilege can become even trickier to apply in a limited liability company or a closely held corporation. *See generally* Roland J. Santoni, *Application of the Attorney-Client Privilege to Disputes Between Owners and Managers of Closely-Held Entities*, 31 CREIGHTON L. REV. 849, 850–852 (1998) (noting that commentators have contended a more "broad-based piercing of the privilege" should apply). In general, a lawyer for a corporation or similar entity owes his loyalty to the entity and not to a director, officer, shareholder, representative, or other individual associated with the entity. *See* H. Lowell Brown, *The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 BUFF. L. REV. 777, 779 (1996).

114. *See* Smith, *supra* note 103, at 395.

115. *Cf. id.* at 396.

cases focus primarily on the separate issue of a corporate employee's ability to assert a personal attorney-client privilege with corporate counsel. The third case focuses on application of a corporation's asserting the attorney-client privilege.

B. *Tenth Circuit Cases*

1. *Grand Jury Subpoenas v. United States*[116]

a. *Facts*

Several hospital doctors and the Intervenor[117] were suspects in a continuing grand jury investigation.[118] During the relevant time period, the Intervenor was employed as the Chief Executive Officer of the hospital.[119] By responding to the grand jury hearing's subpoenas *duces tecum*, the hospital implicated the use of attorneys John Doe and Jane Roe to carry out alleged crimes.[120] During the period of the alleged crimes, attorneys John Doe and Jane Roe provided legal counsel to the hospital.[121]

On January 21, 1997, the grand jury delivered subpoenas to the hospital's counsel compelling their testimony.[122] Five days earlier, Intervenor moved to intervene and to quash the subpoenas by asserting the attorney-client privilege on his own behalf, independent of the attorney's official relationship with the hospital.[123] On February 24, 1997, the court granted Intervenor's motion to intervene, yet simultaneously refused to quash the subpoenas because the court found the crime-fraud exception applied, thereby vitiating the attorney client privilege. The court based this finding on the government's establishment of a prima facie case of criminal conduct between the hospital and its attorneys.[124]

In March and April of 1997, Ms. Roe and Mr. Doe both appeared before the grand jury and both asserted the attorney-client privilege to almost every question asked.[125] The district court found the crime-fraud exception applied and granted the government's motion to compel the

116. 144 F.3d 653 (10th Cir. 1998).

117. Since the appellant was the subject of a grand jury investigation, the court referred to him as "Intervenor," and the two attorney's involved were referred to as "John Doe" and "Jane Roe." *See id.* at 656 n.1.

118. *See Grand Jury Subpoenas*, 144 F.3d at 656.

119. *See id.*

120. *See id.*

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.* at 657.

125. *See id.*

testimony of Ms. Roe and Mr. Doe.[126] The Intervenor then appealed the district court's order.[127]

b. *Decision*

The Tenth Circuit affirmed, holding that the Intervenor had no authority to assert the attorney-client privilege except for private communications made to Ms. Roe and Mr. Doe in his personal capacity.[128] In formulating its decision, the Tenth Circuit adopted a five-part test used by the Second and Third Circuits to determine whether a corporate officer may assert an individual privilege with corporate counsel.[129] Under this test, the corporate officer must show:

> First . . . 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 [lawyer] 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.[130]

Using this test, the Tenth Circuit held a limited privilege existed only to those communications "in which Intervenor sought legal advice as to his personal liability without regard to any corporate considerations."[131]

The court next addressed whether the crime-fraud exception vitiated the attorney-client privilege.[132] The court recognized that the privilege does not apply when the client consults an attorney to further a crime or fraud.[133] The crime-fraud exception is applicable only when the party opposing the privilege can establish a prima facie case of attorney participation in the crime or fraud.[134] The court found the government established a showing of attorney involvement in the crime.[135] Reviewing the

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126. *See id.*

127. *See id.* at 656.

128. *See id.* at 658.

129. *See id.* at 659.

130. *Id.* (citing United States v. International Bd. of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997)).

131. *Id.*

132. *See id.* at 661.

133. *See id.* at 660 (citing Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995)).

134. *See Motley*, 71 F.3d at 1551.

135. *See Grand Jury Subpoenas*, 144 F.3d at 660–61. To assert the crime-fraud exception, the opposing party has to establish a prima facie showing that attorney participation in the crime has some factual foundation. *See id.* Even though the standard of proof required to make out a prima facie showing has not been articulated by the Supreme Court, several circuits have articulated one. *See id.*; *cf.* United States v. Zolin, 491 U.S. 554, 563–64 n.7 (1989) (noting that the use of the phrase "prima facie case" to describe the showing needed to defeat the privilege has caused some confu-

record, the Tenth Circuit concluded that the evidence presented made a prima facie case that the services of Mr. Doe and Ms. Roe were used in furtherance of the crime or fraud.[136] Thus, the crime-fraud exception nullified the limited attorney-client privilege between Intervenor and corporate counsel.[137]

2. *Grand Jury Proceedings v. United States*[138]

a. *Facts*

This case stems from the grand jury case just discussed.[139] In response to the grand jury's subpoenas, the hospital agreed to produce certain documents.[140] The Intervenor moved to quash the subpoenas and bar production of particular documents based on the attorney-client privilege and the work product doctrine.[141] The district court denied the Intervenor's motion and ordered production of the documents.[142] The Intervenor appealed.

b. *Decision*

Affirming the lower court's decision, the Tenth Circuit used the five-part test adopted by the court in *Grand Jury Subpoenas v. United States*.[143] The court noted that the district court erred in interpreting the fifth prong

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sion). *cf., e.g., In re* Sealed Case, 107 F.3d 46, 50 (D.C. Cir. 1997) (stating that the government satisfies its burden of proof if it offers evidence, if believed by the trier of fact, that would establish the elements of an ongoing or imminent crime or fraud); *In re* Grand Jury Proceedings, 87 F.3d 377, 381 (9th Cir. 1996) (determining that the court must find reasonable cause to believe that the attorney was involved with fraud); United States v. Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995) (suggesting that a party must demonstrate there is probable cause to believe some crime or fraud has been attempted); United States v. Davis, 1 F.3d 606, 609 (7th Cir. 1993) (describing what the government must prove in order to trigger the crime-fraud exception); Haines v. Liggett Group, Inc., 975 F.2d 81, 95–96 (3d Cir. 1992) (holding that a party seeking discovery must present evidence that would determine the elements of the crime-fraud exception had been satisfied); *In re* Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987) (setting forth a two-prong test to determine whether the crime-fraud exception applies to a communication between a lawyer and his client); Koenig v. International Sys. & Controls Corp., 693 F.2d 1235, 1242 (5th Cir. 1982) (defining a "prima facie case" as evidence sufficient until "contradicted and overcome by other evidence"). The Tenth Circuit decided it was not necessary to articulate a standard in this case because, under any of these standards above, the government had established a prima facie showing. *See Grand Jury Subpoenas*, 144 F.3d at 660–61.

136. *See Grand Jury Subpoenas*, 144 F.3d at 660–61.

137. *See id.* at 661.

138. 156 F.3d 1038 (10th Cir. 1998).

139. *See Grand Jury Proceedings*, 156 F.3d at 1039; *see also* discussion *supra* notes 116–37 and accompanying text.

140. *See id.* at 1040.

141. *See id.*

142. *See id.*

143. *See id.* at 1041 (citing Grand Jury Subpoenas v. United States, 144 F.3d 653, 659 (10th Cir. 1998)); *see also supra* note 130 and accompanying text.

of the test.[144] Although the documents at issue related to corporate matters, Intervenor was not barred from showing the application of an attorney-client privilege.[145] However, the Intervenor did not satisfy the fifth prong because he did not demonstrate that the documents at issue were primarily limited to his individual legal rights.[146] Nor was the fourth prong, confidentiality,[147] satisfied, because Intervenor did not show the documents at issue were confidential communications between himself "and the corporate attorneys acting in their capacity as his personal lawyer."[148]

The Tenth Circuit affirmed the district court's ruling, and held the preponderance of documents pertained to corporate issues and had been distributed not only to the Intervenor, but to third parties as well.[149] The court also held that the work product doctrine did not protect the documents[150] and that a joint-defense privilege did not apply to bar the production of the documents.[151]

3. *Sprague v. Thorn Americas, Inc.*[152]

a. *Facts*

Ms. Sprague brought this lawsuit based on Title VII and the Kansas Acts Against Discrimination, alleging sexual harassment and gender discrimination.[153] Ms. Sprague worked as a market analyst for Thorn Americas, Inc. (Thorn) and in June 1992 received additional responsibilities in the jewelry department under the supervision of Ed Kowalski.[154] Ms. Sprague left Thorn in September 1993.[155] She informed Thorn she would return only if Mr. Kowalski was no longer her manager and the company upgraded her position.[156] Thorn refused Sprague's demands and deemed her terminated on November 1, 1993.[157]

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144. *See Grand Jury Proceedings*, 156 F.3d at 1041. The fifth prong of the test states that the corporate officer "must show that the substance of their conversations with [counsel] did not concern matters within the general affairs of the company." *Id.*

145. *See id.* at 1042.

146. *See id.*

147. *See id.* at 1041. The corporate officer must prove that "their conversations with [counsel] were confidential." *Id.*

148. *Id.* at 1042.

149. *See id.*

150. *See id.* The court concluded the corporate official failed to demonstrate the district court clearly erred in finding that the documents were not prepared in anticipation of litigation. *See id.*

151. *See id.* at 1043. The court held the Intervenor failed to establish a joint-defense privilege because he "failed to produce any evidence . . . of a joint-defense agreement with the Hospital." *Id.*

152. 129 F.3d 1355 (10th Cir. 1997).

153. *See Sprague*, 129 F.3d at 1359.

154. *See id.*

155. *See id.*

156. *See id.* at 1359–60.

157. *See id.*

Sprague filed her original complaint one month later.[158] The district court denied Sprague's motion to compel production of documents and dismissed Sprague's claim on Thorn's motion for summary judgment.[159] At issue was a memorandum prepared by in-house counsel Doug Westerhaus. Westerhaus refused to produce the memorandum based on his assertion of the attorney-client privilege and work product doctrine.[160] The memorandum prepared by Westerhaus for senior management allegedly addressed issues of disparate treatment of women employees at Thorn.[161] Ms. Sprague's appeal focused on the district court's denial of her motion to compel discovery of the memorandum.[162]

b. *Decision*

In making its decision, the Tenth Circuit stated the "discovery issue turns on the issue of attorney-client privilege and attorney work product privilege."[163] Since Sprague asserted both federal and state claims, consideration of both federal and Kansas law was required.[164] In state causes of action, the Federal Rules of Evidence direct a federal court to use state law to determine issues regarding privileges.[165] While difficulties may arise if the privilege applies under state law but does not under federal law,[166] the court was persuaded that the attorney-client privilege was appropriate, in this instance, under both federal and state law.[167] Since the attorney-client privilege applied, the court decided it was unnecessary to determine whether the work product doctrine applied.[168]

The affidavit of Ms. Melanie Owens supported Ms. Sprague's motion to compel discovery.[169] Ms. Owens stated that she had a conversation with Westerhaus in which Westerhaus informed her of his concern "about the disparate treatment of women at Thorn."[170] According to the

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.* at 1367–68.

162. *See id.* at 1368.

163. *Id.* Discovery issues are reviewed by an abuse of discretion standard. *See id.* (citing Gomez v. Martin Marietta Corp., 50 F.3d 1511, 1520 (10th Cir. 1995)).

164. *See id.*

165. *See id.* (citing Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995)). The pertinent part of Rule 501 of the Federal Rules of Evidence provides that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." FED. R. EVID. 501.

166. *See Sprague*, 129 F.3d at 1369.

167. *See id.* Thus, the court did not need to formulate a remedy for conflicts in attorney-client privilege rules. *See id.*

168. *See id.* at 1372.

169. *See id.* Ms. Owens worked for Thorn from January 1990 until September 1995 in the Human Resources Department. *See id.* at 1369.

170. *Id.* Westerhaus was the staff attorney at Thorn for the Human Relations Department. *See id.*

affidavit, Ms. Owens contended that Westerhaus told her he distributed a memorandum relating to the issue of disparate treatment of women at Thorn to the Vice President and the General Counsel.[171] Owens stated the division she worked in at Thorn had been responsible for compiling statistical information used by Westerhaus in support of his memorandum.[172] Westerhaus commented that based on the information he received, disparate treatment of women existed at Thorn.[173]

The Tenth Circuit held that the attorney-client privilege protected the memorandum because in-house counsel prepared it for higher management and it related to the giving of legal advice.[174] The court found a broad rule prevailed in federal courts, protecting from disclosure any communication regarding legal advice from an attorney to his client.[175] The court was also convinced that, under Kansas's statutory language, the broad rule would apply to protect the memorandum.[176]

Ms. Sprague argued the attorney-client privilege had been waived.[177] The court rejected this argument, stating that the corporation's ability to waive the privilege rests with the corporation's management, specifically with officers and directors.[178] In this case, there was no express or implied waiver of the privilege by either the directors or officers of Thorn in relation to the memorandum as required by federal law.[179] The court also held that there was no waiver under Kansas's statutory law.[180]

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171. *See id.*

172. *See id.*

173. *See id.* at 1369–70.

174. *See id.* at 1370. The court noted that "[l]egal advice . . . from an attorney to his client, individual or corporate, has consistently been held by the federal courts to be within the protection of the attorney-client privilege." *Id.* (quoting United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1980)). The court also cited a Tenth Circuit case which held that "[t]he recognition that privilege extends to statements of a lawyer to a client is necessary to prevent the use of the lawyer's statements as admissions of the client." *Id.* (quoting Natta v. Hogan, 392 F.2d 686, 692–93 (10th Cir. 1968)).

175. *See id.* It has been noted that the attorney-client privilege has been more difficult to apply when it is asserted in the corporate setting as opposed to when it is asserted by outside counsel. *See* Beverly W. Garofalo, *Application of the Attorney-Client Privilege to In-House Counsel*, CORP. COUNS. November, 1998, at 1. In general, the courts will hold that the attorney-client privilege protects corporate communications only if legal advice, and not business advice, predominates. *See id.* The courts, however, have been unable to establish a bright line test to determine what constitutes legal advice as opposed to business advice. *See id.*

176. *See Sprague*, 129 F.3d at 1370.

177. *See id.* at 1371.

178. *See id.* (citing Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348–49 (1985)).

179. *See id.*

180. *See id.* Under Kansas's statutory law, the waiver of the privilege is limited to instances when the judge may determine that the corporation (through an authorized individual) has waived the privilege in accordance with Kansas's statutes. *See id.* No such waiver was shown satisfying such requirements. *See id.*

Ms. Sprague also contended that the attorney-client privilege did not apply due to the crime-fraud exception.[181] Under both Kansas's statutory law and federal law, the attorney-client privilege does not apply when the client contacts an attorney to perpetuate a crime or fraud.[182] The court dismissed Sprague's contention, noting that she provided no evidence to indicate "Westerhaus's advice was sought to perpetuate a crime" or fraud.[183]

C. *Other Circuits*

In *In re Perrigo Co.*,[184] a shareholder derivative action was brought against officers, directors, securities underwriters and controlling shareholders based on their actions during a public offering.[185] The Sixth Circuit articulated the general parameters of the corporation's attorney-client privilege as set forth in *Upjohn* as the appropriate statement of the law.[186] In particular, the Sixth Circuit held that the corporate attorney-client privilege may apply to any communication by a corporate employee acting within his corporate duties when he is aware that the information provided to the attorney is required to help corporate counsel give legal advice to the corporation.[187]

One of the more recent developments of the corporate attorney-client privilege, recognized by the Third Circuit, occurs when a corporate employee asserts a personal privilege for communications made with corporate counsel.[188] In *United States v. International Brotherhood of Teamsters*,[189] the Second Circuit adopted the Third Circuit's requirements, set forth in *In re Bevill, Bresler & Schulman Asset Management Corp.*,[190] for an individual to assert a personal attorney-client privilege between a corporate employee and a corporate attorney.[191] The Second Circuit held that the five-part test[192] described above was not satisfied because the individual seeking to assert the privilege had "neither sought

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181. *See id.*

182. *See id.* at 1371–72; *cf.* Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995)); Burton v. R.J. Reynolds Tobacco Co., 167 F.R.D. 134, 140–41 (D. Kan. 1996).

183. *Sprague*, 129 F.3d at 1369.

184. 128 F.3d 430 (6th Cir. 1997).

185. *See* In re *Perrigo Co.*, 128 F.3d at 430.

186. *See id.* at 437.

187. *See id.* (citing Upjohn v. United States, 449 U.S. 383, 394 (1981)).

188. *See* Chepiga, *supra* note 2, at 484 (citing *In re* Bevill, Brester & Schulman Asset Mgmt. Corp., 805 F.2d 120, 124 (3d Cir. 1986)) (noting that the Second Circuit adopted the requirements, set out in *Bevill*, for a corporate employee to assert the privilege after communicating with corporate counsel).

189. 119 F.3d 210 (2d Cir. 1997).

190. 805 F.2d 120 (3d Cir. 1986). Note that in this case the Third Circuit held that corporate officers could not assert individual attorney-client privilege to prevent disclosure of corporate communications with corporate counsel after a corporation's privilege was waived. *See* In re *Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d at 124–25.

191. *Cf.* Chepiga, *supra* note 2, at 484.

192. *See supra* note 130 and accompanying text.

nor received legal advice in his individual capacity during conversations" with corporate counsel.[193]

The Sixth Circuit, though not relying on the formulation set out in the Second Circuit, nevertheless has required an employee to make it clear to corporate counsel that he sought legal advice on personal matters in order to assert a privilege over ensuing communications with corporate counsel.[194] The Eighth Circuit has also recognized that an individual corporate officer may have a personal claim or attorney-client privilege with regard to communications with corporate counsel.[195]

D. *Analysis*

In *Sprague*, the Tenth Circuit recognized a contradiction of treatment of the attorney-client privilege in several cases.[196] Under the narrower approach, the corporate attorney-client privilege does not protect confidential communications between an attorney and his client unless it relates to legal advice pertaining to client confidences.[197] Under the broader approach, the corporate attorney-client privilege protects from disclosure any communication from a corporate attorney to his client in which the communication relates to giving legal advice.[198] The court was persuaded by the Tenth Circuit's decision in *Natta v. Hogan*,[199] which was representative of the broader approach.[200] The Tenth Circuit followed the broader rule—a rule which the majority of circuits follow.

Meanwhile the Tenth Circuit adopted the five-part test used by the Second and Third Circuit. As other circuits consider the issue of whether a corporate employee can assert an individual attorney-client privilege with corporate counsel, it is reasonable to expect that the test used by the Second, Third, and Tenth Circuits will be adopted.

CONCLUSION

The work product doctrine is alive and well in the Tenth Circuit. During the survey period, the Tenth Circuit in *Frontier* followed the trend of other circuits in affording attorneys work product protection in subsequent litigation. Unlike other circuits, the Tenth Circuit stopped short of determining whether an attorney's work product is protected in unrelated subsequent litigation. The Tenth Circuit's decision is appropriate to further the goal of the work product doctrine, namely to encourage

193. *International Bd. of Teamsters*, 119 F.3d at 217.

194. *Cf. In re* Grand Jury Proceedings, 570 F.2d 562 (6th Cir. 1978).

195. *Cf.* Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977).

196. *See Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1370 (10th Cir. 1997). For a discussion of the two general approaches, see *Loftis v. Amica Mutual Ins. Co.*, 175 F.R.D. 5 (D. Conn. 1997).

197. *See Sprague*, 129 F.3d at 1370 (citing *Loftis*, 175 F.R.D. at 9–10).

198. *See id.* (citing *In re* LTV Sec. Litig., 89 F.R.D. 595, 602 (N.D. Tex. 1981).

199. 392 F.2d 686, 692–93 (10th Cir. 1968).

200. *See Sprague*, 129 F.3d at 1370.

complete and thorough preparation for litigation. Due to the conflicting standards used by circuit courts to determine the applicability of the work product doctrine in subsequent litigation, it would be appropriate for the Supreme Court to establish a uniform standard.

The Tenth Circuit's decision in *Frontier* only suggestively adopted the *Hearn* test to determine whether clients waive the attorney-client privilege when they affirmatively plead a claim or defense that puts the privilege at issue. This decision followed the majority thinking of other circuits. However, the discrepancies among the circuit courts when implied subject matter waiver is in question does implicate the need for a uniform standard. To allow the attorney-client privilege to achieve its goals of open and complete communication between a client and an attorney, like other areas of the law, uniformity and predictability are required.

The Tenth Circuit in *Grand Jury Subpoenas*, further developed a personal corporate attorney-client privilege when it adopted a five-part test to determine whether a corporate employee may assert an individual privilege with corporate counsel. This decision gives corporate attorney's and corporate employee's important guidance surrounding when an individual assertion of the attorney-client privilege exists between a corporate employee and corporate counsel. Although only the Second and Third Circuits use the test adopted by the Tenth Circuit, the other circuits have established similar standards regarding personal attorney-client privilege with corporate counsel.

Finally, in *Sprague*, the Tenth Circuit applied a straightforward analysis of a corporation's ability to assert the attorney-client privilege. Following the general parameters of a corporation's attorney-client privilege established in *Upjohn*, the court held a memorandum prepared by in-house counsel for higher management and related to the giving of legal advice was privileged. Although there is no definitive, uniform standard the circuit courts apply to establish applicability of a corporation's attorney-client privilege, the circuits generally adhere to the framework established by the Supreme Court in *Upjohn*. To assert the privilege, the confidential communication must fall within the employee's scope of duty and must relate to corporate legal advice not otherwise available from upper management.[201]

Kenneth L. Rothenberg[*]

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201. *Cf.* Gregory J. Wallace & Jay W. Waks, *Internal Investigation of Suspected Wrongdoing by Corporate Employees*, 1057 PLI CORP. 515, 524 (1998).

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