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## Attorney-Client Privilege and the Kovel Doctrine: Should Wisconsin Extend the Privilege to Communications with Third-Party Consultants?

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# ATTORNEY–CLIENT PRIVILEGE AND THE *KOVEL* DOCTRINE: SHOULD WISCONSIN EXTEND THE PRIVILEGE TO COMMUNICATIONS WITH THIRD-PARTY CONSULTANTS?

*In today’s marketplace, the way that corporations conduct business is drastically changing, and lawyers are increasingly relying on third-party consultants, such as accountants or investment bankers, to facilitate them in providing accurate legal advice to corporate clients. Despite this reliance, whether the attorney–client privilege protects the communications between an attorney and a third-party consultant is often questioned. In United States v. Kovel, the Second Circuit found that the attorney–client privilege extended to communications between an attorney and a third-party consultant who acted as an interpreter. However, both federal and state courts have since split over the proper scope of the Kovel doctrine. In particular, courts have applied both a narrow and broad interpretation of the Kovel doctrine, rendering the application of the doctrine unpredictable.*

*Wisconsin in particular has not yet addressed whether the attorney–client privilege should apply to third-party consultants, and if so, what the proper scope of or limitations to the privilege should be. Based upon an analysis of both federal and state courts’ application of the attorney–client privilege as well as Wisconsin’s own statutes and policies, this Comment recommends that Wisconsin follow other states and adopt the Kovel doctrine. Rather than apply a broad application, Wisconsin should adopt a narrow, but lenient, approach to the Kovel doctrine. Specifically, Wisconsin courts should analyze (1) whether there is sufficient evidence, other than the substance of the communications, to determine that the consultant was hired for the facilitation of legal advice and (2) whether the third-party consultant acts as a translator of client only information.*

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## I. INTRODUCTION

The way that corporations conduct their businesses and manage the global marketplace is drastically changing.<sup>1</sup> Due to the complexity and legal demands of the marketplace, organizations are increasingly downsizing, restructuring, and relying more on third-party consultants to competitively perform in the marketplace.<sup>2</sup> Rather than have an employee perform a service, corporations utilize third-party consultants who function as independent contractors to perform the once traditional employee services.<sup>3</sup>

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1. See generally Robert Eli Rosen, “*We’re All Consultants Now*”: *How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637 (2002) (arguing that changes in businesses have affected how legal services are rendered to corporations).

2. *Id.* at 641–50.

3. Edward J. Imwinkelried & Andrew Amoroso, *The Application of the Attorney–Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need for A More Precise, Fundamental Analysis*, 48 HOUS. L. REV. 265, 272 (2011) [hereinafter Imwinkelried]; Rosen, *supra* note 1, at 647 (“Having downsized, outsourcing recommends that companies use non-employee workers on a project basis. Today, ‘many basic organizational functions are either outsourced or done collaboratively with outsiders.’”) (footnote omitted) (quoting Walter W. Powell, *The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise*, in THE TWENTY-FIRST-CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE 33, 64 (Paul DiMaggio ed., 2001)); see also Denise Horan, *Why Use a Consultant for Your Business?*, DENISE HORAN: SALE AND MGMT. STRATEGY, CONSULTING, & TRAINING (Mar. 12,

Furthermore, in today's world, legal risks are rarely isolated matters. Instead, these legal risks affect other corporate or business decisions.<sup>4</sup> Because of the effect that legal decisions can have on a corporation's actions, businesses have utilized a variety of consultants from a range of fields to help them make informed business decisions.<sup>5</sup> For example, attorneys have utilized the expertise and knowledge of third-party accountants,<sup>6</sup> public relation consultants,<sup>7</sup> investment bankers,<sup>8</sup> and actuarial consultants<sup>9</sup> to provide legal advice. These professional consultants often possess information and expertise that is necessary for lawyers to accurately give legal advice to clients regarding the consequences or risks of a business decision.<sup>10</sup>

However, when attorneys consult with third-party consultants, there is often a question as to whether the communications are protected by the attorney-client privilege. Traditionally, the attorney-client privilege protected communications between an attorney and client that were made in confidence for the purpose of seeking legal advice.<sup>11</sup> In *Upjohn Co. v. United States*,<sup>12</sup> the Supreme Court held that the attorney-client privilege applied to corporations and delineated that the purpose of the attorney-client privilege is to provide "full and frank communication[s]" between the client and the attorney.<sup>13</sup> Because the business landscape is changing with the increasing use of third-party consultants, understanding when, if at all, attorney-client privilege

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2018), <http://www.denisehoran.com/news-articles/Why-Use-a-Consultant-for-Your-Business--74-news.htm> [<https://perma.cc/LB62-9596>].

4. Rosen, *supra* note 1, at 659 ("Legal risks not only must be assessed, but also processed because legal risks often are not detached risks.").

5. Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Party Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727, 736 (2009) ("Given today's highly regulated, litigious, publicized, and complex marketplace, corporations often rely on consultants from various disciplines to help make business and legal decisions.").

6. See *United States v. Kovel*, 296 F.2d 918, 919 (2d Cir. 1961).

7. See *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 322, 324 (S.D.N.Y. 2003).

8. See *United States v. Ackert*, 169 F.3d 136, 138 (2d Cir. 1999).

9. See *Cottillion v. United Ref. Co.*, 279 F.R.D. 290, 299 (W.D. Pa. 2011).

10. See Beardslee, *supra* note 5, at 737-39 (explaining how an interview Beardslee conducted with a general counsel revealed the extent that attorneys may need the advice and expertise of PR consultants to provide efficient legal advice).

11. See, e.g., *Ferko v. Nat'l Ass'n for Stock Car Auto Racing*, 218 F.R.D. 125, 133 (E.D. Tex. 2003).

12. 449 U.S. 383 (1981).

13. *Id.* at 389-95.

attaches to “full and frank” communications is vital for both corporations and attorneys alike.

In the landmark case, *United States v. Kovel*,<sup>14</sup> the Second Circuit applied the attorney–client privilege to communications between an attorney and accountant where the accountant assisted the attorney in understanding the client’s financial information for the facilitation of legal advice.<sup>15</sup> However, since *Kovel* was decided, courts have split regarding the proper scope of the *Kovel* doctrine.<sup>16</sup> Some federal courts have narrowed *Kovel*’s holding, limiting the application of the attorney–client privilege when applied to third-party consultants.<sup>17</sup> A few other courts have applied the *Kovel* doctrine broadly.<sup>18</sup> While the *Kovel* doctrine has been applied in multiple federal circuits, there is no singular consensus on the proper scope of or limitations to the privilege, rendering the application of the doctrine unpredictable.<sup>19</sup>

Furthermore, state courts have also adopted the *Kovel* doctrine and have applied it in their jurisdictions.<sup>20</sup> Similar to the federal courts, these states have yet to adopt a uniform consensus as to how broadly or narrowly the *Kovel* doctrine should be applied.<sup>21</sup> While many states have adopted or considered the *Kovel* doctrine, Wisconsin has yet to confront a case involving the doctrine. Although Wisconsin’s attorney–client privilege is contained in a statute rather than the common law, the codified attorney–client privilege evidentiary rule does not explicitly address whether communications between attorneys and third-party consultants are covered by the privilege.<sup>22</sup> This Comment will examine whether Wisconsin should adopt the *Kovel* doctrine as defined by other courts, and if so, whether the scope of the privilege should be limiting or broad. Overall, based on Wisconsin’s case law and policies underlying the attorney–client privilege, this Comment recommends that Wisconsin follow other states and adopt the *Kovel* doctrine. Rather than apply a broad application of the test, Wisconsin should adopt a narrow, but lenient, approach to the *Kovel*

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14. 296 F.2d 918 (2d Cir. 1961).

15. *Id.* at 920–23.

16. Imwinkelried, *supra* note 3, at 284 (“If an attorney–client–expert interaction does not fall within the parameters of the [*Kovel* doctrine], the courts split badly over the question of whether the legal privilege should apply to the communications involved in the interactions.”).

17. Kim J. Gruetzmacher, *Privileged Communications with Accountants: The Demise of United States v. Kovel*, 86 MARQ. L. REV. 977, 978 (2003) (“Over the past four decades, courts have repeatedly narrowed the holding in *Kovel*.”); *see also infra* Section III.B and accompanying notes.

18. *See infra* Section III.C and accompanying notes.

19. *See infra* Sections III.B, III.C and accompanying notes.

20. *See infra* Section IV.A and accompanying notes.

21. *See infra* Section IV.A and accompanying notes.

22. *See* WIS. STAT. § 905.01 (2015–2016).

doctrine: one that is not so broad that the privilege applies to every situation but neither too narrow that the privilege is severely limited and inapplicable. This is in keeping both with other courts’ consideration of the doctrine and also with the Wisconsin courts’ own treatment of attorney–client privilege doctrine.

Part II of this Comment discusses the history of the attorney–client privilege, when the privilege is applicable, and the policy considerations underlying the privilege. Part III analyzes the *Kovel* doctrine and examines the federal court cases that have followed *Kovel*. This section highlights how some federal courts have narrowed *Kovel*’s holding while a few other federal courts have been less rigid with the doctrine. Part IV explores how states have interpreted the *Kovel* doctrine and examines Wisconsin’s own approach to the attorney–client privilege before recommending that Wisconsin adopt a moderate but narrow approach to the *Kovel* doctrine.

## II. BACKGROUND ON ATTORNEY–CLIENT PRIVILEGE

### A. History of Attorney–Client Privilege

The attorney–client privilege is “the oldest of the privileges for confidential communications”<sup>23</sup> and can be traced back to the 1600s during the Reign of Queen Elizabeth I.<sup>24</sup> During the Elizabethan era, the holder of the privilege was the attorney acting as a gentleman rather than the client, as is the case in today’s understanding.<sup>25</sup> During this time, the purpose of the privilege was to prevent an attorney from testifying against his client, an act that would be dishonorable

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23. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (John T. McNaughton ed., 1961); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

24. WIGMORE, *supra* note 23, § 2290, at 542; Imwinkelried, *supra* note 3, at 267. However, some commentators have also traced the origins of the attorney–client privilege to Roman law rather than during the reign of Queen Elizabeth I. See Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928). Under this theory, the attorney–client privilege originated from the Roman concept of loyalty rather than a gentleman’s honor. *Id.* at 487. According to Max Radin, “[i]t was one of the commonplaces of the Roman law that a servant—who was . . . a slave—might not give testimony against his master” in part because the slave was an essential part of the family. *Id.* at 487–88. This was based on a “mutual fidelity” and loyalty. *Id.* Although an attorney was not a slave during this time, an attorney would be an “honored and influential servant” who “must keep his master’s secrets.” *Id.* at 487.

25. See John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney–Client Privilege*, 57 N.Y.U. L. REV. 443, 445 (1982); WIGMORE, *supra* note 23, § 2290, at 545.

to a gentleman.<sup>26</sup> Under this philosophy, a true gentleman would never disclose his client's secrets.<sup>27</sup>

However, near the end of the eighteenth century, courts no longer used the attorney–client privilege,<sup>28</sup> and it was not until the early nineteenth century that the privilege reemerged under a new policy theory.<sup>29</sup> Rather than protect a gentleman's honor or prevent the divulgement of a client's secrets, the new theory underlying the adoption of the attorney–client privilege was based on utilitarian principles.<sup>30</sup> In particular, in the American jurisprudence, attorney–client privilege was based on the proposition that but for the protection of a client's confidential communications, clients would be less willing to disclose necessary information, irrevocably harming the facilitation of legal advice.<sup>31</sup> Removing a client's fears that an attorney will repeat confidential information is vital to the attorney–client relationship and enables the attorney to give competent legal advice.<sup>32</sup> Today, Federal Rules of Evidence 501 codifies the attorney–client privilege.<sup>33</sup> It states that a claim of privilege is governed by the “common law—as interpreted by United States courts in the light of reason and experience.”<sup>34</sup>

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26. Ann M. Murphy, *Spin Control and the High-Profile Client—Should the Attorney–Client Privilege Extend to Communications with Public Relations Consultants?*, 55 SYRACUSE L. REV. 545, 549–50 (2005); Emily Jones, *Keeping Client Confidences: Attorney–Client Privilege and Work Product Doctrine in Light of United States v. Adlman*, 18 PACE L. REV. 419, 421–22 (1998).

27. Murphy, *supra* note 26, at 550.

28. See Sexton, *supra* note 25, at 446 (“By the last quarter of the eighteenth century, however, the doctrine fell out of favor and was rejected as antithetical to the judicial search for truth.”); WIGMORE, *supra* note 23, § 2290, at 543 (“That doctrine, however, finally lost ground, and by the last quarter of the 1700s . . . was entirely repudiated.”).

29. Sexton, *supra* note 25, at 446; WIGMORE, *supra* note 23, § 2290, at 543–44.

30. WIGMORE, *supra* note 23, §§ 2290–91, at 541–54; see also Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney–Client Privilege*, 69 NOTRE DAME L. REV. 157, 161 (1993) (arguing that “[m]ost purpose myths supporting the attorney–client privilege today are utilitarian ones. In other words, rather than claiming that the privilege is intrinsically good, these myths claim that the privilege furthers some other social policy.”).

31. Imwinkelried, *supra* note 3, at 267. But see Sexton, *supra* note 25, at 464 (“[S]everal commentators have argued that because of the exigencies of the regulatory state and because of their general business needs, corporations would communicate with attorneys even if the privilege were not available.”); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 363–66 (1989) (arguing that “it is problematic to assume that clients would avoid lawyers to any significant degree merely because they cannot speak in absolute secrecy.”).

32. Jones, *supra* note 26, at 424.

33. FED. R. EVID. 501.

34. *Id.*

Despite the fact that the privilege is codified, the attorney–client privilege rests in tension between the disclosure of “full and frank communication[s]”<sup>35</sup> between an attorney and her client, and the truth finding process, which is essential to the success of the American judicial system. As stated by Dean Wigmore, “the public . . . has a right to every man’s evidence,” and when there is an exemption to this right, that exemption must be “distinctly exceptional.”<sup>36</sup>

Although an advocate of the attorney–client privilege, Dean Wigmore championed a restricted view of the privilege, stating that the privilege “should be recognized only within the narrowest limits required by principle.”<sup>37</sup> Even today, the attorney–client privilege stands at odds with the discovery rules of Federal Rules of Civil Procedure.<sup>38</sup> Furthermore, unlike the work product doctrine,<sup>39</sup> the attorney–client privilege is absolute in nature.<sup>40</sup> This means that unless the client has waived the privilege or a legislative exception exists, the communication will not be exposed regardless of how relevant the information is.<sup>41</sup> By allowing communications between an attorney and a client to be

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

36. WIGMORE, *supra* note 23, § 2192, at 70.

37. *Id.* at 73.

38. Jones, *supra* note 26, at 425; see FED. R. CIV. P. 26 (outlining explicit instances when the parties have a duty to disclose information).

39. Many cases that involve the attorney–client privilege also involve the work product doctrine in part because third-party consultants may be asked to create a memorandum with recommendations for the attorney or client. See, e.g., *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995). A full exploration of the effects of the attorney–client privilege, the *Kovel* doctrine, and the work product doctrine is outside the bounds of this Comment. While this Comment does not fully explore the work product doctrine, the work product doctrine is still relevant to the discussion of the attorney–client privilege because the attorney–client privilege and the work product doctrine are “inseparable twin issues.” *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 126 (N.D.N.Y. 2007). In addition, the work product doctrine claim does not render moot the attorney–client privilege in the context of third-party consultants because (1) courts can pierce the work product doctrine, (2) the doctrine only covers advice given in response to litigation, and (3) the circumstances in which the work product doctrine is invoked are different than the circumstances that typically apply the attorney–client privilege. See Beardslee, *supra* note 5, at 755–59. For a discussion on the work product doctrine in connection with the attorney–client privilege, see Gruetzmacher, *supra* note 17, at 989–94; Jones, *supra* note 26, at 433–46.

40. Imwinkelried, *supra* note 3, at 270–71.

41. *Id.* The fact that a privilege is absolute does not mean that it does not yield. *Id.* at 275. Rather, the claim can be defeated by a showing that the client waived the privilege, such as by disclosing the information to third-party consultants. See *id.* However, unlike the work product doctrine, which can yield if the party shows that there is “substantial need for the materials to prepare [the] case and cannot, without undue hardship, obtain their substantial equivalent by other means,” FED. R. CIV. PRO. 26(b)(3)(A)(ii),

the opposing party cannot override the [attorney–client privilege claim] after the fact merely by showing a desperate need for the privileged information; it is



privileged, relevant evidence may be suppressed,<sup>42</sup> which “frustrate[s] the investigative or fact-finding process”<sup>43</sup> and harms the “administration of justice.”<sup>44</sup>

Despite the tension between the openness of the discovery and litigation process, and the secrecy of the attorney–client privileged communications, the attorney–client privilege is important because it encourages open communication and “promote[s] broader public interests in the observance of law and administration of justice.”<sup>45</sup> “[T]he social good derived from the proper performance of the functions of lawyers acting for their clients,”<sup>46</sup> such as providing accurate legal advice, “outweigh[s] the harm that may come from the suppression of the evidence.”<sup>47</sup>

In addition to having social utility, there are other arguments as to why the attorney–client privilege is beneficial and should not be constructed too narrowly.<sup>48</sup> Clients are more willing to discuss important information if they

immaterial that the party now needs the information in order to sustain his or her initial burden of production and avoid a directed verdict, nonsuit, or judgment as a matter of law.

Imwinkelried, *supra* note 3, at 275–76; *see also* State *ex rel.* Dudek v. Circuit Court, 34 Wis. 2d 559, 581, 150 N.W.2d 387, 399–400 (1967) (“Unless one of the few exceptions can be utilized, the protection afforded by the [attorney–client] privilege is absolute. No showing of necessity, hardship, or injustice can require an attorney to reveal the protected information if his client does not waive the privilege, no matter how necessary the information is to a resolution of the particular issue on its merits.”).

42. Sexton, *supra* note 25, at 446.

43. Comm’r of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1195 (Mass. 2009) (quoting Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., 870 N.E.2d 1105, 1111 (Mass. 2007)).

44. WIGMORE, *supra* note 23, § 2192, at 73 (“The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. . . . Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.”).

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

46. *Comcast*, 901 N.E.2d at 1195 (quoting Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., 870 N.E.2d 1105, 1111 (Mass. 2007)).

47. *Id.*

48. For example, some argue an instrumental rationale for the attorney–client privilege, which “views the privilege as an incentive for full disclosure by the client.” CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5472, at 80 (1st ed. 1986). There are five steps for understanding the application of the attorney–client privilege under this instrumental argument:

1. “[T]he law is complex.” *Id.* at 80. Given that lawyers find it difficult to be aware of all legal rules, a layperson would find it almost impossible to discover or understand the law for a particular action, let alone understand the procedural rules for trial. *Id.* at 80–81.
2. “[I]t is in the public interest that citizens should understand the law and this can best be accomplished by allowing them to obtain advice from persons

know that the attorney will not disclose or repeat the confidential communications.<sup>49</sup> If the privilege did not exist, it would irreparably harm the administration of advice because clients would be less likely to divulge relevant and necessary information.<sup>50</sup> Sound legal advice can only occur if all available facts are disclosed to the attorney.<sup>51</sup> In addition, the privilege may also encourage individuals and corporations to comply with regulatory laws since they are more likely to communicate with attorneys if they know that their communications will be privileged.<sup>52</sup> Therefore, while the attorney-client privilege is an “exception to the general duty to disclose . . . [and] its obstruction is plain and concrete,” the societal benefits of the privilege warrant its continued application and success.<sup>53</sup> However, many argue that the scope of the privileged should be “strictly confined within the narrowest possible

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learned in the law.” *Id.* at 81.

3. “In order for the lawyer to give sound advice or to properly present his client’s claim, it is said that the lawyer must be informed by the client of all of the facts, good and bad, that are relevant to the matter.” *Id.* at 82. This is a controversial empirical proposition because it has never been tested and likely never will be tested. *Id.*
4. “[W]ithout the privilege, clients would only relate to their lawyers those facts that were thought to be favorable to their case or useful in obtaining the desired advice that their proposed conduct is legal.” *Id.* at 83. Again, this point is controversial and subject to many critiques. *See id.* at 83–84.
5. “[T]he benefits to society from increased candor in attorney-client communications outweigh the costs of suppressing evidence of those communications.” *Id.* at 84. This is the most critiqued proposition. *See id.*

49. Carl Pacini et al., *Accountants, Attorney-Client Privilege, and the Kovel Rule: Waiver Through Inadvertent Disclosure via Electronic Communication*, 28 DEL. J. CORP. L. 893, 897 (2003); *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982) (“The purpose of the privilege is to foster full client disclosure to the lawyer; the privilege exists to assure the client that his private disclosures will not become common knowledge.”).

50. *See* WIGMORE, *supra* note 23, § 2291, at 545 (“In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client’s consent.”); Pacini et al., *supra* note 49, at 897 (arguing that limiting the attorney-client privilege would “have a negative impact on the American justice system. Clients, knowing that their communications would be subject to disclosure, would ultimately be less forthright with their lawyers or sacrifice legal services completely.”); Jones, *supra* note 26, at 424 (“The attorney-client privilege helps calm the fear of potential clients that their communications with the attorney may be disclosed to a third party, keeping the potential client from seeking legal advice from an attorney.”).

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

52. Jones, *supra* note 26, at 424.

53. WIGMORE, *supra* note 23, § 2291, at 554.

limits consistent with the logic of its principle.”<sup>54</sup> As we will see later on, the tension between disclosure and confidentiality, as well as the public policy considerations, are extremely important for courts when considering whether to expand the attorney–client privilege to third-party consultants.<sup>55</sup>

Because the attorney–client privilege is based on common law, courts have formulated several tests to determine the applicability of the privilege.<sup>56</sup> Each test contains the same elements articulated in a different manner.<sup>57</sup> One of the most common formulations of the attorney–client privilege is the following:

- (1) Where legal advice of any kind is sought,
- (2) from a professional legal adviser in his capacity as such,
- (3) the communications relating to that purpose,
- (4) made in confidence
- (5) by the client,
- (6) are at his instance permanently

54. *Id.*; see *Comm’r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1194–95 (Mass. 2009) (stating that the attorney–client privilege should be constructed narrowly to “protect the competing societal interest of the full disclosure of relevant evidence”); *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001) (finding that “the privilege applies only to the extent necessary to achieve its underlying goal of ensuring effective representation through open communication between lawyer and client.”).

55. See *infra* Part IV.

56. Jones, *supra* note 26, at 422–23; Pacini et al., *supra* note 49, at 899 (“Various tests have been set forth by the courts to determine whether the attorney–client privilege applies to a particular case.”).

57. For example, one formulation that courts use is the following:

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

See, e.g., *In re Grand Jury Proceedings*, 517 F.2d 666, 670 (5th Cir. 1975); *Cottillion v. United Ref. Co.*, 279 F.R.D. 290, 298 (W.D. Pa. 2011) (quoting *In re Asousa P’ship*, No. 01–12295DWS, 2005 WL 3299823, at \*2 (Bankr. E.D. Pa. Nov. 17, 2005)). Regardless of which test is used, the

- party claiming the privilege [must] prove the existence of each of the following elements: 1. The holder of the privilege is or sought to become a client; 2. The person to whom a communication is made is a licensed attorney or his agent; 3. The attorney is acting as the client’s lawyer with regard to the communication; and 4. The communication relates to a matter of which the attorney was informed by his client, without the presence of third parties, for the purpose of securing legal services and not for the purpose of committing a crime or tort.

Pacini et al., *supra* note 49, at 899. According to the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 1998), the attorney–client privilege may be invoked when there is “(1) a communication, (2) made between privileged persons, (3) in confidence, (4) for the purpose of obtaining or providing legal assistance for the client.”

protected (7) from disclosure by himself or by the legal adviser,  
 (8) except the protection be waived.<sup>58</sup>

Regardless of which formulation a court articulates, the party claiming the privilege has the burden to establish each element of the privilege.<sup>59</sup> In addition, attorney-client privilege only applies to the communications rendered, not the underlying facts of the case.<sup>60</sup> Furthermore, the privilege only applies to legal advice given, not to business advice.<sup>61</sup> For in-house attorneys who typically confront business considerations when rendering legal advice to corporate clients, this may prove to be a vital and important distinction,<sup>62</sup> especially if the individual is an attorney and occupies a business role in the organization.<sup>63</sup> Indeed, courts have applied a higher scrutiny to in-house counsel in comparison

58. WIGMORE, *supra* note 23, § 2292, at 554; Lisa Borelli Flynn, *CEO, CFO, COO . . . Cube Dweller? Attorney-Client Privilege and Corporate Communication: Whose Communications Should Massachusetts Law Protect?*, 43 SUFFOLK U. L. REV. 701, 706 (2010) (quoting 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, 392-93 (1998)); *Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2002); *Comcast*, 901 N.E.2d 1185, 1194 (Mass. 2009).

59. *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997).

60. *Pacini et al.*, *supra* note 49, at 898; *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 644 (S.D.N.Y. 1987) (“[T]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.”).

61. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359-60 (D. Mass. 1950) (“Where a communication neither invited nor expressed any legal opinion whatsoever, but involved the mere soliciting or giving of business advice, it is not privileged.”). Indeed, there is a rebuttable presumption that an attorney employed in a business position is providing business advice while an attorney employed in a legal department of a business is providing legal advice. *Breneisen v. Motorola, Inc.*, No. 02-C-50509, 2003 U.S. Dist. LEXIS 11485, at \*10 (N.D. Ill. July 3, 2003). However, courts will protect communications that contain business advice if the primary purpose of the advice was legal in nature. *See Super Tire Eng’g Co. v. Bandag Inc.*, 562 F. Supp. 439, 441 (E.D. Pa. 1983) (“[T]he communication’s primary purpose must be to gain or provide legal assistance. The privilege is not necessarily lost, however, when some non-legal information is included in a communication seeking or giving legal advice.”).

62. *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 126 (N.D.N.Y. 2007) (“In today’s world, an attorney’s acumen is sought at every turn, even average attorneys mix legal advice with business, economic, and political.”); *see also Hardy*, 114 F.R.D. at 643-44 (“When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved.”).

63. *See Zullig v. Kansas City Power & Light Co.*, No. 87-2342, 1989 WL 7901, at \*2-3 (D. Kan. Jan. 17, 1989) (emphasis omitted) (finding that a committee meeting and business report did not become shielded by the attorney-client privilege because the communications were not shared with in-house counsel “for the purpose of seeking legal advice”).

to outside counsel when determining if the advice given was for legal or business purposes.<sup>64</sup>

Overall, the communications must be made in confidence for the purposes of rendering legal advice.<sup>65</sup> Because the client is the holder of the privilege, only the client can waive the privilege.<sup>66</sup> If the communications are not confidential, then the attorney–client privilege does not apply to the communications, and the privilege is waived.<sup>67</sup> Such waivers can occur by disclosing the communications to a third party or making the communications in the presence of a third party.<sup>68</sup>

However, clients do not waive the attorney–client privilege if the privilege is made or disclosed in the presence of a third party who is the attorney’s agent

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64. *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (holding that while the individual’s position as an in-house attorney does not “dilute the privilege,” the privilege will only be applied if the company proves with a clear showing that the in-house counsel gave advice within “a professional legal capacity”); *Chandola v. Seattle Hous. Auth.*, No. 13-cv-00557RSM, 2014 U.S. Dist. LEXIS 144103, at \*2 (W.D. Wash. Oct. 7, 2014) (citation omitted) (“[W]hile attorney–client privilege is always strictly construed, extra scrutiny is required where in-house counsel is involved, as in-house counsel often act in both a legal and non-legal business capacity, and communications made in this latter capacity are not privileged.”). Therefore, although the mix of business and legal advice may not prevent the privilege from applying, in-house attorneys have a higher burden to meet when compared to outside attorneys. See *Jones*, *supra* note 26, at 462–64 (arguing that the higher level of scrutiny for in-house counsel is appropriate given the public policies that the courts have articulated and are attempting to achieve).

65. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (“The relationship of attorney and client, a communication by the client relating to the subject matter upon which professional advice is sought, and the confidentiality of the expression for which the protection is claimed, all must be established in order for the privilege to attach.”).

66. *Jones*, *supra* note 26, at 422.

67. *Gruetzmacher*, *supra* note 17, at 979; *Cottillion v. United Ref. Co.*, 279 F.R.D. 290, 298 (W.D. Pa. 2011) (“A communication is not made in confidence, and, therefore, is not privileged if persons other than the client, the attorney, or their agents are present.”); MCCORMICK ON EVIDENCE § 91, at 555 (Kenneth S. Brom et al. eds., 7th ed. 2013) (“It is of the essence of the privilege that it is limited to those communications that the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.”); *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982) (“The need to cloak these communications with secrecy, however, ends when the secrets pass through the client’s lips to others. Thus, a breach of confidentiality forfeits the client’s right to claim the privilege.”).

68. See *Schwimmer*, 892 F.2d at 243 (“The attorney–client privilege generally forbids an attorney from disclosing confidential communications that pass in the course of professional employment from client to lawyer.”); *Beardslee*, *supra* note 5, at 744 (“[T]he privilege does not apply or is considered waived when the client voluntarily discloses an otherwise confidential, privileged communication to a third party.”); *Pacini et al.*, *supra* note 49, at 898–99 (“If a client communicates a matter to his lawyer in the presence of a third party who is not an agent of the lawyer, the communication is not confidential.”).

and the communication is necessary to facilitate legal advice.<sup>69</sup> Under this exception, the communication is still considered confidential and protected by the attorney–client privilege despite the fact that a third party has been exposed to the communication.<sup>70</sup> Due to the complexity of the legal practice, courts have extended the attorney–client privilege to multiple types of legal agents, such as clerks<sup>71</sup> or interpreters.<sup>72</sup> As previously noted, the Second Circuit has applied the attorney–client privilege to confidential communications shared between the client, attorney, and an accountant because the accountant was necessary or helpful to the attorney in rendering the legal advice.<sup>73</sup> As this Comment will explore later on, the application of the attorney–client privilege to third-party professional consultants is not a predictable or clear standard to follow.<sup>74</sup> There is not a single consensus among the federal or state courts as to the proper scope of the privilege to communications between third-party consultants.<sup>75</sup> This lack of consensus among the federal courts makes it harder for states who have not yet confronted the *Kovel* doctrine, such as Wisconsin, to determine its applicability and scope.

#### B. Attorney–Client Privilege and Corporations

It was not always intuitive that the attorney–client privilege would be available to corporations since the privilege was originally asserted by

69. *Ferko v. Nat’l Ass’n for Stock Car Auto Racing*, 218 F.R.D. 125, 134 (E.D. Tex. 2003) (“An exception to [the attorney–client privilege waiver] rule exists for third parties who assist an attorney in rendering legal advice.”).

70. *Mileski v. Locker*, 178 N.Y.S.2d 911, 915–16 (Sup. Ct. 1958) (“As a general rule, a communication by a client to his attorney by any form of agency employed or set in motion by the client is within the privilege. Accordingly, communications to any person whose intervention is necessary to secure and facilitate the communication between attorney and client are privileged, as communications through an interpreter, a messenger, or any other intermediary.”).

71. *See Smith v. Mitchell (In re Putnam’s Will)*, 177 N.E. 399, 400–01 (N.Y. 1931).

72. *See Olson v. Accessory Controls & Equip. Corp.*, 757 A.2d 14, 23 (Conn. 2000) (stating that as a general rule “the attorney–client privilege ‘extends to interpreters, and to clerks and agents employed by the attorney’”) (quoting *Goddard v. Gardner*, 28 Conn. 172, 175 (Conn. 1859)). Courts have also extended the attorney–client privilege to other third parties or agents who provided necessary information for the rendering of legal advice, such as parents or adult children. *See Hendrick v. Avis Rent A Car Sys., Inc.*, 944 F. Supp. 187, 188–90 (W.D.N.Y. 1996); *Stroh v. Gen. Motors Corp.*, 623 N.Y.S.2d 873 (N.Y. App. Div. 1995). Although there are multiple types of third parties and agents, this Comment will primarily focus on the third-party professional consultants that attorneys tend to contact for their expertise and knowledge, such as accountants, public relations consultants, investment bankers, or actuarial consultants.

73. *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

74. *See infra* Section IV.A and accompanying notes.

75. *See infra* Section IV.A and accompanying notes.

individuals.<sup>76</sup> However, as early as 1915, the Supreme Court tacitly allowed a corporation to utilize the attorney–client privilege without explicitly addressing whether corporations in general could in fact claim such a privilege.<sup>77</sup> It was not until 1963 in *Radiant Burners, Inc. v. American Gas Ass’n* that a Federal Court of Appeals first directly answered the question as to whether a corporation can assert the attorney–client privilege in the same manner as an individual.<sup>78</sup> After reviewing the lower court’s rationale for not applying the privilege to a corporation,<sup>79</sup> the Seventh Circuit determined that “based on history, principle, precedent and public policy the attorney–client privilege in its broad sense is available to corporations.”<sup>80</sup> Thus, rather than tacitly accepting the proposition, the courts after *Radiant Burners* expressed the proposition that corporations had the right to claim attorney–client privilege.<sup>81</sup>

Because the attorney–client privilege was typically asserted by individuals, the lower courts still grappled with the exact application of the attorney–client privilege to corporations even after it was accepted that corporations could bring a privilege claim.<sup>82</sup> Because corporations are fictional entities, they can only act through their employees or agents, which can range in the hundreds for large corporations.<sup>83</sup> Before the Supreme Court’s decision in *Upjohn Co. v.*

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76. See *Radiant Burners, Inc. v. Am. Gas Ass’n*, 320 F.2d 314, 317–18 (7th Cir. 1963).

77. In *United States v. Louisville & Nashville R.R.*, 236 U.S. 318 (1915), the Supreme Court allowed a railroad company to withhold confidential memorandums and communications between the corporation and its attorneys. Rather than examine whether the corporation could even assert any privilege, the Supreme Court tacitly found that the privilege could be asserted and stated that

[t]he desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.

*Id.* at 336.

78. 320 F.2d at 323.

79. See *id.* at 317.

80. *Id.* at 323; see also *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 484 (E.D. Pa. 1962) (finding that “the availability of the privilege to corporations has gone unchallenged so long and has been so generally accepted that I must recognize that it does exist.”).

81. Sexton, *supra* note 25, at 448.

82. *Id.* at 449.

83. *Id.* (“[A] corporate entity can speak *only* through its agents or employees, and there are often hundreds or even thousands of agents or employees associated with the corporation.”); see also *Petrina v. Allied Glove Corp.*, 46 A.3d 795, 799 (Pa. Super. Ct. 2012) (“A corporation is a creature of legal fiction, which can act or ‘speak’ only through its officers, directors, or other agents.”).

*United States*,<sup>84</sup> the courts were widely split over which employees were considered agents of the corporations for the application of the attorney-client privilege.<sup>85</sup>

In *Upjohn*, the Supreme Court did not adopt or delineate a specific test for determining which employee communications were covered by the attorney-client privilege.<sup>86</sup> Instead, it articulated a broad, expansive, case-by-case analysis<sup>87</sup> that encouraged protection of the confidential communication shared between any level employee and counsel if the communications were made for

84. 449 U.S. 383 (1981).

85. Courts typically adopted one of two approaches to determine whether the attorney-client privilege applied to corporate communications: the control group test and the subject matter test. See Flynn, *supra* note 58, at 708. Under the control group test, the attorney-client privilege applied to those employees who had control of the decision-making process. See *Westinghouse Elec. Corp.*, 210 F. Supp. at 485 (“[I]f the employee making the communication . . . is in a position to control or even to take a substantial part in a decision about any action which the corporation may take . . . then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.”). Under the subject matter test, the attorney-client privilege applied to employee communications made to counsel if the communications were made at the directions of superiors and related to the employee’s corporate duties. See *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491–92 (7th Cir. 1970) (finding that the privilege applies “where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney’s advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment”). For a more thorough discussion of the control and subject matter tests, see Sexton, *supra* note 25, at 449–56.

86. The Supreme Court was aware that the lower courts were grappling with two tests. See *Upjohn*, 449 U.S. at 386 (1981) (“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.”). However, the Supreme Court refused to specifically adopt a test. *Id.* The Supreme Court clearly rejected the control group test because it was not “consistent with ‘the principles of the common law as . . . interpreted . . . in the light of reason and experience’” and “frustrate[d] 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.” *Id.* at 392, 397 (quoting FED. R. EVID. 501). However, the Supreme Court never mentioned the subject matter test by name in its opinion. See *generally id.*; Sexton, *supra* note 25, at 458–59. Despite not articulating the subject matter test, some commentators think that the *Upjohn* opinion favors the subject matter test. For example, Imwinkelried notes the following:

[O]ne of the essential functions of the privilege is to enable the client to convey to the attorney the information in the client’s possession that the attorney needs to advise the client. In stressing that factor, though, the Court clearly gravitated toward one of the central policy considerations underlying the subject-matter test.

Imwinkelried, *supra* note 3, at 296.

87. *Upjohn*, 449 U.S. at 396 (stating that “we decide only the case before us, and do not undertake to draft a set of rules”).



the purpose of receiving legal advice.<sup>88</sup> In articulating such a standard, the Court stated that 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 the observance of law and administration of justice.”<sup>89</sup> The Court acknowledged that “[t]he 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.”<sup>90</sup> Therefore, while the Supreme Court did not delineate a specific test to determinate what communications with employees were covered by the attorney–client privilege, the Supreme Court embraced a broader application of the privilege and demonstrated a public commitment to protecting confidential communications that create “full and frank” conversations. This underlying rationale and purpose behind the attorney–client privilege further helps guide the discussion, as we will see, in determining if and how Wisconsin should adopt the *Kovel* doctrine.<sup>91</sup>

### III. ATTORNEY–CLIENT PRIVILEGE & THIRD-PARTY CONSULTANTS

#### A. *The Kovel Doctrine*

While *Upjohn* articulated a broad application of the attorney–client privilege to corporate employees, corporations are increasingly utilizing third-party consultants to streamline business models, reduce costs, or gain expertise on a subject matter.<sup>92</sup> Because business and legal advice are often intertwined,<sup>93</sup> the rise of third-party consultants means that courts are increasingly confronted with the question of whether confidential communication with a third-party consultant waives the attorney–client privilege.

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88. See Beardslee, *supra* note 5, at 742–43 (“The Court adopted a case-by-case approach that in practice has resulted in an expansive rule emphasizing the importance of the flow of information between corporate employees and attorneys for sound legal advice.”); Flynn, *supra* note 58, at 712 (“Although the Court did not adopt an explicit ‘test’ to decide whether the communications were protected in *Upjohn*, the Court did apply a broader, more subject matter-like test to the facts at hand.”).

89. *Upjohn*, 449 U.S. at 389.

90. *Id.*

91. See *infra* Sections IV.B, IV.C.

92. See *supra* Part I and accompanying notes; see also Nancy Mann Jackson, *How to Build a Better Business with Outsourcing*, ENTREPRENEUR, <https://www.entrepreneur.com/article/204652> [<https://perma.cc/BG26-L6H8>] (last visited Aug. 31, 2018).

93. See *supra* Part I and accompanying notes.

In the landmark case of *United States v. Kovel*,<sup>94</sup> the United States Court of Appeals for the Second Circuit was the first court to grapple with this issue. *Kovel* has since become the seminal case on the application of attorney-client privilege to third-party communications.<sup>95</sup> *Kovel* was a former career IRS agent in accounting who was employed at a tax law firm.<sup>96</sup> When the IRS investigated one of the law firm's clients, *Kovel* was subpoenaed to appear and testify in front of the grand jury.<sup>97</sup> Although *Kovel* appeared in court, he refused to testify on any communications he had with the law firm's client or on any work he performed for the client on the grounds that such communications and documents were protected by the attorney-client privilege.<sup>98</sup> The district court found *Kovel* in contempt, and *Kovel* was sentenced to a year in jail.<sup>99</sup>

Unlike the circuit court, the court of appeals found that the attorney-client privilege did extend to the communications shared between the client and the accountant because the accountant assisted the attorney in rendering legal advice.<sup>100</sup> In reaching this decision, the court first acknowledged that "the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others."<sup>101</sup> The court analogized the accountant to that of an interpreter stating that it

can see no significant difference between a case where the attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client's story; a second where the attorney, himself having some little knowledge of the foreign tongue, has a more knowledgeable non-lawyer employee in the room to help out; a third where someone to perform that same function has been brought along by the client; and a fourth where the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney's behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that

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94. 296 F.2d 918 (2d Cir. 1961).

95. *Imwinkelried*, *supra* note 3, at 280, 284–85.

96. *Kovel*, 296 F.2d at 919.

97. *Id.*

98. *Id.* at 919–20.

99. *Id.* at 920.

100. *Id.* at 922–23.

101. *Id.* at 921. In particular, the court noted that "few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts." *Id.*

the attorney can give the client proper legal advice.<sup>102</sup>

In particular, the court noted that accounting concepts can function as a foreign language to lawyers.<sup>103</sup> If a foreign language interpreter's presence does not destroy the privilege, then the court rationalized that the presence of an accountant, who is translating complex tax information for the lawyer, should not destroy the privilege either.<sup>104</sup> For the privilege to be applicable, the court noted that "the presence of the accountant [must be] necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit."<sup>105</sup>

In holding that a third-party consultant may be covered by the attorney-client privilege, the Second Circuit also articulated a few other principles. First, the court stated that it did not matter if the attorney or the client hired the accountant.<sup>106</sup> Second, the court also placed an emphasis on the type of communications shared rather than the way in which the communications occurred. Specifically, the court stated that "[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer."<sup>107</sup> As long as the information sought is for legal advice rather than business advice or accounting advice, then the privilege exists.<sup>108</sup> It does not matter if the lawyer directs the client to communicate with the accountant and then the accountant interprets the information for the lawyer to give accurate legal advice to the client.<sup>109</sup> As long as the communications are confidential and enable the attorney to give legal advice, then the privilege applies.

However, the court noted it had drawn an "arbitrary line" in terms of what communications are covered by the privilege.<sup>110</sup> If the client first communicates with an accountant and then later communicates with the attorney on the same matter, the privilege would not apply.<sup>111</sup> On the other hand, if a lawyer directs a client to communicate with an accountant or if the

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102. *Id.*

103. *Id.* at 922.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* (emphasis omitted).

108. *Id.* ("If what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists.") (citation omitted).

109. *Id.*; see also Imwinkelried, *supra* note 3, at 273 for an explanation on the three different types of communication that occur between the attorney, client, and third-party consultant.

110. *Kovel*, 296 F.2d at 922.

111. *Id.*

client communicates with a lawyer while an accountant is present, then the privilege would apply—if the communications were rendered for legal advice.<sup>112</sup>

In sum, the Second Circuit extended the attorney–client privilege to third-party consultants who translated confidential communications necessary or helpful in the rendering of effective legal advice. Under *Kovel*, as long as confidential communications are made after an attorney has been retained on the matter, the communications are likely to be privileged if they are for legal advice. Therefore, the *Kovel* doctrine has broad implications for corporations that are increasingly hiring third-party consultants.

### B. Narrow Interpretation

Since the Second Circuit decided *Kovel*, some courts have increasingly narrowed their application of the *Kovel* doctrine to third-party consultants, limiting the circumstances under which the attorney–client privilege can be applied to third parties. Narrow interpretations of the *Kovel* doctrine typically consider factors such as (1) whether there is sufficient evidence, other than the substance of the communications, to determine that the consultant was hired for the facilitation of legal advice;<sup>113</sup> (2) whether the third-party consultant performs as a translator of client only information;<sup>114</sup> or (3) whether the communication is necessary, not just useful or important, for the rendering of legal advice.<sup>115</sup>

#### 1. Communications Protected if Sufficient Contemporaneous Evidence

*United States v. Adlman*<sup>116</sup> is instructive in understanding a narrow interpretation of the *Kovel* doctrine. Here, the Second Circuit determined that the attorney–client privilege did not apply to outside accountants if the company failed to meet its evidentiary burden or failed to provide sufficient evidence. In *Adlman*, the company Sequa was considering a reorganization of its subsidiaries.<sup>117</sup> Adlman, an attorney and Sequa’s Vice President for Taxes, contacted Arthur Andersen & Co. (AA) to help assess the tax implications of the reorganization.<sup>118</sup> AA and its accountants created a fifty-eight-page

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112. *Id.*

113. *See United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995).

114. *See id.*

115. *See United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999).

116. 68 F.3d 1495 (2d Cir. 1995).

117. *Id.* at 1497.

118. *Id.* at 1496–97.

memorandum detailing the tax consequences of the reorganization.<sup>119</sup> Sequa decided to reorganize based on AA's recommendation and specifications.<sup>120</sup> Because of this reorganization, Sequa received a large tax refund, which caused the IRS to undertake an audit of the company.<sup>121</sup> When the IRS requested all documentation related to the reorganization, Adlman refused to give the IRS AA's memorandum on the grounds that it was privileged.<sup>122</sup>

The Second Circuit found that the attorney–client privilege did not apply because Adlman failed to meet his burden in establishing all of the elements of the privilege.<sup>123</sup> *Adlman* thus demonstrates that courts applying a narrower interpretation may require strict compliance to meet the *Kovel* doctrine.<sup>124</sup> The court found that AA was hired to provide tax advice rather than hired to interpret client communications.<sup>125</sup> Furthermore, Adlman served as both an attorney and as a Vice President for Taxes.<sup>126</sup> The fact that Adlman occupied two roles for the corporation and “lacked the expertise necessary to assess the tax implications of corporate reorganizations” means that AA did not help Adlman render legal advice on the reorganization.<sup>127</sup> Rather, the information for the fifty-eight-page memorandum on the tax implications originated from the accountants' own expertise and knowledge.<sup>128</sup> Thus, the accountants were not acting under the analogy as interpreters to facilitate the rendering of legal advice, but instead were performing their traditional third-party consultant duties. Therefore, because Sequa provided the accounting firm with information to get advice on the potential tax implications of the reorganization rather than for legal advice, the attorney–client privilege did not apply.

The court in *Adlman* also based its decision on Sequa's lack of contemporaneous documentation supporting the proposition that Adlman hired AA to help provide legal advice.<sup>129</sup> Sequa regularly employed AA to perform auditing, accounting, and advisory services for the company, and AA extensively helped Sequa with the reorganization in other respects, such as

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119. *Id.* at 1497.

120. *Id.*

121. *Id.* at 1497–98.

122. *Id.* at 1498.

123. *See id.* at 1500.

124. *Id.*

125. *Id.*

126. *Id.* at 1496, 1500.

127. *Id.* at 1500.

128. *Id.*

129. *Id.*

through advisory services.<sup>130</sup> While AA performed services with both Sequa and Adlman, there was “virtually no contemporaneous documentation supporting the view that AA, in this task alone, was working under a different arrangement from that which governed the rest of its work for Sequa.”<sup>131</sup> This lack of contemporaneous documentation indicated that the work AA provided to Adlman was not any different than the accounting services it typically provided to Sequa.<sup>132</sup>

Therefore, when determining whether Adlman met his burden on all elements of the privilege, the court placed significant emphasis on the evidence relating to documentation surrounding the services instead of focusing solely on the substance of the communications.<sup>133</sup> Although the court mentioned that this emphasis did not equate to an “elevation of form over substance,”<sup>134</sup> some commentators<sup>135</sup> and courts<sup>136</sup> have indeed found such contemporaneous documentation instructive when determining if attorney–client privilege applies to third-party consultants.

Based on this narrow interpretation of the *Kovel* doctrine, there are certain steps that companies or individuals can take before communicating with a third-party consultant to protect such communications. First, the attorney, rather than the client, should hire the third-party consultant because it will emphasize the proposition that the attorney hired the consultant to facilitate the service of legal advice.<sup>137</sup> For corporations, an outside counsel, rather than in-house counsel,

130. *Id.*

131. *Id.* The billing statements to AA combined both AA’s work for Adlman as well as AA’s advisory services to Sequa. *Id.* In addition, AA, not Adlman, created all the written documentation for the tax implications of the reorganization. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 1500 n.1.

135. See Gruetzmacher, *supra* note 17, at 984

[D]etermining whether the attorney-client privilege applies to communications with accountants involves analyzing form over substance. Therefore, those who “paper” the file with the right agreements and billing statements will succeed, while those who are a bit sloppy will not, despite the true nature of the relationship between the lawyer, accountant, and client.

*Id.* (footnote omitted); see also Beardslee, *supra* note 5, at 792–93 (arguing that courts should not consider form over substance when determining whether the attorney–client privilege applies because it is an artificial distinction); Pacini et al., *supra* note 49, at 904 (“[I]t is incumbent upon those claiming attorney–client privilege to produce adequate documentation to demonstrate that the main purpose in hiring the accountant was to assist the attorney in providing legal services.”).

136. *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 325–26 (S.D.N.Y. 2003); see also Cavallaro v. United States, 284 F.3d 236, 248 (1st Cir. 2002).

137. Pacini et al., *supra* note 49, at 924.

should hire the third-party consultant, if possible, since courts tend to place a higher scrutiny on in-house counsel to prove that the communications were rendered for legal and not business advice.<sup>138</sup> Second, a written engagement letter should be produced between the attorney and the consultant.<sup>139</sup> The engagement letter should state that the third-party consultant is being hired to enable the giving of legal advice; that all communications between the third-party consultant, the attorney, and the client are intended to be confidential according to the attorney–client privilege; the precise scope of the relationship between the attorney and the third-party consultant; and that all work product produced by the third-party consultant belongs to the law firm and must be surrendered when requested.<sup>140</sup> Third, if possible, the third-party consultant should not be a consultant that the company uses on regular basis, *e.g.*, hiring an accountant for legal tax advice who also performs accounting services for the corporation.<sup>141</sup> Fourth, the attorney should be billed an itemized statement by the third-party consultant and pay the expenses, not the client.<sup>142</sup> The attorney can then send an itemized invoice to the client with the third party’s costs listed in the invoice as expenses.<sup>143</sup> Although the court in *Adlman* stated that such actions were not necessary, performing these steps, while not determinative, will help a proponent establish the necessary elements of the attorney–client privilege under the *Kovel* doctrine.

## 2. Communications Protected only if Translating Client Information

Some courts strictly applying the *Kovel* doctrine have also hesitated to adopt the attorney–client privilege to communications with third parties if the

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138. *See supra* note 64 and accompanying text.

139. Martin A. Schainbaum, *The Scope and Limitations of the Kovel Accountant*, CHAMPION, Mar. 2016, at 26, 28.

140. *Id.*; Cheryl C. Magat, *How Attorney–Client Privilege and the Work Product Doctrine May Apply to Third Parties in Tax Law*, PRAC. TAX LAW., Summer 2011, at 21, 23.

141. *See, e.g.*, *United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995).

142. Pacini et al., *supra* note 49, at 928.

143. *Id.*

information did not originate from the client.<sup>144</sup> In *United States v. Ackert*,<sup>145</sup> the Second Circuit did not extend the attorney–client privilege to an investment banker in part because the third-party consultant did not translate any client communications.<sup>146</sup> In this case, Ackert, an investment banker at Goldman Sachs, approached a company with an investment proposition which was expected to lower its federal income tax liability.<sup>147</sup> The company’s senior vice president and tax counsel, Meyers, conducted research on the proposal and communicated with Ackert about the investment proposal’s tax implications.<sup>148</sup> Although the company decided to enter into the proposed investment with another investment banker, it still paid Goldman Sachs \$1.5 million for its services.<sup>149</sup>

During an audit of the company seven years after the investment, the IRS issued a summons for Ackert to testify.<sup>150</sup> The company asserted that any communications Ackert had with Meyers were covered by the attorney–client privilege under the *Kovel* doctrine.<sup>151</sup> Despite Ackert being an investment banker rather than an accountant, the company asserted that the communications between the two mirrored that of the accountant–attorney under *Kovel* because Ackert was only contacted “for the sole purpose of providing legal advice” and “it was impossible for Mr. Meyers to advise [the company] without these further contacts with Mr. Ackert.”<sup>152</sup>

However, the court refused to extend the *Kovel* doctrine from an accountant to an investment banker because Ackert did not translate information that

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144. Imwinkelried, *supra* note 3, at 284 (“[C]ourts have been reluctant to apply the doctrine to situations in which the client cannot realistically be characterized as the source of the information evaluated by the expert.”); *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 161–63 (E.D.N.Y. 1994) (finding that privilege did not apply to third-party engineers because the engineers consulted the attorney based on “factual and scientific evidence they generated”); *Eprova v. Gnosis S.p.A.*, No. 07 civ. 5898, 2010 U.S. Dist. LEXIS 101215, \*3–7 (S.D.N.Y. Sep. 24, 2010) (holding that the attorney–client privilege did not apply to scientific experts who were providing scientific information themselves rather than acting as interpreters); EDNA SELAN EPSTEIN, *THE ATTORNEY–CLIENT PRIVILEGE AND THE WORK–PRODUCT DOCTRINE* 286 (6th ed. 2017) (“If the information is collected from the client . . . and is digested by the expert for transmission to the attorney so that the attorney may render legal advice, there is substantial likelihood that the expert will be cloaked” in the attorney–client privilege).

145. 169 F.3d 136 (2d Cir. 1999).

146. *Id.* at 139–40.

147. *Id.* at 138.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 138–39.

152. *Id.* at 139.



originated from the client.<sup>153</sup> Rather, because the company did not have the information regarding the investment proposal and did not know the tax consequences, the information communicated between Ackert and Meyers originated from Ackert's own knowledge and expertise as an investment banker.<sup>154</sup> Therefore, because Ackert was not acting as a translator of client communication but rather was utilizing his own expertise to furnish the communication, the attorney–client privilege did not apply.<sup>155</sup>

*Akert* thus stands for the proposition that the *Kovel* doctrine will only apply if the third-party consultant merely translates the client's own communication. If the third-party consultant relies on his or her own expertise, a court applying the *Kovel* doctrine narrowly would likely find that the privilege does not apply.

### 3. Communications Protected if Necessary, not just Important or Useful

Some courts have also limited the holding in *Kovel* by finding that the communications between the third-party consultant and the attorney must be more than just important or useful to the rendering of legal advice; instead, the communications must be necessary.<sup>156</sup> *Cavallaro v. United States*<sup>157</sup> was the first case to determine that the attorney–client privilege did not apply to an accountant because the communication provided was not necessary to the furnishing of legal advice.<sup>158</sup> In *Cavallaro*, two parents owned a company while their sons owned a glue dispensing manufacturing company.<sup>159</sup> In an attempt to merge the two companies, the sons communicated with trust and estate attorneys and with accountants regarding the merger.<sup>160</sup> Based upon this communication, the accountants suggested “a strategy for minimizing transfer tax liability.”<sup>161</sup> Following the advice of the accountants, the two corporations

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153. *Id.* (stating that “Meyers was not relying on Ackert to translate or interpret information given to Meyers by his client.”).

154. *Id.* at 139–40 (finding that “Meyers sought out Ackert for information Paramount did not have about the proposed transaction and its tax consequences.”).

155. *See id.* at 140.

156. *See, e.g.,* *Cavallaro v. United States*, 284 F.3d 236 (1st Cir. 2002); *Akert*, 169 F.3d at 136 (2d Cir. 1999); *Comm’r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1196–98 (Mass. 2009); *Calvin Klein Trademark Tr. v. Wachner*, 198 F.R.D. 53 (S.D.N.Y. 2000) (refusing to extend the attorney–client privilege to PR consultants and their related work documents in part because the possibility that the documents may later be important for the facilitation of legal advice was not sufficient for the privilege to apply).

157. 284 F.3d at 236.

158. *Id.* at 240, 249.

159. *Id.* at 240.

160. *Id.* at 239–41.

161. *Id.* at 240–41.

merged and later sold for \$97 million.<sup>162</sup> The IRS began an investigation into the merger for tax fraud.<sup>163</sup> The IRS served the accounting firm for the records “concerning [the] transfer tax and merger issues”<sup>164</sup> and requested the memorandums dealing with the merger. The defendants refused to produce the documents on the grounds that accountants assisted the attorneys in “providing advice on transfer tax issues.”<sup>165</sup>

In finding that the accountants were not within the *Kovel* doctrine, the United States Court of Appeals for the First Circuit quoted *Kovel* and stated that “to sustain a privilege an accountant must be ‘necessary, or at least highly useful, for the effective consultation between the client and the lawyer, which the privilege is designed to permit.’”<sup>166</sup> Despite the fact that *Kovel* characterized the privilege as applying if the communication is “necessary, or at least highly useful,”<sup>167</sup> the First Circuit limited the circumstances in which the privilege applies, stating that the “‘necessity’ element means more than just useful and convenient.”<sup>168</sup> Rather, the communication with the third-party consultant “must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications. Mere convenience is not sufficient.”<sup>169</sup> Such a characterization allows courts to scrutinize and limit the circumstances under which communications with third-party consultants could be protected.

In addition to the communication being necessary, the court in *Ackert* also articulated that the attorney-client privilege does not apply to a third-party consultant even if the communications are “important” to the attorney in rendering legal advice.<sup>170</sup> Although Meyers, the attorney, likely communicated with Ackert, the investment banker, to gain information and offer better legal advice to the company, the court found that such a distinction was not sufficient for the application of the privilege.<sup>171</sup> In particular, the court stated that the privilege protects communications between a client and an

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162. *Id.* at 243.

163. *Id.* at 239. Specifically, the IRS was examining whether the parties had undervalued the “company to disguise a gift to the sons in the form of post-merger stock.” *Id.*

164. *Id.*

165. *Id.* at 239, 242.

166. *Id.* at 247–48 (quoting *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961)).

167. *Kovel*, 296 F.2d at 922.

168. *Cavallaro*, 284 F.3d at 249 (quoting EDNA S. EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 187 (4th ed. 2001)).

169. *Id.*

170. *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999).

171. *Id.*

attorney, not communications that prove important to an attorney's legal advice to a client. . . . [A] communication between an attorney and a third party does not become shielded by the attorney–client privilege solely because the communication proves important to the attorney's ability to represent the client.<sup>172</sup>

Therefore, even though communications between an attorney and a third party may be important and relevant for the attorney to render effective legal advice, if the communications are not necessary or nearly indispensable, a court applying a narrow application of the *Kovel* doctrine may be unwilling to apply the privilege to communications with third-party consultants.<sup>173</sup>

### C. Broad Interpretation

Some courts have also adopted a broader interpretation of the *Kovel* doctrine.<sup>174</sup> Jurisdictions adopting a broad interpretation of the *Kovel* doctrine typically apply the attorney–client privilege to communications that are helpful in facilitating legal advice.<sup>175</sup> For example, in *Aull v. Cavalcade Pension Plan*,<sup>176</sup> the court found that communications between an attorney, client, and outside accountant were covered by the attorney–client privilege under the

172. *Id.*

173. *See Comm'r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185 (Mass. 2009) (analyzing the narrow interpretation of the *Kovel* doctrine, including both *Cavallaro* and *Ackert*, before determining that the attorney–client privilege did not apply).

174. *See, e.g., SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 477 (E.D. Pa. 2005) (stating that the “Plaintiff did not waive the privilege merely by revealing confidential communications to its own consultant”); *United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) (applying the attorney–client privilege to a psychiatric expert because the court did not see any “distinction between the need of defense counsel for expert assistance in accounting matters and the same need in matters of psychiatry”); *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 518–19 (S.D.N.Y. 1992) (“If the patent agent is acting to assist an attorney to provide legal services, the communications with him by the attorney or the client should come within the ambit of the privilege.”); *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 204 (E.D.N.Y. 1988); *Byrnes v. Empire Blue Cross Blue Shield*, No. 98Civ.8520, 1999 WL 1006312, at \*3 (S.D.N.Y. Nov. 4, 1999) (finding privilege to memorandum shared between the company, the attorney, and actuaries); *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003) (stating that the court is “persuaded that the ability of lawyers to perform some of their most fundamental client functions . . . would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers’ public relations consultants.”).

175. *Beardslee*, *supra* note 5, at 731; *Imwinkelried*, *supra* note 3, at 284–85 (“[S]ome jurisdictions broadly invoke the doctrine whenever the expert helps the attorney give the client fully informed advice.”).

176. 185 F.R.D. 618 (D. Colo. 1998).

*Kovel* doctrine.<sup>177</sup> The court rationalized that the accountant was covered by doctrine if “1) The accountant was consulted, in confidence, for the purpose of obtaining legal advice from the lawyer, and; 2) The communications between the accountant, client, and the lawyer are reasonably related to the purpose of obtaining confidential legal advice from the lawyer.”<sup>178</sup> This broad interpretation of applying the *Kovel* doctrine whenever the third-party consultant advice is helpful for or reasonably related to the rendering of legal advice stands in stark contrast to the narrow interpretations explained above. The less strict interpretation of the *Kovel* doctrine has been applied to psychiatrists,<sup>179</sup> patent agents,<sup>180</sup> actuaries,<sup>181</sup> public relations consultants,<sup>182</sup> and jury consultants.<sup>183</sup>

While some courts have applied a broader interpretation of the *Kovel* doctrine, it has been argued that this application is the minority view of courts.<sup>184</sup> Commentators have also argued that courts should be cautious when adopting a broader view of the attorney-client privilege to external consultants.<sup>185</sup> Opponents argue that an expansion of the *Kovel* doctrine primarily benefits wealthier clients and should only be done for compelling reasons,<sup>186</sup> or that an expansive view of the *Kovel* doctrine denies the public to

177. *Id.* at 628–30.

178. *Id.* at 629.

179. *See, e.g., Alvarez*, 519 F.2d at 1046 (stating that there is “no distinction between the need of defense counsel for expert assistance in accounting matters and the same need in matters of psychiatry”).

180. *See, e.g., Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 518–19, 523 (S.D.N.Y. 1992) (articulating that the privilege should apply if the patent agent was assisting the attorney); *Willemijn Houdstermaatschaap BV v. Apollo Comput. Inc.*, 707 F. Supp. 1429, 1446 (D. Del. 1989) (applying the attorney-client privilege to communications “between an attorney, a client, and an independent patent agent, if that patent agent is working on behalf of and under the direction of the attorney”); *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 204 (E.D.N.Y. 1988) (finding patent documents privileged because the patent agent was “acting under the authority and control” of the attorneys).

181. *Byrnes v. Empire Blue Cross Blue Shield*, No. 98Civ.8520, 1999 WL 1006312, at \*3 (S.D.N.Y. Nov. 4, 1999) (finding that attorney-client privilege extends to actuaries reviewing a memorandum for the attorney because it “assist[s] the attorney in preparing the final version of the letter . . . [and] is within the scope of the legal services that the attorney is providing”).

182. *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003) (“This Court is persuaded that the ability of lawyers to perform some of their most fundamental client functions . . . would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers’ public relations consultants.”).

183. *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 668–69 (3d Cir. 2003) (Garth, J., concurring).

184. *Comm’r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1198 n.20 (Mass. 2009).

185. *See, e.g., Imwinkelried, supra* note 3, at 311–12; *Beardslee, supra* note 5, at 731, 733.

186. *Imwinkelried, supra* note 3, at 311–12.

“every man’s evidence”<sup>187</sup> and “enables corporate misconduct.”<sup>188</sup> While these public policy statements may align with the purposes underlying the attorney–client privilege,<sup>189</sup> courts have still applied a broader view of the *Kovel* doctrine when the communications between an attorney and a third-party consultants help in the facilitation or rendering of legal advice.

#### IV. STATES’ ANALYSES OF THE *KOVEL* DOCTRINE

##### A. *State Adoption of the Kovel Doctrine*

Whether communications between an attorney, client, and a third-party consultant are protected under the attorney–client privilege is not an isolated federal issue. Rather, it is an issue that affects all states as well as the global market since businesses nationwide have increasingly relied on third-party consultants.<sup>190</sup> Although the *Kovel* doctrine originated in the Federal courts and stems from Federal Rules of Evidence 501, state courts have also addressed the issue of whether the attorney–client privilege applies to confidential communications shared between attorneys and third-party consultants.<sup>191</sup> Similar to the federal courts, state courts have yet to adopt a single and uniform consensus as to how broadly or narrowly the *Kovel* doctrine’s scope should be

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187. WIGMORE, *supra* note 23, § 2192, at 70.

188. Beardslee, *supra* note 5, at 731.

189. *See supra* Part II.

190. *See supra* Part I. *See generally* Steve Lohr, *Hot Spot for Tech Outsourcing: The United States*, N.Y. TIMES (July 30, 2017), <https://www.nytimes.com/2017/07/30/technology/hot-spot-for-tech-outsourcing-the-united-states.html> [<https://perma.cc/M4RW-ZWXF>].

191. *See, e.g.*, Comm’r of Revenue v. Comcast Corp., 901 N.E.2d 1185 (Mass. 2009); Delta Fin. Corp. v. Morrison, 820 N.Y.S.2d 745 (N.Y. Sup. Ct. 2006); Olson v. Accessory Controls & Equip. Corp., 757 A.2d 14 (Conn. 2000); People v. Marcy, 283 N.W.2d 754 (Mich. Ct. App. 1979) (citing cases that discuss *Kovel* favorably and protecting communications between a polygrapher, client, and the attorney under the attorney–client privilege); People v. Paasche, 525 N.W.2d 914, 917 (Mich. Ct. App. 1994); Bousamra v. Excelsa Health, 167 A.3d 728 (Pa. Super. Ct. 2017); State v. Carter, 641 S.W.2d 54, 65 (Mo. 1982); State v. Aquino-Cervantes, 945 P.2d 767, 772 (Wash. Ct. App. 1997) (citing *Kovel* favorably to determine that an interpreter is an agent of the attorney and cannot testify about observations seen during interpretation of a client); RCC, Inc. v. Cecchi, No. 323447, 2010 Md. Cir. Ct. LEXIS 8, at \*7–9 (Nov. 18, 2010); Foisie v. Foisie, No. FA114115278S, 2017 Conn. Super. LEXIS 4333 (Conn. Super. Ct. Aug. 31, 2017).

applied.<sup>192</sup> Rather, state courts typically analyze federal cases to determine whether the doctrine should be adopted in their jurisdiction.<sup>193</sup>

Some state courts are hesitant to adopt the *Kovel* doctrine broadly. The most prominent example of a state court adopting a narrow interpretation of the *Kovel* doctrine is the Massachusetts Supreme Court. In *Commissioner of Revenue v. Comcast Corp.*,<sup>194</sup> the Massachusetts Supreme Court determined that communications between an in-house counsel and outside tax accountants were not protected by the attorney-client privilege.<sup>195</sup> The Supreme Court held this in part because the attorney-client privilege had been narrowly constructed in Massachusetts's jurisdiction and "[a] narrow construction of the privilege is particularly appropriate where, as here, information is being withheld from the government in a tax enforcement proceeding."<sup>196</sup>

In adopting a narrow interpretation of the *Kovel* doctrine, the Massachusetts Supreme Court analyzed and discussed multiple federal cases limiting the original holding of the *Kovel* doctrine. *Comcast* favorably cited *Cavallaro* and *Ackert's* narrow opinions,<sup>197</sup> which stated that the privilege is only applicable if the communications are necessary rather than solely useful or substantially helpful to the attorney's ability to give legal advice.<sup>198</sup> Furthermore, the court

192. Some courts call the *Kovel* doctrine the derivative privilege. Although the name may be different, the application is still the same: the derivative privilege protects communications between attorneys and a third party when the communication is necessary or helpful for the rendering of legal advice. See, e.g., *Comcast*, 901 N.E.2d at 1196; *Delta Fin. Corp.*, 820 N.Y.S.2d at 750 (stating that "the derivative privilege protection recognized by *Kovel* and subsequent cases did not apply to the documents.").

193. For example, a few state courts have analyzed or mentioned the Maryland district court opinion of *Black & Decker Corp. v. United States*, 219 F.R.D. 87 (D. Md. 2003), to determine whether the *Kovel* doctrine should apply to their fact situation. See, e.g., *Comcast*, 901 N.E.2d at 1198; *Delta Fin. Corp.*, 820 N.Y.S.2d at 750-51; *RCC, Inc.*, 2010 Md. Cir. Ct. LEXIS 8. The federal district court in *Black & Decker* decided that there were four factors to consider for the derivative privilege (*Kovel* doctrine) to apply: "1) to whom was the advice provided—counsel or the client; 2) where client's in-house counsel is involved, whether counsel also acts as a corporate officer; 3) whether the accountant is regularly employed as the client's auditor or advisor; and 4) which parties initiated or received the communications." 219 F.R.D. at 90. By using these factors, the *Black & Decker* court determined that the communications were not needed to facilitate the communications between the attorney and the third-party consultants. *Id.* Although the opinion is only a district court and does not seem to be very relevant in the federal circuits, state courts have analyzed *Black & Decker* and used its four factors to apply a narrow interpretation of the *Kovel* doctrine.

194. 901 N.E.2d 1185 (Mass. 2009).

195. *Id.* at 1200.

196. *Id.* at 1195.

197. *Id.* at 1197-99.

198. See *supra* Section III.B.3 and accompanying notes.

decided that the communications were not made for legal advice or to help the attorney comprehend client information but instead for tax advice.<sup>199</sup> Even though the accountant's memorandum may have been "critical to [the attorney's] ability to effectively represent his client," such reliance was not sufficient for the privilege to apply.<sup>200</sup> Therefore, by quoting and citing other cases with a narrow application of the *Kovel* doctrine, the Massachusetts Supreme Court demonstrated that although the court was perhaps willing to extend the attorney–client privilege to third-party consultants in its jurisdiction, the scope would have to be narrowly focused.

However, not all state courts adhere to the narrow interpretation of the *Kovel* doctrine as demonstrated in *Comcast*. For example, in *Olson v. Accessory Controls & Equipment Corp.*,<sup>201</sup> the Connecticut Supreme Court protected a report made by a third-party environmental consulting firm.<sup>202</sup> The defendant owned a manufacturing plant that produced hazardous waste material, and after receiving an order from the State Department of Environmental Protection (Department), the defendant retained an attorney.<sup>203</sup> The attorney then hired an environmental consulting firm to assist the defendant's counsel in responding to an order issued by the Department concerning the defendant's waste contamination site.<sup>204</sup>

In determining whether the attorney–client privilege applied to the environmental consulting firm's report, the state court analyzed a few narrow cases<sup>205</sup> where federal courts determined that the privilege did not apply to factual data compiled by environmental consultants.<sup>206</sup> However, the Connecticut Supreme Court refused to adopt a narrow interpretation, finding that a "bright line rule" was not applicable.<sup>207</sup> Rather, the court partly relied on an engagement letter between the environmental consulting firm and the attorney as well as the conduct between them to determine that the privilege applied.<sup>208</sup> The court found that the sole purpose of the communication and the report was to assist the attorney in providing legal advice regarding the

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199. *Comcast*, 901 N.E.2d at 1198.

200. *Id.*

201. 757 A.2d 14 (Conn. 2000).

202. *Id.* at 17, 21.

203. *Id.* at 18–19.

204. *Id.*

205. *Id.* at 24–25.

206. See *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 162 (E.D.N.Y. 1994); *In re Grand Jury Matter*, 147 F.R.D. 82, 86 (E.D. Pa. 1992).

207. *Olson*, 757 A.2d at 25.

208. *Id.* at 26–28.

Department’s order.<sup>209</sup> Therefore, while some state courts have adopted a narrow interpretation of the *Kovel* doctrine, there are other courts that will not immediately draw the narrowest application possible, but rather will apply a broader scope of the *Kovel* doctrine, if it is consistent with the facts present.

B. *Wisconsin, the Attorney–Client Privilege, and the Kovel Doctrine*

Although many state courts have considered the issue of whether the presence of a third-party consultant waives the attorney–client privilege, Wisconsin’s courts have yet to address the issue. Given the change and complexity in the modern business practices<sup>210</sup> and the fact that Wisconsin is home to multiple Fortune 500 companies,<sup>211</sup> business organizations’ decisions to hire third-party consultants are not likely to decrease. Wisconsin courts should thus adopt the *Kovel* doctrine in a way that is still consistent with these realities as well as the courts’ policies underlying the privilege.

Codified in 1878, the attorney–client privilege has deep roots in Wisconsin’s jurisprudence.<sup>212</sup> The privilege can be traced to early Wisconsin common law,<sup>213</sup> and it is also embodied in Wisconsin’s Supreme Court Rules

209. *Id.* at 26–27.

210. *See supra* Part I and accompanying notes.

211. According to Fortune Magazine, Wisconsin has nine companies on the Fortune Magazine’s 500 list. Molly Dill, *Wisconsin Has 9 Companies on 2018 Fortune 500 List*, BIZTIMES (May 21, 2018, 12:10 PM), <https://www.biztimes.com/2018/industries/energy-environment/wisconsin-has-9-companies-on-2018-fortune-500-list/> [https://perma.cc/V4HD-L2ER]. In addition, Foxconn, the world’s largest manufacturer of electronics, is also building a manufacturing plant in Wisconsin which could potentially hire 13,000 workers. Kelvin Chan, *What is Foxconn? Only the World’s No. 1 Contract Electronics Maker*, CHI. TRIB. (July 27, 2017, 7:37 AM), <http://www.chicagotribune.com/business/ct-what-is-foxconn-20170727-story.html> [https://perma.cc/YLY7-U2X8]; Patrick Marley and Jason Stein, *Foxconn Announces \$10 Billion Investment in Wisconsin and up to 13,000 Jobs*, J. SENTINEL, (July 26, 2017, 10:38 AM), <https://www.jsonline.com/story/news/2017/07/26/scott-walker-heads-d-c-trump-prepares-wisconsin-foxconn-announcement/512077001/> [https://perma.cc/2DTZ-S75C].

212. *See* Harney B. Stover & Mary Pat Koesterer, *Attorney–Client Privilege in Wisconsin*, 59 MARQ. L. REV. 227, 228 (1976). The statute stated that “[a]n attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon in the course of his professional employment.” *Id.* (quoting REV. WIS. STAT. § 4076 (1878)).

213. *See, e.g.*, *Koeber v. Somers*, 108 Wis. 497, 504, 84 N.W. 991, 993 (1901) (“It is essential to the ends of justice that clients should be safe in confiding to their counsel the most secret facts, and to receive advice and advocacy in the light thereof without peril of publicity. Disclosures made to this end should be as secret and inviolable as if the facts had remained in the knowledge of the client alone.”).



of Professional Conduct,<sup>214</sup> Wisconsin's Attorney's Oath,<sup>215</sup> and Wisconsin's current statutory scheme.<sup>216</sup>

Wisconsin courts have laid out the policy underlying the attorney–client privilege and have even stated that “the rule [for the privilege] is clear.”<sup>217</sup> Similar to the federal courts' justifications, the Wisconsin Supreme Court upholds the attorney–client privilege as a rule that encourages clients to communicate freely without “fear of detriment or embarrassment.”<sup>218</sup> Although the privilege may conceal relevant information, courts justify the rule by stating that the attorney–client privilege will typically lead to better representation and a better resolution of the issue.<sup>219</sup> For example, in *State ex rel. Dudek v. Circuit Court for Milwaukee Cty.*,<sup>220</sup> the Wisconsin Supreme Court articulated that

[i]t is better to have otherwise concealed facts within the knowledge of the person charged with the direction of the lawsuit, even though he must not reveal the communication, than to have those facts or opinions buried within the knowledge of the client . . . . Although the communication may not be revealed unless the client so wishes, the result of the privilege is a more informed resolution of controversy, at least in the aggregate number of cases.<sup>221</sup>

Consequently, applying the privilege, in the aggregate, leads to a better resolution of the matter. In addition to that underlying policy, Wisconsin courts have also typically held that the scope of the privilege should be strictly confined and narrowly applied because it represents an “obstacle to the

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214. WIS. SCR 20:1.6 (a) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation”).

215. WIS. SCR 40.15 (“I will maintain the confidence and preserve inviolate the secrets of my client.”).

216. WIS. STAT. § 905.03 (2015–2016).

217. *State ex rel. Dudek v. Circuit Court*, 34 Wis. 2d 559, 578, 150 N.W.2d 387, 398 (1967).

218. *Id.*; see also *Lane v. Sharp Packaging Sys.*, 2002 WI 28, ¶ 21, 251 Wis. 2d 68, 640 N.W.2d 788 (2002) (“The policy underlying this privilege is to ensure full disclosure by clients who feel safe confiding in their attorney.”).

219. See *Dudek*, 34 Wis. 2d at 578; *Jacobi v. Podevels*, 23 Wis. 2d 152, 157, 127 N.W.2d 73, 76 (1964) (stating that “[s]ecrecy of communication between one person and his attorney is one of the exceptions” to the truth finding process of the justice system and that the exception “is based upon recognition of the value of legal advice and assistance based upon full information of the facts and the corollary that full disclosure to counsel will often be unlikely if there is fear that others will be able to compel a breach of the confidence.”).

220. 34 Wis. 2d 559, 150 N.W.2d 387 (1967).

221. *Id.* at 578.

investigation of the truth”<sup>222</sup> and is an absolute privilege with a “drastic consequence [that] should be narrowly confined.”<sup>223</sup> Therefore, the policy justifications underlying the attorney–client privilege doctrine in Wisconsin are very similar to the typical justifications other courts and experts rely on.

Today, Wisconsin’s attorney–client privilege is codified in the Wisconsin Rules of Evidence in § 905.03. Section 905.03(2) states in part that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: between the client or the client’s representative and the client’s lawyer or the lawyer’s representative . . . .”<sup>224</sup> Communication is deemed “confidential” under the statute “if [the communication was] not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”<sup>225</sup> Finally, in order to be a representative of the lawyer, “one [must be] employed to assist the lawyer in the rendition of professional legal services.”<sup>226</sup> Therefore, the combination of the policy justifications as well as the codified attorney–client privilege statute help define an understanding of the application of the privilege in Wisconsin.

### C. Wisconsin’s Adoption of the Kovel Doctrine

Based on its statutory provision and the policy justifications underlying the attorney–client privilege doctrine,<sup>227</sup> Wisconsin courts should adopt the *Kovel* doctrine. However, the scope of the *Kovel* doctrine should be limited to some extent. In making this determination, this Comment will first examine the statute itself to assess how the *Kovel* doctrine fits within Wisconsin’s codified attorney–client privilege and then turn to what scope the courts should apply. Specifically, Wisconsin courts should adopt an interpretation of the *Kovel* doctrine that is not too stringent as to render the application of the privilege impossible.

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222. *Jacobi*, 23 Wis. 2d at 157 (quoting WIGMORE, *supra* note 23, § 2291, at 554).

223. *Dudek*, 34 Wis. 2d at 581; *see also* discussion *supra* Section II.A.

224. WIS. STAT. § 905.03(2) (2015–2016).

225. *Id.* § 905.03(1)(d).

226. *Id.* § 905.03(1)(c).

227. *Id.* § 905.03; *Dudek*, 34 Wis. 2d at 578–80.

### 1. The *Kovel* Doctrine Fits Within Wisconsin's Codified Attorney–Client Privilege

The definition of the attorney–client privilege is very relevant in determining whether Wisconsin courts should adopt the *Kovel* doctrine and, if so, under what conditions. Because Wisconsin's attorney–client privilege is codified, a court would first need to ensure that the *Kovel* doctrine is consistent with the statute. Arguably, the *Kovel* doctrine fits well within Section 905.03(2) if a Wisconsin court determines that the third-party consultant is the lawyer's representative. Indeed, if a court determines that an attorney hired a third-party consultant to “assist the lawyer in the rendition of professional legal services,”<sup>228</sup> it would very much so emulate the rationale in *Kovel* for extending the attorney–client privilege to the accountant. While one could argue that a third-party consultant is not a lawyer's representative but rather an individual hired for her expertise and knowledge, as demonstrated earlier, courts have indeed found that the third-party consultants can provide information that assists attorneys in providing legal services.<sup>229</sup> A third-party consultant could thus become a representative of the attorney and prevent the privilege from being waived.

The definition of confidential also supports the assertion that the privilege would not be waived.<sup>230</sup> By being an attorney's representative, third-party consultants and their communications are “in furtherance of the rendition of professional legal services to the client” or are “reasonably necessary” for such legal advice.<sup>231</sup> As stated previously, the growth of third parties consulting with businesses will make attorneys more prone to communicating with consultants for the furtherance of legal advice.<sup>232</sup> Consequently, any communication made in the presence of third parties would still be confidential. Therefore, statutorily, a Wisconsin court could determine that the *Kovel* doctrine is consistent with its codified attorney–client privilege.

### 2. Proper Scope of the *Kovel* Doctrine in Wisconsin

Although a court could, under the right circumstances, determine that the *Kovel* doctrine is applicable with Wisconsin's attorney–client privilege, the

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228. WIS. STAT. § 905.03(1)(c).

229. See *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003) (holding that attorneys would not be able to perform their basic duties to their clients if they could not discuss legal strategy with public relations consultants).

230. WIS. STAT. § 905.03(1)(d).

231. *Id.* § 905.03(1)(d).

232. See *supra* Part I and accompanying notes.

court would still need to determine the proper scope of the privilege. Because there is no consensus in both state and federal courts on the proper scope of the *Kovel* doctrine, the policies surrounding Wisconsin's attorney-client privilege and the court's previous uses of the privilege are instructive on the matter. The purpose of the attorney-client privilege is to encourage clients to communicate with attorneys for the rendering of accurate legal advice.<sup>233</sup> Given the rise of corporations outsourcing more and utilizing third-party consultants for legal advice, not adopting the *Kovel* doctrine or adopting it extremely narrowly, such as by utilizing all three narrow factors,<sup>234</sup> would likely limit the ability of attorneys to give confidential legal advice. For example, adopting all three factors would likely create a rigid and narrow interpretation of the attorney-client privilege that would apply in very limited, if any, situations. This would render the purpose of the *Kovel* doctrine—and the privilege itself—useless. Applying a strict construction of the *Kovel* doctrine defeats the rationale of the attorney-client privilege and fails to adequately balance the need for privileged communication against the justice system's search for truth. However, applying the broad interpretation standard of merely helping or facilitating legal advice would likely have negative effects on the litigation and truth finding process, as it may overextend the application of the privilege.<sup>235</sup>

Therefore, based on Wisconsin's underlying policy justifications for the attorney-client privilege and the illustrative federal and state *Kovel* cases, Wisconsin courts should adopt the *Kovel* doctrine in a manner more lenient than the most stringent interpretation, but stricter than the broad interpretation of the doctrine. Specifically, Wisconsin should adopt a narrow approach that does not take into account all three factors, but rather only considers the two factors of providing sufficient contemporaneous evidence and translating client only information.<sup>236</sup> Examining these two factors will enable a court to effectively determine whether the third-party consultant is truly assisting an attorney in providing legal advice as well as provide some predictability.

For the first factor, analyzing whether there is sufficient evidence enables the courts to determine if the purpose of the privilege was met. Providing sufficient evidence to the court, such as an engagement letter or demonstrating specific hiring and billing patterns, illustrates that the purpose of hiring the third-party consultant was to provide legal advice. Although it could be argued

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233. See *supra* Section II.A and accompanying notes.

234. See *supra* Section III.B and accompanying notes.

235. See *supra* Section III.C and accompanying notes.

236. See *supra* Section III.B and accompanying notes for an explanation of the narrow interpretations of the *Kovel* doctrine.

that advocating for an approach that considers contemporaneous documentation may undercut the specific substance and relationship of the attorney, client, and third party, Wisconsin courts should consider the contemporaneous evidence in addition to the substantive information rather than as a substitute.<sup>237</sup> By utilizing this factor, the courts could provide some predictability for attorneys using third-party consultants. Specifically, attorneys can strengthen the likelihood that communications with a third-party consultant are privileged by creating an engagement letter or performing some of the actions described earlier.<sup>238</sup> Although it likely is not completely necessary that a party have contemporaneous evidence to prove that the *Kovel* doctrine should apply, such documentation can be both helpful and instructive in determining its applicability.

In addition to applying the first factor, Wisconsin courts should also adopt an approach that considers whether the third-party consultant translated client only information. This factor is in keeping with Wisconsin's own policy determination of encouraging clients to communicate freely to attorneys. By examining whether third-party consultants use their own information, rather than the client's information, to provide advice to the attorney, Wisconsin courts can ensure that the privilege is not too broadly applied or prevents the truth-finding process. In addition, companies and attorneys can consider before hiring a consultant what information that third-party consultant would be using, which can potentially offer more predictability in this area.

Therefore, Wisconsin courts should utilize a narrow but lenient approach in adopting the *Kovel* doctrine by only considering two factors when deciding if the attorney-client privilege applies to communications between an attorney, client, and third-party consultants. This is in keeping with Wisconsin's common law and policy justifications of applying the privilege narrowly, as well as with the reality that businesses are going to increasingly rely on third-party consultants in the facilitation of legal advice due to the complexities of modern business practices. With that being said, as the court stated in *Dudek*, "[u]ntil the demand for information is made and the precise nature of the information sought is disclosed it is impossible for the court, upon whom the law has cast the duty of deciding the question, to determine whether" the

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237. For example, in *United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995), the court found that the privilege did not exist because the attorney failed to provide sufficient substantive evidence as well as contemporaneous evidence to support the privilege. This case demonstrates a way that courts have decided whether the privilege applies with the help or lack of contemporaneous documents or attorney actions.

238. See *supra* Section III.B.1 and accompanying notes.

attorney-client privilege will apply.<sup>239</sup> Therefore, although Wisconsin courts should adopt a narrow, but lenient approach, to the *Kovel* doctrine, such application will greatly depend on the facts and circumstances surrounding the court's first brush with when confidential communications are shared with a third-party consultant for the purposes of rendering legal advice.

#### V. CONCLUSION

Although the attorney-client privilege is old and “[n]arrowly defined, riddled with exceptions, and subject to continuing criticism,”<sup>240</sup> it is a vital part of the legal profession. Without the privilege, communications between clients and attorneys would cease to operate in the same manner and would irrevocably harm a lawyer's ability to give accurate and effective legal advice.<sup>241</sup> Given the rise in businesses reorganizing and outsourcing to consultants, the legal business model is also shifting.<sup>242</sup> To give proper legal advice, attorneys will increasingly need to engage in confidential communications with third-party consultants. While the *Kovel* doctrine allows communication between attorneys, clients, and third-party consultants to be protected if the communication is necessary or helpful in the rendering of legal advice, there is no consensus among both the federal and state courts as to the proper scope of the doctrine. This unpredictability and lack of clarity provides uncertainty as to whether vital communications with third-party consultants are covered under the attorney-client privilege. With the rise of third-party consultants, courts need to address this issue when it is presented in order to provide as much clarity as possible.

Based on Wisconsin's statutory scheme, common law, and policies underlying the attorney-client privilege, Wisconsin courts should adopt the *Kovel* doctrine, if presented with the opportunity. Such a decision would be wise given the increasing use of communicating with consultants among businesses and the *Kovel* doctrine's easy fit within Wisconsin's codified attorney-client privilege. In terms of scope, Wisconsin should adopt a moderately narrow approach that takes into consideration the contemporaneous evidence presented as well as whether only client information was translated. This will ensure that the approach is not too stringent that the privilege rarely applies but for in a few circumstances but also one that is not too broad that it disrupts the ability of society to gather evidence and generate the truth. While such an adoption will likely need to wait until the facts are before the court,

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239. *State ex rel. Dudek v. Circuit Court*, 34 Wis. 2d 559, 582, 150 N.W.2d 387, 400 (1967).

240. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

241. *See supra* Part II and accompanying notes.

242. *See supra* Part I and accompanying notes.

given the increase in the use of such third-party professional consultants, the day that the Wisconsin Courts confront and address this issue is likely in the not too distant future.

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