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ALTERNATIVE LITIGATION FINANCE AND THE ATTORNEY-CLIENT PRIVILEGE

BY GRACE M. GIESEL[†]

ABSTRACT

The United States legal system has a new player: the alternative litigation finance (ALF) entity. In recent years ALF entities have begun providing financing for small-scale matters and also complex commercial matters involving millions of dollars. The recent success of ALF has been assisted by the fact that at least in some jurisdictions it is now clear that perceived historical barriers to ALF such as champerty, usury, and ethics precepts do not, in fact, block ALF. With ALF arrangements becoming more commonplace, questions have emerged about the effect the integration of ALF entities into attorney-client relationships has on the attorney-client privilege.

This Article explores traditional attorney-client privilege doctrine to determine whether the privilege protects communications involving ALF entities. This Article concludes that ALF entities cannot benefit from the joint client doctrine because they, in fact, are not joint clients. Even if ALF entities sought to be joint clients, ethical principles likely would not allow joint client status in the investment decision stage of the relationship and might not allow it in the monitoring stage of the relationship. ALF entities likely cannot benefit from the allied party-common interest doctrine for communications in the investment decision stage but might be able to avail themselves of this doctrine for communications in the monitoring stage if the particular court involved uses a broad definition of common interest. In addition, an ALF entity would not likely be found to be an agent of the client or lawyer such that privilege protection would include it. Ultimately, this Article concludes that privilege doctrine should not be stretched to reach the ALF scenario because to do so would damage the privilege itself. Rather, if the involvement of ALF entities in the legal market is sufficiently beneficial and if there is a sufficient need for privilege protection, an independent ALF privilege might be the best solution.

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INTRODUCTION

The United States' legal system has a new player: the alternative litigation finance (ALF) entity.[1] Funding of litigation by an entity that is not a party to the litigation has long existed in the United States in the form of attorney funding through contingent fees[2] and insurer funding through the typical liability insurance contract.[3] In situations in which those two avenues of third-party funding have not been available, parties, large and small, sophisticated and not, often have struggled to fund their own litigation. Today such parties have an additional option: ALF. ALF refers to funding of litigation "by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties."[4] ALF entities have no interest or involvement in the matter before providing funding but provide funding for the litigation and reap a return if the funded party is successful.

ALF entities have been successful in other countries for many years.[5] In the last decade or so, ALF entities in the United States have funded small matters such as personal injury claims.[6] And in the last five

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1. For a sampling of matters in which ALF entities have been involved, see Devon IT, Inc. v. IBM Corp., No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012), concerning a fraud action between two commercial entities, S & T Oil Equip. & Mach., Ltd. v. Juridica Invs. Ltd., 456 F. App'x 481, 482–84 (5th Cir. 2012) (per curiam), involving international arbitration, and Shanks v. Morgan & Meyers, P.L.C., No. 302725, 2012 WL 1314094, at *1–2 (Mich. Ct. App. Apr. 17, 2012) (per curiam), in which a personal injury plaintiff received funding from two ALF entities.

2. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5 (2013) (stating ethical guidelines for contingency fees); *see also* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 99 (2011) (noting that all U.S. jurisdictions recognize contingency fees). Though the attorney is interested in the litigation, he or she funds the litigation but is not a party. Thus, the attorney is a third-party funder.

3. Insurers are interested in the litigation involving the insured but are not a party to the litigation so they are third-party funders. *See* Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice Between Tort and Contract Norms when the Deal Breaks Down*, 66 VAND. L. REV. 1831, 1833–34 (2013) (noting similarity of ALF entities and insurers).

4. AM. BAR ASS'N COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 1 (2012) [hereinafter ABA REPORT], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf; *see also* STEVEN GARBER, RAND INST. FOR CIVIL JUSTICE LAW, FIN., AND CAPITAL MKTS. PROGRAM, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS ix (2010), *available at* http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf.

5. The United Kingdom and Australia have been ahead of the United States in the establishment and acceptance of alternative litigation funding. *See* Jonathan T. Molot, *The Feasibility of Litigation Markets*, 89 IND. L.J. 171, 178, 185 (2014); *see also* MICHAEL LEGG, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, LITIGATION FUNDING IN AUSTRALIA: IDENTIFYING AND ADDRESSING CONFLICTS OF INTEREST FOR LAWYERS 3 (2012), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/Litigation_Funding_in_Australia.pdf (discussing IMF and the Australian experience). In the United Kingdom, a voluntary code of conduct has been created along with an Association of Litigation Funders of England and Wales. *See* Caroline Binham, *Code of Conduct Set Up for Litigation Funders*, FIN. TIMES (London), Nov. 23, 2011, at 4.

6. *See, e.g.*, Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc., No. 04283-2011, 2012 WL 1087341 (N.Y. Sup. Ct. Mar. 29, 2012) (an example of a typical situation); *see also* Maya

years or so, ALF entities, some of which are offshoots of successful entities in the United Kingdom or Australia,[7] began providing financing in the United States for large commercial matters.[8] A sophisticated market of litigation investing has emerged in which ALF entities invest in matters such as contract disputes, real estate disputes, trade secret disputes, and environmental disputes.[9] These ALF entities are answering a need.[10] Some of these entities are answering that need in a manner that allows for quite a profitable return.[11]

The recent success of ALF has been assisted by the fact that at least in some jurisdictions it is now clear that perceived historical barriers to ALF such as champerty, usury, and ethics precepts do not, in fact, block ALF activities. In recent times, many jurisdictions have viewed champerty, the act of "maintaining a suit in return for a financial interest in the

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Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1277 (2011) (discussing the small scale type of ALF).

7. For example, Juridica Investments, Ltd. and Burford Capital, LLC, financing entities investing in litigation in the United States, are traded on the Alternative Investment Market (AIM) which is a part of the London Stock Exchange. *See* Richard Lloyd, *The New, New Thing*, AM. LAW. (May 17, 2010), http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202457711273; *see also* Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 573 (2010) (discussing Burford and Juridica). Australian veteran funder IMF launched a United States subsidiary in 2011, Bentham Capital LLC. *See* LEGG, *supra* note 5, at 3 (discussing IMF).

8. *See* Catherine Ho, *Investment Firms Playing Role in Legal Field*, WASH. POST, Dec. 12, 2011, at A14 (discussing ALF entities BlackRobe, Burford, and Juridica); Leigh Jones, *Another Litigation Finance Firm Opens Its Doors*, NAT'L L.J., Apr. 8, 2013, http://www.nationallawjournal.com/id=1202595145560? ("Three prominent lawyers and a hedge-fund manager have launched [Gerchen Keller Capital LLC, an ALF] with $100 million in capital.").

9. *See* Jones, *supra* note 8 (noting that Gerchen Keller Capital LLC averages investments of $5 million); Eileen Malloy, *Third-Party Financing for U.S. Litigation Profitable Endeavor for U.K. Funding Firm*, 28 Laws. Man. on Prof. Conduct (ABA/BNA) 229 (Apr. 11, 2012) (discussing the success of one such funder of sophisticated commercial disputes, Burford); Molot, *supra* note 5, at 178 ("Burford has committed more than $ 300 million in capital across more than fifty deals involving commercial disputes in the United States, the United Kingdom, and international arbitration."). For an example of ALF involvement in a trade secret litigation matter, see Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014).

10. Before ALF entities, a corporation might dedicate significant corporate resources to fund litigation matters. This use might infringe on the resources available to achieve other important corporate objectives. With the ALF market, corporations seek to involve ALF entities to fund litigation and yet avoid the diversion of corporate resources. The ALF entity funds the litigation. In addition, because ALF entities are not repaid absent a successful result, corporations using ALF can avoid, at least in part, the risk of pouring money into an unsuccessful litigation. In its Annual Report released in April 2011, ALF entity Burford noted "[w]hile uncertain economic conditions, rising litigation costs and shrinking corporate [legal] budgets have helped generate interest in Burford's proposition, the fundamental driver of [Burford's] success . . . has simply been a thirst for financial options." *See* Malloy, *supra* note 9 (quoting BURFORD ANNUAL REPORT 2011, at 4 (2012), http://www.burfordcapital.com/wp-content/uploads/2012/10/burford_ar11.pdf) (internal quotation marks omitted).

11. For example, in April of 2012, Burford reported a $15.9 million profit for 2011 and noted that it had committed $280 million in investments. *Id.* Juridica has also shown signs of being involved in a profitable endeavor. In January of 2012, it announced a stock payout as a result of success in seven antitrust and patent matters. *See* Alex Spence, *The £8m Slice of Courtroom Winnings, with More to Come; Juridica to Pay Out Special Dividend Next Month*, TIMES (London), Jan. 5, 2012, at 39.

outcome,"[12] with great suspicion[13] and have not recognized it as a crime or a tort[14] or even a contract defense.[15] An example of the typical reception for a champerty claim is in a case in which ALF arrangements were at issue. The court stated:

> [O]ur Courts have held for at least a century that an outsider's involvement in a lawsuit does not constitute champerty or maintenance merely because the outsider provides financial assistance to a litigant and shares in the recovery. Rather, "a contract or agreement will not be held within the condemnation of the principle[s] . . . unless the interference is clearly officious and for the purpose of stirring up 'strife and continuing litigation.'"[16]

The ABA's Commission on Ethics 20/20 agreed in 2012 that champerty was not a barrier to ALF in many states.[17] The Commission clarified that if a jurisdiction allows any sort of investment in litigation, an ALF arrangement would not be champertous in such a jurisdiction if the matter is not frivolous litigation, the ALF entity has no improper motive, and the ALF entity does not exercise control over strategic decisions.[18] ALF investments are motivated by a desire to create profit, so it is unlikely that an ALF entity would invest in frivolous litigation[19] or be motivated by any otherwise improper motive. In addition, an ALF entity desiring to maximize profit would not jeopardize the investment by seek-

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12. *In re* Primus, 436 U.S. 412, 424 n.15 (1978). This case also defined maintenance and barratry, two doctrines related to champerty. "[M]aintenance is helping another prosecute a suit." *Id.* "[B]arratry is a continuing practice of maintenance or champerty." *Id.*

13. *See* Del Webb Cmtys., Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011) ("The consistent trend across the country is toward limiting, not expanding, champerty's reach."); *see also* Giambattista v. Nat'l Bank of Commerce, 586 P.2d 1180, 1186 (Wash. Ct. App. 1978) ("In no state are these doctrines and the laws relating to them preserved with their original rigor.").

14. *See, e.g.*, *Del Webb*, 652 F.3d at 1154 (finding no tort); Sec. Underground Storage, Inc. v. Anderson, 347 F.2d 964, 969 (10th Cir. 1965) (finding no tort); Hall v. State, 655 A.2d 827, 830–31 (Del. Super. Ct. 1994) (finding no champerty crime).

15. *See, e.g.*, Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 277–79 (S.C. 2000) (abolishing champerty as a defense to contract enforcement); Saladini v. Righellis, 687 N.E.2d 1224, 1226–28 (Mass. 1997) (same); *see also* Sebok, *supra* note 2, at 98–99 (stating that at least twenty-eight U.S. jurisdictions allow champerty in some form).

16. Odell v. Legal Bucks, LLC, 665 S.E.2d 767, 775 (N.C. Ct. App. 2008) (quoting Smith v. Hartsell, 63 S.E. 172, 174 (N.C. 1908)); *see also* Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 724–28 (N.D. Ill. 2014) (rejecting application of champerty and maintenance to ALF setting, stating "maintenance and champerty have been narrowed to a filament"); Core Funding Grp. v. McIntire, No. 07-4273, 2011 WL 1795242, at *3–4 (E.D. La. May, 11, 2011) (holding that a loan to attorneys to fund litigation was not champertous because it was not a loan to a party and not contingent solely on the underlying litigation's outcome); Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704, at *6–7 (N.Y. Sup. Ct. Mar. 2, 2005) (finding no impermissible champerty). *But see* Johnson v. Wright, 682 N.W.2d 671, 676, 678, 681 (Minn. Ct. App. 2004) (finding an ALF arrangement champertous and not enforceable).

17. *See* ABA REPORT, *supra* note 4, at 11.

18. *See* ABA REPORT, *supra* note 4, at 11; *see also* Sebok, *supra* note 2, at 108–09 (discussing the various forms of champerty permitted and not permitted).

19. *See* William Alden, *Looking to Make a Profit on Lawsuits, Firms Invest in Them*, N.Y. TIMES, May 1, 2012, at B3 ("[ALF entities] insist they only invest in cases that they believe have merit.").

ing to exercise so much control over the matter that the arrangement would be deemed champertous such that it would not be enforced.[20]

ALF arrangements also are permissible under usury laws. Usury prohibitions apply only when there is a loan at an interest rate above that allowed by usury law and the borrower agrees to repay the principal and pay the interest without condition.[21] ALF arrangements usually involve a conditional obligation on behalf of the borrower to repay; the ALF entity recovers its money only if the litigation resolves favorably.[22] As a result, most courts evaluating whether ALF arrangements are usurious have concluded that the arrangements are investments, not loans, and are not usurious.[23]

Repeatedly, ethics bodies have determined that ALF arrangements are not per se unethical.[24] These bodies raise caution flags, not stop signs, as they note that attorneys must protect their independence in ALF arrangements,[25] that attorneys must guard against conflicts of interest,[26]

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20. For example, Burford has stated that it "is simply a provider of investment capital and . . . the litigant retains control of its case." Malloy, *supra* note 9 (internal quotation marks omitted). Michele DeStefano posits that a rule not allowing any ALF influence would not be realistic. Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2796 (2012).

21. *See* Lloyd v. Scott, 29 U.S. 205, 226 (1830) ("Where a loan is made to be returned at a fixed day with more than the legal rate of interest, depending upon a casualty which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury."). *See generally* Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85, 89–92, 96 (2002) (discussing the history of usury laws and how modern usury laws apply to litigation financing).

22. *See* Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 665 (2005).

23. *See, e.g.*, Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc., No. 04283-2011, 2012 WL 1087341, at *5 (N.Y. Sup. Ct. Mar. 29, 2012) ("[T]he Defendants were always at risk of no recourse whenever one of the underlying cases went to trial and resulted in no recovery. Such circumstances simply cannot be stated to constitute a 'loan.'"); Anglo–Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 97 (Tex. App. 2006) (holding that borrowers had no obligation to repay so "as a matter of law, the agreements cannot be usurious"). A few courts have disagreed. *See, e.g.*, Lawsuit Fin., LLC v. Curry, 683 N.W.2d 233, 239 (Mich. Ct. App. 2004) (per curiam) (ALF arrangement entered into after the favorable jury verdict so repayment was certain); Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704, at *8 (N.Y. Sup. Ct. Mar. 2, 2005) (holding that the claim was a "sure thing" so the repayment was certain to occur and the arrangement was usurious (internal quotation marks omitted)); *see also* Odell v. Legal Bucks, LLC, 665 S.E.2d 767, 777–79 (N.C. Ct. App. 2008) (holding that the advance was usurious). *See generally* Jenna Wims Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 ROGER WILLIAMS U. L. REV. 750, 761–62, 769–72 (2012) (discussing the relationship of litigation lending to usury laws).

24. *See, e.g.*, Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 2006-2 (2006), *available at* http://media.dsba.org/ethics/pdfs/2006-2.pdf ("[T]the Attorney may comply with such an arrangement under the proper circumstances."); State Bar of Mich. Standing Comm. on Prof'l Ethics, Ethics Op. RI-336 (2005), *available at* http://www.michbar.org/opinions/ethics/numbered_opinions/ri-336.cfm ("The various State Bar ethics opinions have concluded that litigation-financing arrangements similar to those described above are permissible, as long as it is the lawyer, and not the client, who is the obligor on the loan, and there is full disclosure to the client.").

25. *See, e.g.*, Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2012-3 (2012), *available at* http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2012/Op_12-003.pdf ("[T]he lawyer must ensure that the ALF provider does not attempt to dictate the lawyer's representation of the client."); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2011-2 (2011), *availa-*

and that attorneys must be ever vigilant to protect confidential client information at all times in the ALF setting.[27]

With ALF arrangements becoming more commonplace at all levels of litigation, questions have emerged about the effect the involvement of an ALF entity in a litigation matter has on the work product doctrine and the attorney-client privilege.[28] The courts have not yet fleshed out these issues.[29] Commentators have not engaged in in-depth analysis either.[30] Because these two doctrines are not creatures of state professional responsibility rules, state ethics opinions do not definitively address the application of these doctrines, but rather, note that lawyers should explain to clients that disclosure to ALF entities may waive the attorney-client privilege or the work product doctrine.[31] Obviously, these doc-

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ble at http://www.nycbar.org/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02 ("While a client may agree to permit a financing company to direct the strategy or other aspects of a lawsuit, absent client consent, a lawyer may not permit the company to influence his or her professional judgment in determining the course or strategy of the litigation, including the decisions of whether to settle or the amount to accept in any settlement."). Several Model Rules prohibit improper interference. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.1 (2013) (stating that "a lawyer shall exercise independent professional judgment and render candid advice"); *id.* R. 5.4(c) (stating that a lawyer shall not allow interference); *id.* R. 1.8(f)(2) (stating that a third party can pay only if there is no improper interference).

26. *See, e.g.*, N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2011-2 (2011), *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02 (cautioning about conflicts of interest); Me. Bd. of Overseers of the Bar, Op. 191 (2006), *available at* http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=87348&v=article (instructing lawyers to "be wary of conflicts of interest"). Model Rule 1.7 prohibits, absent informed consent, a representation if there is a "significant risk" that the lawyer's representation of the client will be "materially limited" by the lawyer's relationship with another such as the ALF entity. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013).

27. *See, e.g.*, Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2012-3 (2012), *available at* http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2012/Op_12-003.pdf (prohibiting disclosures to an ALF without client consent and instructing lawyers to warn clients about the risk of waiver of the attorney-client privilege); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2011-2 (2011), *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02 (emphasizing that client consent is necessary before disclosure); *see also* ABA REPORT, *supra* note 4, at 31–32. Model Rule 1.6 requires informed consent unless the disclosure is impliedly authorized or in certain very narrow situations of necessity. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013).

28. *See, e.g.*, Lyon, *supra* note 7, at 604 ("One largely unanswered question raised by opponents of third-party finance is how it affects attorney-client privilege and the work product rule.").

29. With regard to the work product doctrine, see Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 734–39 (N.D. Ill. 2014) (applying the work product doctrine); Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., No. 6:07-CV-222-Orl-35KRS, 2008 WL 5054695, at *4 (M.D. Fla. Nov. 17, 2008) (holding that the work product doctrine did not apply because claimant did not make specific claims in accord with court's standing order regarding privilege); Mondis Tech., Ltd. v. LG Elecs., Inc., No. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW, 2011 WL 1714304, at *2–3 (E.D. Tex. May 4, 2011) (applying the work product doctrine).

30. Commentators have noted the issues but have not fully analyzed the application of the doctrines in the ALF setting. *Compare* Steinitz, *supra* note 6, at 1324 ("Client communication with the financier . . . breaks the attorney-client privilege."), *with* Richmond, *supra* note 22, at 675 ("it is far from certain that an attorney's disclosure of client confidences to a litigation funding company will waive the attorney-client privilege") *and* Sebok & Wendel, *supra* note 3, at 1837 n.11 (noting uncertainty).

31. *See, e.g.*, Ky. Bar Ass'n, Ethics Op. E-432 (2011), *available at* http://www.kybar.org/documents/ethics_opinions/kba_e_432.pdf

trines protect certain material from disclosure and that protection is vitally important to the attorney-client team and to the ALF entity considering an investment or an ALF entity already invested in a matter.[32] Regardless of the stage of the ALF entity involvement, it is likely that the matter's value is maximized by the protection these doctrines offer. Thus, the attorney-client team and the ALF entity must have as a goal the preservation of the protection. This goal should affect attorney, client, and ALF entity conduct in any one matter and should affect how the ALF market operates as well.

The application of the work product doctrine and the attorney-client privilege must be evaluated in light of the sharing of information that might be typical when an ALF entity is involved. First, an ALF entity must have access to information about a matter so that the entity can decide whether to invest in the matter or, rather, to walk away from the matter.[33] Few ALF entities would be willing to make a significant investment absent some level of due diligence activity.[34] In fact, established ALF entities have detailed due diligence procedures that include analysis of the claim's potential for success, the claim's potential value after adjudication, the ability to collect a judgment if the matter is successful, the litigation's potential cost, the time span involved to obtain a final judgment, and the likelihood and timing of settlement.[35] In addition, the ALF entity, if it decides to invest, will desire access to information

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("Any consultation should include a discussion of the possible effects of disclosure of confidential information to the non-lawyer, including the risk of waiver of the attorney-client privilege.").

32. For example, the managing director of Juris Capital Corporation, an ALF entity, in 2009 noted:

> [I]n every conversation I have with a litigant or their counsel, we advise them not to share the information which is or may be subject to a privilege. We never ask for, nor do we receive, any privileged information that if disclosed to us might constitute a waiver of the attorney-client privilege.

Jennifer Banzaca, *In Turbulent Markets, Hedge Fund Managers Turn to Litigation Funding for Absolute, Uncorrelated Returns*, HEDGE FUND L. REP., June 24, 2009 (internal quotation mark omitted), *available at* http://www.juriscapitalcorp.com/images/Hedge%20Fund%20Law%20Report%20Article.pdf (discussing Juridica, Juris, and CaseFunding); *see also* Mathew Andrews, Note, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 YALE L.J. 2422, 2443–44 (2014).

33. Jonathan Molot, chair of the investment committee at Burford, describes this process as follows:

> Litigants approach Burford's team of legal professionals asking whether their cases are financeable. Burford's legal team then conducts extensive diligence that includes an examination of the facts of the dispute, the governing law and forum, the quality of the legal team the litigant has hired or proposes to hire, and the respective financial resources of the parties.

Molot, *supra* note 5, at 178; *see also* Devon IT, Inc. v. IBM Corp., No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012) (describing sharing information with the ALF entity in the evaluation process).

34. *See* Andrews, *supra* note 32, at 2437 ("Funders have argued that the quickest road to bankruptcy is funding suits without a reasonable chance of success.").

35. *See* Andrews, *supra* note 32, at 2437–38; Banzaca, *supra* note 32.

about the matter so that it may monitor its investment as the matter proceeds.[36]

In a recent article I attempted to fill the analysis void with regard to the work product doctrine and concluded that materials created specifically for the ALF entity likely enjoy work product doctrine protection,[37] and that sharing materials otherwise protected by the work product doctrine with the ALF entity likely does not result in a waiver of the work product doctrine.[38] Thus, I ultimately concluded that the work product doctrine would not significantly affect the nature of ALF involvement in the attorney-client relationship and would not significantly affect the ALF market in general.[39]

I now turn to the effect of ALF entity involvement on the attorney-client privilege. In a simplistic analysis, involving an ALF entity in attorney-client communications destroys the privilege because a person other than the attorney and client is present[40] and any communication with an ALF entity is not a communication between attorney and client, the type of communication the privilege protects.[41] Likewise, in a simplistic analysis, any attorney-client communications privileged when made but shared with an ALF entity loses the privilege's protection because the communication is shared with someone other than attorney and client.[42]

But the question of the attorney-client privilege's application to situations involving ALF entities is not so simple. After a brief discussion of the privilege's parameters in Part I, this Article identifies four ways the attorney-client privilege might protect communications involving or shared with ALF entities. In Part II, this Article examines whether the ALF entity and the client are the attorney's joint clients such that the privilege protects the communications involving or shared with the ALF entity. In Part III the Article discusses whether ALF entities and clients, though not joint clients, share a common interest such that the allied party-common interest doctrine protects communications involving ALF entities from compelled disclosure. Part IV evaluates whether ALF entities are the clients' agents under the functional equivalent agent doctrine,

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36. *See* Michelle Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. ECON. & POL'Y 673, 677–78 (2012) (discussing monitoring role).

37. Grace M. Giesel, *Alternative Litigation Finance and the Work-Product Doctrine*, 47 WAKE FOREST L. REV. 1083, 1126–29 (2012).

38. *Id.* at 1137–39.

39. *Id.* at 1140.

40. *See* WebXchange Inc. v. Dell Inc., 264 F.R.D. 123, 126 (D. Del. 2010) ("A communication is not made in confidence, and in turn is not privileged, if persons other than the client, its attorney, or their agents are present.").

41. *See infra* Part I.A for a discussion of the parameters of the privilege.

42. *See* Francisco v. Verizon S., Inc., 756 F. Supp. 2d 705, 718 (E.D. Va. 2010) ("[T]he voluntary production of a privileged document to a third party waives the privilege."); *WebXchange*, 264 F.R.D. at 126 ("[I]f a client shares an otherwise privileged communication with a third party, then the communication is no longer confidential and the client has waived the privilege.").

or the clients' agents or the lawyers' agents under the *Kovel* agency doctrine[43] such that the communications involving ALF entities enjoy the privilege's protection. The Article examines, in Part V, whether existing privilege doctrine should be modified to reach the ALF scenario to the extent it does not reach it now.

The Article concludes that the only claim of privilege that might be successful, and then only in some courts, is the claim that the privilege applies to protect communications involving ALF entities in the monitoring stage as a result of the allied lawyer-common interest doctrine. ALF entities cannot benefit from the joint client doctrine because they, in fact, are not joint clients. Even if ALF entities sought to be joint clients, ethical principles likely would not allow joint client status in the relationship's investment decision stage and might not allow it in the relationship's monitoring stage. ALF entities likely cannot benefit from the allied party-common interest doctrine for communications in the investment decision stage but might be able to avail themselves of this doctrine for communications in the monitoring stage if the particular court involved uses a broad definition of common interest. ALF entities would not likely be able to benefit from the functional equivalent agent doctrine or the *Kovel* agency doctrine. Ultimately, this Article concludes that given that the current privilege doctrine does not protect communications involving ALF entities, the doctrine should not be stretched to reach the ALF scenario because to do so would damage the privilege itself. Rather, the Article posits that a free-standing ALF privilege *might* be called for *if* the involvement of ALF entities in the legal market is sufficiently beneficial and *if* there is a sufficient need for privilege protection.

I. THE PRIVILEGE

A. Parameters and Rationale of the Privilege

The modern attorney-client privilege protects certain communications from compelled disclosure.[44] The privilege protects confidential communications between clients and their lawyers if the communications are for the purpose of obtaining or rendering legal advice and are not in furtherance of a crime or fraud.[45] Some courts state the privilege's defini-

43. I name this doctrine after the case most often associated with it, *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

44. *See* Kerner v. Superior Ct., 141 Cal. Rptr. 3d 504, 524 (Cal. Ct. App. 2012) ("The privilege is absolute and prevents disclosure of the communication regardless of its relevance, necessity or other circumstances peculiar to the case."); Batra v. Wolf, 922 N.Y.S.2d 735, 738 (N.Y. Sup. Ct. 2010) ("Privileged attorney-client communications are absolutely immune from disclosure.").

45. *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950). Judge Wyzanski in *United Shoe* defined the privilege as follows:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of secur-

tion slightly differently or provide more detail, but as one court has stated: "Five elements are common to all definitions of the attorney-client privilege: (1) an attorney, (2) a client, (3) a communication, (4) confidentiality anticipated and preserved, and (5) legal advice or assistance being the purpose of the communication."[46]

Courts recognize that the application of the privilege may impede truth-finding, and so courts often warn that the privilege must be construed narrowly.[47]

The privilege exists to encourage clients to communicate fully and completely with their lawyers. The reasoning is that clients will be more likely to confide in their lawyers if they know that what they tell their lawyers is protected from compelled disclosure. Only with a client's complete disclosure can an attorney render competent and proper legal advice and assistance.[48] And only with that advice and assistance can clients structure their conduct to better abide by the bounds of the law.[49]

B. The Problem Created by an ALF Entity's Involvement

Modern definitions of the attorney-client privilege note that the privilege protects communications that are confidential and stay confi-

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ing 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.

Id.; *see also* Chase v. Nova Se. Univ., Inc., No. 11-61290-CIV, 2012 WL 2285915, at *3 (S.D. Fla. June 18, 2012) (applying the *United Shoe* test); Go v. Rockefeller Univ., 280 F.R.D. 165, 173 (S.D.N.Y. 2012) (applying the *United Shoe* test). *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68–86 (2000) (defining the scope and duration of the attorney client privilege). Some jurisdictions such as New York have codified the privilege. *See, e.g.*, N.Y. C.P.L.R. 4503(a) (Consol. 2014).

46. *In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 795 (E.D. La. 2007).

47. *See, e.g.*, *In re* Pac. Pictures Corp., 679 F.3d 1121, 1126 (9th Cir. 2012) ("[B]ecause . . . this rule 'contravene[s] the fundamental principle that the public has a right to every man's evidence,' we construe it narrowly to serve its purposes." (alteration in original) (citation omitted) (quoting Trammel v. United States, 445 U.S. 40, 50 (1980))).

48. *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("[The privilege] is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."); Castellani v. Scranton Times, LP, 956 A.2d 937, 951 (Pa. 2008) ("The attorney-client privilege, on the other hand, renders an attorney incompetent to testify as to communications made to him by his client in order to promote a free flow of information only between attorney and his or her client so that the attorney can better represent the client.").

49. In *Upjohn Co. v. United States*, 449 U.S. 383 (1980), the Supreme Court stated the privilege's purpose as follows:

> [The] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Id. at 389; *see also* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985) ("[T]he attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice.").

dential.[50] In its narrowest sense, a confidential communication is one between an attorney and a client and one that does not escape beyond those two entities.[51] A conversation that does not involve an attorney and client is not protected regardless of confidentiality. A conversation in the presence of others is not confidential[52] nor is a conversation between an attorney and client that is later shared with another.[53] So, as an initial matter, an ALF entity's presence in the midst of attorney-client communications seems to prevent the privilege from attaching to the communications. Likewise, sharing any privileged communications with an ALF entity would seem to destroy the privilege's protection. Any communication with an ALF entity by an attorney or client, therefore, would not appear to be a communication between attorney and client and, thus, would not enjoy the privilege's protections.

Yet, there are some wrinkles to the privilege that may make such conclusions suspect. If one views the ALF entity and the client as the lawyer's joint clients pursuing a common interest, including the ALF entity in communications or sharing communications with the ALF entity does not destroy the privilege's protection. Second, if the relevant court recognizes that the ALF entity and the client share a common interest, including the ALF entity in communications or sharing communications with the ALF entity does not destroy the privilege's protection. Third, if the ALF entity is a special type of agent of the lawyer or client, including the ALF entity in communications or sharing communications with the ALF entity does not destroy the privilege's protection.

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50. *See* 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:18 (4th ed. 2013); 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 6:1 (2013–2014 ed. 2013).

51. *See* WebXchange Inc. v. Dell Inc., 264 F.R.D. 123, 126 (D. Del. 2010) ("A communication is not made in confidence, and in turn is not privileged, if persons other than the client, its attorney, or their agents are present."); *see also In re* Condemnation in 16.2626 Acre Area, 981 A.2d 391, 397 (Pa. Commw. Ct. 2009) ("Confidentiality is key to the privilege, and the presence of a third-party during attorney-client communications will generally negate the privilege.").

52. *See, e.g.*, *In re* Chevron Corp., 650 F.3d 276, 289 (3d Cir. 2011) ("[I]f persons other than the client, its attorney, or their agents are present, the communication is not made in confidence, and the privilege does not attach." (quoting *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 361 (3d Cir. 2007)) (internal quotation marks omitted)).

53. *See In re* Pac. Pictures Corp., 679 F.3d 1121, 1126–27 (9th Cir. 2012) ("[V]oluntarily disclosing privileged documents to third parties will generally destroy the privilege."); *In re* Grand Jury Proceedings Oct. 12, 1995, 78 F.3d 251, 254 (6th Cir. 1996) ("By voluntarily disclosing her attorney's advice to a third party, . . . a client is held to have waived the privilege because the disclosure runs counter to the notion of confidentiality."); United States v. Ghavami, 882 F. Supp. 2d 532, 537 (S.D.N.Y. 2012) ("It is well-established that voluntary disclosure of confidential material to a third party generally results in forfeiture of any applicable attorney-client privilege.").

II. JOINT CLIENT DOCTRINE

A. What Are Joint Clients?

The law has long recognized that a lawyer may represent two or more parties with regard to the same matter.[54] The parties may desire to proceed together as a unit, as a way to capture efficiency of tasks and cost. These parties seek representation by the same attorney, and they seek a shared representation.[55] In a shared or common representation, often called a joint or co-client representation,[56] the attorney represents the clients as a group, and they agree to be jointly represented for purposes of a common matter.[57] All parties share all information.[58]

In addition to the inherent limitation that parties do not want a joint representation unless the interests of the parties closely align, ethics rules limit joint representations because an attorney cannot ethically represent multiple parties jointly in a matter unless the parties' interests are similar. Rule 1.7 of the ABA Model Rules of Professional Conduct recognizes a conflict if an attorney represents two parties, separately or jointly, if the parties are "directly adverse" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."[59] In such a conflict situation an attorney, to handle the representation, must obtain the parties' informed consent.[60] Even then, the lawyer cannot represent the parties unless the attorney "reasonably believes" that he or she can "provide competent and

54. *See* Magnetar Techs. Corp. v. Six Flags Theme Park Inc., 886 F. Supp. 2d 466, 479 (D. Del. 2012) ("The rules governing attorney-client privilege have evolved to cover the representation of two or more people by a single lawyer, a joint representation. In a joint representation, the joint privilege applies when multiple clients hire the same counsel to represent them on a matter of common interest."). The practice has long occurred. *See, e.g.*, Lessing v. Gibbons, 45 P.2d 258, 261 (Cal. Dist. Ct. App. 1935) (explaining that representing clients jointly is "common practice"); Rice v. Rice, 53 Ky. (14 B. Mon.) 335, 335–36 (1854); Gulick v. Gulick, 39 N.J. Eq. 516, 516–17 (1885). *See generally* Debra Lyn Bassett, *Three's a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 395 (2001) ("Joint representation has been a longstanding practice in which the potential benefits have been emphasized, while the potential dangers have been downplayed.").

55. Clients see a joint representation as cost-effective, and it allows for an amicable relationship with the joint client and facilitates a "united front" approach to the matter. Teresa Stanton Collett, *The Promise and Peril of Multiple Representation*, 16 REV. LITIG. 567, 577 (1997) ("[T]he ability to present a united front to a common foe presents substantial tactical advantages that cannot be ignored."); *see also* Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 226–27 (1982) (noting the advantage of a "united front").

56. *See, e.g.*, RICE, *supra* note 50, § 4:30 (explaining "joint clients"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 (2000) (defining the privilege of "co-clients").

57. *See* Maplewood Partners, LP v. Indian Harbor Ins. Co., 295 F.R.D. 550, 594 (S.D. Fla. 2013) ("There is no need to evaluate whether the legal interests of such co-clients are in common or aligned because the clients are joint clients of a single attorney."); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 cmt. c (2000) (discussing the creation of the joint client representation).

58. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. *l* (2000) ("Sharing of information among the co-clients with respect to the matter involved in the representation is normal and typically expected.").

59. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2013).

60. *Id.* R. 1.7(b)(4).

diligent representation to each affected client," no law prohibits the representation, and no client is asserting a claim against another client in a proceeding before a tribunal.[61]

A comment to Rule 1.7 cautions any attorney considering a joint representation to "advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other."[62] The lawyer also should explain that he or she may not favor one joint client over the other.[63]

Parties logically should not seek joint representation if their interests do not converge. Rule 1.7 provides a conflict of interest threshold of commonality. The disclosure discussed in the Rule's commentary makes it more likely that the parties will understand the situation so that they can more properly evaluate whether their interests converge to the extent that a joint representation would be desirable.

B. The Attorney-Client Privilege and Joint Clients

The attorney-client privilege protects communications involving joint clients and the lawyer from compelled disclosure when the communication is about the joint representation and the one seeking the disclosure is a third-party to the joint representation.[64] If one of the clients communicates with the lawyer about the matter of shared representation, the privilege attaches even though another joint client is present. If one of the clients communicates with the lawyer about the matter of shared representation and later shares that communication with another joint client, there is no waiver of privilege. In effect, in these two situations, the communication is confidential and retains its confidential status because it is not being shared with an outsider to the relationship of attor-

61. *Id.* R. 1.7(b); *see id.* R. 1.7 cmts. 29–32.

62. *Id.* R. 1.7 cmt. 31 (noting that in special situations clients can agree that the attorney will not share certain information).

63. *See id.* R. 1.7 cmt. 32.

64. *See* Vicor Corp. v. Vigilant Ins. Co., 674 F.3d 1, 18–19 (1st Cir. 2012) ("Thus, when a lawyer represents multiple clients having a common interest, communications between the lawyer and any one (or more) of the clients are privileged as to outsiders[] but not *inter sese*." (quoting FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000)) (internal quotation marks omitted)); Magnetar Techs. Corp. v. Six Flags Theme Park Inc., 886 F. Supp. 2d 466, 479 (D. Del. 2012) ("The rules governing attorney-client privilege have evolved to cover the representation of two or more people by a single lawyer, a joint representation. In a joint representation, the joint privilege applies when multiple clients hire the same counsel to represent them on a matter of common interest."). This has long been settled law. *See* Marcuse v. Kramer, 5 Teiss. 247, 250 (La. Ct. App. 1908) ("Two or more persons sometimes address a lawyer as a common agent. So far as concerns strangers, these communications are privileged, but not as between themselves." (quoting EDWARD P. WEEKS, A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW § 175 (2d ed. 1892)); 1 FRANCIS WHARTON, A COMMENTARY ON THE LAW OF EVIDENCE IN CIVIL ISSUES § 587 (1877) ("It is easy to conceive of cases in which two or more persons address a lawyer as their common agent. So far as concerns a stranger, their communications to the lawyer would be privileged.").

ney and client.[65] The flip side of this is that a joint client cannot claim privilege against the other joint clients if the joint clients become adversaries at some time after the joint representation ends.[66] In addition, one of the joint clients cannot waive the privilege without the approval of all, though one of the group can waive the privilege as to his or her own communications but only to the extent that the disclosure does not reveal protected communications of other joint clients.[67]

C. Is an ALF Entity a Joint Client?

While an ALF entity *might* seek to be an attorney's joint client along with the client whose matter the ALF is financing, the descriptions of ALF entity activity to date do not indicate that ALF entities seek or desire a joint client relationship or any client relationship at all.[68] Indeed, a study of ALF entities in Australia has noted that "[n]one of the Australian professional litigation funders approached . . . retain legal practitioners as clients."[69] Strategically, an ALF entity might request such a representation in the future so as to capture the benefit of the privilege's protection.

If an ALF entity seeks to be the attorney's joint client in the investment decision stage, it is not likely the attorney ethically could represent the original client and the ALF entity. The ALF entity and the original client have very divergent goals and interests at that stage. The ALF entity's interest is in critically evaluating the litigation matter so that the enti-

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65. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75(1) (2000) ("If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.").

66. *See FDIC*, 202 F.3d at 461 ("But it will often happen that the two original clients will fall out between themselves and become engaged in a controversy in which the communications at their joint consultation with the lawyer may be vitally material. In such a controversy it is clear that the privilege is inapplicable." (quoting 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 91, at 335–36 (John William Strong ed., 4th ed. 1992)) (internal quotation mark omitted)); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75(2) (explaining that no privilege can be claimed in an adversarial action between joint clients).

67. *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 363 (3d Cir. 2007) ("[A] client may unilaterally waive the privilege as to its own communications with a joint attorney, so long as those communications concern only the waiving client; it may not, however, unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients."); Maplewood Partners, LP v. Indian Harbor Ins. Co., 295 F.R.D. 550, 605–06 (S.D. Fla. 2013) (stating that a client may reveal his or her own statements but not those of others).

68. *See* Boardman, *supra* note 36, at 687–88 ("Third-party litigation funders vary in their stated and probable involvement in the underlying litigation. Given the newness of the funding in the United States, it is not clear what the precise relationship between the plaintiff and the funder is meant to be or how it actually manifests. The funder and the plaintiff, though, are clearly not co-clients of the plaintiff's lawyer.").

69. Vicki Waye, *Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs*, 19 BOND L. REV. 225, 236 (2007). "[T]he funder does not fall within the definition of 'client' set out in the [Australian] Model rules, nor is the funder a client under general law principle." *Id.* at 234 (footnote omitted).

ty can decide whether investing meshes with its profit maximization goals whereas the client's interest is to obtain financing so that the litigation matter can ultimately be resolved successfully. The two parties may very well be viewed as "directly adverse" such that the attorney would have a concurrent conflict of interest under Rule 1.7(a)(1).[70] The situation is definitely an arm's length transaction. There is no doubt that at the very least there is a "significant risk" that the representation of one or the other client "will be materially limited" by the lawyer's representation of the other client such that there is a concurrent conflict of interest under Rule 1.7(a)(2).[71] The conflict may be such that Rule 1.7(b) does not allow the representation under any circumstance; informed consent cannot solve the problem because the lawyer cannot "reasonably believe[] that the lawyer will be able to provide competent and diligent representation" to each client.[72]

The more likely result with regard to the investment decision stage is that the lawyer ethically could not jointly represent the ALF entity and the original client nor would either desire such representation. Thus, the situation could not benefit from the privilege's protection.

If the ALF entity seeks a joint representation after the ALF entity has decided to invest in the matter and thus when the ALF entity is simply monitoring its investment, the ALF entity's interests and the original client's interests may intertwine sufficiently that the attorney could ethically handle the representation, as an attorney often represents an insurer and an insured as joint clients.[73] At this stage of the relationship, the ALF entity and the original client share the goal of litigation success. If the ALF entity and the original client were the lawyer's joint clients, the privilege would protect all communications in pursuit of the common interest from disclosure if those communications otherwise fell within the privilege's definition.

Thus, communications in the relationship's monitoring stage could be privileged if the parties and the lawyer agreed that the representation is a joint one. In contrast, joint representation at the investment decision stage is not likely ethically proper and thus cannot occur. With no joint representation the privilege's benefits cannot be captured.

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70. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2013).

71. *Id.* R. 1.7(a)(2).

72. *See id.* R. 1.7(b)(1).

73. Courts generally view the insurer and insured as joint clients of the attorney in a typical liability insurance defense representation. *See, e.g.*, Maplewood Partners, LP v. Indian Harbor Ins. Co., 295 F.R.D. 550, 595–96 (S.D. Fla. 2013); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-450, at 3 (2008) ("In certain jurisdictions, a lawyer engaged by an insurance carrier to defend an insured is deemed to represent both the insured and the insurer . . . .").

III. ALLIED PARTY-COMMON INTEREST DOCTRINE

A. The Privilege as Applied to Allied Parties Represented by Separate Attorneys

1. General Definition

Many jurisdictions in modern times recognize that the attorney-client privilege protects certain communications among parties and their attorneys even if the parties are separately represented when the parties have a common interest.[74] This doctrine provides an exception to the rule that including a third party in the midst of an attorney-client communication destroys the privilege and also an exception to the rule that sharing a communication otherwise privileged with a third party waives the privilege.[75]

This allied party-common interest doctrine was first recognized in *Chahoon v. Commonwealth*[76] in 1871. In *Chahoon*, a criminal matter, the Virginia Supreme Court held that the attorney-client privilege protected communications by one of the defendants to or in the presence of a lawyer for one of the other defendants.[77] The court stated that "it was natural and reasonable, if not necessary, that these parties, thus charged with the same crimes, should meet together in consultation with their counsel, communicate to the latter all that might be deemed proper for them to know, and to make all necessary arrangements for the defence."[78] The court concluded that these communications, which the defendants had a right to have, must be privileged, "[o]therwise what would such right of consultation be worth?"[79] A more modern court has exhibited the same sentiment, stating: "The common interest doctrine protects that free flow of information by providing that 'clients and their respective attorneys sharing common litigation interests may exchange information freely

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74. *See generally* Grace M. Giesel, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting*, 95 MARQ. L. REV. 475, 519–28 (2011–2012) (explaining the history of the attorney-client privilege among parties with common interests); Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 58–62 (2005) (explaining the evolution and use of the joint defense and common interest doctrines).

75. *See* United States v. Ghavami, 882 F. Supp. 2d 532, 537 (S.D.N.Y. 2012) ("[D]isclosure does not result in forfeiture of the attorney-client privilege when the privilege holder and the third party share a common legal interest."); Roe v. Catholic Health Initiatives Colo., 281 F.R.D. 632, 638 (D. Colo. 2012) ("The 'joint defense' or 'common interest' doctrine is really an exception to the rule that the attorney-client privilege is waived when the communication at issue was made in the presence of a third-party.").

76. 62 Va. (21 Gratt.) 822 (1871).

77. *Id.* at 843. In *Chahoon* three men were indicted for conspiracy to defraud an estate and for forging a note as part of the conspiracy. *Id.* at 834–35. After they were indicted, the three men met with two attorneys; each of the attorneys represented one of the indicted defendants. *Id.* at 835. At trial, one of the attorneys was questioned about what the third defendant had said at the meeting. The court found any such statements privileged. *Id.* at 839–40.

78. *Id.* at 839.

79. *Id.* at 842.

among themselves without fear that by their exchange they will forfeit the protection of the [attorney-client] privilege.'"[80]

Though other courts were slow to adopt the doctrine at first,[81] many jurisdictions now recognize some form of the doctrine[82] and the issue is frequently before the courts.[83] Courts and commentators refer to the doctrine as the "common interest doctrine,"[84] the "joint defense privilege,"[85] the "community of interest" doctrine,[86] the "allied lawyer" doctrine,[87] or some similar term.[88] Just as there is disagreement about the doctrine's name, there is also disagreement about the doctrine's parameters.[89] The *Chahoon* court first recognized the doctrine in a joint defense criminal setting.[90] Modern courts recognize it also in the civil setting.[91] While

80. *In re* Fundamental Long Term Care, Inc., 489 B.R. 451, 470 (Bankr. M.D. Fla. 2013) (alteration in original) (quoting Indiantown Realty Partners, Ltd. v. Law Offices of Carla L. Brown-Harward (*In re* Indiantown Realty Partners, Ltd.), 270 B.R. 532, 539 (Bankr. S.D. Fla. 2001)).

81. The next published opinion in the United States in which the doctrine was applied was not until 1942. Schmitt v. Emery, 2 N.W.2d 413 (Minn. 1942) *overruled on other grounds by* Leer v. Chi., Milw., St. P. & Pac. Ry. Co., 308 N.W.2d 305 (Minn. 1981). In *Schmitt*, the Minnesota Supreme Court applied the doctrine not in a criminal matter as in *Chahoon* but in a civil matter involving an automobile collision. *Id.* at 414. One defendant shared a report with the other defendants so that the parties could brief admissibility as ordered by the court. The court determined that the sharing of the report did not waive the privilege because the defendants were "maintaining substantially the same cause." *Id.* at 417. Two other courts applied the doctrine in the 1960s. *See* Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965) (explaining that the privilege applies if the statements "concern common issues and are intended to facilitate representation in possible subsequent proceedings"); Cont'l Oil Co. v. United States, 330 F.2d 347, 349 (9th Cir. 1964) (finding that the privilege applied though no formal legal proceedings had begun).

82. *See, e.g.*, *In re* XL Specialty Ins. Co., 373 S.W.3d 46, 50–53 (Tex. 2012) (applying Texas law); Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Court, 280 P.3d 240, 245–46 (Mont. 2012) (applying Montana law); Titan Inv. Fund II, LP v. Freedom Mortg. Corp., No. 09C-10-259 WCC, 2011 WL 532011, at *4–5 (Del. Super. Ct. Feb. 2, 2011) (applying Delaware law).

83. For example, in the first six months of 2013, three reported federal district or bankruptcy level cases address the issue. *See* Costello v. Poisella, 291 F.R.D. 224, 231 (N.D. Ill. 2013); *In re Fundamental Long Term Care*, 489 B.R. at 470–71; Egiazaryan v. Zalmayev, 290 F.R.D. 421, 433–34 (S.D.N.Y. 2013).

84. *See, e.g.*, Am. Mgmt. Servs., LLC v. Dep't of the Army, 703 F.3d 724, 732–33 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 62 (2013).

85. *See, e.g.*, United States v. Gonzalez, 669 F.3d 974, 977–78 (9th Cir. 2012), *amended by* No. 10-10310, 2012 U.S. App. LEXIS 2900 (9th Cir. 2012).

86. *See, e.g.*, Santella v. Grizzly Indus., Inc., 286 F.R.D. 478, 483 (D. Or. 2012) (internal quotation marks omitted).

87. *See, e.g.*, 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5493 (1986 & Supp. 2013).

88. *See, e.g.*, *In re* Pac. Pictures Corp., 679 F.3d 1121, 1129 (9th Cir. 2012) (referring to the "'common interest' or 'joint defense' rule"); *In re* XL Specialty Ins. Co., 373 S.W.3d 46, 52 (Tex. 2012) (referring to the "allied litigant doctrine"). With regard to the confusion of terminology, see Lugosch v. Congel, 219 F.R.D. 220 (N.D.N.Y. 2003), *rev'd sub nom*, Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110 (2d Cir. 2006), in which the court stated, "[The] joint defense privilege has many monikers such as the common interest doctrine, common interest arrangement doctrine, or pooled information doctrine. Unfortunately, courts, commentators, and attorneys use these terms interchangeably even when they do not serve the same purpose." *Id.* at 236.

89. *See* Giesel, *supra* note 74, at 531; Schaffzin, *supra* note 74, at 65.

90. Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 839–42 (1871) (considering communications involving a defendant charged with conspiracy to defraud an estate and forgery and a lawyer representing a co-defendant).

91. *See, e.g.*, Am. Mgmt. Servs., LLC v. Dep't of the Army, 703 F.3d 724, 732–33 (4th Cir. 2013) (involving a dispute between corporate entities regarding the provision of housing to members

some courts require at least a threat of litigation,[92] other courts and the *Restatement (Third) of the Law Governing Lawyers* (Restatement) do not require a litigation context.[93] If the context is litigation, plaintiffs as well as defendants can benefit from the doctrine.[94]

Some courts require the parties to have agreed to cooperate in the litigation[95] while other courts do not focus such a showing.[96] The courts also disagree about the required degree of involvement of attorneys. Some courts require the communication to have involved at least one lawyer while others are less exacting.[97] The Restatement does not require

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of the military), *cert. denied*, 134 S. Ct. 62 (2013); Egiazaryan v. Zalmayev, 290 F.R.D. 421, 433–34 (S.D.N.Y. 2013) (involving a civil defamation suit).

92. *See, e.g.*, United States v. Newell, 315 F.3d 510, 525 (5th Cir. 2002) (requiring the threat of litigation); MobileMedia Ideas LLC v. Apple Inc., 890 F. Supp. 2d 508, 515 (D. Del. 2012) (holding that litigation must be anticipated); *In re XL Specialty*, 373 S.W.3d at 51–52 ("Texas requires that the communications be made in the context of a pending action."); *see also* TEX. R. EVID. 503(b)(1)(C) (requiring that the communication be "to a lawyer . . . representing another party in a pending action"); HAW. R. EVID. 503(b)(3) (containing the same "pending action" requirement); ME. R. EVID. 502(b)(3) (containing the same "pending action" requirement). One court defends the pending action requirement by noting that such a requirement limits the privilege "to situations where the benefit and the necessity are at their highest, and . . . restrict[s] the opportunity for misuse." United States v. Duke Energy Corp., 214 F.R.D. 383, 388 (M.D.N.C. 2003).

93. The Third Circuit in *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345 (3d Cir. 2007), stated, "[The doctrine] applies in civil and criminal litigation, and even in purely transactional contexts." *Id.* at 364; *see also* United States v. BDO Seidman, LLP, 492 F.3d 806, 816 & n.6 (7th Cir. 2007) (explaining that litigation need not be actual or imminent); United States v. Gumbaytay, 276 F.R.D. 671, 674 (M.D. Ala. 2011) (stating that the privilege applies in litigated or nonlitigated matters); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) (2000) (applying the privilege to "a litigated or nonlitigated matter").

94. *See* United States *ex rel.* Purcell v. MWI Corp., 209 F.R.D. 21, 25 (D.D.C. 2002) ("[W]hether the jointly interested persons are defendants or plaintiffs . . . the rationale for the joint defense rule remains unchanged." (alteration in original) (emphasis omitted) (quoting *In re* Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990)) (internal quotation mark omitted)).

95. *See, e.g.*, *Am. Mgmt. Servs.*, 703 F.3d at 733 ("[T]here must be an agreement or a meeting of the minds. '[M]ere "indicia" of joint strategy as of a particular point in time are insufficient to demonstrate that a common interest agreement has been formed.'" (alteration in original) (citation omitted) (quoting Hunton & Williams v. U.S. Dep't of Justice, 590 F.3d 272, 285 (4th Cir. 2010))); *In re* Pac. Pictures Corp., 679 F.3d 1121, 1129 (9th Cir. 2012) ("[A] shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within this exception. Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement—whether written or unwritten." (citation omitted)). The *Restatement* seems to require an agreement in that it states that the parties "agree." *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) (2000). Yet, comment c to that section clarifies that the agreement need not be a formal one. *See id.* § 76 cmt. c ("Exchanging communications may be predicated on an express agreement, but formality is not required.").

96. *See, e.g.*, *BDO Seidman*, 492 F.3d at 815–16 (containing no mention of agreement); Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965) (containing no discussion of agreement).

97. *See In re Teleglobe Commc'ns Corp.*, 493 F.3d at 365 (discussing the requirement of attorney involvement as a preventer of abuse since if attorneys are involved there will be sharing only when coordination is needed); *see also* United States v. Gotti, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) ("The defendants would extend the application of the joint defense privilege to conversations among the defendants themselves even in the absence of any attorney during the course of those conversations. Such an extension is supported neither in law nor in logic and is rejected."); *In re XL Specialty*, 373 S.W.3d at 52–53 ("The allied litigant doctrine protects communications made between a client, or the client's lawyer, to another party's lawyer, not to the other party itself."). *But see* Gucci Am., Inc. v. Gucci, No. 07 Civ. 6820(RMB)(JCF), 2008 WL 5251989, at *1 (S.D.N.Y. Dec. 15, 2008) ("If information that is otherwise privileged is shared between parties that have a

that the communication involve a lawyer but it does require that any communication must be "made for the purpose of communicating with a privileged person."[98] The Restatement defines a privileged person to include the client, the client's lawyer, agents of the two who facilitate the communication, and agents of the lawyer who facilitate the representation.[99]

2. The Common Interest Requirement

All courts agree that the privilege only applies if there is a common interest,[100] but formulations of the parameters of what that interest must be vary.[101] Many courts use the definition of common interest stated in *Duplan Corp. v. Deering Milliken, Inc.*,[102] which requires "that the nature of the interest be identical, not similar, and be legal, not solely commercial."[103]

The Restatement espouses a less strict definition of common interest. It requires that the communication relate to the common interest, "which may be either legal, factual, or strategic in character. The interests of the separately represented clients need not be entirely congruent."[104]

Some courts stake out positions somewhere between the *Duplan* standard and that of the Restatement.[105] For example, in *Egiazaryan v. Zalmayev*,[106] the court noted that the parties "must share a common legal interest" and that a "'personal or business oriented' interest shared with another party is insufficient."[107] The *Egiazaryan* court continued by stating that "[t]here must be a substantial showing by parties attempting to invoke the protections of the privilege of the need for a common defense

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common legal interest, the privilege is not forfeited even though no attorney either creates or receives that communication.").

98. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. d.

99. *Id.* § 70.

100. *See In re Teleglobe Commc'ns Corp.*, 493 F.3d at 364 (discussing the common interest requirement). *See generally* RICE, *supra* note 50, § 4:35.

101. *See* RICE, *supra* note 50, § 4:36 ("There is no clear standard for measuring the community of interests that must exist for the privilege to apply."); *see also In re* Fundamental Long Term Care, Inc., 489 B.R. 451, 470 (Bankr. M.D. Fla. 2013) ("There is some dispute over how similar the interests must be for the common interest doctrine to apply.").

102. 397 F. Supp. 1146 (D.S.C. 1974).

103. *Id.* at 1172 ("A community of interest exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice."); *see also* Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y., 284 F.R.D. 132, 139 (S.D.N.Y. 2012) (explaining that the interest must be "identical, not similar, and be legal, not solely commercial" (quoting N. River Ins. Co. v. Columbia Cas. Co., No. 90 Civ. 2518(MJL)(JCF), 1995 WL 5792, at *3 (S.D.N.Y. Jan. 5, 1995) (internal quotation mark omitted)); RICE, *supra* note 50, § 4:36 (noting that many courts use this definition).

104. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. e (2000).

105. *See, e.g.*, Egiazaryan v. Zalmayev, 290 F.R.D. 421, 433–34 (S.D.N.Y. 2013); MobileMedia Ideas LLC v. Apple Inc., 890 F. Supp. 2d 508, 515 (D. Del. 2012).

106. 290 F.R.D. 421 (S.D.N.Y. 2013).

107. *Id.* at 434 (citing Yemini v. Goldberg, 821 N.Y.S.2d 384, 384 (Sup. Ct. 2006)).

as opposed to the mere existence of a common problem."[108] While the court did not require a "total identity of interest," it did require that "a limited common purpose necessitates disclosure to certain parties."[109] Another court has required a "substantially similar legal interest, that is not solely commercial."[110]

Yet other courts add teeth to the common interest requirement by stating that the communication must be made "in pursuit of a joint strategy."[111] For example, in *Fireman's Fund Insurance Co. v. Great American Insurance Co. of New York*,[112] the court required that there not only be "a common legal, rather than commercial interest," but also that "any exchange of privileged information was 'made in the course of formulating a common legal strategy.'"[113]

B. The ALF Allied Party-Common Interest Doctrine Case Law

Given the different positions taken by courts with regard to applying the allied party-common interest doctrine, the only certainty regarding the doctrine's application in the ALF setting is uncertainty. Any prediction of how a court might apply the common interest doctrine to a communication among an ALF entity, the client, the client's lawyer, and perhaps a lawyer for the ALF entity is a matter of speculation at best. There is some guidance, however, in the form of a few court opinions in which courts have addressed the issue with regard to ALF entities and also in the form of court opinions applying the allied party-common interest doctrine in similar, though not identical, settings.

Several reported cases involve ALF entities and claims of privilege involving the allied party-common interest doctrine. In *Leader Technologies, Inc. v. Facebook, Inc.*,[114] a patent infringement action, a court evaluated whether a magistrate judge had erred by denying privilege protection to communications involving an ALF entity.[115] The communications occurred when the ALF entity was deciding whether to invest in

108. *Id.* (quoting Finkelman v. Klaus, No. 5257/05, 2007 WL 4303538, at *4 (N.Y. Sup. Ct. Nov. 28, 2007)) (internal quotation marks omitted).

109. *Id.* (quoting Eugenia VI Venture Holdings, Ltd. v. Chabra, No. 05 Civ. 5277 DAB DFE, 2006 WL 1096825, at *1 (S.D.N.Y. Apr. 25, 2006)) (internal quotation marks omitted).

110. *MobileMedia*, 890 F. Supp. 2d at 515.

111. *E.g.*, *In re* Pac. Pictures Corp., 679 F.3d 1121, 1129 (9th Cir. 2012).

112. 284 F.R.D. 132 (S.D.N.Y. 2012).

113. *Id.* at 139–40 (quoting Sokol v. Wyeth, Inc., No. 07 Civ. 8442(SHS)(KNF), 2008 WL 3166662, at *5 (S.D.N.Y. Aug. 4, 2008) (internal quotation marks omitted); *see also In re* Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 126 (3d Cir. 1986) ("[T]he party asserting the privilege must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived."); Shukh v. Seagate Tech., LLC, 872 F. Supp. 2d 851, 855 (D. Minn. 2012) (requiring a common legal interest and disclosure in the "course of formulating a common legal strategy" (citing Merck Eprova AG v. ProThera, Inc., 670 F. Supp. 2d 201, 211 (S.D.N.Y. 2009)) (internal quotation mark omitted)).

114. 719 F. Supp. 2d 373 (D. Del. 2010).

115. *Id.* at 375.

the litigation matter; Leader shared certain documents with the ALF entity so that it could better evaluate whether it wished to invest.[116] Ultimately, the funder did not invest.[117] The court stated that the magistrate had noted "that the state of the law regarding common interest is unsettled and that this case presented a close question,"[118] yet, the court agreed with the magistrate that Leader had not proved a common interest and so the attorney-client privilege did not protect the shared documents.[119] The court applied a common interest test requiring the interests to be "identical, not similar, and be legal, not solely commercial."[120]

In contrast, in *Devon IT, Inc. v. IBM Corp.*,[121] a court evaluated whether the work product doctrine and attorney-client privilege applied to documents shared with an ALF entity, Burford Group LLC.[122] Devon shared documents with Burford so that Burford could evaluate whether to invest in the matter.[123] Before the sharing, Burford entered into a "Common Interest and Non–Disclosure Agreement" with Devon.[124] Burford ultimately decided to invest.[125] The court determined that the shared documents were protected by the work product doctrine and also by the attorney-client privilege.[126] Sharing the documents with Burford did not waive the privilege because Burford and Devon "now [had] a common interest in the successful outcome of the litigation which otherwise Devon may not have been able to pursue without the financial assistance of Burford."[127]

Interestingly, the *Devon* court determined that the privilege applied in a situation in which the ALF entity ultimately decided to invest and be a continuing litigation team member, noting that as of the time of the writing of the opinion, the ALF entity and the litigation client "now" share a common interest.[128] The court reached this result though the shar-

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116. *Id.* at 376.

117. *See* Nate Raymond, *Ruling Highlights Chink in Armor of Litigation Funding*, N.Y. L.J., Feb. 28, 2011, at 2.

118. *Leader*, 719 F. Supp. 2d at 376.

119. *Id.* at 377.

120. *Id.* at 376 (quoting *In re* Regents of the Univ. of Cal., 101 F.3d 1386, 1390 (Fed. Cir. 1996)) (internal quotation marks omitted).

121. No. 10-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012).

122. *Id.* at *1 n.1.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* The issue was raised in the context of disclosure to investors in *Mondis Technology, Ltd. v. LG Electronics, Inc.*, Nos. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW, 2011 WL 1714304 (E.D. Tex. May 4, 2011). The court decided that the shared documents were protected by the work product doctrine and did not reach the question of attorney-client privilege protection. *Id.* at *3; *see also* Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., No. 6:07-CV-222-Orl-35KRS, 2008 WL 5054695 (M.D. Fla. Nov. 17, 2008) (holding that the work product doctrine did not apply and that claimant did not make specific claims in accord with court's standing order and so there was no privilege).

128. *Devon IT*, 2012 WL 4748160, at *1 n.1.

ing took place in the relationship's investment evaluation stage.[129] This is in direct conflict with the result in the *Leader* case, in which the court determined that the privilege did not apply to documents shared in the relationship's investment decision stage.[130] The only real difference between the *Devon* and *Leader* situations is that in *Devon* the relationship ripened past the investment decision stage and in *Leader* the relationship did not. In both cases, there was little common interest at the time of the sharing.

The most complete treatment to date of the question of whether communications involving ALF entities are privileged is in *Miller UK Ltd. v. Caterpillar, Inc.*[131] In a protracted litigation matter dealing with allegations of theft of trade secrets,[132] Miller sought funding from several ALF entities and ultimately secured a funding relationship with one of the entities.[133] In response to Caterpillar's request that all materials shared with the ALF entities be produced, Miller claimed the protection of the attorney-client privilege.[134]

The *Miller* court concluded that the funding documents were shared as part of a "commercial or financial" transaction and thus the attorney-client privilege did not apply.[135] The court continued its analysis, however, by assuming "*arguendo*, that Miller has sustained its burden of showing that the materials it provided to its lawyers for further submission to prospective funders were protected by the attorney-client privilege and proceed[ing] to the question of waiver."[136] The court then addressed the question of whether sharing with the ALF entities waived the privilege.[137]

Miller asserted that disclosure to ALF entities did not waive the privilege because the entities and Miller shared a common interest.[138] The court stated: "In this, as in most Circuits, the 'common interest' doctrine will only apply 'where the parties undertake a joint effort with respect to a common *legal* interest, and the doctrine is limited strictly to those communications made to further an ongoing enterprise.'"[139] The

129. *Id.*
130. *Leader*, 719 F. Supp. 2d 373, 376–77 (D. Del. 2010).
131. 17 F. Supp. 3d 711 (N.D. Ill. 2014).
132. *Id.* at 717.
133. *Id.* at 719.
134. *Id.* The court stated: "For example, on an application for funding form, Miller redacted its response to a question that asked Miller to provide an estimate of the prospect of success of its lawsuit, and to give the amount of its attorneys fees." *Id.* at 721.
135. *Id.* at 731.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 732 (alteration in original) (quoting United States v. BDO Seidman, LLP, 492 F.3d 806, 815–16 (7th Cir. 2007)).

court then concluded that "[a] shared rooting interest in the 'successful outcome of a case' . . . is not a common *legal* interest."[140]

Acknowledging that the allied party-common interest doctrine's purpose is to aid parties who share a legal interest in obtaining legal advice,[141] the court noted that in the situation before it, "there was no legal planning with third party funders to insure compliance with the law, litigation was not to be averted, as it was well underway, and[] Miller was looking for money from prospective funders, not legal advice or litigation strategies."[142] Thus, the allied party-common interest doctrine did not apply and documents shared with any ALF entity lost privilege protection.[143]

C. Analogous Situations

Courts' determinations regarding the allied party-common interest doctrine in analogous but not identical situations also provide guidance. Cases dealing with disclosures when one party is deciding to invest in another party's matter provide guidance as to how a court might treat a disclosure to an ALF entity when an ALF entity is deciding whether or not to invest in the litigation matter at hand. Cases dealing with disclosures when parties are negotiating sales of businesses or assets are also useful. Cases dealing with disclosures in the context of continuing relationships provide guidance when speculating about how a court might view a disclosure to an ALF entity when the entity has already invested and is simply overseeing the litigation as a way of monitoring the investment.

1. Situations Similar to the ALF Investment Decision Stage

Some courts have declined to find a common interest when the disclosures occur in the midst of a negotiation such as a negotiation about whether to invest or purchase an entity or asset.[144] Such courts thus do not find that the attorney-privilege applies.[145] Other courts have reached a contrary result.[146] In *Santella v. Grizzly Industrial, Inc.*,[147] the holder of

140. *Id.*
141. *Id.*
142. *Id.* at 732–33 (footnote omitted).
143. *Id.* at 733.
144. *See, e.g.*, Corning Inc. v. SRU Biosystems, LLC, 223 F.R.D. 189, 190 (D. Del. 2004) (declining to find a common interest where the sharing occurred during negotiations for one party to invest in the other).
145. *See, e.g.*, Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 577–79 (N.D. Cal. 2007) (finding no common interest where a party disclosed information about patents held in an attempt to interest investors because there was no possibility of joint litigation and the communications at issue did not further the joint effort); Libbey Glass, Inc. v. Oneida, Ltd., 197 F.R.D. 342, 349 (N.D. Ohio 1999) (concluding that the defendant "sought commercial gain, not legal advantage, through disclosure of its lawyer's advice to [third parties]"; this was a negotiation of an agreement for one party to make and another party to buy a product made by the other party; "[t]he parties were formulating not a 'common legal' strategy, but a joint commercial venture.").
146. *See infra* notes 147–60 and accompanying text.

the inventions and patents disclosed information relating to the inventions and patents to a potential investor in the holder.[148] The court declined to find a common interest and thus declined to find that the attorney-client privilege protected the communications.[149] The court noted that the privilege's purpose was to "encourage full disclosure to one's attorney in order to obtain informed legal assistance"[150] and "that purpose would not be enhanced by protecting [the communications] because that disclosure was not made for the purpose of securing representation, either for themselves or for their potential investors, but instead was made to solicit investment capital."[151]

In a similar setting, in *Net2Phone, Inc. v. eBay, Inc.*,[152] the court refused to find a common interest and thus denied attorney-client protection when parties shared information during the negotiation of a loan that was to be repaid from the proceeds of licensing and enforcing patents.[153] The court determined that "the purpose of the communications during the negotiations were [sic] to entice a third-party to loan plaintiff money and not to further a then-shared legal interest."[154] The court observed the lack of proof of a confidentiality agreement as well as the fact that the parties did not share "the prospect of imminent litigation."[155] The court noted that if the negotiation had been successful and an agreement between the parties had "come to pass, then communications to further the enforcement activity may have been protectable."[156] This statement supports the notion that in the ALF scenario, courts may recognize a common interest after the investment decision but not before.

In *Mondis Technology, Ltd. v. LG Electronics, Inc.*,[157] the court evaluated whether the privilege protected disclosures about the effect of a German patent office decision.[158] The disclosures were made when the parties were negotiating the price one of the parties would pay the other for the patent.[159] The court noted that "the parties were negotiating their

147. 286 F.R.D. 478 (D. Or. 2012).

148. *Id.* at 482–83.

149. *Id.* at 484.

150. *Id.* (alteration to original) (quoting *In re* Pac. Pictures Corp., 679 F.3d 1121, 1127 (9th Cir. 2012)) (internal quotation marks omitted). The court also noted that there was no threat that the investors would become parties to the litigation. *Id.* at 483–84.

151. *Id.* at 484.

152. No. 06-2469 (KSH), 2008 WL 8183817 (D.N.J. June 26, 2008).

153. *Id.* at *8–10.

154. *Id.* at *10.

155. *Id.* ("There was neither a threat of impending legal action against them nor was there a common adversary.").

156. *Id.*

157. Nos. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW, 2011 WL 1714304 (E.D. Tex. May 4, 2011). The *Mondis* court also dealt with a privilege claim regarding an ALF entity but decided the issue on the basis of the work product doctrine, not the attorney-client privilege. *Id.* at *3.

158. *Id.* at *4.

159. *Id.*

rights and relationships with each other, which is not covered by the common interest doctrine."[160]

Other courts have disagreed and have found a common interest in scenarios involving investment negotiations or decisions.[161] For example, in *William F. Shea, LLC v. Bonutti Research, Inc.*,[162] a court determined that the privilege applied to material shared as part of "an arms-length negotiation" as to the price one party would pay for patent-related assets because the parties shared a common interest even though an agreement was not reached until after the sharing occurred.[163] The court pointed out that the parties shared an interest in certain patents and in "commencing or continuing litigation" regarding those patents.[164]

Similarly, in *High Point SARL v. Sprint Nextel Corp.*,[165] during a negotiation a party disclosed documents to parties interested in the sale or licensing of certain patents.[166] The court found a sufficient common interest for the privilege to apply, stating:

> Although [one of the parties] and the other companies had adversarial interests when they were negotiating the possible transfer of the patents, they still had a common legal interest in the validity, enforceability, and potential infringement of the patents-in-suit. This is sufficient to establish their common interest in the communications exchanged.[167]

Likewise, in *In re Regents of University of California*,[168] an inventor and patentee shared information about patents with a potential licensee.[169] The court found that the activity's purpose was "to support commercial activity" but that the interests were intertwined and the legal

160. *Id.*

161. *See, e.g.*, William F. Shea, LLC v, Bonutti Research, Inc., No. 2:10-CV-615, 2013 WL 1386005, at *2–4 (S.D. Ohio Apr. 4, 2013); High Point SARL v. Sprint Nextel Corp., No. 09-2269-CM-DJW, 2012 WL 234024, at *9 (D. Kan. Jan. 25, 2012); *see also* Morvil Tech., LLC v. Ablation Frontiers, Inc., No. 10-CV-2088-BEN (BGS), 2012 WL 760603, at *3 (S.D. Cal. Mar. 8, 2012) (concluding that materials shared during negotiations for one entity to acquire assets of another entity along with related intellectual property were protected by the privilege and that the parties shared a common interest because "both parties were committed to the transaction and working towards its successful completion"); La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 310 (D.N.J. 2008) ("Defendant has established that pre-transaction they anticipated the same claims and shared a common-interest in defending against those claims."); BriteSmile, Inc. v. Discus Dental Inc., No. C 02-3220 JSW (JL), 2004 WL 2271589, *1–2 (N.D. Cal. Aug. 10, 2004) (concluding that disclosure to seller by buyer in an attempt to understand the technology being purchased in the transaction did not destroy privilege because both parties shared a common interest in the analysis of the technology).

162. No. 2:10-CV-615, 2013 WL 1386005 (S.D. Ohio Apr. 4, 2013).

163. *Id.* at *2–3.

164. *Id.* at *3.

165. No. 09-2269-CM-DJW, 2012 WL 234024 (D. Kan. Jan. 25, 2012).

166. *Id.* at *5.

167. *Id.* at *9.

168. 101 F.3d 1386 (Fed. Cir. 1996).

169. *Id.* at 1389.

interest was sufficient for recognition of a common interest.[170] Accordingly, the parties had "substantially identical" legal interests in the communication's subject, which the court identified as valid and enforceable patents because of the "potentially and ultimately exclusive nature of the [parties'] license agreement."[171]

2. Situations Similar to the ALF Monitoring Stage

At the relationship's monitoring stage, the ALF entity has decided to invest and has aligned itself financially with the client. The ALF entity likely will want to monitor that investment by monitoring the litigation.[172] Communications may occur that involve the ALF entity and otherwise privileged material may be shared with the ALF entity as part of that monitoring process. Some courts addressing the allied party-common interest doctrine in similar settings have found a common interest and so have found that the doctrine applies such that the attorney-client privilege protects the communications at issue. [173]

a. *Xerox Corporation v. Google Inc.*

A most helpful case is *Xerox Corp. v. Google Inc.*,[174] in which the patent holder shared information about the patents with the entity the patent holder had contracted with for the patents' licensing, commercial-

170. *Id.* at 1390.

171. *Id.* Perhaps some courts finding a common interest and applying the privilege in situations that are arms' length or close to it are less concerned about the effect of a broadly applied privilege and more concerned about promoting commercial goals. One court seems to make this plain by its own words. *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308 (N.D. Cal. 1987), involved the negotiation of a sale of a business. During the negotiation the seller disclosed an attorney opinion letter regarding a patent's validity to a prospective buyer. *Id.* at 308. The sale ultimately did not occur. *Id.* at 310. The court determined that the privilege protected the opinion letter from disclosure as the result of the allied party-common interest doctrine. *See id.* at 310–12. The court recognized a common interest, noting that if the deal was successful, the seller would be defending its marketing of the patent before the sale and the buyer would be defending the marketing after the sale. *Id.* at 310. The court stated:

> This court also is concerned about the effect that finding waiver too freely might have on the sort of business transaction in which defendant and GEC were involved. Holding that this kind of disclosure constitutes a waiver could make it appreciably more difficult to negotiate sales of businesses and products that arguably involve interests protected by laws relating to intellectual property. Unless it serves some significant interest courts should not create procedural doctrine that restricts communication between buyers and sellers, erects barriers to business deals, and increases the risk that prospective buyers will not have access to important information that could play key roles in assessing the value of the business or product they are considering buying.

Id. at 311.

172. *See* Boardman, *supra* note 36, at 677 ("The open question is whether the lawyers remain involved with the borrower's case after making the initial loan.").

173. *See, e.g.*, Xerox Corp. v. Google Inc., 801 F. Supp. 2d 293, 303–04 (D. Del. 2011) (finding that the holder of the patent and the licensee have a common interest in the success of litigation regarding the patents such that the privilege applied); Lectrolarm Custom Sys., Inc. v. Pelco Sales, Inc., 212 F.R.D. 567, 571–72 (E.D. Cal. 2002) (concluding that an insurer and insured have a common interest such that the privilege applied).

174. 801 F. Supp. 2d 293 (D. Del. 2011).

ization, and enforcement.[175] In this context of a continuing, stable, contractual relationship, the court recognized a sufficient common interest shared by the patent holder and the entity such that the allied party-common interest doctrine applied and the attorney-client privilege protected the shared materials from compelled disclosure.[176] The court noted: "Because [the entity's] compensation from Xerox is based on a contingency fee, Xerox and [the entity] share a common interest in Xerox prevailing in the instant litigation and the two companies have operated with the expectation that any shared privileged communications would be kept confidential and protected from disclosure."[177]

Interestingly, the court distinguished the facts before it from those of *Leader Technologies, Inc. v. Facebook, Inc.*, which involved an ALF entity.[178] With regard to the *Leader* case the court noted that "the documents as to which privilege was being asserted were created at a time when the patentee and the potential investors were negotiating at arms-length; at that time, no common interest existed."[179] The *Xerox* court then noted that "by contrast, the documents over which Xerox is asserting privilege relate exclusively to a time frame in which [the entity to which there was a disclosure] was already retained by, and working for and with, Xerox."[180] Thus, the *Xerox* court might not find a common interest in the investment decision stage, but perhaps would find a common interest in the monitoring stage.

b. The Insurer-Insured Situation

Cases involving the application of the allied party-common interest doctrine to the situation of insurers and insureds could be helpful because the ALF entity in the relationship's monitoring stage is in a similar position to an insurer providing coverage for liability and a defense to an insured.[181] However, many courts recognize that in the typical insurer, insured, attorney triangle of liability insurance, in which the insurer has the contractual duty to provide the insured with a defense, selects defense counsel, and exercises a degree of control over the defense raised, the lawyer represents the insured *and* the insurer.[182] Because these courts recognize insureds and insurers as joint clients, the courts also recognize

175. *Id.* at 303–04.
176. *Id.* at 303.
177. *Id.* at 303–04.
178. *Id.* at 304; *see also* discussion *supra* Part III.B.
179. *Xerox*, 801 F. Supp. 2d at 304.
180. *Id.*
181. *See generally* Boardman, *supra* note 36, at 673–75, 681–89 (discussing similarities and differences); Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 617, 617–31 (2014) (discussing similarities and differences).
182. *See, e.g.*, Lamar Adver. of S.D., Inc. v. Kay, 267 F.R.D. 568, 581 (D.S.D. 2010) ("[W]here an insurer has agreed that it has a duty to defend and to indemnify its insured, both the insured and insurer may be considered clients of the insured's lawyer."). While not all courts agree, many courts so hold. *See* Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1603 (1994) (noting the disagreement).

that the attorney-client privilege protects communications within the triangle as communications among joint clients and their common counsel.[183] Nonetheless, ALF entities are *not* joint clients with the litigation parties,[184] and so much of the insurer-insured case law is not useful.

Occasionally, however, courts have evaluated the attorney-client privilege's application in insurance settings in which the insured and insurer are not quite so aligned as to be joint clients. In these cases the insured has separate counsel because the insurer provides the defense with a reservation of rights or the matter involves directors' and officers' insurance in which the insurer funds the defense but does not choose the attorney or exercise the same degree of control as insurers do in the general liability setting.[185] Many of these cases evaluate the privilege's application not in disputes involving third parties, but rather, in disputes between insurers and insureds.[186] The insurers claim that the insureds (or other insurers) cannot assert the privilege with regard to communications involving the insureds and the insured's attorneys because the insureds and the insurers share a common interest. The common interest notion is being used in these cases as a "sword" to obtain communications.[187] Because of the sword posture, these cases are less analogous to the ALF setting in which the opposing party to the litigation, a stranger to the communication, seeks disclosure of material shared with the ALF entity. More analogous and thus more useful are cases in which the claim of

183. *See, e.g.*, Bank of Am., N.A. v. Superior Court of Orange Cnty., 151 Cal. Rptr. 3d 526, 531 (Cal. Ct. App. 2013) ("When an insurer retains counsel to defend its insured, a tripartite attorney-client relationship arises among the insurer, insured, and counsel. As a consequence, confidential communications between either the insurer or the insured and counsel are protected by the attorney-client privilege, and both the insurer and insured are holders of the privilege."). *See generally* RICE, *supra* note 50, § 4:29 (discussing the application of the privilege to the insurance triangle setting).

184. *See* discussion *supra* Part II.C.

185. *See, e.g.*, *In re* Imperial Corp. of Am., 167 F.R.D. 447, 451 (S.D. Cal. 1995) (evaluating common interest in directors' and officers' insurance setting and reservation of rights); Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322, 327–29 (Ill. 1991) (considering whether there was a common interest shared between insured and insurer such that no privilege could later be asserted against parties to that common interest where insurers indemnified defense costs but did not select the attorney and did not direct the defense). *See generally* Douglas R. Richmond, *Independent Counsel in Insurance*, 48 SAN DIEGO L. REV. 857, 888–903 (2011) (discussing independent counsel and its relationship to the insurer); Lindsay Fisher, Comment, *D&O Insurance: The Tension Between Cooperating with the Insurance Company and Protecting Privileged Information from Third Party Plaintiffs*, 32 SEATTLE U. L. REV. 201, 203–10 (2008) (discussing directors' and officers' liability insurance defense setting).

186. *See, e.g.*, Allianz Ins. Co. v. Guidant Corp., 869 N.E.2d 1042, 1046 (Ill. App. Ct. 2007) (insurer sought access to communications between insured and attorney); Bituminous Cas. Corp. v. Tonka Corp., 140 F.R.D. 381, 382 (D. Minn. 1992) (insurer sought communications between insured and attorney on basis of common interest); Rockwell Int'l Corp. v. Superior Court, 32 Cal. Rptr. 2d 153, 159–60 (Cal. Ct. App. 1994) (insurer claimed it was not barred by the privilege from communications between insured and counsel because it shared a common interest with the insured).

187. Fisher, *supra* note 185, at 216; *see also* James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 637 (1997) (discussing "sword" characterization).

common interest occurs in a "shield" posture to block disclosure to a party outside the insurer, insured, attorney triangle.[188]

A case that is particularly analogous is *Lectrolarm Custom Systems, Inc. v. Pelco Sales, Inc.*[189] In *Lectrolarm*, the court reviewed a claim of common interest in a shield posture. A third party to the insurance relationship, Lectrolarm, sought access to communications involving the insured and the insurer.[190] Lectrolarm had brought suit against Pelco making patent infringement and related claims.[191] Fireman's Fund Insurance Company provided a defense to Pelco under a reservation of rights and so Pelco had independent counsel but shared some claim-related information with Fireman's Fund.[192] Lectrolarm sought access to what Pelco shared on the theory that the sharing waived any attorney-client privilege.[193] The court determined that the attorney-client privilege protected the communications from disclosure by application of the allied party-common interest doctrine, noting that though Pelco's independent counsel did not represent Fireman's Fund, the insurer, Pelco and the insurer did share a common interest such that the privilege protected shared communications from disclosure to third parties such as Lectrolarm.[194]

D. Applying the Allied Party-Common Interest Doctrine to ALF Entities

While the small number of courts that have addressed the attorney-client privilege's application to disclosures to ALF entities in the midst of investment decisions means there is little certainty as to how other courts might view such sharing, the decisions certainly cast doubt on whether the privilege protects materials shared with an ALF entity. The court in *Miller UK Ltd. v. Caterpillar, Inc.*, the only court to delve deeply into the privilege application, distinguished *Devon IT, Inc. v. IBM Corp.*, the case in which the court applied the privilege to materials shared with a funder in the investment decision stage,[195] and determined that the allied party-common interest doctrine did not immunize the sharing from waiving the privilege.[196] Though with little analysis, the court in *Leader*

188. *See* Fischer, *supra* note 187, at 637 (discussing "shield" characterization).

189. 212 F.R.D. 567 (E.D. Cal. 2002).

190. *Id.* at 568–69.

191. *Id.* at 568.

192. *Id.* at 568–70.

193. *Id.* at 569.

194. *Id.* at 572 ("The Court finds that the common interest doctrine applies to protect at least those communications between Pelco and Fireman's Fund relating to the claims and defenses in the underlying lawsuit. As to these communications, there is a commonality of interest and the attorney client privilege and the attorney work product privilege are not waived by the disclosure to Fireman's Fund.").

195. *See* Devon IT, Inc. v. IBM Corp., No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012); *see also* discussion *supra* Part III.B. The *Miller* court noted that the *Devon IT* opinion was a one-sentence order with the privilege discussion in a footnote to that single sentence. Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 733 (N.D. Ill. 2014).

196. *See Miller UK*, 17 F. Supp. 3d at 734.

Technologies, Inc. v. Facebook, Inc. also denied the privilege's application to materials shared with funders in the relationship's investment decision stage.[197]

The *Miller* and *Leader* courts reached the results consistent with the existing privilege law and particularly the existing alliedparty-common interest doctrine. Because the ALF entity in *Devon IT* ultimately chose to invest, the court seemed to view the sharing more like a sharing in the monitoring setting because by the time of the litigation the ALF entity and the litigation client shared a common interest.[198] In determining whether the privilege should apply, rather than focusing on the relationship's end result as the court did in *Devon IT*, a more appropriate analysis should focus on the stage of the relationship in which the parties share communications.[199]

The variety of results and reasoning used by the courts in settings similar to the ALF investment decision setting make clear that this is not an area of the law in which there are definitive conclusions. While some courts may recognize a common interest and thus find disclosures protected by the privilege, a significant portion of courts would be unwilling to recognize that the client and the ALF entity share a common interest in the investment decision stage's arm's length setting.

In contrast, courts are much more likely to find sharing in the monitoring stage to be privileged and thus not subject to compelled disclosure. If a court views the monitoring stage to be one in which the ALF entity and the client are in a stable, confidential relationship of shared objectives, then that court might very well follow the *Xerox* court's path in the analogous setting of patent licensing.[200] The *Xerox* court applied the privilege to communications involving a patent holder and the entity entrusted contractually with the patents' commercialization and enforcement.[201] The *Xerox* court expressly found the situation when the communications occurred not to be an arm's length situation but rather one in which the parties were working together with common interest.[202]

The ALF entity's situation in the monitoring stage is similar to the position of an insurer who is financially responsible for an insured's defense but who is not controlling the defense and not selecting the in-

197. *See* Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373, 377 (D. Del. 2010); *see also* discussion *supra* Part III.B.

198. *Devon IT*, 2012 WL 4748160, at *1 n.1; *see* discussion *supra* Part III.B.

199. *See* RICE, *supra* note 50, § 4:38 (espousing the position that the application of the allied party-common interest doctrine depends on the reason the communications are shared).

200. *See* Xerox Corp. v. Google Inc., 801 F. Supp. 2d 293, 303–04 (D. Del. 2011); *see also* discussion *supra* Part III.C.2.a.

201. 801 F. Supp. at 303.

202. *Id.* at 304.

sured's counsel.[203] The ALF entity has an interest in the litigation's result but generally does not exercise control.[204] If a court follows the path of the *Lectrolarm* case, a case involving such limited involvement by the insurer, that court may find a common interest though the ALF entity is not intimately involved in the matter's defense but is involved monetarily. Such a court may be willing to recognize a common interest among the ALF entity, the client, and the attorney. The cooperative relationship, along with the financial interest in the litigation result, may be a sufficient commonality. Such a court would then be willing to apply the privilege to communications involving ALF entities in the monitoring stage.

Whether a court is willing to apply the privilege will depend on the strictness with which that court views the requirement of joint involvement. For example, a court that views a common interest as only present when two parties are both at risk of an adverse judgment in a litigation matter will not find a common interest in a matter involving an ALF.[205] A court willing to recognize a common interest even though the ALF entity's interest in the litigation's result is limited to the effect result has on the ALF's ability to recover its investment will find a common interest in the typical ALF situation. Thus, such a court will conclude that the attorney-client privilege protects communications involving an ALF entity.

V. AGENCY DOCTRINE

In addition to the joint client and allied party-common interest doctrine exceptions to the rule that attorney and client communications involving third parties are not privileged,[206] courts have recognized that the privilege does apply even in the presence of third parties in certain circumstances by application of agency principles. First, when the client is a corporation or other organization, communications involving nonem-

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203. The similarity of the ALF entity in the monitoring stage and an insurer paying for a defense is emphasized by contrasting the situation of a public relations firm assisting with litigation. In Egiazaryan v. Zalmayev, 290 F.R.D. 421 (S.D.N.Y. 2013), the court evaluated a claim of privilege for communications shared with a public relations firm assisting with litigation. *Id.* at 425–26. The litigating party claimed that the public relations firm shared a common interest with the litigating party and his counsel such that communications within the group were privileged as the result of the allied party-common interest doctrine. *Id.* at 433. The court disagreed, noting that "the doctrine does not contemplate that an agent's desire for its principal to win a lawsuit is an interest sufficient to prevent waiver of privilege inasmuch as it does not reflect a common defense or legal strategy." *Id.* at 434.

204. Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 137 (2013) (noting ALF entity disclaimers of interest in control); *see also* Boardman, *supra* note 36, at 695 (stating that litigation funding will be less intrusive than insurer involvement in defense actions).

205. *See, e.g.*, *Egiazaryan*, 290 F.R.D. at 434–35 (noting that the public relations firm was not a party to the lawsuit and "has no need to develop a common litigation strategy").

206. *See In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 361 (3d Cir. 2007) ("[I]f persons other than the client, its attorney, or their agents are present, the communication is not made in confidence, and the privilege does not attach.").

ployee third parties can enjoy the privilege if those nonemployee third parties are functional equivalents of corporate employees.[207] Theoretically, no third party is present because the functional equivalent party is the agent through whom the corporation acts. Might an ALF entity be a functional equivalent of a corporate litigating party such that the ALF entity's involvement does not waive the privilege's protection?

Second, courts recognize that third parties who are agents of the lawyer or the client can be involved in communications without a loss of privilege if the third party is sufficiently necessary to the communication.[208] Might an ALF entity be sufficiently necessary such that the ALF entity can be involved in communications and yet the privilege apply? Or might an ALF entity be sufficiently necessary so that disclosure to the ALF entity of otherwise privileged communications does not waive the privilege?

If an ALF entity fits either of these agent categories, then including the ALF entity in attorney-client communications does not prevent the privilege from attaching and disclosing otherwise privileged material to the ALF entity does not waive the privilege. While courts have exhibited quite a bit of confusion in applying these agency concepts,[209] it is not likely that even in the midst of the confusion a court would find communications involving an ALF entity to be privileged.

A. Might an ALF Entity Be a Functional Equivalent of the Client?

1. *Upjohn v. United States*

The United States Supreme Court clarified in *Upjohn v. United States*[210] that the attorney-client privilege applies to communications with corporations as it applies to communications with individual clients.[211] Since a corporation can only act by way of agents, one of the issues before the *Upjohn* Court was the test for determining which communications between corporate employees and the attorney representing the corporation were privileged.

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207. *See, e.g.*, *In re* Bieter Co., 16 F.3d 929, 937–38 (8th Cir. 1994); Twentieth Century Fox Film Corp. v. Marvel Enters., Inc., No. 01 Civ. 3016 (AGS)(HBP), 2002 WL 31556383, at *2 (S.D.N.Y. Nov. 15, 2002). The Restatement recognizes that a third party who is not an employee can be a corporation's representative for purposes of the privilege. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (2000).

208. *See, e.g.*, United States v. Kovel, 296 F.2d 918, 921–22 (2d Cir. 1961).

209. *See* Michele DeStefano Beardslee, *The Corporate Attorney–Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727, 731 (2009) (discussing the courts' confusion).

210. 449 U.S. 383 (1981).

211. *See id.* at 391. This principle was not new with the *Upjohn* decision. *See* United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915). *See generally* Grace M. Giesel, *The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations*, 48 MERCER L. REV. 1169, 1183–86 (1997) (discussing the *Upjohn* decision).

In *Upjohn* the corporation's attorney conducted an internal investigation to determine whether any illegal payments on the corporation's behalf had been made to foreign governments.[212] The Internal Revenue Service later demanded that investigation materials be produced.[213] The corporation claimed privilege.[214] The United States Court of Appeals for the Sixth Circuit determined that the privilege could apply only to communications between the corporation's control group and the lawyer.[215] The control group's members were people who could control the corporate response to the lawyer's advice or who could be significantly involved in designing that response.[216] Another test used by the courts before the Supreme Court's *Upjohn* decision was a test that came to be known as the subject matter test.[217] With this test, an employee, no matter how lowly, speaks for the corporation and thus the communication enjoyed the privilege's protection if "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" and "the employee makes the communication at the direction of his superiors in the corporation."[218] The Supreme Court in *Upjohn* rejected the control group test but did not explicitly adopt the subject matter test.[219] The Court found the communications privileged, noting that they were necessary for counsel to advise the corporation, that the communications occurred because superiors directed that they occur, that everyone knew they were for the purpose of obtaining legal advice, that the communications related to the employees' duties at the corporation, and the communications were otherwise within the privilege's protection because they were treated as confidential.[220]

While *Upjohn* dealt with federal common law,[221] many states now use some variation of the subject matter test.[222] Generally, courts apply the privilege to communications between the lawyer and the corpora-

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212. *Upjohn*, 449 U.S. at 387.

213. *Id.* at 387–88.

214. *Id.* at 388.

215. *Id.* at 388–89.

216. *See* Glen Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations*, 65 IOWA L. REV. 899, 908 (1980); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 424, 429–30 (1970).

217. *See* MUELLER & KIRKPATRICK, *supra* note 50, § 5:21; WRIGHT & GRAHAM, *supra* note 87, § 5483 (discussing subject matter test).

218. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491–92 (7th Cir. 1970) (per curiam), *aff'd by an equally divided court*, 400 U.S. 348 (1971) (per curiam).

219. *See Upjohn*, 449 U.S. at 389–95 ("[I]t will frequently be employees beyond the control group . . . who will possess the information needed by the corporation's lawyers").

220. *Id.* at 394–95.

221. *See id.* at 389.

222. *See, e.g.*, Exxon Corp. v. Dep't of Conservation & Natural Res., 859 So. 2d 1096, 1104–06 (Ala. 2002) (per curiam) (holding that privilege attaches to the control group and employees whose jobs relate to the matter about which the communications relate); S. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994) (adopting the subject matter standard).

tion's "natural spokesperson"—the party who has the information needed by the lawyer to advise the client corporation.[223]

2. The Extension to Third Parties Who Are Not the Corporation's Employees

Following the *Upjohn* opinion's logic, some courts have held that the privilege applies when the corporation's agent communicating with counsel is not the corporation's employee.[224] These courts recognize that the attorney-client privilege can apply even if the attorney is dealing with a third party who is not an employee if the third party is the functional equivalent of a corporate employee.[225] The rationale is that a corporation's agent may have information an attorney needs to render advice to the corporation regardless of official employment status or artificial concepts of enterprise bounds.[226] Likewise, such an agent, at least theoretically, may be situated to act upon the attorney's advice on the corporation's behalf.

An often referenced case with regard to determining when a nonemployee third party is a functional equivalent for privilege purposes is *In re Bieter Co.*,[227] decided by the United States Court of Appeals for the Eighth Circuit. The Bieter Company was formed to develop a parcel of land.[228] A nonemployee third party was intimately involved in the project and the ensuing litigation, providing guidance and advice.[229] The third party rendered his services pursuant a contract—at least initially.[230] In the midst of litigation regarding the land project, the opposing party sought access to communications that had included the third party or that later had been disclosed to the third party.[231] The court found that the

223. *See* MUELLER & KIRKPATRICK, *supra* note 50, § 5:21 (internal quotation marks omitted) (coining term "natural spokesperson").

224. *See generally* RICE, *supra* note 50, § 4:19 (discussing case law interpreting the scope of the privilege concerning corporations, employees, and agents).

225. *See, e.g.*, United States v. Graf, 610 F.3d 1148, 1158–59 (9th Cir. 2010) (finding the third party was a functional equivalent, the court stated: "[w]e find the reasoning in *Bieter* persuasive and adopt its principles in the Ninth Circuit."); *In re* Bieter Co., 16 F.3d 929, 938–40 (8th Cir. 1994) (finding the third party a functional equivalent); Digital Vending Servs. Int'l, Inc. v. Univ. of Phx., Inc., No. 2:09cv555, 2013 WL 1560212, at *9–10 (E.D. Va. Apr. 12, 2013) (finding that the privilege applied because party was the functional equivalent of a member of the Board of Directors); *In re* High-Tech Emp. Antitrust Litig., No. 11-CV-2509-LHK-PSG, 2013 WL 772668, at *4 (N.D. Cal. Feb. 28, 2013) (finding that the privilege applied because third party advisor was the functional equivalent of an employee).

226. *See* John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 498 (1982) ("There is no reason to differentiate between an accountant-employee and a regularly retained outside accountant when both occupy the same extremely sensitive and continuing position as financial adviser, reviewer, and agent: both possess information of equal importance to the lawyer."); *see also* Beardslee, *supra* note 209, at 748 (discussing the functional equivalent doctrine).

227. 16 F.3d 929 (8th Cir. 1994).

228. *Id.* at 930.

229. *Id.* at 933–34.

230. *Id.*

231. *Id.* at 931.

privilege protected the communications including or disclosed to the third party, stating:

> There is no principled basis to distinguish [the third party's] role from that of an employee, and his involvement in the subject of the litigation makes him precisely the sort of person with whom a lawyer would wish to confer confidentially in order to understand Bieter's reasons for seeking representation. . . . [H]e was in all relevant respects the functional equivalent of an employee.[232]

In *Bieter*, the functional equivalent third party's involvement was extensive and continuing, and the tasks he performed were indeed typical of an employee.[233] Similarly, in *In re Flonase Antitrust Litigation*,[234] the nonemployee third party was an independent consultant for a pharmaceutical company who was "an integrated member of the brand maturation team."[235] The *Flonase* court accepted that the third party was a functional equivalent but noted that it could not determine whether particular communications were privileged without looking at each document and confirming that the communication was for the purpose of providing or obtaining legal advice.[236]

Courts have found third parties to be functional equivalents in less standard settings as well. For example, in *In re High–Tech Employee Antitrust Litigation*,[237] the court found an "executive whisperer" who advised Google's top management to be a functional equivalent, stating that "[h]is high-level position and advisory role suggests that a blanket denial of the attorney-client privilege would undermine . . . the ability of the corporation both to provide information to its counsel and to obtain guidance from its counsel."[238] In *Digital Vending Services International,*

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232. *Id.* at 938 (citations omitted). The *Bieter* court referred to *McCaugherty v. Siffermann*, 132 F.R.D. 234 (N.D. Cal. 1990) for guidance as well as Sexton, *supra* note 226. *Bieter*, 16 F.3d at 938.

233. *Bieter*, 16 F.3d at 938. In explaining the nature of the third party's involvement, the *Bieter* court stated:

> [The third party] has been involved on a daily basis with the principals of Bieter and on Bieter's behalf in the unsuccessful development that serves as the basis for this litigation. Bieter was formed with a single objective and [the third party] has been intimately involved in the attempt to achieve that objective. As Bieter's sole representative at meetings with potential tenants and with local officials, he likely possesses information that is possessed by no other. As the initial retainer agreement he entered into with Bieter indicates, it retained him "to provide advice and guidance regarding commercial and retail development based upon [his] knowledge of commercial and retail business in the State of Minnesota," just as one would retain an outside accountant for her knowledge of, say, the proper accounting practices and taxation concerns of partnerships.

Id. But see Freeport–McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res., Inc., Nos. Civ.A. 03-1496, Civ.A. 03-1664, 2004 WL 1237450, at *5–6 (E.D. La. June 2, 2004) (finding no privilege where the third party did not hold himself out as the entity's representative though he had worked for the client for twenty-five years).

234. 879 F. Supp. 2d 454 (E.D. Pa. 2012).

235. *Id.* at 454, 460.

236. *Id.* at 460.

237. No. 11-CV-2509-LHK-PSG, 2013 WL 772668 (N.D. Cal. Feb. 28, 2013).

238. *Id.* at *1, *4 (internal quotation marks omitted).

Inc. v. University of Phoenix, Inc.,[239] the court applied the functional equivalent concept not to find a functional equivalent of an employee, but rather to find a third party to be a functional equivalent of a member of the Board of Directors.[240] The court justified its decision by noting that the third party had a "need to know counsel's advice as he was part of the strategic decision making for [the entity]."[241]

In some cases the relationship between the nonemployee third party and the entity is even more abbreviated.[242] For example, in *A.H. ex rel. Hadjih v. Evenflo Co.*,[243] the court found the third party, a public relations firm brought in to assist Evenflo in the recall of a product, was a functional equivalent of an employee for purposes of the privilege's application.[244] The court noted that the communications were "primarily or predominately of a legal character and therefore would be considered privileged attorney-client communications if the [third party individuals] were technically employees of Evenflo."[245] Likewise, in *In re Copper Market Antitrust Litigation*,[246] the court held that the privilege protected communications to and from a "crisis management" public relations firm engaged to help a corporation handle a copper trading scandal.[247] In so holding the court stated: "[i]n applying the principles set forth by the Supreme Court in *Upjohn*, there is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice."[248] The *Copper Market* court continued: "for purposes of the attorney-client privilege, [the public relations firm] can fairly be equated with the [corporation] for purposes of analyzing the availability of the attorney-client privilege to protect communications to which [the public relations firm] was a party concerning its scandal-related duties."[249]

The case law is rather short on clear statements of the test the courts apply to determine whether a third party is a functional equivalent to a corporation's employee, but some courts such as *Export–Import Bank of the United States v. Asia Pulp & Paper Co.*,[250] note several factors: (1) whether the third party had a "key corporate job"; (2) "whether there was

239. No. 2:09cv555, 2013 WL 1560212 (E.D. Va. April 12, 2013).
240. *Id.* at *10.
241. *Id.*
242. *See, e.g.*, Twentieth Century Fox Film Corp. v. Marvel Enters., Inc., No. 01 Civ. 3016 (AGS)(HGB), 2002 WL 31556383, at *1–2 (S.D.N.Y. Nov. 15, 2002) (involving disclosure to independent contractors engaged to create movie).
243. No. 10-CV-02435-RBJ-KMT, 2012 WL 1957302 (D. Colo. May 31, 2012).
244. *Id.* at *4–5.
245. *Id.* at *5.
246. 200 F.R.D. 213 (S.D.N.Y. 2001).
247. *Id.* at 215–16, 220 (internal quotation marks omitted).
248. *Id.* at 219.
249. *Id.*
250. 232 F.R.D. 103 (S.D.N.Y. 2005).

a continuous and close working relationship between the consultant and the company's principals on matters critical to the company's position in litigation"; and (3) "whether the consultant is likely to possess information possessed by no one else at the company."[251]

Courts have accepted the functional equivalent agent concept with regard to communications with third parties because it is consistent with *Upjohn*'s rationale. Communications between attorneys for the entity and certain nonemployee third parties must be privileged so that lawyers can access information necessary to provide the best possible representation to the client corporation.

In contrast, there is usually no reason consistent with the privilege for otherwise privileged communications that did not include a third party to be shared with that third party and retain the privilege's protection. In *LG Electronics U.S.A., Inc. v. Whirlpool Corp.*,[252] the court refused to find such communications with a third party marketing entity privileged because there was no need consistent with the privilege's rationale; the corporation could receive the attorney-client privileged communication and screen it.[253]

3. Application of the Functional Equivalent Agent Doctrine to ALF Entities

As an initial matter, this functional equivalent agent doctrine is a creature of the narrow area of law dealing with applying the privilege to corporations; in any matter in which the client is not a corporation or similar entity, it has no application.[254] In situations involving corporations, the question is whether the third party, the ALF entity, acts as the agent of the corporate entity in the communications with counsel. A rare court might find an ALF entity to be the functional equivalent of a corporate employee, but the vast majority of courts will not so find.

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251. *Id.* at 113; *see also* A.H. *ex rel.* Hadjih v. Evenflo Co., No. 10-CV-02435-RBJ-KMT, 2012 WL 1957302, at *3 (D. Colo. May 31, 2012) (quoting three-factor test); LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 958, 963–65 (N.D. Ill. 2009) (quoting three-factor test but stopping short of accepting functional equivalent concept).

252. 661 F. Supp. 2d 958 (N.D. Ill. 2009).

253. *Id.* at 964–65; *see also* RICE, *supra* note 50, § 4:19 (discussing the Special Master's Opinion in *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007), which states that the privilege should not apply to communications to the third parties unless the third parties can act on the corporation's behalf without screening and approval). *But see* Digital Vending Servs. Int'l, Inc. v. Univ. of Phx., Inc., No. 2:09cv555, 2013 WL 1560212, at *10 (E.D. Va. Apr. 12, 2013) (applying the privilege to communications which flowed to the third party because the functional equivalent "had a need to know counsel's advice as he was part of the strategic decision making for [the entity]"). *See generally* 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, 292–93, 310–13 (2011) (discussing the scope of the privilege when consulting third-party experts).

254. In *Egiazaryan v. Zalmayev*, 290 F.R.D. 421 (S.D.N.Y. 2013), the court distinguished the functional equivalent analysis used in *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001), noting that the case before the court did not involve a corporation. *Egiazaryan*, 290 F.R.D. at 433 ("Here, there is no corporation involved . . . .").

An ALF entity at the investment decision stage or at the monitoring stage is not serving the same role as an employee might; it is not a third party performing a task that an employee might if the corporation had not chosen to outsource the task. The ALF entity is thus not like the employee in *Bieter*, whose involvement in the real estate venture that was the litigation's subject matter was extensive and continuing.[255]

The ALF entity also is not the source of information necessary to the attorney in advising the corporate client. In *Bieter* the third party was the natural person who knew the details of the venture that was the subject of the litigation just as an employee who managed the venture would have been knowledgeable of the venture's details.[256] An ALF entity is not such a source of information. Rather, the ALF entity is simply the receiver of information from the client or attorney; the ALF entity is not involved in the underlying litigation's subject matter at all.

Some courts, such as the *Evenflo* and *Copper Market* courts, have been willing to find that a third party is a functional equivalent even when the third party is engaged on a less continuing basis and even when the third party is engaged to advise the corporation at a time when litigation looms.[257] An ALF entity's time of involvement is when litigation is anticipated and when it is occurring. In this way, an ALF entity's position is similar to the public relations firms in the *Evenflo* and *Copper Market* cases.

Yet, an ALF entity does not advise or assist the client or the attorney at the investment decision stage. If one accepts that an ALF entity does advise and assist to some degree in the monitoring stage, then it is possible that a court could find an ALF entity to be a functional equivalent such that communications involving the ALF entity would be privileged just as the *In re High–Tech* court found communications with the "executive whisperer" to be privileged.[258] However, even the reasoning of the *High–Tech* decision would not support finding communications with an ALF entity to be privileged because that court focused on the fact that denying the privilege to the "executive whisperer" would "undermine . . . the ability of the corporation both to provide information to its counsel and to obtain guidance from its counsel."[259] In contrast, an

255. *In re* Bieter Co., 16 F.3d 929, 938 (8th Cir. 1994); *see also* discussion *supra* Part IV.A.2.

256. *Bieter*, 16 F.3d at 938 ("[H]is involvement in the subject of the litigation makes him precisely the sort of person with whom a lawyer would wish to confer confidentially in order to understand Bieter's reasons for seeking representation.").

257. *See* A.H. *ex rel.* Hadjih v. Evenflo Co., No. 10-CV-02435-RBJ-KMT, 2012 WL 1957302, at *11–12, *14 (D. Colo. May 31, 2012) (involving a public relations firm engaged to assist with the issues surrounding the recall of a product); *Copper Market*, 200 F.R.D. at 215–16, 219 (involving a "crisis management" public relations firm engaged to assist with issues surrounding a scandal (internal quotation marks omitted)).

258. *In re* High–Tech Emp. Antitrust Litig., No. 11-CV-2509-LHK-PSG, 2013 WL 772668, at *1, *4 (N.D. Cal. Feb. 28, 2013) (internal quotation marks omitted).

259. *Id.* (internal quotation marks omitted).

ALF entity does not assist the corporation in providing information to counsel and certainly does not assist the corporation in obtaining guidance from counsel.

If a court applies the three factors noted in *Export-Import Bank*[260] to an ALF entity's situation, such a court must conclude that communications involving the ALF entity are not privileged because the ALF entity is not the functional equivalent of a corporate employee. The ALF entity does not have a "key corporate job" in either the investment decision or monitoring stage.[261] In addition, it would be difficult to conclude that the ALF entity had a "continuous and close working relationship" with "the company's principals on matters critical to the company's position in litigation."[262] Finally, the ALF definitely does *not* "possess information possessed by no one else at the company."[263] The nature of the ALF entity's involvement is simply not that of a functional equivalent to an employee of the corporate litigation party.

B. Might Communications Involving ALF Entities Be Privileged Under the Kovel *Agency Doctrine?*

1. The *Kovel* Agency Doctrine

Aside from a nonemployee third party who is the functional equivalent of an entity employee and therefore may speak for the entity for privilege's purposes, some communications involving third parties to the attorney-client relationship retain their privileged status if the third party is a particular kind of agent of the client or the attorney.[264] Courts have long applied the privilege to communications involving agents of either the client or the lawyer if those agents facilitate what would be an otherwise privileged communication between attorney and client. So the involvement of office personnel such as "administrative assistants, receptionists, and messengers" does not affect the application of the privilege.[265] Courts have held that the involvement of agents such as law

260. Exp.–Imp. Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113 (S.D.N.Y. 2005). The factors are as follows: (1) whether the third party had a "key corporate job"; (2) "whether there was a continuous and close working relationship between the consultant and the company's principals on matters critical to the company's position in litigation"; and (3) "whether the consultant is likely to possess information possessed by no one else at the company." *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. Beardslee, *supra* note 209, at 731 (discussing this agency notion).

265. MUELLER & KIRKPATRICK, *supra* note 50, § 5:15, at 516–17; *see also* Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U. L.Q. 19, 25–26 (1990) ("All courts and commentators agree that clerks and secretaries fall within the definition. They are convenient intermediaries for communication between the attorney and client, and society would gain nothing by forcing attorneys to communicate face-to-face with clients and forego the use of such intermediaries." (footnotes omitted)).

clerks, investigators, and paralegals also does not destroy the privilege.[266] Courts and commentators accept that interpreters do not destroy the privilege because they act as a conduit of the communication to or from the client.[267]

The seminal case involving an agent who was not a receptionist or other basic conduit of attorney-client communication is *United States v. Kovel*,[268] a case involving an accountant employed by a law firm and his communications with the client of one of the law firm's attorneys.[269] Using an analogy to a language translator who transforms the client's statements into a language the client's counsel can comprehend, the *Kovel* opinion states that the same is true for an accountant who makes the client's story comprehensible to the client's counsel.[270] In finding that the communications involving the accountant enjoyed the privilege, the court stated:

> [T]he presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist . . . ; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit. By the same token, if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege . . . . What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. 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.[271]

266. MUELLER & KIRKPATRICK, *supra* note 50, § 5:15; RICE, *supra* note 50, § 3:3; *see, e.g.*, Owens v. First Family Fin. Servs., Inc., 379 F. Supp. 2d 840, 848 (S.D. Miss. 2005) (holding that a paralegal is covered by the privilege); Am. Nat'l Watermattress Corp. v. Manville, 642 P.2d 1330, 1334 (Alaska 1982) (holding that an investigator is covered by the privilege).

267. *See* WRIGHT & GRAHAM, *supra* note 87, § 5486; Imwinkelried, *supra* note 265, at 26; *see also* People v. Osorio, 549 N.E.2d 1183, 1186 (N.Y. 1989); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 cmt. f, illus. 2 (2000).

268. 296 F.2d 918 (2d Cir. 1961). In recognizing the settled law regarding communication agents, the court noted, "[i]ndeed, the Government does not here dispute that the privilege covers communications to non-lawyer employees with 'a menial or ministerial responsibility that involves relating communications to an attorney.'" *Id.* at 921.

269. *Id.* at 919.

270. *Id.* at 921–22.

271. *Id.* at 922 (footnote omitted).

2. Courts' Application of the *Kovel* Agency Doctrine

While there are exceptions,[272] courts generally have applied the *Kovel* principle narrowly, not expansively.[273] For example, in *Egiazaryan*, the court refused to apply the privilege to communications involving a public relations firm the plaintiff had engaged to assist regarding his claims of defamation and injurious falsehood.[274] The court stated that to benefit from the privilege one must show "(1) . . . a reasonable expectation of confidentiality under the circumstances, and (2) [that] disclosure to the third party was necessary for the client to obtain informed legal advice."[275] The court explained that "[t]he 'necessity' element means more than just useful and convenient, but rather requires that the involvement of the third party be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications."[276] The court continued: "Thus, where the third party's presence is merely useful but not necessary, the privilege is lost."[277] While the plaintiff claimed that the public relations firm was retained to "[d]evelop a set of key messages and compelling narrative in support of the legal cases" and "participate[ ] in the development of legal strategy"[278] and advised the plaintiff about the benefits of legal action, the court denied the privilege because the plaintiff did not show the firm's involvement "was necessary to facilitate communications *between himself and his counsel*."[279] Thus, the *Egiazaryan* court applied a high standard of necessity and a narrow notion of facilitation by limiting the acceptable facilitation to facilitation of communications between attorney and client, not facilitation of legal representation in general.

Similarly, in *Banco do Brasil, S.A. v. 275 Washington Street Corp.*,[280] a court refused to find communications privileged[281] that involved a real estate agent hired by a trust client to find a tenant for a va-

272. *See, e.g.*, *In re* Grand Jury Subpoenas, 265 F. Supp. 2d 321, 326, 330–31 (S.D.N.Y. 2003) (applying the privilege to communications involving public relations firm because it assisted the attorney in influencing the prosecution and regulators regarding the indictment decision); SmithKline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 476–77 (E.D. Pa. 2005) (applying the privilege to a consultant).

273. *See, e.g.*, Banco do Brasil, S.A. v. 275 Wash. St. Corp., No. 09-11343-NMG, 2012 WL 1247756, at *7 (D. Mass. Apr. 12, 2012); United States v. Ackert, 169 F.3d 136, 139–40 (2d Cir. 1999).

274. Egiazaryan v. Zalmayev, 290 F.R.D. 421, 431–35 (S.D.N.Y. 2013).

275. *Id.* at 431 (alterations in original) (quoting Don v. Singer, No. 105584/06, 2008 WL 2229743, at *5 (N.Y. Sup. Ct. May 19, 2008)) (internal quotation marks omitted).

276. *Id.* (quoting Nat'l Educ. Training Grp., Inc. v. Skillsoft Corp., No. M8-85(WHP), 1999 WL 378337, at *4 (S.D.N.Y. June 10, 1999)) (internal quotation marks omitted).

277. *Id.* (quoting Allied Irish Banks, P.L.C. v. Bank of Am., N.A., 240 F.R.D. 96, 104 (S.D.N.Y. 2007)) (internal quotation marks omitted).

278. *Id.* (alterations in original) (quoting exhibits from the record) (internal quotation marks omitted).

279. *Id.*

280. No. 09-11343-NMG, 2012 WL 1247756 (D. Mass. Apr. 12, 2012).

281. *Id.* at *7.

cant space.[282] The court stated that the third party must be "necessary for the effective consultation between client and attorney"[283] and "[s]ignificantly, this '"necessity" element means more than just useful and convenient. The involvement of the third party must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications. Mere convenience is not sufficient.'"[284] The court continued, saying that "the exception applies only to communications in which the third party plays an interpretive role. In other words, the third party's communication must serve to translate information between the client and the attorney."[285] The court also pointed out that the advice provided by the third party was business advice, not legal advice.[286]

A narrow application of the *Kovel* principle is typical. Courts commonly have found privilege only when the third party plays an interpretive role.[287] In *United States v. Ackert*,[288] the United States Court of Appeals for the Second Circuit, the same court that authored the *Kovel* opinion, refused to find communications involving an investment banker to be privileged because the attorney dealing with the investment banker did not rely on the investment banker "to translate or interpret information given to [the attorney]."[289] And in *In re Refco Securities Litigation*,[290] the court refused to apply the privilege to communications in-

282. *Id.* at *1.

283. *Id.* at *7 (alterations in original) (quoting Comm'r of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1197 (Mass. 2009)) (internal quotation marks omitted).

284. *Id.* (quoting Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002)).

285. *Id.* at *8 (quoting Dahl v. Bain Capital Partners, LLC, 714 F. Supp. 2d 225, 228 (D. Mass. 2010)) (internal quotation marks omitted).

286. *Id.*; *see also* Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 22–23 (1st Cir. 2011) (refusing to find communications involving a factchecker privileged where the factchecker was hired because such a consultation was necessary to assist the attorney in obtaining insurance for the client's documentary film project).

287. In *Merck Eprova AG v. Gnosis S.p.A.*, No. 07 Civ. 5898(RJS)(JCF), 2010 WL 3835149 (S.D.N.Y. Sept. 24, 2010), the court refused to apply the privilege to communications involving third party experts engaged to render opinions about the qualities of a dietary supplement because the experts "were not acting as 'interpreters' of scientific concepts for [the attorney]." *Id.* at *1–3. The *Merck* court stated: "when an attorney seeks out a third party to provide information rather than to act as a translator for client communications, the communications between the attorney and the third party are not privileged." *Id.* at *2 (citing United States v. Ackert, 169 F.3d 136, 139–40 (2d Cir. 1999)); *see also* Ceglia v. Zuckerberg, No. 10-CV-00569, 2012 WL 3527935, at *2 (W.D.N.Y. Aug. 15, 2012) (denying privilege because consultant's contact with documents was not to "improve the comprehension of the communications between [the attorney] and [the client]" (quoting *Ackert*, 169 F.3d at 139)) (internal quotation marks omitted); AVX Corp. v. Horry Land Co., No. 4:07-CV-3299-TLW-TER, 2010 WL 4884903, at *9–10 (D.S.C. Nov. 24, 2010) (denying privilege to communications involving an environmental consultant because the consultants "were not simply putting into usable form information obtained from the client; rather, they were independently gathering their own data, conducting testing, engaging in remedial measures and rendering opinions" and thus there was no showing "that the communication involved gathering information from client confidences or providing information from the client through the consultant to the attorney for the purpose of assisting the attorney in giving legal advice").

288. 169 F.3d 136 (2d Cir. 1999).

289. *Id.* at 139.

290. 280 F.R.D. 102 (S.D.N.Y. 2011).

volving a third party consultant, stating that "there is no evidence suggesting [the attorney] relied on [the consultant] to translate or interpret information given to him by his clients."[291]

Even in a case in which the court applied the privilege to communications involving a public relations firm, the court required a significant showing regarding the third party's importance and role.[292] In *In re Grand Jury Subpoenas*,[293] the defense of a target in a high-profile investigation engaged a public relations firm to assist with a media message to convince the prosecution and regulators not to indict the target.[294] After noting 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,"[295] the court found that communications involving the public relations firm were privileged, stating:

> In consequence, this Court holds that (1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege.[296]

Interestingly, the court, with regard to particular communications, was concerned with whether the communication "has a nexus sufficiently close to the provision or receipt of legal advice."[297] Evidently, the court determined that some communications involving the public relations firm did have this nexus generally since it determined that the privilege applied,[298] though the court denied the privilege on the basis of a lack of "nexus" to other communications between the client and the public relations firm.[299]

Rather than applying the *Kovel* agency doctrine as developed in other cases, this court seemed to recognize an independent privilege for

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291. *Id.* at 105 ("What does not appear, however, is any evidence that there was information [the attorney] *could not understand* without [the consultant] translating or interpreting the raw data for him.").

292. *See In re* Grand Jury Subpoenas, 265 F. Supp. 2d 321, 330–31 (S.D.N.Y. 2003).

293. 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

294. *Id.* at 323. The high profile client was Martha Stewart. 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, 562 (2005).

295. *Grand Jury Subpoenas*, 265 F. Supp. 2d at 330.

296. *Id.* at 331.

297. *Id.* at 332. The court also noted that communications involving jury consultants "and personal communication consultants come within the attorney-client privilege, as they have a close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body." *Id.* at 326.

298. *Id.* at 331.

299. *Id.* at 332 ("[T]here has been no showing that it has a nexus sufficiently close to the provision or receipt of legal advice.").

public relations firms in some situations. Many courts, when dealing with the question of privilege when public relations firms have been involved, have not gone so far, and like the *Egiazaryan* court, have denied the privilege.[300]

3. Applying the *Kovel* Agency Doctrine to ALF Entities

Communications involving ALF entities that occur in the investment decision stage or in the monitoring stage are not conduit communications in which the ALF entity is in a role akin to a secretary, law clerk, or investigator. Nor is an ALF entity in the same interpretive role as the accountant in the *Kovel* case.[301] An ALF entity's role is not to assist communication between attorney and client so any communication involving an ALF entity cannot be "necessary to facilitate communications *between* [*client*] *and his counsel*."[302] Nor is an ALF entity "nearly indispensable or serve[ing] some specialized purpose in facilitating the attorney-client communications."[303] An ALF entity does not interpret or translate in any way. Any analogy to a translator or interpreter fails as does a looser analogy to a third party such as the accountant in *Kovel*. Any court that requires the third party to be in "an interpretive role"[304] would reject any claim of privilege summarily.[305]

The only port in the storm for an ALF entity is the argument that communications involving it are necessary for the rendering of legal advice because without funding there can be no legal advice. As is obvious from this Article's discussion of a sampling of court opinions, many courts would not apply the privilege because they do not have such an expansive view of the *Kovel* doctrine. A court such as the *Grand Jury Subpoenas* court might be receptive to this claim of privilege, but even that result is highly speculative. From its application of the privilege to a public relations firm based on the firm's services that were essential to rendering legal advice, it is clear that the *Grand Jury Subpoenas* court was not constrained by the interpreter analogy. Rather, a kindred court may be willing to extend the privilege's protection when the court believes "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"[306] ALF entities. Yet, that court did require "a nexus sufficiently close to the pro-

300. *See* Murphy, *supra* note 294, at 570; *see also* Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000); Blumenthal v. Drudge, 186 F.R.D. 236, 243 (D.D.C. 1999); Burroughs Wellcome Co. v. Barr Labs., Inc., 143 F.R.D. 611, 616, 619 (E.D.N.C. 1992).

301. *See* discussion *supra* Part IV.B.1.

302. Egiazaryan v. Zalmayev, 290 F.R.D. 421, 431 (S.D.N.Y. 2013) (emphasis in original).

303. Banco do Brasil, S.A. v. 275 Wash. St. Corp., No. 09-11343-NMG, 2012 WL 1247756, at *7 (D. Mass. Apr. 12, 2012) (quoting Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002)).

304. *Id.* at *8 (quoting Dahl v. Bain Capital Partners, LLC, 714 F. Supp. 2d 225, 228 (D. Mass. 2010)).

305. *See* discussion *supra* Part IV.B.2.

306. *Id.* at 330.

vision or receipt of legal advice."[307] Even though funding of a representation is related to the provision of legal advice, perhaps even the *Grand Jury Subpoenas* court would not find that "nexus" to be "sufficiently close."[308]

Thus, courts' past treatment of claims of privilege under the *Kovel* doctrine signals that a claim that communications involving an ALF entity should benefit from the privilege will not be accepted by all but the rare court.

VI. SHOULD COMMUNICATIONS INVOLVING ALF ENTITIES BE PRIVILEGED?

This Article has concluded that ALF entities cannot avail themselves of the joint client doctrine. It has also concluded that ALF entities cannot successfully claim privilege via the common interest doctrine for communications in the investment decision stage, and that such a claim for communications in the monitoring stage is questionable at best. In addition, this Article has concluded that courts applying the attorney-client privilege, in accord with its bounds as current law defines those bounds, would not likely find communications with ALF entities to be privileged under the functional equivalent agent doctrine or the *Kovel* agency doctrine. The next logical question is whether the current attorney-client privilege doctrine should be stretched beyond its current boundaries to reach the ALF scenario.

There may be very good policy arguments for creating *a special privilege* for ALF entities.[309] This Article expresses no opinion about the wisdom or folly of such arguments.

Yet, the existing attorney-client privilege doctrine and all of its subdoctrines (joint client doctrine, allied party-common interest doctrine, functional equivalent agent doctrine, and *Kovel* agency doctrine) should not be modified to encompass communications with ALF entities.

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307. *Id.* at 332.

308. *Id.*; *see also* Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN ST. L. REV. 381, 399 (2005). Richmond states that for communications with a public relations firm to be privileged "there must be a clear nexus between the public relations consultant's work and the attorney's role in representing the client. In other words, the client must show that communications with a public relations consultant were made so that the client could obtain legal advice from his attorney." *Id.* (footnote omitted).

309. *See* Molot, *supra* note 5, at 186 (arguing that communications involving ALF entities should be privileged because ALF "level[s] the playing field" in litigation). *See generally* DeStefano, *supra* note 20, at 2797 (arguing that barriers to the involvement of third parties in the provision of legal services should be mitigated because the involvement of some third parties, such as ALF entities, is beneficial). Others have posited that there should not be barriers to third parties of other sorts. *See, e.g.*, Spencer Rand, *Hearing Stories Already Told: Successfully Incorporating Third Party Professionals into the Attorney-Client Relationship*, 80 TENN. L. REV. 1, 9–13 (2012) (discussing inclusion, for example, of therapists in domestic violence matters and social workers in elder law and other matters).

No reason consistent with the attorney-client privilege's modern *raison d'etre* exists for extending the privilege to communications involving ALF entities. In *Upjohn* the Supreme Court provided a statement of the attorney-client privilege's modern purpose:

> [The] purpose [of the 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 [the] administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.[310]

An assumption at work in this rationale is that clients will not be candid and thus the legal advice rendered by the attorney will be less than sound if the opposition can access communications between the attorney and the client.[311] The privilege allows for the free flow of information between attorney and client because the client is not fearful of such disclosure.

Involving an ALF entity in attorney-client communications is necessary to the rendering of sound legal advice in the general sense that the ALF entity's involvement provides the funding that makes the legal advice possible. Yet, including an ALF entity is not necessary, in a more specific sense, to ensure that the "full and frank communication between attorneys and their clients" occurs.[312] ALF entities do not assist clients in communicating with counsel and do not assist counsel in rendering sound legal advice. Thus, extending the attorney-client privilege to ALF entities is inconsistent with the rationale behind the attorney-client privilege and is at odds with the accepted notion that the privilege should remain narrow to limit its perhaps deleterious effect on truth finding.[313]

In addition, extending the privilege is not wise for the privilege's health. Pulling the privilege away from its moorings, its rationale, means that courts will become even more confused than they might already be about when and how to apply it.[314] Such confusion adds uncertainty to the privilege's application. Uncertainty destroys the privilege's value. The value of the privilege is that a client knows, at the time of communi-

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

311. For example, in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), the Court noted that "it seems quite plausible that [the client], perhaps already contemplating suicide, may not have sought legal advice from [the lawyer] if he had not been assured the conversation was privileged." *Id.* at 408.

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

313. *See* discussion *supra* Part II.A.

314. More specifically, the common interest doctrine is already an amazing confusion and would only suffer more by a recognition that an ALF entity shares a sufficient common interest at the investment decision stage. *See* discussion *supra* Part III.A. Likewise, courts are confused by the functional equivalent concept and when it should be used. *See* discussion *supra* Part IV.A. In addition, courts are uncertain about the appropriate reach of the *Kovel* agency doctrine. *See* discussion *supra* Part IV.B.

cating, that the communication will be protected. Only with that certainty does the privilege encourage "full and frank" disclosure to the attorney.[315] In *Upjohn*, the Supreme Court stated:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.[316]

Stretching and modifying the attorney-client privilege and its subdoctrines to encompass communications involving ALF entities would not be a positive development for the privilege itself.

CONCLUSION

ALF has become a reality in the United States in recent years. With the growing popularity of ALfF and as perceived barriers have faded away, the need for an understanding of the attorney-client privilege's application to communications involving ALF entities has become apparent.

While ALF entities could perhaps become joint clients of the lawyer involved and thus share the privilege's protection, to date, they have not sought joint client status. Even if ALF entities wanted to be joint clients in the future, such a representation could not occur if the arrangement yielded an ethically impermissible conflict of interest, a result very likely in the relationship's investment decision stage and certainly possible in the relationship's monitoring stage.

Nor is it likely that ALF entities can successfully claim privilege via the allied party-common interest doctrine for communications in the relationship's investment decision stage. It is simply not likely that courts will find that at that stage the litigating party and the ALF entity share an appropriate common interest. While a claim of privilege based on a common interest is more plausible with communications in the relationship's monitoring stage, even with these communications, the privilege's protection is uncertain because of the variety of standards applied by the courts to this subdoctrine of the privilege.

Similarly, courts likely would not find communications involving ALF entities to be protected by the privilege as a result of the functional equivalent agent doctrine or the *Kovel* agency doctrine. Courts to date

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

316. *Id.* at 393; *see also* Giesel, *supra* note 74, at 502–03. Indeed, in *Swidler & Berlin*, the Court refused to apply a balancing test to determine when the privilege might apply to the statements of a dead client, stating that use of such a test "introduces substantial uncertainty into the privilege's application." *Swidler & Berlin*, 524 U.S. at 409.

have applied those doctrines in ways that would exclude communications involving ALF entities from privilege protection.

While the existing attorney-client privilege may not protect communications involving ALF entities, the privilege and its subdoctrines should not be stretched to encompass the ALF scenario because to do so is inconsistent with the privilege's rationale and will add uncertainty and confusion to an area of the law that thrives when there is certainty. If the presence of ALF entities in the United States' legal market creates a sufficient benefit, and if that benefit cannot be captured if including ALF entities in communications or revealing otherwise privileged communications destroys the application of the privilege, perhaps the best path is to establish a free-standing privilege not dependent upon existing attorney-client privilege doctrine.