

PROTECTING PRIVILEGE AFTER RICHEY
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PART 1

A. Introduction

Ron Decker, a respected and knowledgeable Arizona estate planner pushed away his *Trusts & Estates* magazine in frustration. “The law is constantly evolving,” he thought to himself. Resolved to maintain the integrity of his prestigious practice and continue to do right by his clients, Ron Decker sat at his computer to research the court case that promised to create complications for his estate planning practice. Ron vowed to find a way to protect his clients’ privacy in the face of this new challenge.

The recent court case that had Ron Decker so concerned was *U.S. v. Richey*, 632 F.3d 559 (9th Cir. 2011). *Richey* was born out of an Internal Revenue Service (IRS) summons issued by an IRS auditor seeking to determine the tax liability of the Peskys. The Peskys owned general and limited partnership interests in a limited partnership called FAWPEAS. FAWPEAS was half owner of real property in Idaho.¹ The Peskys retained a law firm to provide legal advice concerning the tax benefits if FAWPEAS granted a conservation easement on real property it owned in Idaho.² After receiving advice from their attorney, the Peskys caused FAWPEAS to execute a conservation deed.³ The Peskys’ attorney engaged Richey, an appraiser, to provide “valuation services and advice with respect to the conservation easement”⁴ as required by Internal Revenue Code (IRC) §170.⁵ Richey prepared an appraisal report for the Peskys’ federal income tax return, which was included only in Richey’s work file.⁶ The Peskys claimed a \$200,000 charitable deduction on their return that year as a result of the easement.⁷ The

remainder of the approximately \$1.3 million dollar deduction was claimed over the next two years.⁸ The appraisal report was attached to the Peskys' return.⁹

The IRS questioned the valuation and summoned Richey to appear and provide testimony, documents, and other information to the IRS. Asserting the protections of the attorney-client privilege and work product doctrine, the Peskys' attorney directed Richey not to comply with the summons. The IRS pursued the matter in court. The Ninth Circuit held that the attorney-client privilege and the work product doctrine did not apply primarily because the documents were not prepared for the purpose of providing legal advice or in anticipation of future litigation.¹⁰

This recent decision emphasizes the importance for estate planning attorneys to preserve the attorney-client privilege.¹¹ It also underscores the challenges involved in protecting that privilege. Many attorneys who read *Richey* when it was decided were alarmed because it appeared that the Peskys' attorney had taken the appropriate precautions to preserve the protections of both the attorney-client privilege and the work product doctrine. If neither applied in *Richey*, then what could attorneys do to protect the privacy of their clients when the advice of a third party professional is necessary?

To provide valuable estate planning advice to clients, it is often necessary to rely on the expertise of other professionals including accountants, appraisers, and other valuation experts. These professional's expertise often extends beyond the scope of the attorney's area of practice and serves a valuable purpose in informing the attorney's legal advice. Furthermore, to protect a client's privacy, it is desirable that interactions with non-lawyer professionals remain confidential and fall under the third party attorney-client privilege. *Richey* threatens to undermine this accepted practice of security that the privilege once provided, by making

documents accessible to the government, creditors, and other interested parties. Careful safeguards must be followed to ensure that interactions with other non-lawyer professionals assisting clients in an estate planning engagement remain privileged and therefore protected from discovery in court actions. This paper endeavors to provide practical advice to estate planners after explaining the current legal environment of attorney-client privilege and work product doctrine.

B. Abstract

Part I provided an introduction and brief analysis of *Richey*. Part II includes a general discussion of the attorney-client privilege and the work product doctrine. These two legal concepts are compared and contrasted to give the reader an understanding of when each applies. This section also attempts to clarify common misconceptions concerning the differences between the attorney-client privilege and the work product doctrine. Part III of the paper discusses the *Kovel* doctrine and other landmark cases that provide some insight into how attorneys can protect the privacy of clients when third party professionals are hired to advise the attorney on specialized areas. Part IV analyzes the impact of *Richey* on the attorney-client privilege and the work product doctrine. Part V concludes this article with practical strategies that attorneys can employ to protect the privacy of communications with third party professionals, even in the face of the jarring holding in *Richey*.

PART 2

A. Attorney-Client Privilege

The attorney-client privilege is the oldest privilege “for confidential communications known to the common law.”¹² The purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public

interests in the observance of law and administration of justice.”¹³ “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.”¹⁴ The attorney-client privilege “rests on the need for the advocate . . . to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”¹⁵ Clients are more willing to communicate openly and truthfully with counsel if the fear that counsel would disclose their communications is dispelled.¹⁶ Thus, the attorney-client privilege fosters competent representation by arming the lawyer with all the relevant facts.¹⁷

However, for the attorney-client privilege to attach, the communication must meet a rigorous standard. The party claiming the privilege must establish the elements of an eight-part test which describes privilege as attaching when: “(1) legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such”¹⁸ or his subordinate (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort¹⁹ “(4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.”²⁰ The prospective client or client holds the privilege, which applies to the communications, but not to the underlying facts.²¹ Although the privilege suggests it would only prevent disclosure of the client’s communications to the attorney, it is now established that “[t]he privilege is applicable to communications from the attorney to the client, as well as communications to the attorney from the client.”²²

The courts have also extended this privilege to a very limited number of third parties. Persons covered by the attorney-client privilege include the client's agents and those who assist the lawyer with the representation of the client.²³ Agents within the coverage of the privilege include non-employees such as paralegals,²⁴ investigators,²⁵ interviewers,²⁶ technical experts,²⁷ accountants,²⁸ physicians,²⁹ patent agents,³⁰ and other specialists.³¹ If these third parties are present to facilitate communication between the lawyer and the client or to further the client's representation, then the privilege is not waived.³² The courts have recognized that some third party professionals serve legitimate roles as "interpreters" who apply their specialized knowledge to translate the client's situation into terms that help the attorney provide competent advice.³³ However, for the privilege to attach, courts require these agents be retained by counsel and that their assistance be critical to the legal services being rendered.³⁴ If attorneys could not include these individuals under the purview of the attorney-client privilege, representing clients would be nearly impossible.

Generally, a third party's presence during attorney-client communications would signify that the communication was not intended to be confidential.³⁵ The privilege is narrowly construed because it is an exception to evidentiary rules and potentially obstructs the truth-finding process.³⁶ For example, if an estate planning client tells something to his attorney within the scope of the privilege, the attorney is obligated to keep the client's communication private, unless an exception applied. Because of this obstruction to the truth-finding process, the attorney-client privilege should not apply when a third party is permitted to know of the communications.³⁷ However, in instances where third-party consultants are present to facilitate advice, the privilege should not be destroyed.³⁸ As the complexity of cases increases, the need to consult with non-legal professionals increases. To provide clients with competent, effective, and

efficient representation, attorneys may need to consult with third-parties who are not retained experts.

B. Work Product Doctrine

Richey also considered whether the appraiser's work could be protected under the work product doctrine and ultimately found that it could not. Nonetheless, estate planning attorneys must have a working knowledge of this doctrine in order to protect their clients. The work product doctrine provides qualified immunity from the evidentiary rules for papers and other materials that are produced by an attorney in anticipation of litigation.³⁹ The doctrine was first established by the Supreme Court in the landmark case *Hickman v. Taylor*.⁴⁰ In *Hickman*, the petitioner in a personal injury action involving a tug boat accident requested in an interrogatory that opposing counsel produce copies of personal interviews that the attorney had taken in the course of preparing to defend the tug boat owners against potential lawsuits.⁴¹ The Court held that the documents did not need to be produced as they fell within an exception to the evidentiary rules of discovery.⁴² The court noted that the "work product" of the attorney included, "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs,"⁴³ and other tangible and intangible products collected by the attorney in preparation for litigation. The *Hickman* court reasoned that the doctrine was necessary because,

"it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."⁴⁴

The work product doctrine allows the attorney to write down all of his or her thoughts, impressions, and strategies without fear that opposing counsel will be able to access them through a discovery request. Without this doctrine, many attorneys would be hesitant to write down this precious information, which would limit the effectiveness of the attorney in representing clients. Also, it would permit unscrupulous attorneys to game the system and profit off of the work of their opposing counsel to learn trial strategies and information that they should have compiled for themselves.

However, the Supreme Court was clear to state that the work product doctrine was a doctrine of only qualified immunity only. Qualified immunity is an exemption from civil liability for the attorney, as long as the attorney's conduct does not violate clearly established constitutional or statutory rights.⁴⁵ The Court placed a limitation on the work product doctrine by stating it was not absolute and that there were circumstances where it could be overcome by a showing of need.⁴⁶ Specifically, courts have made exceptions for crimes or fraud, which is known as the crime-fraud exception,⁴⁷ as well as on a case-by-case basis upon a showing of substantial need.⁴⁸ Thus, where the relationship between client and counsel has been abused, such as where the consultations are conducted for the purpose of furthering an unlawful act, the crime-fraud exception applies to violate any protection from discovery that work product would have otherwise enjoyed.

The work product doctrine has also been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. The Rule provides that when a court orders discovery of “documents and [other] tangible things . . . prepared in anticipation of litigation,” then the court must “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation.” The Rule further states that:

“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1);

and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”⁴⁹

Estate planning attorneys can effectively use the work product doctrine to protect client confidences with a clear understanding of the current rules and case decisions.

C. Attorney-Client Privilege vs. Work Product Doctrine

The attorney-client privilege and work product doctrine are often confused with one another. The philosophical and legal core of both doctrines is very similar. Both legal concepts seek to encourage the open and free exchange of ideas and information between attorneys and their clients. Both doctrines carve out exceptions to the rules of evidence to provide confidentiality to the protected communication. Yet, in application, these two concepts do have a number of striking differences. The Ninth Circuit described the key difference in terms of the protections the respective doctrines provides. For example, the attorney-client privilege cannot be overcome by a showing of need, but a showing of need may justify the discovery of work product.⁵⁰

“The attorney-client privilege . . . may obstruct a party’s access to the truth. Although it may be inequitable that information contained in privileged materials is available to only one side . . . , a determination that communications or materials are privileged is simply a choice to protect the communication and relationship against claims of competing interests. Any inequity in terms of access to information is the price the system pays to maintain the integrity of the privilege. The work-product [doctrine] is not a

privilege but a qualified immunity protecting from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation. Although the rule affords special protections for work-product that reveals an attorney's mental impressions and opinions, other work-product materials nonetheless may be ordered produced upon an adverse party's demonstration of substantial need or inability to obtain the equivalent without undue hardship. The conditional protections afforded by the work-product [doctrine] prevent exploitation of a party's efforts in preparing for litigation. While the work-product rule protects a client's investment in his attorney's labor to prevent unfair exploitation, the privilege protects communications between client and counsel to encourage the client to be forthcoming with his attorney so that appropriate legal advice can be offered."⁵¹

Another difference between these two concepts is what is covered by each. The mental impressions, opinions, and written statements of witnesses taken by an attorney in the course of preparing for litigation fall outside the scope of the attorney-client privilege, but are covered by the work product doctrine. The attorney-client privilege is exerted by the client, whereas the work product doctrine is exerted by the attorney who wishes to protect the materials that he or she has produced.

PART 3

A. *The Kovel Doctrine*

Part of the reason why *Richey* caused such concern among legal practitioners was because legal precedent already existed, which suggested that communications with third party professionals was protected under the attorney-client privilege. Pursuant to what has been called the "*Kovel* Doctrine,"⁵² a consulting expert retained by the attorney to give advice qualifies under the attorney-client privilege as a privileged agent if the expert is consulted to improve the attorney's comprehension of the facts.⁵³ In the landmark case of *U.S. v. Kovel*, the Second Circuit Court decided to extend the attorney-client privilege to include communications between a lawyer and an accountant who was hired by the lawyer to better understand the client's

financial information.⁵⁴ In *Kovel*, a law firm that specialized in tax law hired Kovel, a former IRS agent who possessed accounting skills.⁵⁵ Kovel was specifically hired to help the attorney understand the documents that the client provided so that the attorney could render competent services.⁵⁶ A grand jury was investigating potential federal income tax violations by a client of the law firm and subpoenaed Kovel to testify.⁵⁷ Kovel refused to answer a number of questions on the grounds that as an employee of the law firm under the direct supervision of the partners, all of the direct communication he had with the client was confidential.⁵⁸ The Assistant United States Attorney asserted that no privilege existed and that Kovel should be compelled to answer.⁵⁹ The trial court judge directed Kovel to answer, but he refused to do so.⁶⁰ Kovel was eventually charged with criminal contempt of court.⁶¹

The Second Circuit Court of Appeals vacated that judgment.⁶² The court recognized that the complexities of the modern practice of law require attorneys to involve a number of third parties.⁶³ Judge Friendly, writing the opinion for the court, analogized the accountant to an interpreter for a client who speaks a foreign language.⁶⁴ It has long since been established that in cases where an attorney needs an interpreter to understand his client, an interpreter present for attorney-client communications does not void the privilege.⁶⁵ *Kovel* explained:

“[W]e can see no significant difference between a case where the attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client’s story; a second where the attorney, himself having some little knowledge of the foreign tongue, has a more knowledgeable non-lawyer employee in the room to help out; a third where someone to perform that same function has been brought along by the client; and a fourth where the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney’s behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice. This analogy of the client speaking a foreign language is by no means irrelevant to the appeal at hand.

Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the 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 in the second or third variations of the foreign language theme discussed above; 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; there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer's physical presence while the client dictates a statement to the lawyer's secretary or is interviewed by a clerk not yet admitted to practice. What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal advice from the lawyer*.”⁶⁶

However, as the *Kovel* Court emphasized, for the communication to be privileged, it must be *for the purpose of obtaining legal advice*.⁶⁷ Thus, communications between a third party and an attorney do not become privileged merely because a communication is vital to the attorney's ability to represent the client.⁶⁸ As a result, if a communication is for accounting services, or if the client seeks advice from an accountant and not the attorney, then the attorney-client privilege would not apply to the accountant's communications.⁶⁹ The client must seek the advice of the attorney, and it is the attorney who can then contact a third party if additional assistance is necessary to help the attorney understand the complexities of the client's situation and provide competent legal advice. Judge Friendly acknowledged that it may seem like an arbitrary line that the court was drew, but it was a line that needed to be drawn to allow attorneys to seek the expert advice they needed without unduly expanding the scope of the attorney-client privilege.⁷⁰

The holding in *Kovel* provides insight into how estate planning attorneys can protect, as confidential, the communications of third parties that they consult to provide legal advice to clients. As noted above, the court in *Kovel* compared the accountant to an interpreter for a client that speaks a foreign language.⁷¹ Some attorneys may need an “interpreter” to fully understand a concept in order to competently represent or advise a client. Because attorneys cannot always grasp the complex details of a client’s particular problem, communications with third parties must be privileged when the attorney directs a client to discuss issues with a third party (hired by the attorney) who then furnishes information to the attorney so that the attorney can competently advise the client. The *Kovel* case recognized that including a third party in communications with a client does not destroy the attorney-client privilege if the third party’s participation improves the lawyer’s understanding of the attorney-client communications.

Nevertheless, courts have been careful not to permit the attorney-client privilege to extend too far. When a lawyer requires the assistance of a third party to intervene to provide information, opposed to serve as an “interpreter” for client communications, then communications between the third party and the lawyer or client are *not* privileged.⁷² Additionally, communications are not privileged where the client communicates to an accountant even if the client consulted a lawyer on the same issue.⁷³ With the narrowing of the *Kovel* decision, the applicability of the attorney-client privilege has been cast into doubt. Moving forward, estate planning attorneys must take deliberate actions to preserve the attorney-client privilege.

B. Upjohn Co. v. U.S.

In addition to the Court’s advice in *Kovel*, estate planning attorneys should consider the *Upjohn Co. v. U.S.* decision. In *Upjohn*, an internal audit conducted by the large pharmaceutical

company revealed that improper payments were made to foreign officials to secure government business.⁷⁴ The general counsel of the company sent a letter to all foreign managers to investigate the extent of any wrongdoing.⁷⁵ Those managers were also interviewed by the general counsel. As a result of the investigation, the company filed a report with both the Securities Exchange Commission (SEC) and the IRS.⁷⁶ The IRS immediately launched an investigation and issued a summons demanding production of the questionnaires and interview notes.⁷⁷ *Upjohn* declined to produce the materials on the grounds that it was protected under the attorney-client privilege and constituted work product that was prepared in anticipation of litigation.⁷⁸ The IRS sued to compel production of the documents.

The Supreme Court held that the documents were protected under the attorney-client privilege.⁷⁹ The Court noted that the company was very meticulous in identifying the documents as being used for legal purposes by the company's general counsel in gathering information to provide legal advice to the company to comply with all applicable laws.⁸⁰ The Court also held that the work product doctrine *does* apply to IRS tax summons enforcement proceedings.⁸¹ Unlike *Richey*, any material requested in the summons that fell outside the attorney-client-privilege was therefore still protected. Although the *Upjohn* Court conceded that the work product doctrine can be overcome by a showing of necessity or hardship, the government failed to meet its burden in *Upjohn*.⁸²

The holdings in *Upjohn* are illustrative to understand how a court approaches both the attorney-client privilege and the work product doctrine. *Upjohn* demonstrates that the court found it appropriate to apply the attorney-client privilege particularly when the attorney has followed a clear procedure and has clearly indicated that documents and communications are intended to be confidential. The holdings in *Upjohn* also suggest that a court may be willing to

uphold the work product doctrine, even in the face of a government summons, when the documents contain an attorney's mental processes.

C. U.S. v. Nobles

Another important case that helps delineate the contours of the work product doctrine is *U.S. v. Nobles*.⁸³ In *Nobles*, during a criminal trial for armed robbery, the defense sought to impeach the prosecution's witnesses by using a report that was compiled by a defense investigator who interviewed the witnesses.⁸⁴ The prosecution requested the investigator's report, but defense counsel refused to produce it on the grounds that it constituted work product and was therefore protected.⁸⁵ The court held that the work product doctrine applied in criminal cases, as well as civil cases.⁸⁶ In dicta, the court noted the purposes for the work product doctrine.⁸⁷

“At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.”⁸⁸

Thus, the Court laid the groundwork to provide protection to materials produced by third parties under the work product doctrine. However, the Court clearly noted that the work product doctrine was not unconditional. “The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived.”⁸⁹ Here, the *Nobles* court held that because defense counsel introduced the investigator as a witness, the work product doctrine was waived as to the report that the investigator prepared.⁹⁰

The holding in *Nobles* is instructive for estate planning attorneys in several key areas. First, the *Nobles* Court reaffirmed the holding in *Kovel*, that materials produced by third parties can be protected under the work product doctrine. Second, the Court reaffirmed that it will narrowly construe the work product doctrine. The protection that it provides *can* be waived. This could prove problematic and underscores why estate planning attorneys must be meticulous in their approach to preserve the protection for their clients.

D. Uncertainty

The attorney-client privilege is valuable because it is predictable. Uncertainty as to when the privilege may apply destroys the usefulness of the attorney-client privilege. A client would hardly feel confident in communicating honestly and truthfully with a third party assisting an attorney after the client learns that the communication may not be privileged. As noted in *Upjohn*, “[a]n 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.”⁹¹ Likewise, a cautious attorney would feel uncomfortable discussing or permitting a client to discuss issues with a third party in light of the uncertainty of whether the privilege would protect the sensitive communications. Considering the recent court cases that have carved away at the extension of the privilege in *Kovel*, representing a client on complicated issues that require the assistance of a third party becomes murky.

With this lack of clarity, the system can break down. Clients who are fearful that their communication will not be kept confidential will not tell the truth to their attorneys. Attorneys cannot competently represent their clients when the truth is not fully disclosed. Also, attorneys may not be able to comprehend the nuanced facts of a client’s case without outside help. If attorneys fear seeking assistance of a third party because of unclear boundaries surrounding the

attorney-client privilege and work product doctrine, then the attorneys would be forced to waste their valuable time learning a topic that is not their expertise or simply shoot from the hip. The end result of a lack of clarity in these two critical doctrines creates higher legal costs or a lower quality of legal advice being provided to the client. These are obviously both undesirable outcomes for all parties involved in the legal system.

PART IV

A. *U.S. v. Richey*

1. Attorney Client Privilege

In *United States v. Richey*, the Ninth Circuit held that the attorney-client privilege and the work product doctrine did *not* apply because the appraiser's documents were not prepared for the purpose of providing legal advice or in anticipation of litigation.⁹² The appraiser attached a note to his report, which read: "report may not include full discussion of the data, reasoning, and analyses that were used in the appraisal process to develop the appraiser's opinion of value. Supporting documentation concerning the data, reasoning, and analyses is retained in the appraiser's file."⁹³ Because of this disclosure, the IRS summoned the appraiser to appear and provide all records on the Peskys.⁹⁴ The *Richey* Court ruled that the appraiser must comply with the IRS summons because the communications to the appraiser were not for legal advice, but was "to provide valuation services in the form of an appraisal for the easement."⁹⁵

The Court went on to state that the appraisal was prepared "so that the Peskys could claim the charitable deduction" for the value of the easement.⁹⁶ Instead of detailing their reasoning, the *Richey* Court merely stated that "[b]ased on this record, any communication related to the preparation and drafting of the appraisal for submission to the IRS was not made

for the purpose of providing legal advice, but instead it was made for the purpose of determining the value of the [e]asement.”⁹⁷ The Court further stated that “to the extent the files contain documents that were not communications; they are not protected by the attorney-client privilege.”⁹⁸ The Court also found it fatal that the Peskys did not indicate which communications in the appraisal work file were allegedly the proper subject for the attorney-client privilege.⁹⁹ Because the attorney-client privilege did not apply to any communications the client or lawyer made to the appraiser, all of the information and communications were discoverable to the IRS and made public record once the appraiser complied with his obligations to disclose communications. This paints a bleak picture for estate planning attorneys who believed that they were following the rules before *Richey* and clients who value their privacy.

2. Work-Product Doctrine

Additionally, in *Richey* the Peskeys argued that the communications to the appraisal should be protected under the work product doctrine.¹⁰⁰ The Court followed the test for documents that serve dual purposes, or documents that were not prepared exclusively for litigation.¹⁰¹ The test used was the “because of” test.¹⁰² This test essentially states that “a document should be deemed prepared ‘in anticipation of litigation’ and thus eligible for work product protection under Rule 26(b)(3) if ‘in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.’ ”¹⁰³ In applying the “because of” test, courts “consider the totality of the circumstances” and determine whether the “document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation.”¹⁰⁴

The *Richey* Court reasoned that the appraiser was “hired to provide valuation services, and he prepared the appraisal report that the Peskys attached to their 2002 federal income tax return, as required by law.”¹⁰⁵ If no appraisal report was attached to the Peskys’ 2002 federal income tax return, the Peskys would have been ineligible for a charitable deduction. Furthermore, if the IRS never sought to examine the Peskys’ income tax returns, then the Peskys would still have been required to attach the appraisal to their federal income tax return. The Court further reasoned that there was no evidence that the appraiser “would have prepared the appraisal work file differently in the absence of prospective litigation.” Thus, in considering the totality of the circumstances, the Court refused to conclude that the appraisal work file “can be fairly said to have been prepared or obtained because of the prospect of litigation,” thereby eliminating the possibility of using the work product doctrine to protect the appraiser’s communications.¹⁰⁶ Because the work product doctrine did not apply to an appraiser’s work file, any and all communications that the client made to the appraiser became public knowledge.

B. Implications

While the result in *Richey* was not favorable to attorneys who need of assistance from third parties, narrowing the privilege is not an inherently bad idea. The attorney-client privilege is a substantial exception to the rules of evidence, and as such it should be construed narrowly. Unscrupulous lawyers should not be allowed to include third parties on the attorney-client privilege or work product doctrine without merit. This would run afoul with the purpose of these doctrines. However, these doctrines must allow for the common practice of seeking assistance from a knowledgeable third party when representing a client. If attorneys are fearful of communications becoming discoverable, they will be forced to provide incomplete advice or attempt to educate themselves in matters out of their area of expertise, which costs the client

more, is an inefficient use of their time, and decreases the productivity of the justice system overall.

PART V

A. *Richey in the Context of Estate Planning*

On the surface, the erosion of the *Kovel* Doctrine and the recent *Richey* decision does not bode well for estate planners. While the issue of third parties hired to assist attorneys with tax information has been litigated, use of third parties to assist in estate planning is less commonly litigated. Yet, estate planning attorneys need to consult with third party professionals as often, if not more, than other attorneys. For example, it is common for estate planning attorneys to consult experts in accounting, company valuation, appraisals, and other areas. As evidenced by the increase in the use of trusts clients wish to avoid probate and maintain confidentiality in the estate planning process to protect their assets, avoid family feuds, and dispose of their property in ways they see fit without alerting the general public to matters they wish to keep private. The interests of the testator may be superior to the broad concept of maintaining a narrow attorney-client privilege and work product doctrine to prevent bad actors from taking advantage of these concepts to hide information. However, the law does not treat estate planning clients any differently. Thus, estate planners need to keep the rules of attorney-client privilege and work product doctrine at the forefront of their minds to ensure the clients' wishes are fulfilled.

Nonetheless, in the face of *Richey*, attorneys who follow a carefully prescribed process can consult with third party professionals and be assured that those communications will be kept confidential. The quality of the advice that estate planning attorneys offer to clients does not have to suffer. Courts have sought to balance the need to consult third party experts with the desire to construe the attorney-client privilege and the work product doctrine narrowly. In

making that balance, courts have provided guidance as to the path that should be followed. The process to ensure confidentiality for third parties is described in more detail in the next section.

B. How to Protect Third-Party Communications in Estate Planning

As previously noted, although estate planners now have *Richey* to contend with, it is important to note that *Kovel* has not been overruled, only narrowed. Communications made for receiving legal advice will be protected by the privilege.¹⁰⁷ Conscientious attorneys who follow the clearly prescribed process detailed below should feel confident that their communications with third party professionals will remain confidential. The initial step in contacting the third party is critical to preserving the privilege. Courts will analyze whether the third party was consulted before or after the lawyer was retained to evaluate whether communications should be privileged.¹⁰⁸ If the third party is engaged before, the privilege will not apply.¹⁰⁹

The attorney seeking the consulting services of a third party must always be the one to engage the third party professional for any representation. The client must not contact the third party professional at any time or under any circumstances before the third party is engaged by the attorney. If they do so, they most likely will destroy the privilege. Next, all communications between the client, third party, and attorney must be labeled or stamped confidential. This labeling requirement is the same for all communication intended to be kept confidential and therefore it will not require the attorney to spend more time. In today's legal environment where e-mail is frequently used, attorneys should make sure that all e-mail communication contains a disclaimer at the bottom that asserts that the content is privileged and confidential. Also, the lawyer must explain in detail to the client and to all third party professionals what the attorney-client privilege and work product doctrine means. The attorney must make it clear that all communications dealing with the client's representation must be kept confidential.

The next step is crucial in light of the holding in *Richey*. The savvy estate planning attorney should draft an engagement letter to govern the third party's assistance. This engagement letter should explain that all communications are to remain confidential. Further, the letter must state that the purpose of the third party's presence is to assist the attorney in providing legal services and rendering legal advice. In light of *Richey*, it may be beneficial if the engagement letter spells out that the consultant is retained for the purpose of anticipating future litigation. The importance of this step cannot be overstated. One of the key factors that swayed the court in *Richey* was the fact that the Court did not believe that the appraiser was hired primarily for the purpose of anticipating future litigation. The engagement letter should further detail that the third party is retained by the attorney, working under the attorney's direction, and all work product is the property of the attorney. Another factor that affected the decision in *Richey* was the disclaimer that the appraiser attached to the file stating that supporting documentation was available in the appraiser's file.¹¹⁰ To protect the privilege, it would be best to avoid such disclaimers or indicate that the work product is owned and possessed by the attorney.

The attorney should also maintain a privilege log. Privilege logs are often neglected.¹¹¹ This can be problematic and expose otherwise protected communication to discovery.¹¹² The entries in the privilege log should also be specific. Entries such as "e-mail to client containing legal advice" are insufficient.¹¹³ The failure to maintain support of the privilege can have the dire consequences in the form of waiving protection.¹¹⁴ The Federal Rule of Civil Procedure 26 provides that:

“[w]hen a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim;

and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”¹¹⁵

While jurisdictions interpret Rule 26 differently, a privilege log should generally describe (1) authors, (2) recipients, (3) date, (4) nature of privilege asserted, (5) type of document withheld, and (6) a description of the contents sufficient to establish the elements of the specific privilege asserted.¹¹⁶ The privilege description should include information to “make a prima facie showing that the privilege protects the information the party intends to withhold.”¹¹⁷

The third party professional should also provide a disclaimer on all reports, memos, and documents that the material is confidential. Also, the purposes for the engagement, i.e. to assist in rendering legal services, legal advice, and in anticipation of litigation should be restated in the beginning of all documents the third party professional prepares.

CONCLUSION

Estate planning attorneys must have a clear understanding of the attorney-client privilege in light of recent court decisions, as well as the work-product doctrine in order to protect their clients’ wishes. Because estate planning attorneys uniquely consult third parties for different issues and because their clients may wish to keep their financial matters out of public record, attorneys are especially vulnerable to decisions like *Richey*.

Although *Richey* has caused confusion for estate planning attorneys, as well as attorneys in other areas of specialization, the result of confining the privilege to a narrow area is not a bad

decision. The work product doctrine and attorney-client privilege, both which prevent our legal system from determining the whole truth, must be balanced against the need to establish the truth to arrive at a fair balance. Nevertheless, the work product doctrine and attorney-client privilege must have clearly established boundaries so that clients, attorneys, and third parties can play by the rules. Without the lines clearly drawn, uncertainty defeats the purpose of having these protections because they cannot confidently be used.

In order to protect clients using the work product doctrine and attorney-client privilege, estate planning attorneys must do the following:

1. Engage the third party themselves.
2. Draft an engagement letter, stating that all communications are confidential, clearly articulating the purpose of the third party's role as: (a) assisting the attorney in providing legal services, (b) rendering legal advice, and (c) providing advice in anticipation of future litigation. The letter must also state that (a) the third party is engaged by the attorney, (b) working under the attorney's direction, and (c) all work product is the property of the attorney or the law firm.
3. Label all communications as "confidential" including email.
4. Explain in detail the attorney-client privilege and work product doctrine to both clients and third parties.
5. Maintain a detailed privilege log expressly stating: (a) authors, (b) recipients, (c) date, (d) nature of privilege asserted, (e) type of

document withheld, and (f) description of the contents sufficient to establish the elements of the specific privilege asserted.

In light of *Richey* and other cases narrowing the attorney-client privilege and work product doctrine, it is highly recommended that the checklist provided above is followed. Perhaps, if fulfilled, these steps will persuade a court that the stringent requirements courts have adopted have been satisfied.

¹ U.S. v. Richey, 632 F.3d 559, 562 (9th Cir. 2011).

² Id. at 562.

³ Id. at 562.

⁴ The Internal Revenue Code §170 provides the rules for charitable contributions and gifts. The general rule states that: “[t]here shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.” 26 U.S.C.A. § 170.

⁵ U.S. v. Richey, 632 F.3d 559, 562 (9th Cir. 2011).

⁶ Id. at 562.

⁷ Id. at 563.

⁸ Id. at 563.

⁹ Id. at 563.

¹⁰ Id. at 563.

¹¹ Id. at 563.

¹² Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981).

¹³ Id. at 389.

¹⁴ Id. at 389.

¹⁵ Id. at 389 (citing and quoting Trammel v. U.S., 445 U.S. 40, 51 (1980)).

¹⁶ Hunt v. Blackburn, 128 U.S. 464 (1888), Fisher v. U.S., 425 U.S. 391, 403 (1976); Swidler & Berlin v. U.S., 524 U.S. 399, 407 (1998).

¹⁷ Robert E. Jones, Gerald E. Rosen, William E. Wegner, and Jeffrey S. Jones, RUTTER GROUP PRAC. GUIDE FED. CIV. TRIALS & EV., Ch. 8H-B Attorney–Client Privilege.

¹⁸ U.S. v. Richey, 632 F.3d 559, 566 (9th Cir. 2011).

¹⁹ U.S. v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950).

²⁰ U.S. v. Richey, 632 F.3d 559, 566 (9th Cir. 2011).

²¹ Upjohn Co. v. U.S., 449 U.S. 383, 395 (1981).

²² Amcast Indus. Corp. v. Detrex Corp., S88-620(RLM), 1991 WL 441904 (N.D. Ind. July 26, 1991)(citing Green v. I.R.S., 556 F.Supp. 79, 85 (N.D.Ind.1982)).

²³ U.S. v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950); Claxton v. Thackston, 559 N.E.2d 82 (Ill. App. Ct. 1990).

²⁴ Dabney v. Investment Corp. of America, 82 F.R.D. 464, 465 (E.D. Pa. 1979).

²⁵ U.S. v. Nobles, 422 U.S. 225 (1975).

²⁶ Carter v. Cornell University, 159 F.3d 1345 (2d Cir. 1998).

²⁷ U.S. v. Pipkins, 528 F.2d 559, 563 (5th Cir. 1976); Baxter Travenol Laboratories, Inc. v. Abbott Laboratories, 1987 WL 12919, at *8 (N.D. Ill. 1987); Flood v. Waste Management, Inc., 1989 WL 106689, at *1 (N.D. Ill. 1989); U.S. Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 161 (E.D. N.Y. 1994); Calvin Klein Trademark Trust v. Wachner, 124 F. Supp. 2d 207, 209 (S.D. N.Y. 2000).

²⁸ U.S. v. Kovel, 296 F.2d 918, 922, 96 A.L.R.2d 116 (2d Cir. 1961).

²⁹ U.S. v. Alvarez, 519 F.2d 1036, 1046 (3d Cir. 1975).

³⁰ Cuno, Inc. v. Pall Corp., 121 F.R.D. 198, 204 (E.D. N.Y. 1988).

³¹ In re Witness-Attorney Before Grand Jury No. 83-1, 613 F. Supp. 394, 397 (S.D. Fla. 1984) (The court upheld privilege where the bondsman’s presence was found to be necessary for effective consultation).

³² In re Grand Jury Investigation, 918 F.2d 374, 386 n.20 (3d Cir. 1990) (presence of agent does not abrogate privilege).

³³ U.S. v. Kovel, 296 F.2d 918 (2d Cir. 1961).

³⁴ Id.

³⁵ Jay Zitter, *Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Nonattorney Consultants, Professionals, and Similar Contractors*, 66 A.L.R.6th 83 (Originally published in 2011).

³⁶ Fisher v. U.S., 425 U.S. 391, 403 (1976) (The privilege “protects only those disclosures necessary to obtain informed legal advice which might not otherwise have been made absent the privilege.”); Wachtel v. Health Net, Inc., 482 F.3d 225, 231 (3d Cir. 2007) (“Because the . . . privilege [results in] withholding relevant information from fact-finders, . . . courts must apply it only where necessary.”); U.S. v. Doe, 429 F.3d 450, 453 (3d Cir. 2005) (“Because this ancient and valuable privilege is at the expense of the full discovery of the truth, it should be strictly construed.”); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977) (“[T]he adverse effect of [the privilege’s] application on . . . disclosure of truth may be such that the privilege is strictly construed.”).

³⁷ Jay Zitter, *Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Nonattorney Consultants, Professionals, and Similar Contractors*, 66 A.L.R.6th 83 (Originally published in 2011).

³⁸ Id.

³⁹ Id.

⁴⁰ Hickman v. Taylor, 329 U.S. 495 (1947).

⁴¹ Id. at 498.

⁴² Id. at 510.

⁴³ Id. at 511.

⁴⁴ Id. at 510–11.

⁴⁵ BLACK’S LAW DICTIONARY, 817 (9th ed. 2009).

⁴⁶ Hickman v. Taylor, 329 U.S. 495, 511 (1947).

⁴⁷ In re Grand Jury Subpoena, 220 F.3d 406 (5th Cir. 2000). For more about the crime–fraud exception, see CRIME–FRAUD EXCEPTION TO WORK PRODUCT PRIVILEGE IN FEDERAL COURTS 178 A.L.R. Fed. 87 (Originally published in 2002).

⁴⁸ Fed. R. Civ. P. 26(b)(3)(ii).

⁴⁹ Id.

⁵⁰ Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona, 881 F.2d 1486, 1493 (9th Cir. 1989).

⁵¹ Id.

⁵² The Kovel doctrine has been applied in several cases. See Cavallaro v. U.S., 284 F.3d 236, 247 (1st Cir. 2002); U.S. v. Kovel, 296 F.2d 918 (2d Cir. 1961); U.S. v. Alvarez, 519 F.2d 1036, 1045–46 (3rd Cir. 1975); U.S. v. Bornstein, 977 F.2d 112, 116–17 (4th Cir. 1992); In re Grand Jury Proceedings, 220 F.3d 568, 571 (7th Cir. 2000); Fed. Trade Comm’n v. TRW, Inc., 628 F.2d 207, 212 (D.C. Cir. 1980); U.S. v. Cote, 456 F.2d 142, 144 (8th Cir. 1972); U.S. v. Judson, 322 F.2d 460, 462–63 (9th Cir. 1963).

⁵³ U.S. v. Kovel, 296 F.2d 918 (2d Cir. 1961).

⁵⁴ Id.

⁵⁵ Id. at 919.

⁵⁶ Id. at 922.

⁵⁷ Id. at 919.

⁵⁸ Id. at 919.
⁵⁹ Id. at 919.
⁶⁰ Id. at 919.
⁶¹ Id. at 920.
⁶² U.S. v. Kovel, 296 F.2d 918, 919 (2d Cir. 1961).
⁶³ Id. at 921.
⁶⁴ Id. at 921.
⁶⁵ Id. at 921.
⁶⁶ Id. at 921–922 (emphasis added).
⁶⁷ Id. at 922 (emphasis added).
⁶⁸ U.S. v. Ackert, 169 F.3d 136 (2nd Cir. 1999). See also, Hickman v. Taylor, 329 U.S. 495 (1947).
⁶⁹ U.S. v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961).
⁷⁰ Id.
⁷¹ Id.
⁷² Merck Eprova AG v. Gnosis S.p.A., 07 CIV. 5898 (RJS), 2008 WL 5336587 (S.D.N.Y. Dec. 12, 2008)(emphasis added).
⁷³ Garipey v. U.S., 189 F.2d 459, 463–64 (6th Cir. 1951).
⁷⁴ Upjohn Co. v. U.S., 449 U.S. 383, 386 (1981).
⁷⁵ Id. at 387.
⁷⁶ Id. at 387–88.
⁷⁷ Id. at 388.
⁷⁸ Id. at 388.
⁷⁹ Id. at 395.
⁸⁰ Id. at 395.
⁸¹ Id. at 401.
⁸² Id. at 401.
⁸³ U.S. v. Nobles, 422 U.S. 225 (1975).
⁸⁴ Id. at 229.
⁸⁵ Id. at 229.
⁸⁶ Id. at 236.
⁸⁷ Id. at 238–39.
⁸⁸ Id. at 238–39.
⁸⁹ Id. at 239.
⁹⁰ Id. at 240.
⁹¹ Upjohn Co. v. U.S., 449 U.S. 383, 393 (1981).
⁹² U.S. v. Richey, 632 F.3d 559, 563 (9th Cir. 2011).
⁹³ Id. at 563.
⁹⁴ Id. at 563.
⁹⁵ Id. at 566–57.
⁹⁶ Id. at 567.
⁹⁷ Id. at 567.
⁹⁸ Id. at 567 (citing to U.S. v. Graf, 610 F.3d 1148, 1156 (9th Cir. 2010)).
⁹⁹ Id. at 567 (citing to U.S. v. Martin, 278 F.3d 988, 1000 (9th Cir. 2002) (“A party claiming the privilege must identify specific communications and the grounds supporting the privilege as to

each piece of evidence over which privilege is asserted.”(citing U.S. v. Osborn, 561 F.2d 1334, 1339 (9th Cir.1977))).

¹⁰⁰ Id. at 568.

¹⁰¹ Id. at 568.

¹⁰² Id. at 568.

¹⁰³ In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.), 357 F.3d 900, 907 (9th Cir. 2004).

¹⁰⁴ U.S. v. Richey, 632 F.3d 559, 568 (9th Cir. 2011)(citing to In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.), 357 F.3d 900, 908 (9th Cir. 2004) (quoting U.S. v. Adlman, 134 F.3d 1194 (2d Cir.1998)).

¹⁰⁵ U.S. v. Richey, 632 F.3d 559, 568 (9th Cir. 2011).

¹⁰⁶ Id. at 568.

¹⁰⁷ U.S. v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961).

¹⁰⁸ See, e.g., In re Grand Jury Proceedings Under Seal, 947 F.2d 1188 (4th Cir. 1991) (holding that attorney client privilege may relate back no further than to protect communications, which occurred immediately prior to the meeting which involved protected communications); U.S. v. Bein, 728 F.2d 107, 113 (2d Cir. 1984) (finding that the accountant was not an agent of the attorney because he was not consulted until after the attorney had rendered legal advice to the client).

¹⁰⁹ U.S. v. Kovel, 296 F.2d 918 (2d Cir. 1961).

¹¹⁰ U.S. v. Richey, 632 F.3d 559, 563 (9th Cir. 2011).

¹¹¹ Robert L. Haig, *Attorney-Client Privilege and Work Product Protection*, 795 PRACTISING LAW INSTITUTE/LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 89, 274 (2009).

¹¹² Id. at 274.

¹¹³ Id. at 274.

¹¹⁴ Id. at 274.

¹¹⁵ Fed. R. Civ. P. 26(b)(5)(A).

¹¹⁶ See, e.g., In re Universal Serv. Fund Tel. Billing Practices Litig., 232 F.R.D. 669, 673 (D. Kan. 2005) (listing 9 elements necessary for a sufficient log); Wilderness Soc. v. United States Dept. of Interior, 344 F. Supp. 2d 1 (D.D.C. 2004) (holding government privilege log inadequate to support deliberative process and attorney-client privilege claims in FOIA action); S.D.N.Y. Ct. L.R. 26.2(a) (requiring privilege logs to include (1) type of document, (2) general subject matter, (3) date, and (4) “such other information as is sufficient to identify the document for a subpoena *duces tecum*, including, where appropriate, the author of the document, the addressee of the document, and where not apparent, the relationship of the author and addressee to each other”); see also S.D. Fla. Ct. L.R. 26.1(G)(3)(b).

¹¹⁷ In re Grand Jury Investigation, 974 F.2d 1068, 1071 (9th Cir. 1992); see also, Barclaysamerican Corp. v. Kane, 746 F.2d 653, 656 (10th Cir. 1984); Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 88–89 (N.D.N.Y. 2003); Securities and Exchange Comm’n v. Beacon Hill Asset Mgmt. LLC, 231 F.R.D. 134, 144 (S.D.N.Y. 2004).