

The Part & Parcel Principle, II: Applying Attorney-Client Privilege to Attachments Over Half a Century

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A decade ago, this author published a brief article concerning privilege in attachments to emails, enunciating what it called the “Part & Parcel Principle,” explaining that there is no basis to distinguish one technical portion of an attorney-client communication from another. But a dated strand of the law from before email technology even existed prescribed evaluating those attachments separately from the communication. The original article drew attention to the fallacy of that approach, unsuited to email attachments, taking hope that the more recent cases had broadly embraced the Principle’s logic. A decade later, however, courts have reverted to strident dispute over how to treat privilege in email attachments, and tracing the cases in detail reveals the halting evolution of a more coherent theory consistent with the Principle. In the last few years, that theory has grown ascendant once more, culminating with a 2024 case that interrogated the issues with great lucidity and thoroughness.

TABLE OF CONTENTS

INTRODUCTION: THE PAST IS PROLOGUE	352
I. THE ADVENT OF EMAIL AND THE ACCIDENT OF ATTACHMENTS	356
II. FORTY YEARS IN THE DESERT: 1975 TO 2014	359
A. SNEIDER AND ITS DISRUPTIVE PROGENY	360

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B. REBUTTALS OF SNEIDER'S PREMISES	366
C. FORERUNNING PROMULGATORS OF THE PRINCIPLE	369
1. THE DESULTORY GAINS BEFORE <i>MURO AND RHOADS</i>	370
2. A SEEMINGLY WELL-ACCEPTED PRINCIPLE OF PRIVILEGE	374
III. BATTLES AT THE WALLS OF JERICHO: 2014 TO 2024	377
A. MODERN SCIONS OF SNEIDER'S MISCONCEPTIONS	377
B. A CREDIBLE CONSENSUS BASED IN CONCEPTUAL COHERENCE	385
C. AN APT CAPSTONE TO HALF A CENTURY OF CASE LAW: <i>LINET</i>	391
IV. A PRACTITIONER'S COMPENDIUM OF PART & PARCEL PRINCIPLE CASES	394
V. CONCLUSION: THE FUTURE IS NOW	401

Attachments which do not, by their content, fall within the realm of the privilege cannot become privileged by merely attaching them to a communication with the attorney.¹

—*Sneider v. Kimberly-Clark Corp.* (1980)

The crux of the dispute here is not about the privileged character of the emails *per se* but about whether the attachments are covered by the attorney client privilege . . . The status of attachments to privileged communications is more nuanced than Hillrom acknowledges. Both parties rely on *Upjohn*.²

—*Linet Americas, Inc. v. Hill-Rom Holdings, Inc.* (2024)

INTRODUCTION: THE PAST IS PROLOGUE

In 2014, this author published an article of modest length in a law journal, making a minor point: that when attachments to emails were part and parcel of a confidential communication to or from counsel for legal purposes, the attachments enjoyed the privilege every bit as much as the email itself.³ There, this principle was given a straightforward name befitting a straightforward concept: the Part &

1. *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980), abrogated in unrelated part by *In re Queen's Univ. at Kingston*, 820 F.3d 1287 (Fed. Cir. 2016).

2. *Linet Americas, Inc. v. Hill-Rom Holdings, Inc.*, No. 1:21-cv-6890, 2024 WL 3425795, at *12 (N.D. Ill. Jul. 15, 2024).

3. Jared S. Sunshine, *The Part & Parcel Principle: Applying the Attorney-Client Privilege to Email Attachments*, 8 J. MARSHALL L.J. 47 (2014) [hereinafter Sunshine, *Part & Parcel*].

Parcel Principle.⁴ The proposition followed from the seminal Supreme Court case of *Upjohn Co. v. United States*,⁵ which distinguished crisply between the independent discoverability of facts and the privileged attorney-client communications concerning or containing those facts which could not be discovered.⁶ That is, the document attached might be utterly unprivileged in any other context, but the instance of the document attached in an exchange with counsel was part and parcel of a privileged communication, meaning it could not be elicited in discovery. In a technical sense, the attachment was encoded as an actual portion of the emailed data transmitted to or from counsel; in a semantic sense, the content of the attachment generally formed an integral part of the communication that was the object of the privilege.

This principle seems rather commonsensical, so one might wonder why even a brief article was needed to explore a point that ought to go without saying. But the fate of preexisting documents had long been a vexation for attorney-client privilege, as Paul R. Rice explored in 1999.⁷ Moreover, an odd countercurrent of precedent had arisen in the embryonic days of email technology demanding that attachments to letters (and then email) must qualify for privilege “independently” to enjoy privilege.⁸ Read one way, these cases insisted that even the copy attached to the concededly privileged communication had to be produced in response to a discovery request. Such opinions were, by and large, confused and confusing, amalgamating concepts of independent discoverability with whether *that particular copy* had to be considered, counterfactually, independently of the communication it was actually part of.⁹ An ill-defined calculus of supposed fairness pervaded the opinions, proponing that preexisting documents could not be “cloak[ed]” from discovery by the expedient of sending them to counsel, or qualify “automatically” by free-riding as an attachment to a privileged email.¹⁰ Some

4. This modest little principle must not be confused with the byzantine and seldom-invoked rule of antitrust and contract law known as the “part-and-parcel doctrine” in which a release of antitrust liability may be held unenforceable where the exaction of the release was itself a violation of the antitrust laws. *See generally* Jared S. Sunshine, *The “Rarely Discussed and More Rarely Applied” Antitrust Implications of Contractual Releases of Antitrust Liability, with a Modest Proposal*, 48 OHIO N.U. L. REV. 239 (2022).

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

6. *Id.* at 395-96 (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)) (“The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who *communicated* with the attorney: ‘[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, “What did you say or write to the attorney?” but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.’”).

7. Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion about Attorney Communications, Drafts, Pre-existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 989-994 (1999) (surveying cases).

8. *See infra* Part III.A

9. *See infra* Part III.B.

10. *E.g., In re Zetia (Ezetimibe) Antitrust Litig.*, No. CV 2:18-MD-2836, 2020 WL 1593544, at *3 (E.D. Va. Feb. 6, 2020) (“As Merck’s counsel has acknowledged, however, confidential review by counsel does not cloak the later-

fault can be ascribed to misinterpretation of *Fisher v. United States*,¹¹ a Supreme Court case predating the era of email confirming that discovery could not be evaded by lodging a *physical* document with one's attorney.¹² Regardless of the reason, however, the state of the law was unsettled, and its implications were unsettling to diligent ediscovery counsel.¹³

Even so, beyond common sense, the principle must also seem somewhat nugatory: What was the point of bickering over one copy of a document that was readily discoverable elsewhere?¹⁴ There were a few reasons. First, timelines and interlocutors are important to litigation, and exactly when and which persons were discussing a particular document with their counsel could not only be probative in many cases,¹⁵ but, considered in that light, patently transgress the sanctity of the privilege.¹⁶ Second, privilege has always incorporated a dimension of so-

disclosed document with any privilege.”); *Lee v. Chi. Youth Ctrs.*, 304 F.R.D. 242, 248 (N.D. Ill. 2014), *objections sustained in part and overruled in part* (Aug. 6, 2014) (“It cannot be too strongly emphasized that the lawyer-client relationship, itself, ‘does not create “a cloak of protection which is draped around all occurrences and conversations which have any bearing, direct or indirect, upon the relationship of the attorney with his client.”’” (quoting *In re Walsh*, 623 F.2d 489, 494 (7th Cir. 1980))); *RBS Citizens, N.A. v. Husain*, 291 F.R.D. 209, 217 (N.D. Ill. 2013) (“[T]he mere existence of an attorney-client relationship is not sufficient to cloak all communications with the privilege.”) (quoting *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84, 86 (N.D. Ill. 1992)); *Fed. Trade Comm'n v. Boehringer Ingelheim Pharms., Inc.*, 180 F. Supp. 3d 1, 31–32 (D.C.C. 2016) (“As an initial matter, the Court notes that attachments to privileged communications are not thereby automatically privileged. Instead, the attachments must independently satisfy the requirements for the application of the attorney-client privilege.” (citations omitted)), *aff'd*, 892 F.3d 1264 (D.C. Cir. 2018).

11. *Fisher v. United States*, 425 U.S. 391 (1976); *see, e.g.*, *Evergreen Trading, LLC ex rel. Nussdorf v. United States*, 80 Fed. Cl. 122 (Fed. Cl. 2007) (discussed *infra* text accompanying notes 86–91).

12. Sunshine, *Part & Parcel*, *supra* note 3, at 66–67 n.73.

13. *E.g.*, *Rice*, *supra* note 7, at 989–995. This author will prefer the orthography of “ediscovery” throughout this Article, rather than the baseless capitalization and hyphenation exemplified by “e-Discovery,” *e.g.*, Joel Henry & Michael Pasque, *Panic About e-Discovery*, 41 MONT. LAW. 12 (March 2016), a style serving only to make a common practice into a seemingly proper noun, exotic and worthy of panic. Some are already beginning to discard the hyphen, even as they maintain an idiosyncratic mid-word majuscule defying rote rules of capitalization. *E.g.*, Maura R. Grossman & Gordon V. Cormack, *The eDiscovery Medicine Show*, 18 OHIO ST. TECH. L. J. 1 (2021). By way of permission structure, this author observes that in its early days, *see infra* Part II, email has suffered too from such foibles, being regularly rendered as “eMail” or “e-mail” in the twentieth century, as even twenty-first century legal work sometimes perpetuates, though the Supreme Court seems to have seen the light. *Compare, e.g.*, *Reno v. Am. C.L. Union*, 521 U.S. 844, 851 (1997) (“electronic mail (e-mail”); *Adam R. Eaton & Roxane J. Perruso, E-Mail as Evidence*, 27 COLO. LAW. 43 (May 1998); *and Keith A. Call, E-Mail Privacy*, 25 UTAH B. J. (2D SER.) 26 (2012); *with Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024) (“email” *passim*). Time has proven that the minuscule and unhyphenated setting of a common noun is more apt treatment of a very common thing with “email,” as it presumably will with “ediscovery” too.

14. Sunshine, *Part & Parcel*, *supra* note 3, at Part V, 73–77.

15. *See* Jared S. Sunshine, *The Categorical Imperative: In Search of the Mythical Perfect Privilege Log So Devoutly to Be Wished*, 39 TOURO L. REV. 165, 186–87 (2024) [hereinafter Sunshine, *Categorical*] (discussing Douglas C. Rennie, *Why the Beginning Should Be the End: The Argument for Exempting Postcomplaint Materials from Rule 26(b)(5)(A)’s Privilege Log Requirement*, 85 TUL. L. REV. 109 (2010) and John E. Tyler III, *Analyzing New Protections for Intangible Work Product and Harmonizing That Protection with the Use of Privilege Logs*, 64 UMKC L. REV. 743, 748 (1996)).

16. *Cf. Craig Ball, E-Discovery: What’s All the Fuss About Linked Attachments?*, 87 TEX. BAR J 686, 687 (“But, if we rely upon the content of transmitting messages to prompt a search of linked attachments, we will miss the lion’s share of responsive evidence. If we produce responsive documents without tying them to their

called “subject matter waiver,” under which, if a party deliberately produces one privileged document on a topic, it is considered to have waived privilege over the subject matter at some level of generalization to prevent parties from picking and choosing their evidence and presenting misleadingly incomplete pictures.¹⁷ Producing documents in a state of uncertainty about privilege can thus translate into much broader waivers that would be desired. Third, and most crucial, it is not *always* the case that a party possesses other copies of the attachment in question. Sometimes, the only copy of a document is that sent to or from counsel, and thus the principle’s application actually might shield substance from discovery by the opposing party.¹⁸ Disputes inevitably ensue.

In the decade since the first article on this subject, the question has arisen even more regularly, and courts have in the main hewed to the straightforward logic of the Principle—sometimes even citing to the article’s discussion.¹⁹ Meanwhile, the counterfactual current of the law insisting on assessing attachments independently has dwindled but has hardly disappeared despite rebuttals by the mainstream current. The actual technical infrastructure of the emails that have engendered this discord is plumbed in Part II, having been elided in the original article. Part III recapitulates the long history of judicial attention to attachments from the beginning, from the enclosure with letters of paper documents and through the transition to email attachments. Part IV picks up where the original article left off, examining the increasingly sophisticated courts of the last decade, ones deeply familiar with email yet still grappling with a problem stemming from its twentieth century origins. Part V summarizes the trends observable in court decisions and offers an easily referenceable compendium for the busy practitioner looking for precedent rather than philosophy. A concluding Part VI previews the emerging questions presented by ever-evolving technology, and how past precedent already offers a solution, which will be given the detail it deserves in a forthcoming article in the next volume of this journal.

This Article comes not to relitigate or even praise its previous installment, but to bury it:²⁰ to inter the vacillations of its treatment of the cases through 2014, presenting a trenchant interrogation of the precedents that got the Principle wrong

transmittals, we can’t tell who got what and when. All that ‘what did you know and when did you know it’ matters.”).

17. Sunshine, *Part & Parcel*, *supra* note 3, at 74-75; see Jared S. Sunshine, *Failing to Keep the Cat in the Bag: A Decennial Assessment of Federal Rule of Evidence 502’s Impact on Forfeiture of Legal Privilege Under Customary Waiver Doctrine*, 68 CLEV. ST. L. REV. 637, 653-663, 728-733 (2020) [hereinafter, Sunshine, *FRE 502*] (discussing subject matter waiver before and after Fed. R. Evid. 502).

18. See, e.g., *Willis Elec. Co. v. Polygroup Trading Ltd.*, No. 15-cv-3443, 2021 WL 568454 (D. Minn. Feb. 16, 2021) (discussed *infra* notes 253-269).

19. E.g., *Linet Americas, Inc. v. Hill-Rom Holdings, Inc.*, No. 1:21-cv-6890, 2024 WL 3425795, at *12-*16 n.17 (N.D. Ill. Jul. 15, 2024) (quoting Sunshine, *Part & Parcel*, *supra* note 3, at 66-67 n.73 (citation corrected)); *Willis Elec. Co.*, 2021 WL 568454, at *7 (citing and quoting Sunshine, *Part & Parcel*, *supra* note 3, at 63-64, 66 n.73).

20. Cf. WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR, act 3, sc. 2, l.2.

and a succinct presentation of those that got it right. The prior article assumed too much, and in some ways begged the ultimate question of whether *Upjohn* and logic truly command its conclusion, as the 2024 judge in *Linet* illustrated in finding the Supreme Court's decision in *Upjohn* did not directly control the answer, despite both parties claiming it did.²¹ This Article unabashedly advocates for the Part & Parcel Principle's utility and cogency, addressing individually the decisions counter and in favor of its reasoning. Discussing both viewpoints will give more measured guidance to a practitioner of the law attempting to make sense of attorney-client privilege in the special case of email attachments. The question of what the future portends via ever-evolving technology, and what legal judgments await the Principle as of 2025, must await the forthcoming sequel.²²

I. THE ADVENT OF EMAIL AND THE ACCIDENT OF ATTACHMENTS

Academic legal scholarship has not dwelt on the underpinnings of email, a technology that has launched a thousand jurisprudential ships. The modern legal practice of ediscovery is rooted in electronically stored information (ESI), of which email is the most prominent, ubiquitous, and troublesome example.²³ Other examples include network or cloud file storage (e.g., Microsoft's OneDrive or Google Drive) and structured data solutions (i.e., databases) that tend to be distinct to every industry (if not company), but email is generic and well-known to everyone. Many current users will not recall an era in which email did not exist nor know how it came to be. Few now attend, therefore, to how it works.²⁴

How it works is not irrelevant to questions of privilege. Courts confronting novel technologies have often looked to the underlying mechanisms of the thing to analogize it to past precedent.²⁵ Email seemingly escaped such scrutiny because it self-labeled its paraphernalia with the trappings of yesteryear; even the earlier icons for email consisted of a letter emerging from a half-opened envelope and the term "attachment" was used as a deliberate analogue to the enclosures once regularly announced with letters (preexisting documents enclosed with the "cover letter" and generally forming part of the letter's intended message).²⁶ Even today, formal letters including such attachments will note their presence

21. *Linet*, 2024 WL 3425795, at *12.

22. See *supra* note * (noting Journal's suggestion of bifurcating this Article).

23. See Sunshine, *Categorical*, *supra* note 15, at 171, n.21 (2024) (noting emergence of ESI as driving factor in discovery practice and citing sources).

24. See generally E. Parker Lowe, *Emailer Beware: The Fourth Amendment and Electronic Mail*, 2 OKLA. J.L. & TECH 28 (2005), <https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1070&context=okjolt> [<https://perma.cc/RYY5-R9GP>] ("Before one can understand the privacy implications email presents, a basic history and understanding of the Internet is appropriate.").

25. See, e.g., IQVIA, Inc. v. Veeva Sys., Inc., No. 2:17-CV-00177, 2019 WL 3069203, at *6 (D.N.J. July 11, 2019); Nichols v. Noom, Inc., No. 20-CV-3677, 2021 WL 948646, at *1-*2 (S.D.N.Y. Mar. 11, 2021); *In re Telxon Corp. Sec. Litig.*, No. 5:98-cv-2876, 1:01-cv-1078, 2004 WL 3192729, at *24 (N.D. Ohio July 16, 2004).

26. Lowe, *supra* note 24, at 2-3.

with the antiquated notation of “Enclosures (X)”, where X signifies the number of such attachments.²⁷ Such enclosures had been a standard feature of letters for centuries, and they soon became a standard feature of emails.

The reason why enclosure transitioned so readily from paper letters into the electronic version is largely accidental, arising as a virtual analogue to an office mailroom system.²⁸ Email itself originated with the U.S. Department of Defense in cooperation with American colleges, drawing on developments in universities’ computer systems throughout the 1960s and 1970s.²⁹ Programs to process communications between early users on the primordial internet first arose in 1979 and gained traction when Microsoft released one such program in 1988.³⁰ Attachments appeared soon after, when the Multipurpose Internet Mail Extensions (MIME) format was developed to encode computer files beyond textual emails in the same way as emails.³¹ At base, MIME utilizes a technique called Base64 to translate any

27. See, e.g., U.S. DEP’T OF THE NAVY, CORRESPONDENCE MANUAL 2-9 (2010) (“Enclosures must be marked on the first page; however, you may mark all pages. An enclosure marking goes in the lower right corner, whether the text is arranged normally or lengthwise. Type “Enclosure” and its number in parentheses.”), <https://www.marforres.marines.mil/portals/116/docs/g-1/aaau/aaudocuments/correspondence%20manual.pdf>.

28. See generally L. P. MICHELSON ET AL., INVENTION OF EMAIL IN NEWARK, NJ (1978): THE FIRST EMAIL SYSTEM, <https://vashiva.com/wp-content/uploads/2016/03/Invention-of-Email-At-Newark-The-First-Email-System.pdf>. [<https://perma.cc/4245-K55P>].

29. Samuel Gibbs, *How Did Email Grow from Messages Between Academics to a Global Epidemic?*, THE GUARDIAN (Mar. 7, 2016), <https://www.theguardian.com/technology/2016/mar/07/email-ray-tomlinson-history> [<https://perma.cc/46RF-XUY3>] (“The very first version of what would become known as email was invented in 1965 at Massachusetts Institute of Technology (MIT) as part of the university’s Compatible Time-Sharing System, which allowed users to share files and messages on a central disk, logging in from remote terminals. American computer programmer Tomlinson arguably conceived the method of sending email between different computers across the forerunner to the internet, Arpanet, at the US Defense Advanced Research Projects Agency (Darpa), introducing the ‘@’ sign to allow messages to be targeted at certain users on certain machines.”); Lowe, *supra* note 24, at 4-6.

30. See Gibbs, *supra* note 29. (“EMAIL program developed * * * At the age of 14, Shiva Ayyadurai writes a program called EMAIL for the University of Medicine and Dentistry of New Jersey, which sent electronic messages within the university, later copyrighting the term in 1982. Whether or not this is the first use of the word email is up for debate. * * * Microsoft Mail arrives – 1988 * * * The first version of Microsoft Mail was released in 1988 for Mac OS, allowing users of Apple’s AppleTalk Networks to send messages to each other.”).

31. See *id.* (“The attachment – 1992 * * * The attachment was born when the Multipurpose Internet Mail Extensions (Mime) protocol was released, which includes the ability to attach things that are not just text to emails.”); Mary Ann Horton, *Email Attachments*, MARY ANN’S AUTHOR WEB SITE, <https://maryannhorton.com/mary-ann-horton/a-career-in-computing/email-attachments/> [<https://perma.cc/6453-HB9V>] (last visited Mar. 22, 2025) (“I wrote a dumb little program called ‘uuencode’ to address this. All it did was turn a binary file into a text file by making it about 30% larger. Three bytes of binary content became 4 ordinary printable characters. You could uuencode a binary file and email it with a simple command. The recipient would write out the email message to another little program called uudecode, and the file would be recreated on their system. I added it to the BSD system and went on with my life. Little did I know I had just invented binary email attachments. It turns out that uuencode became the standard way people sent binary files by email.... Microsoft later put the same feature in their ‘MS Mail’ system.”); *MIME::Base64*, v 3.16_01 PERLDOC BROWSER (Nov. 1, 2024), <https://perldoc.perl.org/MIME::Base64> [<https://perma.cc/RVZ9-HUUB>] (“This module provides functions to encode and decode strings into and from the base64 encoding specified in RFC 2045 - MIME (Multipurpose Internet Mail Extensions). The base64 encoding is designed to represent arbitrary sequences of octets in a form that need not be humanly readable. A 65-character subset ([A-Za-z0-9+/=]) of US-ASCII is used, enabling 6 bits to be represented per printable character.”).

binary file (like images, sounds, and videos) into a string of American Standard Code for Information Interchange (ASCII) characters transmissible via email protocols, and appending this string to the email.³² Soon enough, protocols were established to ensure interoperability of emails and attachments between different computers, even though they were few in those early days of the 1990s.³³ The Texas Bar Journal recounted a “quick march through history” for email attachments in 2024, courtesy of attorney Craig Ball, the popular legal columnist of the syndicated feature *Ball in Your Court*:

Nascent email conveyed basic American Standard Code for Information Interchange (ASCII) text but no attachments. In the early ‘90s, the advent of Multipurpose Internet Mail Extensions (MIME) enabled files to hitch a ride on emails via ASCII encoded in Base64. This tech pivot meant attachments could join emails as encoded stowaways, to be unveiled upon receipt. For two decades, this embedding magic meant capturing an email also netted its attachments.³⁴

Like Betamax and VHS as standards for consumer storage of videographic magnetic tape recordings (neither of which is now relevant in 2024), see *Sony Corp. of Am. V. Universal City Studios, Inc.*, 464 U.S. 417, 422 (describing the physical function of magnetic tape recorders, distinguishing between the plaintiff’s and defendant’s devices), UUEncode once competed with the simpler MIME encoding. *See, e.g.*, Charles R. Merrill, *E-Mail for Attorneys From A to Z*, 68 N.Y. ST. B.J. 20, 23 (1996) (citing both UUEncode and MIME as current technologies). MIME triumphed because it was easier for users, just as VHS beat Betamax. *See* Kenneth Shear, *Delete Doesn’t Mean Delete (Revisited) Computer Forensics and Doublespeak*, 50 Miss. LAW. 10 (2003) (“[A]n archaic encoding program called ‘Uuencode’ was used instead of the more effective Base64”); *Uuencoding*, WIKIPEDIA (Nov. 2, 2024), <https://en.wikipedia.org/wiki/Uuencoding> [<https://perma.cc/S8T7-RULP>] (“UUencoding has now been largely replaced by MIME and yEnc. With MIME, files that might have been uuencoded are instead transferred with Base64 encoding.”); *cf. Sony*, 464 U.S. at 446 (citing “[M]illions of owners of [videotape recorders] who make copies of televised sports events, religious broadcasts, and educational programs such as Mister Rogers’ Neighborhood.”).

32. Jiahe Zhang et al., *Inbox Invasion: Exploiting MIME Ambiguities to Evade Email Attachment Detectors*, in PROCEEDINGS OF THE 2024 ACM SIGSAC CONFERENCE ON COMPUTER AND COMMUNICATIONS SECURITY 468-69 (2024). *See generally* Henry S. Rzepa et al., *The Application of Chemical Multipurpose Internet Mail Extensions (Chemical MIME) Internet Standards to Electronic Mail and World Wide Web Information Exchange*, 38 J. CHEM. INFO. & COMP. SCIS. 976, 976-977 (1998) (“The MIME protocol comprises two components. The first defines how binary computer files must be encoded to achieve so-called 7-bit transparency for compatibility with most text-based Internet mail routers (so-called base-64 encoding) and is not discussed further here. The second component defines a standard mechanism whereby computer files can be associated with an email message via appropriate headers and delimiters, and allows the appropriate processing of such enclosures by mail handling programs in the possession of the email recipient. Borenstein and Freed envisaged a multi-component structure to an email message, in which the first compo[n]ent would comprise the informal and unstructured message body, whilst subsequent components could include structured and well defined data files which could be handled by programs other than the basic email client.”).

33. Patrick Kingsley, *Father of the Email Attachment*, THE GUARDIAN (Mar. 26, 2012), <https://www.theguardian.com/technology/2012/mar/26/ather-of-the-email-attachment> [<https://perma.cc/25AT-XACS>] (“This [email in 1992] was the first functional attachment ever, or at least the first one most people could actually open. People had sent attachments before, but they were mostly useless because recipients couldn’t open them unless they shared the sender’s email system.”) (quoting Nathaniel Borenstein).

34. Ball, *supra* note 16, at 68 (quotation prior to the block quotation is the section title preceding the block quotation, reduced to minuscle font).

Lawyers may call it magic; more technical publications have explicated details of the MIME encoding and how it enabled attachments for the average email user.³⁵ The inventor of MIME admitted his innovation was ultimately not maximally efficient, but even two decades later, he maintained that his invention got the job done well enough.³⁶ That inventor, Nathaniel Borenstein, also remarked in 2012 to a journalist that “too much business data—85%, by his estimate—is stored in email form (and most of that in attachments), which makes a move away from the format harder.”³⁷ To this day, much business activity occurs via emails and the attached documents that accompany them, employing ancient technology from 1992, the implications of which courts have largely digested at this point.³⁸ New advancements on Borenstein’s invention have arrived since³⁹—though social media like Facebook serve quite different purposes than email.⁴⁰ With so much business conducted via emails and their attachments their treatment remains a constant source of dispute in ediscovery, because quite long ago courts confirmed that emails were no less susceptible of privilege than their epistolary forbears.⁴¹ The devil was in the details.

II. FORTY YEARS IN THE DESERT: 1975 TO 2014

Sometimes it feels as though the law of privilege for preexisting documents has been wandering in the desert for forty years, ever since *Fisher v. United States* was decided in 1976. But there have been many discernable eras in the long peregrination, and it is worth tracing the path of this long journey if the destination is to be understood.

35. See, e.g., Zhang et al., *supra* note 32, at 467-481; Rzepa et al., *supra* note 32, at 976-982; S. Dusse et al., *RFC2311: S/MIME Version 2 Message Specification*, THE INTERNET SOC. (Mar. 1998), <http://ftp.planet.lv/ftp/rfc/pdf/rfc/rfc2311.txt.pdf> [<https://perma.cc/F85J-YRWW>].

36. Kingsley, *supra* note 33 (“‘Every Mime object wastes 19 bytes,’ he confides, referring to the fact that every attachment includes 19 bytes of redundant coding. ‘Overall, we’re wasting seven petabytes a year. But I only dislike it on aesthetic grounds: what’s 19 bytes out of a 3MB email?’”).

37. *Id.* Borenstein concluded: “When television came along, he notes, people predicted the death of radio. ‘But 70 years later, radio seems fine. It just broadcasts different kinds of things. It’s still growing. Similarly, email, which some people say is dying, continues to grow. And most dying things don’t really do that.’” *Id.*

38. See *infra* Parts III-IV.

39. See sources cited *infra* note 312.

40. Kingsley, *supra* note 33 (“Borenstein admits social media will eventually replace large email mailing lists, but he still thinks email will always be the best way of contacting specific individuals. ‘When you have a great article which you want to share with your friends, social media beats the hell out of email. But if you want to send a very sensitive communication specifically to me, I find it hard to imagine that you want to put it on your social network, because it’s more prone to accidental exposure.’”).

41. See, e.g., *City of Reno v. Reno Police Protective Ass’n*, 59 P.3d 1212, 1218-19 (Nev. 2002) (“[D]ocuments transmitted by e-mail are protected by the attorney-client privilege.”) (dismissing ABA standards and employer disclaimers as obstacles to email being considered confidential for purposes of privilege and holding it so).

A. SNEIDER AND ITS DISRUPTIVE PROGENY

Setting aside *Fisher* in 1976,⁴² the progenitor of all the turmoil is *Sneider v. Kimberly-Clark Corp.*,⁴³ decided in 1980, well before email was in general use. The paper goods magnate Kimberley-Clark was the defendant in patent litigation, and a discovery dispute emerged over more than a hundred internal memoranda involving the patents at issue exchanged with attorneys. Broadly, the court held that direct communications via letter or memorandum with Kimberly-Clark's inhouse patent counsel were protected, but identified a critical nuance: "Several documents, however, contain attachments. Attachments which do not, by their content, fall within the realm of the privilege cannot become privileged by merely attaching them to a communication with the attorney."⁴⁴ As history would show, few fairly stated words have wrought such persistent mischief as those. Otherwise undefended, the attachments were therefore held nonprivileged.⁴⁵ The court, moreover, thought these enclosures called for a distinct analysis that disregarded the overarching communication, citing to the "well-established rule that only the communications, not underlying facts, are privileged."⁴⁶

Sneider suffered from several strands of illogical leaps. It quickly accepted that "the fact that highly technical information, that is not legal, is mixed with requests for legal advice does not destroy the privilege," but did not grapple with the reality that the attachment of patent specifications to a letter to counsel is precisely such an intermixing of technical information with a request for legal advice.⁴⁷ Under *Sneider*'s confused rationale, an attachment was somehow tantamount to abstract "underlying facts"⁴⁸ that could be extricated from and produced separately from the communication it was part and parcel of. Perhaps the confusion arose because these attachments were physical, preexisting pieces of paper that could tangibly be separated from their cover letters.⁴⁹ No less fundamentally, the court confused the confidentiality required of the privileged communication with that of the facts discussed in the communication, reasoning that privilege was negated if the supposititious "facts" (qua attachments) being discussed were publicly known or comprised "business, not legal" information.⁵⁰ These two key premises—both erroneous—underpinned *Sneider*'s improvident conclusion.

42. See *infra* Part II.C.

43. *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980), abrogated in unrelated part by *In re Queen's Univ. at Kingston*, 820 F.3d 1287 (Fed. Cir. 2016).

44. *Sneider*, 91 F.R.D. at 4. ("Therefore, even though many of these documents partially contain technical, non-legal matters, any document which is essentially legal in nature will be held to be privileged. The in camera inspection has revealed that almost all of these documents meet the requirements of the privilege.").

45. *Id.*

46. *Id.*

47. *Id.* at 3 (citing *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136 (D. Del. 1977)).

48. *Id.*

49. See, e.g., *id.* at 10 (declining to order production of privilege log entry 118 whilst noting the attachment was not privileged and presumably must be).

50. *Id.* at 4 ("Furthermore, since many of the attachments are already matters of public record or

Notwithstanding its internal flaws, a number of cases stumbled over *Sneider*'s loose language and reasoning, stretching from 1990 through the 2000s and spanning the transition from typed letters to emails. The earliest, *Leonen v. Johns-Manville*, recited *Sneider*'s treatment of letter attachments as distinct without much further analysis or elaboration.⁵¹ But the next, *P & B Marina v. Logrande*, imported more of *Sneider*'s conflation of attachments to letters with separable "facts" that could not be protected merely by inclusion in a privileged communication.⁵² As further authority, *Logrande* looked to a D.C. Circuit case that confirmed that facts as such could not be privileged,⁵³ even though the communications that contained them could. This citation, of course, begged the question of whether an attachment was a "fact" or part of a communication. A third, *Pacamor Bearings, Inc. v. Mineaba Co.*, followed suit in 1996,⁵⁴ along with still others in the last years of the millennium.⁵⁵ All perseverated in *Sneider*'s error, viewing attachments not as an integral portion of the letter but as some kind of extrinsic fact that could—and must—be considered in isolation.⁵⁶

communications with outside parties, they cannot be privileged because the requisite confidentiality does not exist. Similarly, attachments containing business, not legal information, cannot be privileged.”).

51. *Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990) (“Where a privileged document has attachments, each attachment must individually satisfy the criteria for falling within the privilege. Merely attaching something to a privileged document will not, by itself, make the attachment privileged. The privilege, however, protects only the disclosure of the protected document; it does not protect disclosure of the underlying facts in the documents.”) (citing *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 1 (N.D. Ill. 1980)).

52. *P & B Marina, Ltd. P'ship v. Logrande*, 136 F.R.D. 50, 56 (E.D.N.Y. 1991) (footnote omitted) (“Some of the intra-association documents neither seek, offer, nor relate legal advice but are merely letters with attachments to attorney correspondences. Merely attaching such documents to attorney-client communications does not constitute a basis for assigning the privilege. [T]o permit this result would abrogate the well established rule that only the communication, not the underlying facts, are privileged.”) (quoting *Sneider*, 91 F.R.D. at 4) (citing 2 J. Weinstein and M. Berger, *Weinstein's Evidence*, § 503(b)(04) at 503-37 (1976))).

53. *P & B Marina*, 136 F.R.D. at 56 n.5 (“[W]hatever the precise formulation of this standard, it is clear that when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged.”) (quoting *Brinton v. Dept. of State*, 636 F.2d 600, 602 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905 (1981)).

54. See *Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 918 F. Supp. 491, 511 (D.N.H. 1996) (“Attachments which do not, by their content, fall within the realm of the [attorney-client] privilege cannot become privileged by merely attaching them to a communication with the attorney.”) (quoting *Sneider*, 91 F.R.D. at 4)).

55. See *McCook Metals, LLC v. Alcoa, Inc.*, 192 F.R.D. 242, 254-55 (N.D. Ill. 2000); *Med. Waste Techs. L.L.C. v. Alexian Bros. Med. Ctr., Inc.*, No. 97 C 3805, 1998 WL 387706, at *3 (N.D. Ill. June 24, 1998) (“Document 6 is a memo written by Scott Ortkiese that essentially memorializes a conversation that he had with Don Pedder. The memo was then forwarded to Gerald Daigle who is the attorney for MWT. This document fails the test for attorney-client privilege because its purpose was not to solicit legal advice from Daigle—it was a just a conversation between Ortkiese and Pedder that was forwarded to Daigle. Indeed, one cannot merely hand over documents to an attorney and have them be protected by the attorney-client privilege. See *Sneider*, 91 F.R.D. at 4; *Radiant Burners v. American Gas Ass'n*, 320 F.2d 314, 324 (7th Cir. 1963). Documents 5, and 10 were also communications between Ortkiese and Pedder that were merely forwarded to Daigle. Thus, documents 5, 6, and 10 are not protected by the attorney-client privilege.”); *Draus v. Healthtrust, Inc.*, 172 F.R.D. 384, 393 (S.D. Ind. 1997) (“The cover letter is protected by the attorney-client privilege. The [attached] agreement is not.”).

56. In this regard, *Applied Telematics, Inc. v. Sprint Commc'n's Co., L.P.*, No. CIV. A. 94-4603, 1996 WL 539595 (E.D. Pa. Sept. 18, 1996), is instructive. The court accepted that a cover letter from client to attorney

By 1999, these wayward decisions were accumulating into a principle. Facing a complaint covering events spanning five decades,⁵⁷ *O'Connor v. Boeing North America, Inc.* collected several of the prior precedents in its discussion.⁵⁸ The court accepted the plaintiffs' contention that attachments are not necessarily privileged by virtue of attachment to a concededly privileged communication, ruling that "to claim the attorney-client privilege or work product doctrine for an attachment to, or enclosure with, another privileged document, the attachment or enclosure must be listed as a separate document on the privilege log; otherwise, such attachment or enclosure must be disclosed."⁵⁹ Procedurally, the onus to identify attachments to claim the privilege is unobjectionable,⁶⁰ but *O'Connor* persisted in characterizing attachments as "separate document[s]" from the attorney-client communications into which they were incorporated. This raised a serious doubt as to whether such claims of privilege would be honored in application.

Two years later, *Mold-Masters Ltd. v. Husky Injection Molding Systems Ltd.* spelled out the harsh consequences in a case involving email rather than letters for the first time.⁶¹ "It should hardly come as a surprise," the court instructed, "that an attachment to a document must appear as a separate entry on the privilege log,"⁶² adding that "disclosure of the document is an appropriate sanction" for omissions from the log.⁶³ Despite the court's rhetoric, this was *Sneider*'s inaugural application to email. Nonetheless, *Mold-Masters* did not hesitate to levy its sanction on dozens of attachments that it felt had been inadequately identified distinctly from the communication of which they were a part.⁶⁴ The court's reasoning, echoing the dangerous language from *O'Connor*, contended that the claim of privilege must be supported on an imaginary isolated or "individual[]" basis, rather than considering the reality of the whole substance that was communicated:

Since a document with an attachment constitutes two *separate documents*, a party objecting to the disclosure of a document with an attachment must prove that both the document and the attachment *individually* satisfy the

represented a privileged "discussion of strategy" with his counsel. Nonetheless, the court declared that the attached draft patent application "is not fundamentally a legal analysis or opinion, or a request for legal advice," but rather "a recitation of technical information" and "must be produced." *Id.* at *6. The perverse compelled disclosure of the very draft application on which the client was concededly strategizing with his counsel subject to privilege is the inevitable outcome of this persistent conceptual error.

57. *O'Connor v. Boeing N. Am., Inc.*, 185 F.R.D. 272, 280 (C.D. Cal. 1999).

58. *Id.* at 280 (citing *Leonen v. Johns-Manville*, 135 F.R.D. 94 (D.N.J. 1990); *Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 918 F. Supp. 491 (D.N.H. 1996); and *Sneider*, 91 F.R.D.

59. *O'Connor*, 185 F.R.D. at 280.

60. Sunshine, *Part & Parcel*, *supra* note 3, at 60-61.

61. See *Mold-Masters Ltd. v. Husky Injection Molding Sys. Ltd.*, No. 01 C 1576, 2001 WL 1558303, at *3 (N.D. Ill. 2001).

62. *Id.* (citing *O'Connor*, 185 F.R.D. at 280; *Leonen*, 135 F.R.D. at 98; and *Sneider*, 91 F.R.D. at 4).

63. *Id.* at *2.

64. E.g., *id.* at *4-13 (ordering the disclosure of both e-mail attachments to entries P26, P75, P78, P103, P104, P105, P106, P110, P114, P121, P129, P136, P140, P142, P144, P148, P152, P156, and a fax attachment to entry P170—all for the stated reason that the attachments "are not described at all" on the privilege log).

requirements of the applicable privilege or doctrine. Merely attaching a document to a privileged or protected document does not make the attached document privileged or protected.⁶⁵

The same year, *Renner v. Chase Manhattan Bank* began its analysis by asserting that “defendants’ claims of privilege are frequently too broad.”⁶⁶ Consistent with that preconception, privilege was denied where the client had faxed preexisting agreements to his attorney with the note “for your information.”⁶⁷ Looking to Epstein’s hornbook, the court confirmed that “merely conveying something to an attorney will [not] cloak the underlying facts from disclosure,” but evidently from this holding inferred that the actual copies transmitted to counsel, rather than the underlying agreements in their original form pre-fax, were discoverable.⁶⁸ The conflation was understandable given the court’s citation to several of *Sneider*’s progeny making the same unsupported leap.⁶⁹ The much-reprehended specter of attorney-funneling was cited as reason: “Were the rule otherwise, a party could shield quantities of highly relevant and fully discoverable documentary evidence through the simple expedient of conveying copies to his attorney. . . . ‘Legal departments are not citadels in which public, business or technical information may be placed to defeat discovery.’”⁷⁰

A trio of 2003 cases offered only perfunctory ratifications. *Guidry v. Jen Marine LLC* found that the communications in question were “not transmitted for the purpose of rendering or receiving legal advice.”⁷¹ Only in dictum did the court opine that “[c]orrespondence that merely transmit documents to or from an attorney, even at the attorney’s request for purposes of rendering legal advice to a client,” are unprivileged.⁷² Likewise, in *Clavo v. Zarrabian*, the court stated simply that the proponent had not made an adequate case for why the attached photographs should be privileged, noting that “mere transmission of the photographs to counsel does not by itself justify privilege protection.”⁷³ Finally, *In re*

65. *Id.* at *4-5 (citing *O’Connor*, 185 F.R.D. at 280; *Leonen*, 135 F.R.D. at 98; and *Sneider*, 91 F.R.D. at 4) (emphases added) (citation omitted).

66. *Renner v. Chase Manhattan Bank*, No. 98-CV-926, 2001 WL 1356192, at *1 (S.D.N.Y. Nov. 2, 2001).

67. *Id.* at *5. In fairness, there is considerable doubt as to whether such a note suffices to prove the intent was to request legal advice—an “FYI” is thin gruel on which to rely. *See Sokol v. Wyeth, Inc.*, No. 07 Civ. 8442, 2008 WL 3166662, at *7 (S.D.N.Y. Aug. 4, 2008) (ordering production of “any communication consisting of the text ‘FYI,’ or a similar announcement”).

68. *Renner*, 2001 WL 1356192, at *5 (quoting 1 EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 48 (Am. Bar Ass’n, 4th ed. 2001)).

69. *Id.* (citing *Draus v. Healthtrust, Inc.*, 172 F.R.D. 384, 393 (S.D. Ind. 1997); *Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 918 F. Supp. 491, 511 (D.N.H. 1996); and *P & B Marina, Ltd. P’ship v. Logrande*, 136 F.R.D. 50, 56 (E.D.N.Y. 1991)).

70. *Id.* (quoting *SCM Corp. v. Xerox*, 70 F.R.D. 508, 514 (D. Conn. 1976)).

71. *Guidry v. Jen Marine LLC*, No. Civ.A.03-0018, 2003 WL 22038377, at *2 (E.D. La. Aug. 25, 2003).

72. *Id.* (citing *Beal v. Treasure Chest Casino*, No. Civ. A. 98-0786, 1999 WL 461970, at *4 (E.D. La. July 1, 1999) (“Letters that merely transmit documents to or from an attorney, even at the attorney’s request for purposes of rendering legal advice to a client, are neither privileged nor attorney work product.”)).

73. *Clavo v. Zarrabian*, No. 8:03-CV-00864, 2003 WL 24272641, at *1 (C.D. Cal. Sept. 24, 2003).

Gabapentin Patent Litigation opined that “stapling one privileged document to a non-privileged document does not cloak the non-privileged material with protection from discovery.”⁷⁴ Harkening back to *O’Connor*, a demand that the rationale for an attachment’s privilege be enunciated was not itself unreasonable so long as the proponent knew of the requirement.⁷⁵

In 2005, the misbegotten principle received a mixed reception from the court in *In re Asousa Partnership*.⁷⁶ True, the bankruptcy court held that an appraisal report addressed to outside counsel Hunton & Williams was not privileged and had to be produced, citing *Sneider*, *O’Connor*, and *Leonen*.⁷⁷ But this result rested on other grounds, as the court believed counsel’s involvement was a fraudulent artifice intended to manufacture privilege, and moreover the log listed another recipient whose role was not clarified, undermining the requisite confidentiality.⁷⁸ A second privilege claim more squarely implicated the *Sneider* rule: draft documents were emailed on from the client to its counsel as attachments for review.⁷⁹ The court envisioned two scenarios: “(1) Smithfield received these documents from [third parties] and simply forwarded them to in-house counsel, which does not give rise to the privilege; or (2) these documents represent Smithfield’s changes to [third party] Pennexx drafts which it then submitted to counsel for legal advice, which would be privileged.”⁸⁰ As the log did not specify which applied, *Asousa* held the privilege was inadequately asserted.⁸¹

Still, endorsing privilege in the latter scenario shied from *Sneider*’s or *Mold-Master*’s extremity of pretending attachments were not, in fact, part of a larger communication with counsel. Nevertheless, *Asousa*’s belief that the first scenario would forgo privilege was misplaced: simply because the enclosed subject of the request for legal advice was public, or came from a third party (as in *Asousa*), did not make the *request to counsel* any less confidential or privileged.⁸² The court clearly understood that third parties’ participation in the communication with counsel itself would vitiate the confidentiality there, for it had said so.⁸³ There should therefore have been no difference whether the client had annotated the external draft before soliciting his counsel’s advice upon it.⁸⁴ Avowedly, the

Likewise, the proponent had not provided “sufficient evidence” that the internal conversations attached to fax transmissions to counsel were privileged as well. *Id.* at *2.

74. *In re Gabapentin Pat. Litig.*, 214 F.R.D. 178, 187 (D.N.J. 2003).

75. *O’Connor v. Boeing N. Am., Inc.*, 185 F.R.D. 272, 280 (C.D. Cal. 1999).

76. See *Asousa P’ship v. Smithfield Foods, Inc.* (*In re Asousa P’ship*), Bankr. No. 01-12295, Adv. No. 04-1012, 2005 WL 3299823 (Bankr. E.D. Pa. Nov. 17, 2005).

77. *Id.* at *5.

78. *Id.*

79. *Id.* at *7.

80. *Id.* (citation to *Sneider* omitted).

81. *Id.*

82. See *infra* notes 108-12 and accompanying text.

83. *Asousa*, 2005 WL 3299823 at *5 (discussed *supra* text accompanying note 78).

84. See *infra* notes 107-12 and accompanying text.

court's belief only rested on the suite of misconceptions originally promulgated by *Sneider*.⁸⁵

Evergreen Trading ex rel. Nussdorf v. United States deserves attention because of its invocation of the already-dated *Fisher*.⁸⁶ The court cited a few of the early credulous devotees of *Sneider*'s rule, *Gabapentin* and *McCook*,⁸⁷ believing that they only stated a corollary of *Fisher*'s pronouncement, namely that a "pre-existing document which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice."⁸⁸ Therefore, *Evergreen* found, once again citing to *Fisher*, that "documents do not acquire protection under the attorney-client privilege merely because they were transferred from client to attorney."⁸⁹ Thus the court concluded cover letters and attachments must be treated separately and their privilege justified in isolation.⁹⁰ *Evergreen* would prove the last ruling before *Muro*, which was issued later that year, evidently quieting *Sneider*'s misrule.⁹¹

There followed a long lacuna of cases falling into *Sneider*'s rut in years following. But as a sign of *Sneider*'s enduring influence, *RBS Citizens N.A. v. Hussein* offered a nigh impenetrable argument in 2013, with its topsy-turvy attempt to import the rule blazoning the latent defects.⁹² There, the disputed documents were emails assertedly deriving privilege from the evidence of the attachments thereto.⁹³ The court cited *Sneider* for the rule that attachments cannot derive privilege from their cover emails, observing that "[e]-mails can be produced independently of their attachments, and vice versa,"⁹⁴ implying that what is sauce for the goose is sauce for the gander.⁹⁵ That is, if privileged emails could not (*arguendo*) provide context to their attachments, then attachments could not provide context to substantiate the privilege of the emails to which they were attached; rather, attachments had to be considered as if they were unrelated

85. *Asousa*, 2005 WL 3299823 at *7 (citing *Sneider* as authority for the outcome in its first scenario); *see supra* note 50 (quoting *Sneider*'s relevant statement).

86. *Evergreen Trading, LLC ex rel. Nussdorf v. United States*, 80 Fed. Cl. 122 (Fed. Cl. 2007).

87. *See supra* cases cited accompanying notes 55, 74.

88. *Evergreen*, 80 Fed. Cl. at 137-38 (citing *Fisher v. United States*, 425 U.S. 391, 403-04 (1976)).

89. *Id.* at 138.

90. *Id.* at 137 ("To the extent that the cover letters and memoranda reveal the instructions of plaintiffs' counsel or contain other legal or factual analysis, they . . . are undoubtedly protected by either the attorney-client privilege or the work product doctrine and should not be produced. But, the court hastens to add that the same conclusion does not obtain as to the documents that were attached to these transmittals.").

91. *See infra* notes 132-158 and accompanying text.

92. *RBS Citizens, N.A. v. Husain*, 291 F.R.D. 209 (N.D. Ill. 2013).

93. *Id.* at 221 ("With regards to the disputed e-mails, RBS notes that many of them are only responsive and privileged by virtue of their attachments.").

94. *Id.*

95. Cf. Jared S. Sunshine, *Observations at the Quinceañero of Intel Corp. v. AMD, Inc. on International Comity in Domestic Discovery for Foreign Antitrust Matters*, 69 DRAKE L. REV. 295, 352 n.391 (2021).

records.⁹⁶ Yet, in a poignantly paradoxical ruling, the court further directed that “[t]o the extent the e-mails are not themselves privileged . . . and are responsive, and to the extent the e-mails are necessary to contextualize the non-privileged responsive attachments, RBS is directed to produce them,” simultaneously ignoring the unity of the communication for purposes of privilege analysis while foregrounding it for purposes of responsiveness.⁹⁷

B. REBUTTALS OF SNEIDER'S PREMISES

Even if *RBS Citizens* and *Evergreen* affected confidence, *Asousa*'s conflicted ambivalence was no anomaly.⁹⁸ A much earlier case in 1998, *Medical Waste Technologies v. Alexian Bros. Medical Center*, had relied on *Sneider* in denying privilege to a memorandum merely when it was later forwarded to counsel.⁹⁹ The defendants, however, overreached in trying to pierce privilege at large, in search of the underlying facts, and were rebuked sharply:

The defendants also argue that even if documents are protected by either the work product doctrine or the attorney-client privilege, the underlying facts of those documents must be produced in redacted form since facts are not protectable. Indeed, it is well established that under either the work product doctrine or the attorney-client privilege, the underlying facts cannot be protected from disclosure. However, while the facts of each document are not protected, it is often impossible to separate those facts from the attorney-client communication and/or the attorney work product contained in each document. Indeed, an *in camera* inspection of the documents at issue here demonstrate this problem. Thus, while the defendants are free to question witnesses, parties, etc., about facts in the context of a deposition, interrogatory or trial, this court will not order MWT [Medical Waste Technologies] to produce the facts of the privileged documents in redacted form due to the problems described above.¹⁰⁰

Medical Waste's erratic turnabout reflects the conceptual paradox facing judges, perhaps animating *Sneider*'s facile solution. Given it was *not* impossible to separate attachments logically, why not order the disclosure of *those* handily prepackaged “underlying facts,” even whilst confirming less separable facts as subsumed into the communication? Most courts, however, properly hewed to *Upjohn* in treating the attorney-client communication as the indivisible unit of analysis,¹⁰¹ recognizing that the substantive facts recited in a privileged exchange

96. *RBS Citizens*, 291 F.R.D. at 221.

97. *Id.*

98. *See supra* notes 58-65 (discussing *Asousa*'s inconsistencies in light of *Sneider*).

99. *Med. Waste Techs. L.L.C. v. Alexian Bros. Med. Ctr., Inc.*, No. 97 C 3805, 1998 WL 387706, at *3 (N.D. Ill. June 24, 1998) (quoted *supra* note 55).

100. *Id.* at *5 (citations to N.D. Ill. cases without mention of *Upjohn*, and going on to collect numerous cases).

101. *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

could not be sifted out of the whole¹⁰²—that the same facts could be elicited via *other* discovery, such as different documents, oral testimony, or written interrogatories, but not extracted from the contents of the privileged communication itself.¹⁰³ *Upjohn* had said exactly that, after all, reiterating earlier precedent: “The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.”¹⁰⁴ But later judges manifestly approached this jurisprudential knot in different ways, spawning the doctrinal opacity in the ensuing decades.¹⁰⁵

Fellow judges also made clear, albeit not without some confusion,¹⁰⁶ that *Sneider*’s other crucial premise was faulty, namely that the lack of confidentiality of facts in contexts other than the attorney-client communication—whether received from third

102. See, e.g., *United States v. O’Malley*, 786 F.2d 786, 794 (7th Cir. 1986) (“A client does not waive his attorney-client privilege ‘merely by disclosing a subject which he had discussed with his attorney.’ In order to waive the privilege, the client must disclose the communication with the attorney itself.” (quoting Weinstein)); *United States v. El Paso Co.*, 682 F.2d 530, 538-39 n.10 (5th Cir. 1982) (“The attorney-client privilege does not protect against discovery of underlying facts from their source merely because those facts have been communicated to an attorney. The public disclosure of those facts, moreover, does not destroy the privilege with respect to attorney-client communications about those facts.”) (citation omitted); *United States v. Cunningham*, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982) (reaffirming that “we do not suggest that an attorney-client privilege is lost by the mere fact that the information communicated is otherwise available to the public. The privilege attaches not to the information but to the communication of the information”).

103. See *Eastman Kodak Co. v. Agfa-Gevaert N.V.*, No. 02-CV- 6564 T-F, 2006 WL 1495503 at *4 (W.D.N.Y. Apr. 21, 2006) (“While this factual information may be discoverable from other non-privileged sources (e.g. other documents, files and/or depositions), it should not be discoverable in the invention reports”); *Med. Waste Techs.*, 1998 WL 387706 at *5 (quoted *supra* text accompanying note 100); *Solomon v. Sci. Am., Inc.*, 125 F.R.D. 34, 37 (S.D.N.Y. 1988) (“[A]lthough a client may not be questioned about what he told his attorney, he may be questioned about what he knows. Conversely, just as facts cannot be invested with privilege merely by communicating them to an attorney, so the confidentiality of the communication is not destroyed by disclosure of the underlying facts.” (citations omitted)); *Willnerd v. Sybase, Inc.*, No. 1:09-CV-500, 2010 WL 5391270, at *3 (D. Idaho Dec. 22, 2010) (“Here, the email in question recounted conversations between two Sybase employees, Karen Chapin and Terry Stepien—neither of whom are attorneys. Willnerd argues that the substance of these conversations between Chapin and Stepien are not privileged, and the Court agrees. Undoubtedly, Willnerd could ask Chapin to recount her conversations with Stepien, and she would be required to answer. Sybase could not conceal the contents of the conversations between Chapin and Stepien merely because Chapin revealed them to Baum. *Upjohn*, 449 U.S. at 395 (1981). This, however, does not resolve the question at issue here. ‘A fact is one thing and a communication concerning that fact is an entirely different thing.’ *Upjohn*, 449 U.S. at 395. Even if the privilege does not attach to the underlying fact, communications of that fact are privileged. *Id.*; See also *Muro v. Target Corp.*, 250 F.R.D. 350, 363 (N.D. Ill. 2007). Willnerd’s first argument—that the email to Baum is not privileged because ‘no lawyer was a party to the conversations summarized in the email between Chapin and Stepien’—misses this distinction. Here, the issue is not whether Chapin’s conversation with Stepien is privileged; instead, the question is whether Chapin’s email to Baum and White-Ivy is privileged.”). See also *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 389-90 (D.D.C. 1978) (attorney can be questioned about facts learned from outside sources, but not about what was learned in a privilege communication).

104. *Upjohn*, 449 U.S. at 395-96 (1981) (quoting *Westinghouse*, 205 F. Supp. at 831).

105. Rice sums up this strain of confusion admirably whilst clarifying the proper reasoning. Rice, *supra* note 7, at 983-988 (“Regardless of where the client acquired the *information*, or the information’s confidential or public nature, the *content* of the client’s communication with his attorney is privileged.”).

106. *Id.* at 979 (“Confusing the two, courts often decline to apply the privilege where the information contained within a communication was not confidential, even if the communication itself was confidential.”).

parties, publicly available, or later disseminated—was irrelevant to the confidentiality of those facts as contained within the privileged message.¹⁰⁷ In the same year as *Sneider*, *Knogo Corp. v. United States* enunciated this rebuttal sharply: “If an attorney-client communication could be discovered if it contained information known to others, then it would be the rare communication that would be protected and, in turn, it would be the rare client who would freely communicate to an attorney.”¹⁰⁸ Fundamentally, *Knogo* thought it infeasible to tease apart which elements of a confidential exchange with counsel might have been intended to be publicized, and the court declined to engage in a speculative exercise in retrospective mind-reading.¹⁰⁹ Other judges agreed, after considering both *Sneider*’s rule and the conflicting body of precedent insisting that confidentiality was assessed as to the communication rather than the constituent facts—and endorsing the latter.¹¹⁰ Many more agreed without mention of *Sneider*.¹¹¹ Some such cases, indeed, had predated and gone unnoticed by *Sneider*, despite offering thorough and convincing logic:

107. See *id.* at 979-983; Sunshine, *Part & Parcel*, *supra* note 3, at 51-54.

108. See *Knogo Corp. v. United States*, No. 194-79, 1980 WL 39083, at *4-*5 (Fed. Cl. 1980) (“The expectation of confidentiality applies to the communication, but not to the information contained in the communication.”) (citing *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 389-90 (D.D.C. 1978); and *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968).

109. *Id.* at *6 (“A hindsight evaluation to determine if a client has the necessary intention of keeping a given communication confidential can be a troublesome task. There is, for example, no inference of an intent to disclose anything to the Patent Office when the purpose of the communication by the client to the attorney is merely to elicit a legal opinion concerning the patentability of the invention. Some inference of an intent to disclose begins to arise when the filing of a patent application becomes the dominant purpose behind the communication of the technical information. Since aspects of both purposes are inextricably present in most cases, it becomes unreliable at best, and an invitation for false swearing at worst, to ask the client to recall the dominant intent. The practical test for determining whether the client intended the communication to be confidential is the one laid down in *United Shoe*, *supra*, by J. Wyzanski more than 30 years ago, namely, whether the communication was made ‘without the presence of strangers.’ This is often verifiable from the face of the document in question by inspecting it for any indication, such as a circulation list, that extraneous parties were intended to receive the same communication.”).

110. See *Astra Aktiebolag v. Andrx Pharm., Inc.*, 208 F.R.D. 92, 103 (S.D.N.Y. 2002) (responding to *Sneider* that “the mere fact that a document contains some public or nonconfidential information does not necessarily make the document discoverable.”); accord *In re Omeprazole Patent Litig.*, No. M-21-81(BSJ), MDL No. 1291, 2005 WL 818821, at *8 (S.D.N.Y. Feb. 18, 2005) (same).

111. See, e.g., *Oasis Int’l Waters, Inc. v. United States*, 110 Fed. Cl. 87, 104 (Fed. Cl. 2013) (“Just as an attorney’s interpretation of a statute, regulation, or contract may be privileged, even though the information underlying the attorney’s interpretation is in the public domain, the privilege may apply to defendant’s internal requests for legal advice regardless of whether the information that serves as the basis for those requests is confidential.”); *Cencast Servs., L.P. v. United States*, 91 Fed. Cl. 496, 504 (2010) (“[T]hat a client communicates public information does not destroy the privilege if the circumstances surrounding the creation and dissemination of the document show that the communications were intended to be confidential.”); *United States v. Philip Morris USA, Inc.*, No. Civ. A.99-2496, 2004 WL 5355972, at *4 (D.D.C. Feb. 23, 2004); *Yankee Atomic Elec. Co. v. United States*, 54 Fed. Cl. 306, 315 (Fed. Cl. 2002); *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 630 (W.D.N.Y. 1993) (holding that confidentiality “is not negated by the fact that the information contained in the communication from a client to patent counsel, which is not protected by the privilege, has its source in the public domain”); *In re Diet Drugs Prods. Liab. Litig.*, No. 1203, 2000 WL 1545028, at *5 (E.D. Pa. Oct. 12, 2000) (“While the underlying facts discussed in these communications may not be privileged, the communications themselves are privileged.”); *Nestle Co. v. A. Cherney & Sons, Inc.*, No. HM79-653, 1980 WL 30337, at *4 (D. Md. Sept. 2, 1980) (“Those [cases] imply that a document does not fall outside the attorney-client privilege

Because the purpose of the attorney-client privilege is to promote a free and open discussion between the client and the attorney, the privilege should protect only the client's communications to the attorney . . . It is not necessary that the [i]nformation be confidential. Under this standard, information the attorney learned from a client would be privileged if it was learned in a confidential client communication. Similarly, the attorney may be questioned about information obtained from public documents or other public sources because it was learned [o]utside of the confidential attorney-client relationship (not because there is a requirement that the information be confidential). The [c]ommunication of this publicly-obtained information, however, should be privileged to the extent that the communication was treated as confidential by the client and would tend to reveal a confidential communication of the client.¹¹²

In sum, both of *Sneider*'s key premises were roundly repudiated by ample prior, contemporary, and subsequent cases, and rebutted by the Supreme Court's ruling a year later in *Upjohn*.¹¹³ It is not fair to wholly blame *Sneider* for failing to anticipate *Upjohn*, though the cases that followed *Sneider* in defiance of *Upjohn* can claim no such safe harbor. But it was perplexing that relatively few cases clearly articulated the logically entailed Part & Parcel Principle thereafter, a testament to the authority and momentum that *Sneider* initially accumulated in the then-abstruse niche of attachments to attorney communications.

C. FORERUNNING PROMULGATORS OF THE PRINCIPLE

Nevertheless, a number of astute courts in the decades after *Sneider* not only apprehended its flaws but enunciated the more defensible Part & Parcel Principle in its stead. Consolidating the tide of theoretical repudiations of *Sneider*'s premises into a contrary rule, the striking judicial efflorescence of cases espousing this epiphany from 2008 to 2012 set the stage for the original Part & Parcel article to promulgate the superior reasoning in 2014. A few cases had pointed at the eventual result in the late twentieth century in the pre-email context,¹¹⁴ but one of the earliest to tie the strands of law together cohesively was *Robinson v. Texas Auto Dealers Association* in 2003.¹¹⁵

merely because it contains technical or publicly-obtained information. If the party invoking the privilege can show that the document has some legal significance, then the document may be immune from discovery. More specifically, the communication of the publicly-obtained information 'should be privileged to the extent that the communication was treated as confidential by the client and would tend to reveal a confidential communication of the client.'") (citations omitted); *see generally* Rice, *supra* note 7, at 979-83.

112. *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 389-90 (D.D.C. 1978); *see Natta*, 392 F.2d at 692 ("The situation is like that where a client gives general information to his lawyer so that the lawyer may prepare a complaint in any ordinary civil action. The fact that some of the information is thus publicly disclosed does not waive the privilege.").

113. *See* Rice, *supra* note 7, at 979-988.

114. *See, e.g.*, *Alexander v. FBI*, 186 F.R.D. 154, 162 (D.D.C. 1999); *Angst v. Mack Trucks, Inc.*, Nos. 90-3274, 90-4329, 1991 WL 86931, at *2 (E.D. Pa. May 14, 1991); *Solomon v. Sci. Am., Inc.*, 125 F.R.D. 34, 36 (S.D.N.Y. 1988).

115. *Robinson v. Tex. Auto. Dealers Ass'n*, 214 F.R.D. 432 (E.D. Tex. 2003), *vacated in unrelated part, In re Tex. Auto. Dealers Ass'n*, No. 03-40860, 2003 WL 21911333 (5th Cir. July 25, 2003).

1. THE DESULTORY GAINS BEFORE *MURO AND RHOADS*

Robinson first confirmed that privilege turned on whether the legal communication with counsel itself was intended to and did in fact remain confidential.¹¹⁶ It then noted that facts or documents could not be withheld solely because they had been conveyed to counsel, but clarified that “an attorney-client communication does not lose its privileged status because it contains non-privileged facts or consists of otherwise non-privileged documents”¹¹⁷—exactly the Principle’s point. A prior case in its circuit led the way, having held that “although unprivileged business records had to be disclosed, the client did not have to disclose which of those business records were provided to its attorney.”¹¹⁸ Ultimately, *Robinson* upheld privilege in the disputed attachment on a Part & Parcel basis: “Although the original document was not a communication between attorney and client, [the attorney’s] act of sending the pre-existing document to [the client] as the means of providing legal advice constitutes a privileged communication.”¹¹⁹

Eastman Kodak Co. v. Agfa-Gevaert N.V. expanded on this foundation in 2006.¹²⁰ At issue were draft invention reports prepared for the purpose of seeking a patent, which the defendant argued “should be produced because they contain technical information that is unavailable elsewhere.”¹²¹ The court was unconvinced, finding that, given their preparation for counsel’s review, “factual information, including technical information and comparative reports which may be included in Kodak’s invention reports is not discoverable *via the invention reports*. While this factual information may be discoverable from other nonprivileged sources (e.g. other documents, files and/or depositions), it should not be discoverable in the invention reports.”¹²² The court found the fortuity that the information was not available in any other nonprivileged document to be of no moment to the privilege.¹²³ Attachments to the reports, moreover, were generated

116. *Robinson*, 214 F.R.D. at 439 (“The privilege requires both intent that the communication remain confidential and that the communication actually remained confidential.”).

117. *Id.* (“The privilege protects attorney-client communications, not information contained within the communications. Thus, a client may not refuse to disclose facts or documents simply because they were communicated or given to an attorney.” (citations omitted)) (citing *Lahr v. Fulbright & Jaworski*, No. 3:94-CV-0981-D, 1996 U.S. Dist. LEXIS 20133, at *17 n. 3 (N.D. Tex. July 11, 1996); and *High Tech Commc’ns, Inc. v. Panasonic Co.*, No. 94-1477, 1995 WL 45847, at *4-*5 (E.D. La. Feb. 2, 1995)).

118. See *id.* (describing *In re LTV Sec. Litig.*, 89 F.R.D. 595, 613 (N.D. Tex. 1981)).

119. *Id.* at 447.

120. See *Eastman Kodak Co. v. Agfa-Gevaert N.V.*, No. 02-CV-6564, 2006 WL 1495503, at *4-5 (W.D.N.Y. Apr. 21, 2006).

121. *Id.* at *3. The argument that factual information in patent reports must be produced notwithstanding privilege if it is unavailable anywhere else was not well presented in *Eastman* and awaited parties more squarely clashing on that specific point. See, e.g., *Willis Elec. Co. v. Polygroup Trading Ltd.*, No. 15-cv-3443, 2021 WL 568454 (D. Minn. Feb. 16, 2021) (discussed *infra* notes 253-269).

122. *Eastman*, 2006 WL 1495503, at *4.

123. *Id.* (“Agfa argues that principles of fairness require that Kodak produce comparative examples included in the invention reports because these examples are unavailable elsewhere. However, under Spalding, the invention reports should not be dissected. Thus, as indicated in the privilege log, Kodak’s

for the same purpose—advice of counsel—and thus were just as privileged as the report to which they were attached.¹²⁴ Nonetheless, at this comparatively early stage, the court still acknowledged *Sneider*'s rule, distinguishing the current case rather than rebutting it head-on.¹²⁵

The special master's report in *In re Vioxx Products Liability Litigation* illustrated the still-prevailing contradictions as late as 2007.¹²⁶ The master denied privilege

when the attorney had conveyed information to the client that the attorney had acquired from third parties" and "when in-house lawyers were electronically rendering their advice (in the form of line edits) on a non-privileged attachment to non-privileged client communications . . . Merck then claimed that the non-privileged attachment became privileged because of the advice its lawyers chose to place on it," because "Merck cannot be permitted to manipulate the discovery process by the manner in which their in-house attorneys render their advice.¹²⁷

However, where internal documents were sent to counsel, the master treated attachments consistently with the Part & Parcel Principle, allowing privilege to depend on the legal purpose of the communication as a whole.¹²⁸ Yet he also denied privilege to emails *from* counsel attaching substantive documents that did not in the email itself "reveal the substance of what either the client was communicating (for example attaching a study, report, article, etc.) or the attorney was advising (because the comments appeared on the attachment) . . . regardless of what the disposition was on the attachments," enforcing an artificial separation between integral

invention reports were created for the purpose of procuring a patent, and are therefore privileged in their entirety.”).

124. *Id.* at *4-*5 (“However, documents that are prepared specifically as an attachment to an invention report are usually prepared seeking the same legal advice or services as the invention report, namely, procuring a patent. In these cases, an attachment to an invention report will also be privileged. . . . A finding that any document included in an invention report constitutes an attachment that requires a separate privilege review could encourage artificial ‘cutting and pasting’ of such documents during the creation of an invention report. Moreover, if any included document is an attachment requiring separate *in camera* review, the court could end up ‘dissecting’ most invention reports, a result in direct opposition to *Spalding*. Agfa has offered no explanation as to *why* any withheld documents constitute ‘attachments’ that must be separated from the invention reports.”).

125. *Id.* at *4 (“Agfa claims that comparative examples included in the invention record constitute attachments which are discoverable. Agfa is correct that generally an attachment is a separate document. ‘Merely attaching a document to a privileged or protected document does not make the attached document privileged.’” (quoting *Mold-Masters* (citing *O'Connor, Leonen, and Sneider*))).

126. *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 795-813 (E.D. La. 2007) (recapitulating master's report at length).

127. *Id.* at 796. The notion that privilege can be forgone because of the precise manner in which a client seeks it or an attorney provides it, absent artifice in bad faith, is without foundation and a dangerous concept, substituting the court's *a posteriori* formulation of idealized practice for that of actual attorneys and clients. That said, where actual evidence appears of an attempt to artificially invoke privilege in bad faith, a court should rightly deny privilege. *See, e.g.*, *Asousa P'ship v. Smithfield Foods, Inc. (In re Asousa P'ship)*, Bankr. No. 01-12295DWS, 2005 WL 3299823, at *6 (E.D. Pa. Nov. 17, 2005)

128. *Id.* at 809-811.

segments of the communication.¹²⁹ Noting the challenges posed by enormous ediscovery demands, the district court adopted the master's recommendations.¹³⁰

Such ambivalence was redressed soon with the incisive and influential *Muro v. Target Corp.* holding in 2007, which overruled a magistrate judge's findings on privilege adhering to the *Sneider* rule and was later affirmed by the Seventh Circuit.¹³¹ *Muro* declared that, "as *Upjohn Co. v. United States* makes clear, the fact that non-privileged information was communicated to an attorney may be privileged, even if the underlying information remains unprotected."¹³² The court explained that, in the new context of email, it "understands *Upjohn* to mean that even though one e-mail is not privileged, a second e-mail which forwards that prior e-mail to counsel might be privileged in its entirety," because "the forwarded material is similar to prior conversations or documents that are quoted verbatim in a letter to a party's attorney."¹³³ Confronting the conceptual koan, the court recognized that its rule meant a document sent to counsel might be privileged even as an identical copy not sent to counsel was unprotected, but held this peculiarity to be no obstacle.¹³⁴ Implicitly rejecting *O'Connor* and *Mold-Masters*,¹³⁵ the court found further that the privilege log could not demand details sufficient to identify attachments that had been sent to counsel when those data were privileged.¹³⁶ Most crucially, *Muro* explained away the errant *Sneider* rule in light of *Upjohn*, albeit via footnote:

Muro analogizes e-mail strings to letters with attachments, and cites *Sneider v. Kimberly-Clark Corporation*, for the proposition that attachments to a letter containing confidential communications to counsel do not, by virtue of that attachment, become privileged. Muro misreads *Sneider*, which merely stands for the proposition, recognized in *Upjohn*, that non-privileged documents do not become privileged solely by virtue of being transmitted to counsel. . . . But as the *Sneider* court recognized, communications of facts are privileged even

129. *See id.* at 812.

130. *See id.* at 814-15.

131. *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007), *aff'd*, 580 F.3d 485 (7th Cir. 2009). The original article said it explained the Principle "particularly well." Sunshine, *Part & Parcel*, *supra* note 3, at 58. This is an understatement, as it features in most of the subsequent cases as the progenitor of the proper formulation of the Principle.

132. *Muro*, 250 F.R.D. at 363.

133. *Id.*

134. *Id.* ("A party can therefore legitimately withhold an entire e-mail forwarding prior materials to counsel, while also disclosing those prior materials themselves.").

135. Neither case was cited in the opinion.

136. *See Muro*, 250 F.R.D. at 363 ("It could well be confusing to require a party to list documents in its privilege log that it had already furnished to opposing counsel. More troublingly, the disclosure of this information could very well be a breach of attorney-client privilege. If the opposing party can gather enough material from the log and already produced materials to discover the topic or contents of material forwarded to counsel, then a privileged communication has been revealed to that party. Rule 26(b)(5)(A) requires only that a party provide sufficient information for an opposing party to evaluate the applicability of privilege, 'without revealing information itself privileged.' Thus, Judge Brown erred by reading this rule to require a method of itemization that will, in some cases, force parties to disclose privileged information.").

if the original facts are not. . . . Thus, when letters to counsel included certain attachments, the fact that those documents were attached may be privileged, even if the originals are not. Thus, the analogy of e-mail strings to letters with attachments does not favor the rule announced by the Magistrate Judge.¹³⁷

Barton v. Zimmer Inc. followed shortly thereafter, even before the Seventh Circuit had registered its affirmance of *Muro*, noting that “[e]-mails, with sometimes different and multiple recipients and authors, add complexity to the analysis of the attorney-client privilege.”¹³⁸ *Barton* was quickly recited elsewhere as persuasive precedent on its own,¹³⁹ inasmuch as it found application of the Part & Parcel Principle no different for email attachments than any other document type:

Nevertheless, under *Upjohn*, the very fact that non-privileged information was communicated to an attorney may itself be privileged, even if that underlying information remains unprotected. As applied to e-mails, this means that even though one e-mail is not privileged, a second e-mail forwarding the prior e-mail to counsel might be privileged in its entirety.¹⁴⁰

Outside the Seventh Circuit, *Rhoads Industries, Inc. v. Building Materials Corp.* soon endorsed *Muro*, calling the decision “a sound interpretation of *Upjohn*” in that “even though one email is not privileged, a subsequent and privileged email which forwards that prior non-privileged email, will allow the privilege to attach to the entire email chain, including the non-privileged prior email message.”¹⁴¹ *Barton* too was accepted as persuasive precedent.¹⁴² But the court in *Rhoads* added a new wrinkle: that the pendent emails that enjoyed privilege by virtue of being forwarded to counsel must be accounted for *when they occurred as separate documents*, either confirmed produced, or logged if they were independently privileged.¹⁴³ Judges back in the Northern District of Illinois agreed,¹⁴⁴ and intercircuit dialogue continued in the Eighth and Ninth Circuits.¹⁴⁵ Even as

137. *Id.* at n.21 (citations omitted).

138. *Barton v. Zimmer Inc.*, No. 1:06-CV-208, 2008 WL 80647, at *5 (N.D. Ind. Jan. 7, 2008).

139. *N. Valley Commc’ns, L.L.C. v. Qwest Commc’ns Corp.*, No. 09-1004, 2010 WL 3672233, at *4 (D.S.D. Sept. 10, 2010) (discussing *Barton* and ordering *in camera* review to apply the proper rule).

140. *Barton*, 2008 WL 80647, at *5 (citations to *Muro* omitted).

141. *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 238, 240 (E.D. Pa. 2008).

142. *See id.*

143. *See id.* at 240-42.

144. *U.S. Sec. & Exch. Comm’n v. Hollnagel*, No. 07 CV 4538, 2010 WL 11586980, at *6-*7 (N.D. Ill. Jan. 22, 2010) (“Thus, under *Muro* and *Rhoads*, whether an earlier email strand must be separately listed in the privilege log depends on whether that strand has been produced in its original form to the opposing party. If it has, then the email strand has not been withheld and does not need to be separately logged. However, if it has not been produced, then that strand must be separately listed in the privilege log.”). Despite asserting privilege over forwarded email chains, the proponent had voluntarily disclosed attachments to privileged emails; although viewing such claims as plausible, the court held them waived by concession. *Id.* at *8. Where the proponent had not, the court applied *Muro* to find them protected. *Id.* n.9.

145. *See, e.g., BreathableBaby, LLC v. Crown Crafts, Inc.*, No. 12-CV-94, 2013 WL 3350594, at *10-11 (D. Minn. May 31, 2013) (accepting *Rhoads*’s interpretation of *Muro* and directing separate logging), *aff’d*, No. 12-CV-0094 PJS/TNL, 2013 WL 3349999 (D. Minn. July 1, 2013); *Cont’l Cas. Co. v. St. Paul Surplus*

they affirmed the Principle, courts noted that “the unprivileged material will have to be produced in some form, as it is the transmission that is protected, not the underlying information”—the question was simply *how*, if the transmission is taboo.¹⁴⁶ The question of accounting for the attachments as separate documents took on a life of its own, as some courts held emails forwarding other emails required logging (if privileged) without even passing on the Principle itself.¹⁴⁷

2. A SEEMINGLY WELL-ACCEPTED PRINCIPLE OF PRIVILEGE

A new consensus was palpably building in the early twenty-first century, with *Muro* at its heart: the little case from Illinois would prove to be much cited.¹⁴⁸ In 2009, the Northern District of Illinois forged on in *Rainey v. Plainfield Community Consolidated School District No. 202*.¹⁴⁹ The court looked directly to *Muro*, explaining: “Plaintiff disputes whether attachments to privileged communications with an attorney are also privileged. If legal advice is requested regarding the attachments, the communication with the attorney is privileged. Whether the attachments as independent documents are discoverable is a separate question.”¹⁵⁰ The court went on to address both prongs of confusion under *Sneider*:

Lines Ins. Co., 265 F.R.D. 510, 517 n.9 (E.D. Cal. 2010) (discussing *ChevronTexaco* and *Muro*); Thompson v. Buhrs Americas, Inc., No. CV 07-2746, 2009 WL 10711526, at *3 (D. Minn. May 19, 2009) (“As noted beforehand, otherwise unprivileged information does not become privileged simply by sharing it with counsel. A different scenario, however, is presented where a client forwards a string of older email messages to counsel. If the client forwards those messages in order to share information with counsel, and to elicit legal advice about the events described in the string, then the privilege will attach to the entire string. The key consideration is whether the prior e-mails are being forwarded to counsel for the purpose of securing legal advice. Even if the privilege attaches to the string as a whole, the privilege does not necessarily attach to constituent messages within the string. If a constituent message remains unprivileged in another context, that message can be separately discovered by other means. If a string is broken down and only its constituent messages are produced, and an adverse party cannot infer the substance of subsequent legal advice, the privilege is preserved.”), *aff’d*, No. CV 07-2746, 2009 WL 10711525 (D. Minn. June 23, 2009).

146. U.S. Sec. & Exch. Comm’n v. Wyly, No. 10 CIV. 5760 SAS, 2011 WL 3055396, at *4 (S.D.N.Y. July 19, 2011). The court cited *Barton* for the principle that “common interest doctrine can protect the confidential transmission of non-privileged information to a lawyer, where the transmission itself communicates the lawyer’s implicit or explicit assertion that the non-privileged information may be relevant to the common legal interest.” *Id.*

147. *See, e.g., In re 3M Combat Arms Earplug Prod. Liab. Litig.*, No. 3:19-MD-2885, 2020 WL 1321522, at *3 (N.D. Fla. Mar. 20, 2020); EPAC Techs., Inc. v. Thomas Nelson, Inc., No. 3:12-CV-00463, 2015 WL 13729725, at *4–5 (M.D. Tenn. Dec. 1, 2015); Helm v. Alderwoods Grp., Inc., No. C 08-01184 SI, 2010 WL 2951871, at *2 (N.D. Cal. July 27, 2010) (“The parties’ submissions demonstrate that the question of how to apply privilege principles to email communications is a matter of disagreement among district courts.”).

148. *E.g., Treat v. Tom Kelley Buick Pontiac GMC, Inc.*, No. 1:08-CV-173, 2009 WL 1543651, at *4 (N.D. Ind. June 2, 2009). One contemporaneous ruling even summarily applied *Muro*’s rule to work product rather than attorney-client privilege. *See Mills v. Cnty. Action Program of Evansville & Vanderburgh Cnty.*, No. 3:12-CV-64, 2013 WL 1703742, at *3 (S.D. Ind. Apr. 19, 2013) (“The forwarded portion of e-mails may be protected by work-product privilege, even though the e-mails were first sent to a non-party intermediary and the underlying content of the e-mails is not protected.”) [hereinafter *Mills v. Cnty. Action Program*].

149. *Rainey v. Plainfield Cnty. Consol. Sch. Dist. No. 202*, No. 07 C 3566, 2009 WL 1033654, at *2 (N.D. Ill. Apr. 16, 2009).

150. *Id.* (citing *Muro v. Target Corp.*, 250 F.R.D. 350, 363 (N.D. Ill. 2007), *aff’d*, 580 F.3d 485 (7th Cir.

even when email chains involving third parties were sent on to counsel, they were privileged, and even when drafts of announcements intended for (eventual) public release were sent to counsel, they too were privileged.¹⁵¹ Not only was the privilege of attachments treated rightly as dependent on the communication of which they were a part, but either the past or future lack of confidentiality in their content was found irrelevant.¹⁵²

Barton was quoted at length in *Hilton-Rorar v. State & Federal Communications Corp.* in 2010 after it prefaced that “[e]-mails add complexity to the already difficult analysis of the application of the attorney-client privilege.”¹⁵³ Again, *Upjohn* was cited to show “attorney-client privilege does not protect against discovery of the underlying facts contained in an attorney-client communication.”¹⁵⁴ Likewise, *Hilton-Rorar* recognized that attachments pendent to documents had been in some courts “regarded as existing independently of the relationship and not as communications made pursuant to it.”¹⁵⁵ Yet *Barton*’s reasoning was persuasive, as the court agreed that “[c]onfidential e-mails from a client to his attorney attaching a pre-existing unprivileged e-mail may, nevertheless, be protected.”¹⁵⁶ Despite its acknowledgement of prior cases to the contrary, the court ruled that the disputed emails and attachments, properly considered together, enjoyed privilege.¹⁵⁷

The Article I court in *Oasis International Waters, Inc. v. United States* deftly integrated the strands again in 2013.¹⁵⁸ After quoting *Upjohn*, the court recited that “[u]nderlying facts, therefore, are independently discoverable, but the facts that a client included in a request for legal advice to assist the attorney in providing legal services are privileged in the context of an attorney-client communication”—adducing *Muro* as authority.¹⁵⁹ A number of other cases were summoned

2009)).

151. *Id.* (“For example, there are communications from the media or parents that were forwarded to an attorney for legal advice about how to respond before school officials provided any response. The communications, including any attachments, sent to the attorney are privileged. However, the communications as originally received from the media or parents still must be disclosed to the extent they are responsive to a proper discovery request. Also, when a draft communication is sent for an attorney’s advice before being finalized, the draft itself is a privileged document even if the final version is not.”).

152. *See id.*

153. *Hilton-Rorar v. State & Fed. Commc’ns Inc.*, 2010 WL 1486916, at *6–7 (N.D. Ohio Apr. 13, 2010).

154. *Id.* at *7.

155. *Id.*

156. *Id.*

157. *Id.* at *8 (“To the extent these e-mails contain attachments or other e-mail communications that are not otherwise independently privileged, the attorney-client privilege nevertheless applies because to order the disclosure of those e-mails would necessarily reveal the substance of a confidential client communication made seeking legal advice. Thus, compelling disclosure would undercut a bedrock principle underlying the attorney-client privilege that is the privilege encourages clients to make full disclosure to their lawyers. . . . Accordingly, the e-mails bearing Bates Numbers [omitted] are immune from disclosure due to the attorney-client privilege.”).

158. *Oasis Int’l Waters, Inc. v. United States*, 110 Fed. Cl. 87, 99–100 (Fed. Cl. 2013).

159. *Id.* at 99 (citing *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007), *aff’d*, 580 F.3d 485 (7th Cir. 2009) and *Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 508–09 (S.D. Cal. 2003)).

for the proposition that the inclusion of an attachment in a legal request to counsel is privileged under the same principle.¹⁶⁰ And, almost as an afterthought, the case affirmed that the presence or absence of confidentiality in the information included in the privileged communication does not bear on the privilege.¹⁶¹ By this time, the initial force of *Sneider*'s influence was largely exhausted, and the cases embracing a more faithful reading of *Upjohn* had gained considerable inertia, guided by *Muro* and its disciples in *Barton* and *Rhoads*.

Also in 2013, a thoughtful court itemized its thinking on the many disputed entries on the privilege log in *Phillips v. C.R. Bard, Inc.*, offering an uncommonly punctilious exemplar.¹⁶² First, however, it interrogated exactly how the “forwarded” emails of *Muro* fit into the attachment paradigm.¹⁶³ The proponent claimed prior cases established that “all e-mails within an e-mail chain are considered one communication,” citing *Muro*, amongst others.¹⁶⁴ The court thought the issue slightly more nuanced, taking first *United States v. ChevronTexaco, Inc.*,¹⁶⁵ which had indeed found “Chevron’s assertion that each separate e-mail stands as an independent communication” inaccurate.¹⁶⁶ But it clarified, “[w]hat is communicated with each e-mail is the text of the e-mail and all the e-mails forwarded along with it. If an e-mail with otherwise privileged attachments is sent to a third party, Chevron loses the privilege with respect to that e-mail and all of the attached e-mails.”¹⁶⁷ A second case, *Dawe v. Corrections USA*,¹⁶⁸ likewise “reiterate[d] the point made in *ChevronTexaco* that an e-mail consists of the sender’s

160. *Id.* at 99–100 (“The fact that a client included a document in a request for legal advice is privileged, however, because it partially reveals the substance of the client’s privileged communication to an attorney.”) (citing *Alexander v. FBI*, 186 F.R.D. 154, 162 (D.D.C. 1999) (“holding that a document sent to a government attorney was privileged while noting the facts contained within the document were independently discoverable”); *Angst v. Mack Trucks, Inc.*, Nos. 90–3274, 90–4329, 1991 WL 86931, at *2 (E.D. Pa. May 14, 1991) (“holding that notes a client transmits to an attorney are ordinarily privileged, while identical notes retained by a client may not be privileged”); *Solomon v. Scientific Am., Inc.*, 125 F.R.D. 34, 36 (S.D.N.Y. 1988) (“holding the privilege applied to a memorandum describing facts relating to a client’s case after the client sent the memorandum to an attorney because the memorandum was ‘intended as the equivalent of an “intake interview”’”); *Robinson v. Tex. Auto. Dealers Ass’n*, 214 F.R.D. 432, 447 (E.D. Tex. 2003) (“holding the copy a of document that an attorney transmitted to a client was privileged because the ‘act of sending the pre-existing document . . . constitute[d] a privileged communication’”), vacated in unrelated part sub nom. *In re Tex. Auto. Dealers Ass’n*, No. 03–40860, 2003 WL 21911333 (5th Cir. July 25, 2003)). The quoted parenthetical descriptions are those of *Oasis*.

161. *Oasis*, 110 Fed. Cl. at 100 (“The privilege protects the confidentiality of communications regardless of whether the information they contain is confidential, because a communication by a client with his or her attorney is generally assumed to be a request for legal advice.”) (citing *Yankee Atomic Elec. Co. v. United States*, 54 Fed. Cl. 306, 315 (2002); and *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 388–89 (D.D.C. 1978)).

162. *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 642–62 (D. Nev. 2013).

163. *Id.* at 641–642.

164. *Id.* at 641.

165. *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065 (N.D. Cal. 2002).

166. *Id.* at 1074 n.6.

167. *Id.*

168. *Dawe v. Corr. USA*, 263 F.R.D. 613 (E.D. Cal. 2009).

message as well as the prior e-mails that are attached.”¹⁶⁹ *Dawe*, citing *Muro*, found that “while one e-mail may not be privileged and discoverable on its own, a second e-mail which forwards the prior non-privileged e-mail to counsel may be entirely privileged.”¹⁷⁰

Summing up, the *Phillips* court declined to order the proponent to separately itemize emails from their pendent chains, being viewed as a species of attachments, but reaffirmed the principle of independent discoverability: “this does not mean the e-mails that were part of an e-mail chain that are not privileged in and of themselves should not have been produced *if they existed separately* assuming they are otherwise relevant and responsive.”¹⁷¹ Applying that rule, the court found numerous emails to or from counsel together with their attachments to be wholly privileged,¹⁷² even whilst carefully denying privilege where the communication as a whole did not evince the purpose to obtain legal advice from counsel.¹⁷³ In one representative example, the court explained that “the e-mails included in the thread appear to have been discoverable standing alone because they did not involve an attorney-client communication” but “to the extent the e-mail thread was then forwarded to counsel with a request for legal advice, the communication becomes privileged.”¹⁷⁴

III. BATTLES AT THE WALLS OF JERICHO: 2014 TO 2024

So matters stood in 2014. The overwhelming majority of contemporary cases had departed from the outmoded *Sneider* rule to grapple with the actual practice of electronically stored information and adopted the Part & Parcel Principle more or less as crystallized in *Muro*.¹⁷⁵ The accord would be short-lived, however. Since 2014, the cases of the last decade have evinced greater sophistication with the technology of email but also resurrected fundamental disagreements about how attachments interact with privilege. Even if the Principle has been favored by the majority of judges since the original article’s publication, a vocal minority has not been persuaded.

A. MODERN SCIONS OF SNEIDER’S MISCONCEPTIONS

The attraction of *Sneider*’s simple rule that attachments must be sequestered and considered distinctly from their cover emails has endured.¹⁷⁶ In 2014, the

169. *Phillips*, 290 F.R.D. at 642 (describing *Dawe*, 264 F.R.D. at 621).

170. *Id.* (describing *Dawe*, 264 F.R.D. at 621).

171. *Id.* (emphasis added).

172. *See, e.g., id.* at 643 (entry 3), 656–57 (entry 37), 657 (entry 38), 658 (entry 39), 660 (entry 46).

173. *See, e.g., id.* at 644–45 (entry 6), 646–47 (entry 10), 652–53 (entry 26), 656 (entry 36).

174. *Id.* at 657 (entry 38).

175. *See Gen. Elec. Co. v. United States*, No. 3:14-cv-00190, 2015 WL 5443479, at *1–2 (D. Conn. Sept. 15, 2015); *United States v. Davita, Inc.*, 301 F.R.D. 676, 683 (N.D. Ga. 2014).

176. *Sneider* remained much cited by even modern cases, even when the ruling rests on other grounds. For example that the recipient of the attachment was not acting in a legal capacity or that the document attached was intended for public dissemination. *See, e.g., Kleen Prods. LLC v. Int’l Paper*, No. 10 C 5711, 2014 WL 6475558, at *2 (N.D. Ill. Nov. 12, 2014). State courts are no less susceptible to this cynosure. As late as 2013, Delaware chancery declared that “[i]f emails are privileged, but the attachments to the emails do not

Northern District of Illinois once again wrestled with the issue at length in *Lee v. Chicago Youth Centers*.¹⁷⁷ The producing defense counsel had only begrudgingly enunciated privilege claims, and the claims it did proffer were sparse and vague.¹⁷⁸ Perhaps owing to this lack of candor, the court initially remonstrated—rightly—that to enjoy privilege, a communication must have occurred for a *bona fide* legal purpose, not as an artifice.¹⁷⁹ Citing *RBS Citizens*, the court thought “it inexorably follows that sending an otherwise non-privileged document to a lawyer in connection with a request for legal advice will not make the attached document independently privileged and immune from discovery, even though the communication seeking legal advice is privileged.”¹⁸⁰ That too was true, as the court’s familiar quote from *Upjohn* had established long ago: the attachment is not *independently* privileged and must be produced if it is found anywhere other than privileged communications.¹⁸¹ The cases advanced by the defense, *Muro* and *C.R. Bard*, did not say otherwise, recognizing that the “originals” are not privileged, as *Lee* accurately quoted.¹⁸² Yet somehow these predicates misled *Lee* to reject the defendant’s quite different argument that “the ‘version’ of the plaintiff’s personnel record and other documents . . . are not producible since they were attached to an email to CYC lawyers.”¹⁸³ Undoubtedly, any contention that the original copy of the personnel file was somehow privileged standing alone was doomed, but that fact did not demand that the attachment to the privileged email be produced too.¹⁸⁴

independently earn that protection, then the attachments may not be withheld on the grounds of privilege emanating from the email which they accompanied,” though the point was apparently moot because no documents fell into that category. *See AM Gen. Holdings LLC v. Renco Grp., Inc.*, No. CIV.A. 7639-VCN, 2013 WL 1668627, at *3 (Del. Ch. Apr. 18, 2013).

177. *Lee v. Chi. Youth Ctrs.*, 304 F.R.D. 242, 248–49 (N.D. Ill. 2014), *objections sustained in part and overruled in part*, No. 12-C-9245 (Aug. 6, 2014).

178. *Id.* at 246–48.

179. *Id.* at 248–49 (“Thus, merely communicating with a lawyer or copying a lawyer on an otherwise non-privileged communication, will not transform the non-privileged communication or attachment into a privileged one. . . . Thus, while a client cannot be compelled to answer the question, ‘what did you say to your attorney,’ he may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney. From this it follows that the privilege would never be construed to allow a client to funnel papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure. If the result were, otherwise, unscrupulous clients and lawyers could have all relevant documents sent to their counsel initially or as attachments to emails and then refuse to honor a single Rule 34 request. The privilege is not so easily perverted.”) (citing *Radiant Burners, Inc. v. Am. Gas Ass’n*, 320 F.2d 314, 324 (7th Cir. 1963); *N. Valley Comm’ns, L.L.C. v. Qwest Comm’ns Corp.*, 2010 WL 3672233, *4 (D.S.D. 2010); and *McCullough v. Fraternal Order of Police, Chi. Lodge 7*, 304 F.R.D. 232, 237 (N.D. Ill. 2014)).

180. *Id.* at 249.

181. *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)).

182. *Id.* at 251 (citing *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007), *aff’d*, 580 F.3d 485 (7th Cir. 2009) and *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615 (D. Nev. 2013)).

183. *Id.*

184. *See Wellin v. Wellin*, No. 2:13-CV-1831, 2018 WL 3254483, at *5 n.5 (D.S.C. Feb. 28, 2018) (discussing *Lee*).

Nevertheless, far beyond the unfounded leap mandating production of the personnel record, the court’s ensuing *in camera* inspection of actual communications with counsel was unaccountably draconian. For example, the court grudgingly admitted that an email to counsel overtly making a request for analysis was “arguably privileged” and need not be produced, as was the lawyer’s reply email attaching the requested work—but that the actual legal work embodied in the attachment must be produced.¹⁸⁵ Indeed, the magistrate denied privilege to attachments without exception. Applying such a blanket rule across all instances is always suspicious, for it implies the nuances of each were disregarded.¹⁸⁶ As to another email, attaching the job descriptions under litigation and commenting on them to her attorney, the magistrate thought not even the email—let alone the attachment—was privileged because it did not request legal advice, even though the attorney’s reply to the putatively nonexistent request *was* protected.¹⁸⁷ In yet another instance, *Lee* rejected privilege in written requests that the lawyer review language in attached board committee minutes and suggest revisions, holding that “editorial” work by a lawyer is not protected.¹⁸⁸ This stilted semblance of privilege, leaving clients uncertain whether almost anything they communicate to their counsel is protected, however much legal advice is sought, is not what *Upjohn* contemplated.¹⁸⁹

Lee’s severe approach was not often followed. For instance, the district court sustained a number of the objections to the magistrate’s rulings.¹⁹⁰ A pair of other courts issued drive-by rulings,¹⁹¹ ostensibly relying on *Lee* in the following years with little consideration of its premises, echoing mostly that attachments do not automatically become privileged by transmission to counsel.¹⁹² (Again, there is

185. *Lee v. Chi. Youth Ctrs.*, 304 F.R.D. 242, 252 (N.D. Ill. 2014) (Ex. 4).

186. *Id.*

187. *Id.* (Ex. 6).

188. *Id.* (Ex. 5).

189. *See Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (“But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application.”).

190. *See Lee*, 304 F.R.D. at 248–49.

191. *See also Wilkins v. United States*, 598 U.S. 152, 143 S.Ct. 870, 874 (2023) (“A decision that simply states that ‘the court is dismissing “for lack of jurisdiction” when some threshold fact has not been established’ is understood as a ‘drive-by jurisdictional rulin[g]’ and receives ‘no precedential effect.’”) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006)).

192. *E.g.*, *Rowan v. Sunflower Elec. Power Corp.*, No. 15-CV-9227, 2016 WL 3745680, at *5, n.33 (D. Kan. July 13, 2016) (“The Court must carefully consider these drafts separate and apart from the emails to which they were attached. ‘Sending an otherwise non-privileged document to a lawyer in connection with a request for legal advice will not make the attached document independently privileged and immune from discovery, even though the communication seeking legal advice is privileged.’”) (quoting *Lee*); *Reid v. Transocean Offshore Deepwater Drilling, Inc.*, No. CIV.A. 13-6080, 2014 WL 2740376, at *1 (E.D. La. June 17, 2014) (“All other correspondence to and from defendant’s attorneys are merely transmittal letters, which are not subject to the attorney-client privilege because they contain no confidential communications. ‘[T]urning documents over to one’s lawyer does not automatically cloak those documents in attorney-client privilege’ or

no doubt of that; the question is whether they were sent to counsel for the genuine purpose of obtaining legal advice.)¹⁹³ Other courts, however, sifted the wheat from the chaff, seizing on *Lee*'s accurate account that attachments are independently discoverable elsewhere despite their inclusion in a privileged email.¹⁹⁴ One court had to sustain every objection to a magistrate who had relied too blindly on *Lee* in his privilege rulings.¹⁹⁵

Several more cases in the later 2010s pretermitted *Lee* in a new reemergence of *Sneider*'s errors, however, beginning with the headstrong *Taber v. Ford Motor Co.*¹⁹⁶ It looked to a Missouri state case rejecting privilege in factual reports sent to counsel, rebuking the idea that "discoverable factual information can be made privileged by being recited by the attorney or the client in their confidential communications."¹⁹⁷ Persuaded as to the attachments at issue in its case, the court "concluded that the attorney-client privilege does not protect these documents from discovery as they contain factual information,"¹⁹⁸ ordering Ford to unredact and produce the portions of the memorandum to counsel that "similarly contain purely factual information," such as "what was observed during testing" and "the diagram showing damage."¹⁹⁹ Oddly, however, the court allowed privilege in a memorandum detailing "opinions of the Ford employee as to what he was observing during an inspection of the vehicle and directed to a claims analyst apparently in the Office of General Counsel."²⁰⁰ In seeking to dissect facts from legal intercourse within the narrative itself, rather than limiting itself to readily divisible attachments, *Taber* broke the taboo dating back to *Asousa* and *Medical Waste*.²⁰¹

work product protection." (quoting *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 300 n.57 (5th Cir. 2010))).

193. *Reid* added the observation that "Transocean cannot shield non-privileged materials from discovery by sending them to its attorney and then claiming the attorney-client privilege or work product protection because the materials are in the attorney's files," which would only be relevant were Transocean baselessly resisting production of the original copies *not* sent to counsel. *Reid*, 2014 WL 2740376, at *1. Still, the observation rings of *Fisher*'s arguments, though uncited. *See supra* Part III.C.1.

194. *E.g.*, *Slaven v. Great Am. Ins. Co.*, 83 F. Supp. 3d 789, 795 (N.D. Ill. 2015) ("Finally, while the attorney/client privilege protects communications between the carrier and outside counsel seeking or giving legal advice that refer to the otherwise discoverable documents, the documents referred to in the protected communication are, themselves, independently discoverable." (citing *Lee*)).

195. *See Miller UK Ltd. v. Caterpillar, Inc.*, No. 10 C 3770, 2015 WL 13652752, at *1 (N.D. Ill. Feb. 11, 2015) ("Thus, communicating with, mentioning, or copying a lawyer on an otherwise non-privileged communication, will not transform the non-privileged communication or attachment into a privileged one, even if the otherwise non-privileged communication was at the behest of the lawyer." (citing *Lee*)), *objections sustained*, No. 10-CV-03770, 2015 WL 14069754 (N.D. Ill. Sept. 24, 2015).

196. *Taber v. Ford Motor Co.*, No. 16-00162-CV-W-SWH, 2017 WL 4391779 (W.D. Mo. Sept. 29, 2017).

197. *Id.* at *6 (quoting *State ex rel. Great Amer. Ins. Co. v. Smith*, 574 S.W.2d 379, 385 (Mo. en banc 1978)).

198. *Id.*

199. *Id.* at *7.

200. *Id.*

201. *See supra* notes 77-86, 100-01, and accompanying text.

In 2018, *CCC v. Cardinal Health Managed Care* rejected the proponent's theory of "privilege by family" with *Muro* offered as support.²⁰² The court dwelt on the fact that the underlying documents sent to counsel were themselves prior communications with third parties, which the court believed made the content insusceptible of even later being rendered privileged because the original "third-party waiver" rule continued to intercede even after they were incorporated into a request to counsel.²⁰³ That is, information exchanged with a third party was simply immune from ever being privileged because such information could not constitute a client confidence, even if confided by the client to counsel in the utmost secrecy.²⁰⁴ Notably, the court omitted any discussion of the fact-communication dichotomy established by *Upjohn* that reprehended such a theory, rejecting *Muro* out of hand as "not *persua[sive]*."²⁰⁵

RTC Industries, Inc. v. Fasteners for Retail, Inc. too was self-assured in 2019.²⁰⁶ In examining several privilege log entries, the court rejected privilege over two dozen pages of internal emails collected and sent as an attachment to counsel in preparation for a meeting to formulate legal strategy regarding their contents.²⁰⁷ The court's analysis turned solely on the underlying emails standing alone, ignoring that they had been gathered for the purpose of provision to counsel as the subject on which legal advice was sought.²⁰⁸ More egregious still, the court admitted that the compilation "contains some markings that presumably identify certain emails that are particularly relevant, but these markings do not rise to the level of a communication meant to be protected by the attorney-client privilege," and thus had to be produced even though they did not appear in the original emails.²⁰⁹ That the marked emails did *in fact* constitute a communication with counsel was apparently irrelevant. *Muro* had recognized that clients could submit emails to their own counsel without their adversary learning precisely the items upon which they sought to obtain legal advice,²¹⁰ but *RTC* inexplicably looked

202. Carolina Coupon Clearing, Inc. v. Cardinal Health Managed Care Servs., LLC, No. 1:16CV412, 2018 WL 11424682, at *5 (M.D.N.C. Aug. 3, 2018) [hereinafter *CCC v. Cardinal Health Managed Care*].

203. *Id.* at *5–6.

204. *Id.* at *5 ("Documents do not contain 'client confidences' if they 'relate to business agreements with unrelated third parties, or general business matters or technical matters, unless they were communicated primarily for a legal purpose.' In this case, Defendants have not carried their burden of establishing that the communications with third parties in question would somehow also be communications with an attorney, much less for the purpose of securing that attorney's legal advice.") (citations omitted).

205. *Id.*

206. See *RTC Indus., Inc. v. Fasteners for Retail, Inc.*, No. 17-C-3595, 2019 WL 5003681, at *12 (N.D. Ill. Oct. 8, 2019).

207. *Id.* at *12.

208. *Id.* ("However, that does not make the email attachment privileged. The emails are communications between various FFR employees—none of whom are attorneys—and none of the communications say anything touching upon the need or desire for legal analysis or advice. . . . In short, the emails themselves do not contain anything that could be reasonably deemed to be privileged, and non-privileged documents do not become privileged simply because they are sent to an attorney.").

209. *Id.*

210. See *supra* notes 132–138 and accompanying text.

instead to the magistrate's report that *Muro* had overruled.²¹¹ *RTC* could, however, depend on other local rulings more aligned with its skepticism to privilege.²¹²

Not long after *Lee*, *FTC v. Boehringer Ingelheim Pharm., Inc.* provided a more faithful, and thus ambivalent, result.²¹³ In several challenged log entries involving emails with attachments, it found the email "privileged in its entirety" because "disclosure would reveal the facts transmitted to the attorneys from the Boehringer businesspeople which enabled counsel to give the corporation legal advice."²¹⁴ For others, however, it recited the theoretically unobjectionable truism that "attachments to privileged communications are not thereby *automatically* privileged,"²¹⁵ but followed thence a well-worn road to conclude that "the attachments must independently satisfy the requirements for the application of the attorney-client privilege."²¹⁶ Despite this doctrinal misstep, however, the court immediately added that "the email to which a document is attached necessarily provides some context for that assessment" and straightaway found all of the attachments privileged because, again, "one of their primary purposes was to enable Boehringer's counsel to advise it on how to settle the complex, interlocking lawsuits pending at the time."²¹⁷

It was not until 2021 that another case resurrected *Sneider*'s rule with robust analysis, this time relying on the antiquated *Fisher* decision, in *Doe v. Intermountain HealthCare, Inc.*²¹⁸ In support of their privilege, the defendants argued that "emails and documents attached to emails—although independently containing nonprivileged information—are nevertheless privileged because they relate to the facilitation of legal advice and revealing the contents of those documents would reveal the substance of privileged communications."²¹⁹ But the court accepted the plaintiff's counterargument and looked to the inapposite pre-email case of *Fisher* for the rule that "if attorney-client privilege protects an email itself, attachments to the email are not privileged unless the attached document is privileged when the client created it."²²⁰ *Pacamor Bearings and Renner* were duly trotted out to support this principle, invoking the hackneyed

211. *RTC*, 2019 WL 5003681, at *12.

212. *Id.* (citing Towne Place Condo. Ass'n v. Phila. Indem. Ins. Co., 284 F. Supp. 3d 889, 895 (N.D. Ill. 2018) and McCullough v. Frat. Order of Police, Chi. Lodge 7, 304 F.R.D. 232, 237 (N.D. Ill. 2014)).

213. See *Fed. Trade Comm'n v. Boehringer Ingelheim Pharm., Inc.*, 180 F. Supp. 3d 1 (D.D.C. 2016), *aff'd*, 892 F.3d 1264 (D.C. Cir. 2018).

214. *Id.* at 31 (D.D.C. 2016) (entry 1057); *see id.* (entry 2578).

215. *Id.* (emphasis added) (citing *O'Connor v. Boeing N.A., Inc.*, 185 F.R.D. 272, 280 (C.D. Cal. 1999); *Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 918 F. Supp. 491, 511 (D.N.H. 1996); *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980); and *Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990)).

216. *Id.* at 31-32 (citing *Leonen*, 135 F.R.D. at 98).

217. *Id.* at 32-33 (discussing how *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981) and *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757-60 (D.C. Cir. 2014), compelled the result).

218. See *Doe v. Intermountain HealthCare, Inc.*, No. 2:18-CV- 807, 2021 WL 425117, at *2-*3 (D. Utah Feb. 8, 2021).

219. *Id.*

220. *Id.*

bogeyman of clients artificially funneling their documents to counsel in vain pursuit of privilege.²²¹

Creditably, the court at least considered the defendants' protest that it was overextending *Fisher*, citing the email cases of *Hilton-Rorar*, *Barton*, and *Muro*.²²² The judge was unpersuaded, however, opining that those cases themselves contravened *Fisher*,²²³ even though they concerned a novel mode of communication unexamined in *Fisher*: email. The court observed that under the modern Part & Parcel Principle, which it felt ignored *Fisher*, all that needed to be asserted was that the documents were transferred with legal purpose—far too facile a bar:

The three cases that Defendants cite ignore *Fisher*. Under the three cited cases, all a client has to do to assert privilege over pre-existing, non-privileged emails and attachments forwarded to an attorney is to show that they were transmitted with an email or letter that is privileged because it seeks legal advice. Getting around *Fisher* cannot be that easy. It seems odd indeed to assert that if the taxpayers in *Fisher* had merely included the subpoenaed documents in a package with a cover letter that sought legal advice, all the attached documents to that letter would also become privileged. This court views that reading of *Fisher* with askance [*sic*] given that the *Fisher* court recognized that transferring the documents to legal counsel was for the express purpose of obtaining legal advice.²²⁴

To bolster its conclusion, the court recited the serpentine trail of jurisprudence stretching back to *Sneider*.²²⁵ But neither those cases nor *Intermountain* explained why “[g]etting around *Fisher*” could not be easy. Like its forebears, *Intermountain* itself ignored the critical distinction: the documents in *Fisher* were tangible objects and thus transfer to the attorney removed them from the possession of the client.

221. *Id.* (citing *Pacamor Bearings, Inc. v. Minebea Co.*, 918 F. Supp. 491, 511 (D.N.H. 1996) and *Renner v. Chase Manhattan Bank*, No. 98-CV-926, 2001 WL 1356192, at *5 (S.D.N.Y. Nov. 2, 2001)).

222. *Id.* at *3 (“Despite this authority, Defendants contended at oral argument that the court’s reading of *Fisher* was too broad and that when pre-existing, non-privileged emails or attachments are connected to privileged emails containing attorney-client communications, those forwarded emails and corresponding attachments become privileged too.”).

223. *Id.* (“This court will not follow these decisions because they ignore the Supreme Court’s holding in *Fisher*. . . . Therefore, even though these pre-existing documents were provided to the attorneys for the precise purpose of obtaining legal advice, the mere transfer of these documents to the attorney did not preclude them from being produced because they were not privileged while in the hands of the client.”).

224. *Id.*

225. *Id.* (“Not surprisingly, numerous courts have long agreed that *Fisher*’s reasoning is not so easily overcome. Therefore, pre-existing, non-privileged emails and attachments sent with a privileged communication seeking legal advice will not themselves be privileged merely because they were sent as part of a communication that was.” (citing *United States v. Osborn*, 561 F.2d 1334, 1338 (9th Cir. 1977); *Clavo v. Zarabian*, No. 03-CV-864, 2003 WL 24272641, at *1–2 (C.D. Cal. Sept. 24, 2003); *Guidry v. Jen Marine LLC*, No. 03-CV-18, 2003 WL 22038377, at *2 (E.D. La. Aug. 22, 2003); *Renner*, 2001 WL 1356192, at *5; *Draus v. Healthtrust, Inc.*, 172 F.R.D. 384, 393 (S.D. Ind. 1997); *Pacamor Bearings*, 918 F. Supp. at 511; *P & B Marina, L.P. v. Logrande*, 136 F.R.D. 50, 56 (E.D.N.Y. 1991); *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980))).

The nominal clash between *Fisher* and *Upjohn* will be explored further in a forthcoming article to disabuse any misconceptions, looking to the future of the Principle as underlain by the extant Supreme Court decisions bearing on its validity. In any event, *Intermountain* largely exhausted thought leadership in *Sneider*'s lineage to date.

Even at this late date, however, some courts could still be found hewing to *Sneider*'s now-ancient dictate with less introspection, as did *United States v. Community Health Network, Inc.*²²⁶ Albeit citing *RBS Citizens* as well, it looked all the way back to *Sneider* for its rule.²²⁷ At base, however, its complaint was the log inadequately justified attachments aside from their pendency on a privileged email, noting it was possible some of the attachments might be “saved” by more detail,²²⁸ especially given the descriptions of the emails themselves were “impermissibly vague.”²²⁹ The same year, another discarded the *Barton* application of *Upjohn*, instead opting to follow *Community Health*.²³⁰ Other cases were more muddled. One noted *Sneider*'s rule for attorney-client privilege, but ultimately found it inapplicable to the spousal privilege context.²³¹ Another court found that preexisting documents cannot be shielded simply because they were sent to counsel and directed production of the “underlying documents.”²³² This

226. See *United States v. Cmty. Health Network, Inc.*, No. 1:14-CV-01215, 2023 WL 3151847, at *6–8 (S.D. Ind. Apr. 28, 2023), *report and recommendation adopted sub nom. United States ex rel. Fischer v. Cmty. Health Network, Inc.*, No. 1:14-CV-01215, 2023 WL 4577673 (S.D. Ind. June 27, 2023).

227. See *Cmty. Health*, 2023 WL 3151847 at *7.

228. *Id.*

229. *Id.* at *8.

230. See *Cardinal Square, LLC v. QBE Specialty Ins. Co.*, No. 123-CV-00114, 2023 WL 8471849, at *2 (S.D. Ind. Dec. 7, 2023). (“Plaintiff also argues that it withholds certain documents on the basis that producing such documents, such as communications from Defendant itself, policy provisions, or factual reports, as ‘would allow QBE to reverse engineer the thoughts and impressions of Cardinal Square’s attorneys by matching up dates of communications disclosed in the privilege log to the underlying attachments.’ [Dkt. 120 at 15.] This argument is based on *Upjohn Co. v. U.S.*, which has been interpreted by the Northern District of Indiana, among other courts, to mean that even though the underlying content of the independently discoverable attachment is not privileged, the act of sending the attachment is privileged. See *Barton v. Zimmer Inc.* However, as Defendant points out, other courts, including one in the Southern District of Indiana, have found that ‘attachments to an email do not become privileged just by virtue of the privileged email itself.’ *United States v. Community Health Network, Inc.* Indeed, ‘merely communicating with a lawyer or copying a lawyer on an otherwise non-privileged communication will not transform the non-privileged communication or attachment into a privileged one, even if the otherwise non-privileged communication was at the behest of the lawyer.’ *Id.*, citing *Towne Place Condo. Ass’n v. Phila. Indem. Ins. Co.*” (citations omitted)).

231. *United States ex rel. Scott v. Humana, Inc.*, No. 3:18-CV-61, 2019 WL 7404032, at *3 (W.D. Ky. Sept. 24, 2019) (citing *Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990)’s citation of *Sneider*, 91 F.R.D. at 4).

232. *NAACP v. E. Ramapo Cent. Sch. Dist.*, No. 17 Civ. 8943, 2019 WL 12248031, at *3 (S.D.N.Y. Mar. 14, 2019) [hereinafter *NAACP v. E. Ramapo Cent. Sch. Dist.*] (“E-mails Mr. White received from third parties that were not prepared in anticipation of litigation or notes that he created through his own independent investigations are not privileged. Furthermore, documents created years before this litigation commenced do not become privileged simply because they were shared with Plaintiffs’ counsel. Thus, Plaintiffs are directed to produce the following documents from the privilege log relating to Mr. White: . . . Plaintiffs may make appropriate redactions to cover e-mails forwarding the attached documents, but the underlying documents (i.e.,

would have been proper if it referred to the *original* underlying documents, but it invaded the privilege inasmuch as it referred to the copies of documents actually attached to communications with counsel. As usual, the confusion derived from the counterintuitive idea that two identical copies of a document might be subject to divergent privilege analyses, with one discoverable and the other protected.

B. A CREDIBLE CONSENSUS BASED IN CONCEPTUAL COHERENCE

More thoughtful modern cases, however, have had no difficulty mastering this enigma.²³³ In 2014, *United States v. Davita, Inc.* made short work of the “many” emails with attachments on the log.²³⁴ Broadly, the court found that attached drafts that were sent to obtain advice of counsel or ones that conveyed advice were privileged.²³⁵ The court reasoned that “the proper drafting of sensitive business documents ‘is often the type of communication at the core of the attorney-client privilege,’ and attorney-client communications discussing and attaching such drafts should generally be entitled to a privilege.”²³⁶ Thus, the court “treated drafts of documents included within or attached to attorney-client communications discussing the contents of those drafts as part of the communication itself, and subject to a claim of privilege.”²³⁷ On the other hand, the court properly overruled the claims of privilege as to drafts or other documents lacking any indicia that legal advice was sought or given.²³⁸ Conversely, even “finalized, non-draft” attachments were found privileged where the communication *did* clearly evince a legal purpose.²³⁹ Separately, *Davita* embraced the *Rhoads* standard for email strings forwarding other emails.²⁴⁰

communications with the third parties and Mr. White’s notes) must be produced.”). The court’s sparse ruling does not make clear which scenario it thought applied, but its overall rhetoric evinces skepticism of the Principle, and its description of the items ordered produced suggests the Principle was disregarded.

233. Some, indeed, have been exceedingly brief in accepting the ascendant theory with scant introspection. *See, e.g., Drummond Co. v. Collingsworth*, No. CV-2:11-CV-3695-RDP, 2019 WL 5076554, at *4 (N.D. Ala. Aug. 16, 2019) (citing *Barton v. Zimmer Inc.*, No. 1:06-CV-208, 2008 WL 80647 (N.D. Ind. Jan. 7, 2008) and *Jackson v. Sara Lee Bakery Grp.*, No. CV 07-PWG-1238-S, 2008 WL 11377664, at *4 (N.D. Ala. Apr. 11, 2008)).

234. *United States v. Davita, Inc.*, 301 F.R.D. 676, 683 (N.D. Ga. 2014) (citing *Oasis Int’l Waters, Inc. v. United States*, 110 Fed. Cl. 87, 99 (Fed. Cl. 2013)), *on reconsideration*, No. 1:07-CV-2509, 2014 WL 11531065 (May 21, 2014).

235. *See id.*

236. *Id.* (quoting *United Food and Com. Workers Union v. Chesapeake Energy Corp.*, No. CIV-09-1114-D, 2012 WL 2370637, at *10-11 (W.D. Okla. June 22, 2012)).

237. *Id.*

238. *See id.* (“However, the Court in its *in camera* review generally rejected Defendants’ claims of privilege where a copy of a draft business document was simply distributed to an attorney without a request for legal comment or advice; without comments or notes made by the attorney reflecting legal advice; or lacking other circumstances in which the distribution of the document reflected a request for legal advice.”).

239. *See id.* (“From time to time, Defendants also withheld as privileged finalized, non-draft business documents that were transmitted to lawyers. The Court attempted to review these communications to determine whether the transmission of the business document was part of, or otherwise reflected, a request for legal advice. If so, the Court generally upheld the claim of privilege as to the communication as a whole, including the business document.”).

240. *See id.* at 684-685.

General Electric Co. v. United States provided a clear and concise enunciation in 2015.²⁴¹ The court immediately rebuked the government for assailing the privilege of attachments to concededly privileged emails, despite the “well-established law that information communicated to an attorney in connection with obtaining or rendering legal advice is properly subject to a claim of privilege, even if the information standing alone would not otherwise be subject to a claim of privilege.”²⁴² The government fared no better with its “claims that only confidential or secret facts that may have been communicated in an attachment to an otherwise privileged communication may be subject to a claim of privilege.”²⁴³ Not so, said the court: “This argument, however, conflates the requirement that an attorney-client *communication* be confidential, with a non-existent requirement that the underlying *information* that is transmitted be non-public or confidential.”²⁴⁴ In the end, “any public document that a client sends a lawyer might be subject to a claim of privilege if disclosure would reveal that it was communicated in confidence to an attorney in connection with the seeking or receipt of legal advice.”²⁴⁵

In re NC Swine Farm Nuisance Litigation, like many other cases since, found *General Electric* highly persuasive.²⁴⁶ It quoted an entire paragraph—italicizing the critical line that “the fact that the [attached] news article is a quintessentially public document would not defeat a claim of privilege”—before concluding that “the privileged nature of the communication between Defendant’s employee and its counsel seeking legal advice is not defeated by the publicly-available nature of the underlying report” attached.²⁴⁷ Likewise, *Durling v. Papa John’s International, Inc.*, affirmed rightly that “[t]o the extent PJI maintains that any attachment to a privileged e-mail is *automatically* privileged, PJI’s argument fails.”²⁴⁸ Rather, privilege

241. *See Gen. Elec. Co. v. United States*, No. 3:14-cv-00190, 2015 WL 5443479 (D. Conn. Sept. 15, 2015).

242. *Id.* at *1 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 390, 395 (1981) and *Bernbach v. Timex Corp.*, 174 F.R.D. 9, 10 (D. Conn. 1997)). Incidentally, the court also noted that the government was inconsistently disregarding its own argument in asserting privilege on attachments of its own. *See id.*

243. *Id.* at *2.

244. *Id.* (citing *United States v. Cunningham*, 672 F.2d 1064, 1073, n.8 (2d Cir. 1982)).

245. *Id.* Going on, the court conjured an example nearly identical to that in the original *Part & Parcel* article. Compare *Gen. Elec. Co.*, 2015 WL 5443479 at *2 (“Imagine, for example, that a company executive sent the company’s counsel a news article about alleged bid-rigging activities within the company’s industry; if the executive did so for the confidential purpose of seeking advice about the company’s legal obligations or liability exposure, the fact that the news article is a quintessentially public document would not defeat a claim of privilege. Accordingly, the fact that numerous and concededly privileged GE email communications included attachments (such as draft board meeting minutes, presentations, and spreadsheets) evincing facts that were known to third parties who were not part of the privileged communications does not render these documents free from a valid claim of privilege in the context of their inclusion within otherwise privileged communications.”), with *Sunshine, Part & Parcel*, *supra* note 3, at 48-49 (relating such a parable, inspired by the *Upjohn* case).

246. *See In re NC Swine Farm Nuisance Litig.*, No. 5:15-CV-13-BR, 2017 WL 2313470, at *2 (E.D.N.C. May 26, 2017).

247. *Id.* (quoting *Gen. Elec. Co.*, 2015 WL 5443479, at *2).

248. *Durling v. Papa John’s Int’l, Inc.*, No. 16-CIV-3592, 2018 WL 557915, at *8 (S.D.N.Y. Jan. 24, 2018).

in the attachment depends on the usual standards for attorney client privilege.²⁴⁹ Looking to *General Electric*, the court explained: “When assessing whether an attachment is privileged, PJI’s counsel can consider the contents of the parent e-mail and need not view the attachment as an entirely distinct and independent document.”²⁵⁰ Other sequelae have been even briefer, citing *General Electric* dispositively as authority for sustaining the Part & Parcel claim.²⁵¹

The year 2021 brought not only *Intermountain* but also a direct counterpoint decided mere months later. At issue in *Willis Elec. Co. v. Polygroup Trading Ltd.* was a single, mysterious request to a company’s patent counsel.²⁵² Attached to the request were images of the prototype, and the court ultimately split the baby in Solomonic fashion, specifying that if nonprivileged copies could not be located elsewhere, the attachments would have to be detached and produced, but “dissociate[d]” from the privileged request. This was because the *facts depicted* in the pictorial representations could not be privileged and wholly sequestered from discovery, even if the sole instance that had been located to date was privileged.²⁵³ The court explained

249. *See id.* (“Whether an attachment to a privileged e-mail is itself privileged will depend on the circumstances. The general standard for the attorney-client privilege applies. To be subject to a claim of attorney-client privilege, an attachment must have been communicated in confidence between counsel and client for the purpose of obtaining or providing legal advice.”).

250. *Id.* (“A document that a client sends a lawyer ‘might be subject to a claim of privilege if disclosure would reveal that it was communicated in confidence to an attorney in connection with the seeking or receipt of legal advice.’” (quoting *Gen. Elec. Co.*, 2015 WL 5443479, at *2)).

251. *See, e.g., In re Martinez Sampedro*, No. 3:18-MC-47, 2020 WL 8922834, at *2 (D. Conn. Mar. 2, 2020) (“Thus, whereas each document, standing alone, may not contain privileged information, in this context, they were properly withheld as privileged . . .”) (citing *General Electric*); *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md-2836, 2020 WL 1593544, at *5 (E.D. Va. Feb. 6, 2020) (“At this stage of the proceedings, the court finds Merck’s log adequately asserts its claims of privilege with respect to the communications it seeks to protect, and it will not require the company to further supplement the log by providing individual Bates numbers specifying which stand-alone attachments accompanied each withheld email. It is important, however, to note the limits of Merck’s claim. It is not seeking to protect from disclosure the attachments themselves, which have already been produced. As set forth above, the materials submitted for in camera review, which included several of these emails and their non-privileged attachments, they all reflect an ongoing process of review and revision. The non-privileged materials were not conveyed to the attorney solely for information purposes such that the attorney’s awareness of the material might have independent, non-privileged relevance. Instead, they are the subject of the advice being sought.”). One began with *General Electric* and *Muro* before finding, after thoughtful analysis, that Part & Parcel applied in the context of marital privilege as well. *See Matter of Search of Info. Associated with rickmaike@yahoo.com that is Stored at Premises Controlled by Yahoo! Inc.*, No. 4:15-MJ-00042, 2020 WL 4373447, at *4-*5 (W.D. Ky. July 10, 2020) [hereinafter *In re Search of Yahoo!*], *report and recommendation adopted*, No. 4:15MJ-00042-HBB-JHM, 2020 WL 4369448 (W.D. Ky. July 30, 2020).

252. *See Willis Elec. Co. v. Polygroup Trading Ltd.*, No. 15-cv-3443, 2021 WL 568454 (D. Minn. Feb. 16, 2021). “Mysterious” is apt because the proponent could not locate an actual copy of the email transmitting the request to counsel. Therefore, the court had to look to circumstantial evidence of a past practice of sending such requests to the lawyer, as well as return mail replying to the missing request. The actual communication under review was a *draft* of a request to counsel being prepared by the company, together with the attachments to the draft. But in light of the circumstantial evidence, the court treated it as tantamount to the actual, absent requesting email. *See id.* at *5.

253. *See id.* (“For the following reasons, the Court concludes that the photos and videos of the Polygroup prototype depicted in the attachments are not protected by the attorney-client privilege.”).

its reasoning at length because “[i]n the era of e-discovery, lower courts have differed with respect to how *Upjohn*’s holding applies to email attachments.”²⁵⁴

It first took on the majority approach of the “large set of lower courts [that] interpreted *Upjohn* to mean that even though the underlying content of the independently-discoverable attachments is not privileged, the act of sending the attachments is privileged.”²⁵⁵ It distilled their philosophy briefly: “By separating the act of attaching a document to an email from the attachment’s *contents*, these lower courts maintain that they are safeguarding against exposure of the substance of the otherwise-privileged email,” being “concerned that if the act of attachment were disclosed, opposing counsel would be able to ‘reverse engineer’ the contents of the otherwise-privileged email from the attachments.”²⁵⁶ This was somewhat reductionist, since these courts had generally viewed attachments as an integral portion of the communication itself, not merely revelatory of the communication, but nonetheless conveyed their gravamen succinctly.²⁵⁷ *Willis* then addressed the rule of the “[o]ther group of lower courts” holding that “for the attorney-client privilege to apply to attachments, each attachment must qualify for the privilege” in isolation.²⁵⁸

Weighing the two approaches, *Willis* was “convinced that the approach taken by those courts recognizing some limited protection for email attachments is the better reasoned of the two lines of cases....”²⁵⁹ Opining (“respectfully”) that *Intermountain* misread *Hilton-Rorar*, *Barton*, and *Muro*, the court also thought *Fisher* and *Upjohn* were best read in harmony as supporting the dominant approach, citing to the original *Part & Parcel* article.²⁶⁰ In sum, quoting the article, the court concluded that “[o]nly the instance of a document attached to a communication with counsel is privileged by virtue of attorney-client privilege; other copies of the same document do not acquire an abiding immunity from discovery based on counsel’s former or future involvement.”²⁶¹ This meant that Polygroup was entitled to the photographs standing alone, just not the copies attached to the attorney-client communication, a distinction that would ordinarily be satisfied by other copies produced in discovery.²⁶² But given *Willis* avowed that it had located no other extant copies to date

254. *Id.* at *6 (“Lower courts agree that an otherwise-discoverable attachment to a privileged email to counsel is not automatically cloaked in privilege. But lower courts have not always been clear about what protection—if any—applies to such attachments and have taken two different (although arguably not entirely distinct) approaches to independently-discoverable attachments.”).

255. *Id.*

256. *Id.*

257. *See id.* (citing *Muro v. Target Corp.*, 250 F.R.D 350, 363 (N.D. Ill. 2007) and *Hilton-Rorar v. State & Fed. Commc’n Inc.*, No. 5:09-CV-01004, 2010 WL 1486916, at *8 (N.D. Ohio Apr. 13, 2010)).

258. *Id.* at *7.

259. *Id.*

260. *Id.* (citing *Sunshine, Part & Parcel*, *supra* note 3, at 66 n.73).

261. *Id.* (citing *Sunshine, Part & Parcel*, *supra* note 3, at 63-64).

262. *Id.* at *7-8 (citing *Rainey v. Plainfield Cnty. Consol. Sch. Dist. No. 202, No. 07 C 3566*, 2009 WL 1033654 (N.D. Ill. Apr. 16, 2009)).

(understandably, given they dated from a decade ago), the court thought that the special measures it had ordered were the equitable accommodation.²⁶³

The same year, *Elm 3DS Innovations, LLC v. Samsung Electronics Co.* likewise acknowledged the “varying approaches regarding the privilege claims over email attachments.”²⁶⁴ Magistrate Judge Jennifer Hall admitted that both approaches had their merits, and thus explained her accommodation in a lucid vernacular, mirroring *Willis*’s compromise:

Here is how I see it. The emails themselves demonstrate that the client sender (or client recipient) had the non-privileged article in their possession because at one point they sent (or received) it. The client cannot immunize discovery of those articles merely because they were sent to (or received from) their lawyer. Nor can the client conceal the fact that they were and are in possession of those articles. On the other hand, I am sensitive to the possibility that the fact that a client sent (or received) a particular article to (or from) his attorney on a certain date can implicate privilege concerns.

In view of the foregoing, this is how the parties should proceed with respect to this group. Plaintiff must either (1) produce the non-privileged attachments or (2) if Plaintiff contends that the act of sending a particular attachment is privileged, confirm that the attachment has already been produced in discovery under circumstances that demonstrate which custodians had possession of it.²⁶⁵

The protocol engineered by *Willis* and standardized in *Elm* was admirably tidy. The party resisting discovery could safeguard its privilege, and demanding parties could be guaranteed precisely the information they were permitted—namely the otherwise nonprivileged article and with whom it was found—and no more. Given such a ready expediency, one wonders why the modest little Part & Parcel Principle has been subject to such enduring dispute.²⁶⁶ Indeed, another court in 2021,

263. *Id.* at *8 (“However, this case presents a practical challenge that is not present in the ordinary case. At the hearing, Willis’s counsel represented that other than the photo and video files attached to the April 12th email, Willis had so far located no other electronic copies of the images and video files at issue. This is not altogether surprising given that the electronic files were created nearly nine years ago Accordingly, the Court concludes that though the fact of attachment of the photos and videos to the April 12th email as part of the draft communication to patent counsel is protected, the pre-existing photos and videos are independently discoverable. . . . If that search reveals other copies not previously located by Willis, Willis must produce those images and video files. If other versions cannot be found after a reasonably diligent search, then Willis must produce the photos and videos at issue.”).

264. *Elm 3DS Innovations, LLC v. Samsung Elecs. Co.*, C.A. No. 14-1439-LPS-JLH, 2021 WL 4819904, at *4–5 (D. Del. Oct. 15, 2021) (“I don’t need to get into the weeds on all the ways that attachments might be privileged because, in this case, I only need to decide how to handle emails between privileged persons that attach articles that are clearly not privileged standing alone.”) (citing *Willis*, 2021 WL 568454, and *Doe v. Intermountain HealthCare, Inc.*, No. 2:18-CV- 807, 2021 WL 425117 (D. Utah Feb. 8, 2021)).

265. *Id.* (footnotes and citations omitted). Again, there is some loose language here: the attachments of the first prong must not actually be *non-privileged* if they are susceptible to an assertion of privilege under the second—but Magistrate Hall may be taken to mean that the first prong refers only to attachments where the proponent concedes no privilege inhered in the act of attachment.

266. Compare Sunshine, *Part & Parcel*, *supra* note 3, at 59 (“The Principle is really just an inoffensive corollary of well-established privilege law: a communication with counsel seeking legal advice is privileged

apparently unaware of *Willis* and *Elm*, stumbled across the older strain of logic presented in *Rhoads* interpreting the *Muro* rule, and found it convincing, but declined to parse proprieties in a log when it could just rule on the documents in question.²⁶⁷ As for the documents, those where the underlying substance conveyed to the lawyer evinced no purpose for legal advice were ordered disclosed, and those in which anything of actual content was included were held protected.²⁶⁸

Contemporary cases have nonetheless gravitated less to conciliation than adoption of the ascendant approach.²⁶⁹ As a premise, *America West Bank Members, L.C. v. Utah* accepted that forwarding a preexisting document to counsel did not automatically confer privilege, but neither did the fact the material was forwarded foreclose privilege.²⁷⁰ Crucially, “the identity of an unprotected document a client sends her lawyer could ‘reveal that it was communicated in confidence to an attorney in connection with the seeking or receipt of legal advice.’”²⁷¹ Ultimately, the court agreed that all of the Part & Parcel claims on forwarded documents were “proper” because “even the forwarding of otherwise public information can reflect a client’s concern and reveal the client sought legal advice in connection with it sufficient to merit attorney-client privilege protections.”²⁷² Likewise, two cases in the District of New Jersey in 2017 and 2021 relied on *Muro* and *Rhoads*

irrespective of its technological division into multiple digital files.”), *with Sunshine, Part & Parcel, supra* note 3, at 73 (“Qui bonum?”) (quoting EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 1366 (5th ed. 2007)).

267. Diamond Servs. Mgmt. Co., LLC v. C&C Jewelry Mfg., Inc., No. 19 C 7675, 2021 WL 5834004, at *3 (N.D. Ill. Dec. 9, 2021).

268. *Compare id.* at *6 (“all of the non-privileged email messages consist of nothing more than introductions between lawyers or transmittals of drafts of what eventually became the common interest agreement between C&C and the Sterling Retailers; the actual draft documents are not included and no attorney impressions or advice are conveyed”), *with id.* at *7, *9 (protected). The court did, however, find some documents unprotected on the separate ground that they were outside the parties’ common legal interest. *Id.* at *8.

269. *Belcastro v. United Airlines, Inc.*, No. 17 C 1682, 2021 WL 1531601, at *6, n.2 (N.D. Ill. Apr. 19, 2021) provides a fascinatingly reticulated application of the Principle somewhat at odds with its ready acceptance elsewhere. On review of the privilege log, the judge observed that the plaintiff had sent contemporaneously what appeared to be the same attachment, in separate emails, both to his lawyer for legal advice, and to a third party for non-legal advice. *Id.* at *6. Faced with claims of privilege over both, the court ordered the latter be produced in whole, and that the attachment to the lawyer also be produced because it was the same document being simultaneously divulged to a third party. *Id.* However, without the two presumably identical copies of the attachment before him, the judge allowed that he was making an assumption that could be wrong: “The Court is basing its assumption that the attachments are the same on the similar timing of the emails and the similar document titles. To the extent the documents are different, Plaintiff need only provide the version sent to union representative Riley.” *Id.* at n.3.

270. *Am. W. Bank Members, L.C. v. Utah*, No. 2:16-CV-00326, 2022 WL 103736, at *9 (D. Utah Jan. 11, 2022).

271. *Id.* (quoting *Gen. Elec. Co. v. United States*, No. 3:14-cv-00190, 2015 WL 5443479 (D. Conn. Sept. 15, 2015)) (citing *Hilton-Rorar v. State & Fed. Commc’ns Inc.*, No. 5:09-CV-01004, 2010 WL 1486916 (N.D. Ohio Apr. 13, 2010) and *Barton v. Zimmer Inc.*, No. 1:06-CV-208, 2008 WL 80647 (N.D. Ind. Jan. 7, 2008), whilst contrasting *Doe v. Intermountain HealthCare, Inc.*, No. 2:18-CV- 807, 2021 WL 425117 (D. Utah Feb. 8, 2021) and its interpretation of *Fisher v. United States*, 425 U.S. 391, 403-04 (1976)).

272. *Id.*

for their result.²⁷³ In the same district, *Salomon v. Wolff* essentially adopted the prevailing approach unquestioned in 2022, quoting *Hilton-Rorar* for the result that “to the ‘extent th[at] e-mails contain attachments . . . not otherwise independently privileged, the attorney-client privilege nevertheless applies because to order the disclosure of those e-mails would necessarily reveal the substance of a confidential client communication made seeking legal advice.’”²⁷⁴

C. AN APT CAPSTONE TO HALF A CENTURY OF CASE LAW: *LINET*

Befitting the long involvement of the Northern District of Illinois, that district recently gave the most thorough treatment to the Part & Parcel Principle yet, as *Linet Americas, Inc. v. Hill-Rom Holdings, Inc.* offered something of a retrospective capstone to the past half century in 2024.²⁷⁵ At issue were thirty-three documents attached to emails with Linet’s counsel, presumed *arguendo* to themselves be privileged: the question was whether the attachments were as well.²⁷⁶ Linet invoked the Part & Parcel Principle, asserting that attachments to privileged emails seeking legal advice are just as privileged as the emails, citing *Rainey* and *Muro*.²⁷⁷ Linet also avowed that twenty-nine of the challenged attachments had already been produced where other nonprivileged copies existed, as those cases demanded.²⁷⁸ For its part, Hill-Rom maintained “there is a *per se* rule that attachments to privileged communications cannot be withheld without an independent basis for privilege,” apparently ignoring Linet’s precedents in its briefing.²⁷⁹

Dryly, the court began with the obvious: “The status of attachments to privileged communications is more nuanced than Hill[-R]om acknowledges”—noting that both parties had sought to rely on *Upjohn*.²⁸⁰ But neither party was wholly right, for “*Upjohn* does not directly address the issue presented here, namely whether non-privileged documents attached to privileged communications can be

273. *Jorjani v. N.J. Inst. of Tech.*, No. CV 18-11693, 2021 WL 4237255, at *4 (D.N.J. Sept. 17, 2021); *Engage Healthcare Commc’ns, LLC v. Intellisphere, LLC*, No. 12CV00787, 2017 WL 10259770, at *3 (D.N.J. Sept. 12, 2017), *report and recommendation adopted*, No. CV 12-787, 2017 WL 10259774 (D.N.J. Nov. 21, 2017).

274. United States *ex rel. Salomon v. Wolff*, 2022 WL 17327214, at *2-*3 (D.N.J. Mar. 14, 2022) (quoting *Hilton-Rorar*, 2010 WL 1486916, at *8) (citing *Gen. Elec. Co. v. United States*, No. 3:14-cv-00190, 2015 WL 5443479 (D. Conn. Sept. 15, 2015); *United States v. Davita, Inc.*, 301 F.R.D. 676 (N.D. Ga. 2014); *Barton*, 2008 WL 80647; *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007); *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007); *In re NC Swine Farm Nuisance Litig.*, No. 5:15-CV-13-BR, 2017 WL 2313470 (E.D.N.C. May 26, 2017); and *Durling v. Papa John’s Int’l, Inc.*, No. 16-CIV-3592, 2018 WL 557915 (S.D.N.Y. Jan. 24, 2018)).

275. *Linet Ams., Inc. v. Hill-Rom Holdings, Inc.*, 740 F. Supp. 3d 685 (N.D. Ill. 2024).

276. *Id.* at *703.

277. *Id.* at *13.

278. *Id.*

279. *Id.* (“Hillrom does not address the cases cited in the March 5 Letter”).

280. *Id.* (“Linet cites *Upjohn* for the position that the attorney-client privilege also protects ‘the giving of information to the lawyer to enable him to give sound and informed advice.’ Hillrom says *Upjohn* provides that a party ‘may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.’”) (citations to briefing omitted).

withheld as a privileged part of the communication, and whether those attachments should be produced as they exist independent of the privileged communication.”²⁸¹ Rather, the court thought “the question presented here is whether requiring *Linet* to produce the attachments to privileged communications with counsel is akin to requiring the disclosure of non-privileged facts permitted under *Upjohn* or is closer to the disclosure of privileged communications about those facts that *Upjohn* held can be withheld as privileged.”²⁸² Helpfully, *Linet* finally foregrounded, as the pivotal question, *Sneider*’s original sin of blithely characterizing attachments as “facts” without further analysis.

Hill-Rom relied principally on only two recent cases: *Lee* and *RBS Citizens*. As for *Lee*, the court thought that *Linet* had avoided what *Lee* actually forbade, namely the withholding of the attachments qua independent documents.²⁸³ Far from such a sin, *Linet* had averred that in every case where it could locate them—indeed, in twenty-nine of the thirty-three items at issue—it had duly produced the underlying, non-privileged version of the attachment.²⁸⁴ (In fairness, the *Lee* court might have been surprised at what *Linet* thought it said.²⁸⁵) As for *RBS Citizens*, Hill-Rom misread the holding,²⁸⁶ albeit understandably given the opaque upside-down reasoning.²⁸⁷ Moreover, the language cited from *RBS Citizens* had come from the magistrate judge’s report overruled by the district court in *Muro*.²⁸⁸ The superseding decision by the district court, affirmed by the Seventh Circuit, in fact contradicted Hill-Rom, which erred gravely in relying unannounced on an abrogated precedent.²⁸⁹

Hill-Rom fell back on the intuitive misconception animating much of the *Sneider* lineage—“*Linet* cannot simultaneously produce certain documents while also asserting privilege over those same documents when they are attached to privileged communications”—but the court disagreed.²⁹⁰ As counterintuitive as the notion might be, invading privilege was a greater sin.²⁹¹ Finally, trying to

281. *Id.*

282. *Id.* at 704.

283. *Id.* (discussing *Lee v. Chi. Youth Ctrs.*, 304 F.R.D. 242, 249 (N.D. Ill. 2014)).

284. *Id.*

285. *See supra* notes 177-189 and accompanying text.

286. *Linet*, 740 F. Supp. 3d at 704 (*RBS Citizens* only “found non-privileged but responsive attachments to non-privileged emails should be produced, and in some instances, the non-responsive, non-privileged emails to which those documents were attached may also need to be produced to provide context.”).

287. *See supra* notes 92-97 and accompanying text.

288. *Linet*, 740 F. Supp. 3d at 705 (citing *Acosta v. Target Corp.*, 281 F.R.D. 314, 317-19 (N.D. Ill. 2012), as summarizing the convoluted history in *Muro*). For itself, the court denominated the district court’s decision as *Muro III* to distinguish it from the magistrate’s report, which it called *Muro I*. *Id.*

289. *See id.* at 705 (“For all these reasons, Hillrom’s cited authority does not support its position.”).

290. *Id.* at 706.

291. *Id.* (“As the court acknowledged in *Muro III*, ‘[i]t could well be confusing to require a party to list documents in its privilege log that it had already furnished to opposing counsel’ but it reasoned ‘[m]ore troublingly, the disclosure of this information could very well be a breach of attorney-client privilege. If the opposing party can gather enough material from the log and already produced materials to discover the topic or contents of material forwarded to counsel, then a privileged communication has been revealed to that party.’ *Id.*”).

sidestep the court's rejection of *Lee*'s applicability, Hill-Rom questioned whether the separate versions Linet produced were really identical, and if they were not, insisted that the copies in the privileged communication must then be disgorged.²⁹² Conceding Linet had not been utterly clear about how similar the produced copies were, the court found the question irrelevant: "To the extent there are some differences between the documents, however, Linet has asserted privilege over the version that was provided to its counsel for purposes of seeking legal advice."²⁹³ To be fair, the court acknowledged a number of cases in its own jurisdiction espousing Hill-Rom's *per se* rule.²⁹⁴ But the court simply found the majority approach applying the Part & Parcel Principle to be more logically compelling.²⁹⁵ *Intermountain*, it added by (lengthy) footnote, had been mistaken in believing that *Fisher* foreclosed the Principle.²⁹⁶

Rather, *Willis* was Linet's exemplar of an instructive case.²⁹⁷ The court seemingly endorsed its reasoning in full, and noted that as Linet had already produced most of the attachments in some form, it did not confront a situation similar to *Willis* requiring extraordinary measures.²⁹⁸ Nonetheless, it outlined at length the procedures Linet should follow to account for the nonprivileged versions of the privileged attachments.²⁹⁹ As for the four attachments of which no version had been produced, Linet argued that they had been created for the purpose of conveyance to counsel to obtain legal advice, thus did not exist in nonprivileged form, and therefore should be immune from production.³⁰⁰ In short, Linet asserted

(emphasis in original). Hillrom fails to address this nuance.").

292. *Id.* ("Hillrom also suggests that regardless of whether Linet has or will produce 'documents corresponding to' those listed in the log, to the extent those documents are not identical, the attachments listed on the log (in the form those attachments were sent to counsel) must also be produced.").

293. *Id.*

294. *Id.* at 706 n.16 (citing *RTC Indus., Inc. v. Fasteners for Retail, Inc.*, No. 17 C 3595, 2019 WL 5003681, at *12 (N.D. Ill. Oct. 8, 2019) ("the emails themselves do not contain anything that could be reasonably deemed to be privileged, and non-privileged documents do not become privileged simply because they are sent to an attorney," citing, among other decisions, *Muro I*, 2006 WL 3422181, at *5"); *United States v. Cnty. Health Network, Inc.*, No. 1:14-cv-01215-RLY-MKK, 2023 WL 3151847, at *6-8 (S.D. Ind. Apr. 28, 2023) ("Attachments to an email do not become privileged just by virtue of the privileged nature of the email itself" citing *RBS Citizens*, 291 F.R.D. at 221, *Muro I*, 2006 WL 3422181, at *5; and *Sneider*, 91 F.R.D. at 4"), report and recommendation adopted sub nom. *United States ex rel. Fischer v. Cnty. Health Network, Inc.*, 2023 WL 4577673 (S.D. Ind. June 27, 2023)).

295. See *Linet*, 740 F. Supp. 3d at 707 (citing *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007); *Rainey v. Plainfield Cnty. Consol. Sch. Dist. No. 202*, No. 07 C 3566, 2009 WL 1033654 (N.D. Ill. Apr. 16, 2009); *U. S. ex rel. Salomon v. Wolff*, No. 217CV05456JLLCLW, 2022 WL 17327214 (D.N.J. Mar. 14, 2022); *Willis Elec. Co. v. Polygroup Trading Ltd.*, No. 15-CV-3443-WMW-KMM, 2021 WL 568454 (D. Minn. Feb. 16, 2021); *Hilton-Rorar v. State and Fed. Commun. Inc.*, No. 5:09-CV-01004, 2010 WL 1486916 (N.D. Ohio Apr. 13, 2010); *Barton v. Zimmer Inc.*, No. CIV.A. 1:06-CV-208, 2008 WL 80647 (N.D. Ind. Jan. 7, 2008); *Am. W. Bank Members, L.C. v. Utah*, No. 2:16-CV-00326-CW-DAO, 2022 WL 103736 (D. Utah Jan. 11, 2022); and *Gen. Elec. Co. v. U.S.*, No. 3:14-CV-00190 (JAM), 2015 WL 5443479 (D. Conn. Sept. 15, 2015)).

296. *Id.* at 708 n.17 (quoting *Sunshine, Part & Parcel*, *supra* note 3, at 66-67 n.73 (citation corrected)).

297. *Id.* at 707-08.

298. *Id.* at 708-09.

299. *Id.*

300. *Id.* at 709.

that these attachments were *inherently* privileged, not dependent on the happenstance of attachment to a communication.³⁰¹ Thus it sought to distinguish these attachments from those in *Willis* and *Elm*,³⁰² which all agreed were not inherently privileged, and might exist solely in privileged form purely by accident—and thus might need to be dissociated and divulged.³⁰³ Unable to determine inherent privilege from the log, the *Linet* court ordered the four documents be submitted for *in camera* inspection, bringing its lengthy but edifying analysis to an end.³⁰⁴

IV. A PRACTITIONER'S COMPENDIUM OF PART & PARCEL PRINCIPLE CASES

So matters stood as of 2024. The following table collects cases that directly ruled on the applicability of privilege to attachments specifically, as discussed in the preceding pages, for the use of the busy practitioner. Those that spoke generally to the fact-communication dichotomy, like *Upjohn*, or principally to the general implications of prior or future confidentiality, like *Ampicillin*, are not—nor could they be—exhaustively compiled, as such abstractions are legion in the case reporters.³⁰⁵ Even this compendious listing inevitably omits some opinions on privilege log entries addressing attachments that invoke or abjure the Principle, especially unreported decisions, as only the more significant could be noted without this Article swelling to hundreds of pages. Although notable and key cases in the Principle's development are apparent from the preceding discussion, they are also flagged in the notes below (⌘ and ⚡) for easy reference.

FIGURE 1: PART & PARCEL CASES

Fn	Year	Case	Juris.	Cir.	Notes
43	1980	Sneider v. Kimberly-Clark Corp.	N.D. Ill.	7th	▼⌘
160	1988	Solomon v. Scientific Am., Inc.	S.D.N.Y.	2d	▲
51	1990	Leonen v. Johns-Manville	D.N.J.	3d	▼⌘

301. *Id.* (“Accordingly, the question is whether Linet has established a basis for withholding these attachments entirely from production in any form based on privilege grounds.”).

302. *See id.*

303. *See* cases cited *supra* notes 252, 264.

304. *Linet*, 740 F. Supp. 3d at 710-11.

305. *See, e.g., In re Abilify (Aripiprazole) Prod. Liab. Litig.*, No. 3:16-MD-2734, 2017 WL 6757558, at *7 (N.D. Fla. Dec. 29, 2017) (“Simply because factual information has been transmitted to an attorney does not make the underlying factual information privileged. On the other hand, there is little question that where a client (or agent of the client) submits information to an attorney for legal advice the attorney-client privilege protects the communication from disclosure.”) (citing *Johnson v. Ford Motor Co.*, No. 3:13-CV-06529, 2015 WL 5193568, at *3 (S.D. W. Va. Sept. 3, 2015)).

Fn	Year	Case	Juris.	Cir.	Notes
52	1991	P & B Marina, Ltd. P'ship v. Logrande	E.D.N.Y.	2d	▼
160	1991	Angst v. Mack Trucks, Inc.	E.D. Pa.	3d	▲
54	1996	Pacamor Bearings, Inc. v. Minebea Co., Ltd.	D.N.H.	1st	▼*▲
56	1996	Applied Telematics, Inc. v. Sprint Commc'ns Co., L.P.	E.D. Pa.	3d	▼
55	1997	Draus v. Healthtrust, Inc.	S.D. Ind.	7th	▼
55	1998	Med. Waste Techs. L.L.C. v. Alexian Bros. Med. Ctr.	N.D. Ill.	7th	▼▲*
57	1999	O'Connor v. Boeing N. Am., Inc.	C.D. Cal.	9th	▼
114	1999	Alexander v. FBI	D.D.C.	D.C.	▲
72	1999	Beal v. Treasure Chest Casino	E.D. La.	5th	▼
55	2000	McCook Metals, LLC v. Alcoa, Inc.	N.D. Ill.	7th	▼
61	2001	Mold-Masters Ltd. v. Husky Injection Molding Sys. Ltd.	N.D. Ill.	7th	▼*
66	2001	Renner v. Chase Manhattan Bank	S.D.N.Y.	2d	▼*
165	2002	United States v. ChevronTexaco Corp.	N.D. Cal.	9th	▲
115	2003	Robinson v. Tex. Auto. Dealers Ass'n	E.D. Tex.	5th	▲*
74	2003	<i>In re Gabapentin Patent Litig.</i>	D.N.J.	3d	▼
71	2003	Guidry v. Jen Marine LLC	E.D. La.	5th	▼
73	2003	Clavo v. Zarabian	C.D. Cal.	9th	▼
76	2005	Asousa P'ship v. Smithfield Foods, Inc.	E.D. Pa.	3d	▼▲*
103	2006	Eastman Kodak Co. v. Agfa-Gevaert N.V.	W.D.N.Y.	2d	▲
86	2007	Evergreen Trading, LLC <i>ex rel.</i> Nussdorf v. U.S.	Fed. Cl.	Fed.	▼

Fn	Year	Case	Juris.	Cir.	Notes
126	2007	<i>In re Vioxx Products Liab. Litig.</i>	E.D. La.	5th	▲▼※
131	2007	Muro v. Target Corp.	N.D. Ill.	7th	▲⊗
138	2008	Barton v. Zimmer Inc.	N.D. Ind.	7th	▲※
141	2008	Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.	E.D. Pa.	3d	▲↗⊗
233	2008	Jackson v. Sara Lee Bakery Grp.	N.D. Ala.	11th	▲
149	2009	Rainey v. Plainfield Cnty. Consol. Sch. Dist. No. 202	N.D. Ill.	7th	▲※
145	2009	Thompson v. Buhrs Americas, Inc.	D. Minn.	8th	▲↗
168	2009	Dawe v. Corr. USA	E.D. Cal.	9th	▲
148	2009	Treat v. Tom Kelley Buick Pontiac GMC, Inc.	N.D. Ind.	7th	▲▼↗
144	2010	U.S. Sec. & Exch. Comm'n v. Hollnagel	N.D. Ill.	7th	▲↗
145	2010	Cont'l Cas. Co. v. St. Paul Surplus Lines Ins. Co.	E.D. Cal.	9th	▲
153	2010	Hilton-Rorar v. State & Fed. Commc'ns Inc.	N.D. Ohio	6th	▲※
139	2010	N. Valley Commc'ns, L.L.C. v. Qwest Commc'ns Corp.	D.S.D.	8th	▲▼
146	2011	U.S. Sec. & Exch. Comm'n v. Wyly	S.D.N.Y.	2d	▲▼↗
92	2013	RBS Citizens, N.A. v. Husain	N.D. Ill.	7th	▼※
176	2013	AM Gen. Holdings LLC v. Renco Grp., Inc.	Del. Ch.	n/a	▼
111	2013	Oasis Int'l Waters, Inc. v. United States	Fed. Cl.	Fed.	▲※
162	2013	Phillips v. C.R. Bard, Inc.	D. Nev.	9th	▲↗
145	2013	BreathableBaby, LLC v. Crown Crafts, Inc.	D. Minn.	8th	▲↗
148	2013	Mills v. Cnty. Action Program	S.D. Ind.	7th	▲≈

Fn	Year	Case	Juris.	Cir.	Notes
179	2014	McCullough v. Frat. Order of Police, Chi. Lodge 7	N.D. Ill.	7th	▼
177	2014	Lee v. Chi. Youth Ctrs.	N.D. Ill.	7th	▼⊗
2135	2014	United States v. Davita, Inc.	N.D. Ga.	11th	▲?※
192	2014	Reid v. Transocean Offshore Deepwater Drilling, Inc.	E.D. La.	5th	▼
241	2015	General Electric Co. v. United States	D. Conn.	2d	▲⊗
194	2015	Slaven v. Great Am. Ins. Co.	N.D. Ill.	7th	▼
192	2016	Rowan v. Sunflower Elec. Power Corp.	D. Kan.	10th	▼
213	2016	FTC v. Boehringer Ingelheim Pharm., Inc.	D.D.C.	D.C.	▼▲
246	2017	<i>In re NC Swine Farm Nuisance Litig.</i>	E.D.N.C.	4th	▲
196	2017	Taber v. Ford Motor Co.	W.D. Mo.	8th	▼?*
273	2017	Engage Healthcare Commc'ns, LLC v. Intellisphere, LLC	D.N.J.	3d	▲
248	2018	Durling v. Papa John's Int'l, Inc.	S.D.N.Y.	2d	▲
212	2018	Towne Place Condo. Ass'n v. Phila. Indem. Ins. Co.	N.D. Ill.	7th	▼
202	2018	CCC v. Cardinal Health Managed Care	M.D.N.C.	4th	▼
233	2019	Drummond Co., Inc. v. Collingsworth	N.D. Ala.	11th	▲
232	2019	NAACP v. E. Ramapo Cent. Sch. Dist.	S.D.N.Y.	2d	▼▲
206	2019	RTC Indus., Inc. v. Fasteners for Retail, Inc.	N.D. Ill.	7th	▼?*
231	2019	U.S. <i>ex rel.</i> Scott v. Humana, Inc.	W.D. Ky.	6th	▲▼≈
251	2020	<i>In re Martinez Sampedro</i>	D. Conn.	2d	▲
251	2020	<i>In re Zetia (Ezetimibe) Antitrust Litig.</i>	E.D. Va.	4th	▲?*

Fn	Year	Case	Juris.	Cir.	Notes
251	2020	<i>In re Search of Yahoo!</i>	W.D. Ky.	6th	▲≈
273	2021	Jorjani v. N.J. Inst. of Tech.	D.N.J.	3d	▲
218	2021	Doe v. Intermountain HealthCare, Inc.	D. Utah	10th	▼⊗
252	2021	Willis Elec. Co. v. Polygroup Trading Ltd.	D. Minn.	8th	▲⊗⊗
264	2021	Elm 3DS Innovations, LLC v. Samsung Elecs. Co.	D. Del.	3d	▲⊗⊗
269	2021	Belcastro v. United Airlines, Inc.	N.D. Ill.	7th	▲
267	2021	Diamond Servs. Mgmt. Co. v. C&C Jewelry Mfg.	N.D. Ill.	7th	▲▼⊗
270	2022	Am. W. Bank Members, L.C. v. Utah	D. Utah	10th	▲
274	2022	U.S. <i>ex rel.</i> Salomon v. Wolff	D.N.J.	3d	▲
226	2023	United States v. Cmty. Health Network, Inc.	S.D. Ind.	7th	▼※
230	2023	Cardinal Square, LLC v. QBE Specialty Ins. Co.	S.D. Ind.	7th	▼
275	2024	Linet Americas, Inc. v. Hill-Rom Holdings, Inc.	N.D. Ill.	7th	▲⊗⊗

Legend of Notes

▲	Case espouses and applies the Part & Parcel Principle
▼	Case denies the Part & Parcel Principle and analyzes attachments in isolation
▲▼	Ambivalent holding that supports the Principle but with caveats or countervailing statements
▼▲	Ambivalent holding that rebuffs the Principle but with caveats or countervailing statements
⊗	Case upholds the Principle but prescribes some form of accounting for nonprivileged copies
≈	Case discusses the Principle in the context of another privilege (e.g. marital or work product)

Fn	Year	Case	Juris.	Cir.	Notes
⌘		Notable case with considerable analysis and/or recurrent attention in future cases			
☀		Key case with very detailed analysis and/or frequent reliance in future cases			

It may not be apparent from this compendium, but the total number of rulings going each way is somewhat even, albeit tilting toward the Principle: thirty-three in the negative and forty-two in the affirmative. There are trends to be seen within the rough equipoise, however. Negative cases rejecting Part & Parcel reasoning predominated in the sporadic early rulings, accompanied by only a modest emergence in affirmative rulings leading up to *Muro*'s much-cited rejoinder in 2007, followed by an upwelling of uncontested acceptance of the Principle in the years that immediately followed—engendering the original article published in 2014. Bourgeoning consensus fractured rapidly thereafter, however. The last twelve years have seen a persistently higher rate of cases overall, with about the same overall ratio of negative to affirmative rulings (fifteen to twenty-two), book-ended by the detailed interrogations reaching opposite results in *Lee* and *Linet*, and anchored by the dueling *Intermountain* and *Willis* in the middle. Judicial familiarity with the issue has increased, but the debate remains just as unresolved, if more sharply defined. The most recent years, however, have seen a renewed surge in affirmative rulings, encouraging this Article's return to the subject. A histogram by quadrennia (to smooth annual variation) illustrates the timeline in terms of quantity, depicted in Figure 2.

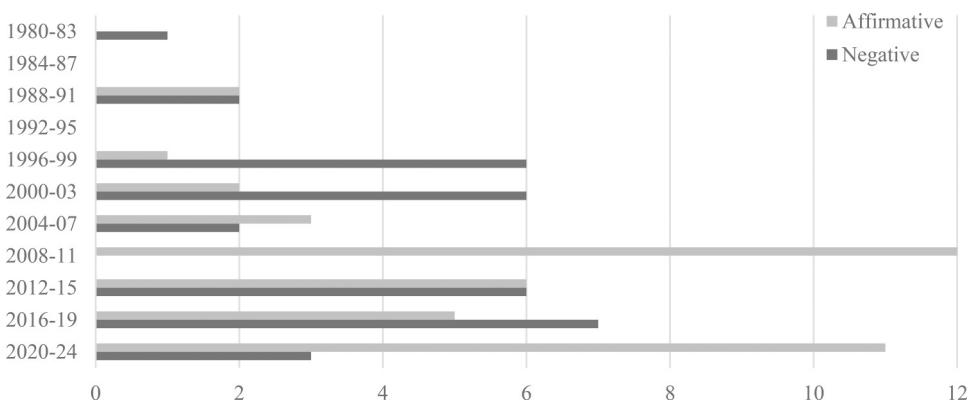


Figure 2: Part & Parcel Cases by Year

Attention should be drawn to the role of the Northern District of Illinois. Possibly reflecting the doctrinal influence of the celebrated early Seventh Circuit decision in *Radiant Burners*,³⁰⁶ that judicial district has generated not only the lion's share of the more incisive treatments of the Part & Parcel Principle—both *Sneider and Muro*, *Mold-Masters*, *Medical Waste*, *Rainey*, *RTC*, and the modern point and counterpoint *Lee* and *Linet*—but also a regular litany of more ordinary cases upholding or rejecting the Principle. An entire article could be penned on the Principle as treated in that single court alone, but given their multitude, beyond substantial waypoints in jurisprudential development, the cases cited herein are perforce exemplary.³⁰⁷ Fairly, there is something of happenstance in the district's regular appearance, as local precedent tends to engender more. Still, the geographically expansive Eighth and Tenth Circuits feature far more seldomly in the juridical dialogue, yet their courts yielded the incisive 2021 opinions in *Intermountain* and *Willis*.

Finally, it should not go unobserved that cases upholding the Part & Parcel Principle in recent years (notably both *Willis* and *Linet*) have renewed the requirement that the producing party account in some manner for the production of nonprivileged versions of the attachments held privileged in an attorney communication, noted in the listing by \mathcal{P} . This doctrinal compromise—which might be called the Hall Accommodation after the magistrate judge in *Elm* who articulated in plain English a procedure for applying it—seems a felicitous future settling point were the Part & Parcel Principle to achieve hegemony.³⁰⁸ Indeed, this approach is only a refinement of practical considerations and questions adumbrated by many prior courts beginning with *Rhoads* in 2008.³⁰⁹ How

306. See *Radiant Burners, Inc. v. Am. Gas Ass'n*, 320 F.2d 314, 324 (7th Cir. 1963). The fact that the circuit accounts for nearly a third of the cases, 22, with Indiana districts also somewhat overrepresented amongst relevant cases—*Draus v. Healthtrust, Inc.*, 172 F.R.D. 384 (S.D. Ind. 1997); *Barton v. Zimmer Inc.*, No. CIV.A. 1:06-CV-208, 2008 WL 80647 (N.D. Ind. Jan. 7, 2008); *Treat v. Tom Kelley Buick Pontiac GMC, Inc.*, No. 1:08-CV-173, 2009 WL 1543651 (N.D. Ind. June 2, 2009); *Mills v. Cnty. Action Program*, No. 3:12-CV-64, 2013 WL 1703742, at *3 (S.D. Ind. Apr. 19, 2013); *United States v. Cnty. Health Network, Inc.*, No. 1:14-CV-01215, 2023 WL 3151847, at *6–8 (S.D. Ind. Apr. 28, 2023), *report and recommendation adopted sub nom.*; *United States ex rel. Fischer v. Cnty. Health Network, Inc.*, No. 1:14-CV-01215, 2023 WL 4577673 (S.D. Ind. June 27, 2023); and *Cardinal Square, LLC v. QBE Specialty Ins. Co.*, No. 123-CV-00114, 2023 WL 8471849 (S.D. Ind. Dec. 7, 2023)—lends credence to this etiology.

307. This author has previously observed that many, if not most, rulings on privilege are not only unreported but do not even appear in WestLaw or Lexis, being magistrate or special master resolutions not further pursued in the district court proper. See *Sunshine, FRE 502*, *supra* note 17, at 697 n.425 (“Undoubtedly far more lurk in the orders of the magistrate judges, special masters, and other adjuncts to Article III jurists who so often decide matters of privilege that do not make their way into centralized electronic databases.”).

308. Magistrate judges, saddled with the principal burden of discovery in many cases, too seldom seek or receive credit for the great innovations they have pioneered the practice of ediscovery. *Contra John M. Facciola & Jonathan M. Redgrave, Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19 (2009); *Sunshine, Categorical*, *supra* note 15, *passim* (discussing Magistrate Judge Facciola's views, contributions, and the Facciola-Redgrave Framework for discovery at length).

309. See, e.g., *U.S. Sec. & Exch. Comm'n v. Hollnagel*, No. 07 CV 4538, 2010 WL 11586980, at *6–7 (N.D. Ill. Jan. 22, 2010); *U.S. Sec. & Exch. Comm'n v. Wyly*, No. 10 CIV. 5760 SAS, 2011 WL 3055396, at *4

such an accommodation might apply in the modern technological era of emails and attachments will be explored in the further article forthcoming in the next volume of this Journal.

V. CONCLUSION: THE FUTURE IS NOW

The future is now: the eager practitioner awaiting answers need not wait long. This immediately forthcoming continuation arises in large part because technology has not abided whilst the courts mused indecisively over the fate of email attachments.³¹⁰ A new species of nominal attachments to communications, widely denominated (unoriginally) as “modern attachments” by ediscovery professionals, has entered common usage, in which the pre-existing document to which the email refers is no longer embedded in any technical sense. It is merely referred to by a hyperlink in an email, which, by the miracle of technology, can whisk the authorized email recipient to the intended document actually stored somewhere far away via the internet.³¹¹ As with email itself, how exactly these “modern attachments” work technologically is a vital question in how the law should treat them, and deserves its own dedicated scrutiny untainted by past presumptions.³¹²

Meanwhile, the Supreme Court has not returned to the subject of privilege in attachments, if ever it did in the first place. *Fisher* and *Upjohn* offer only meager fodder for resolving the question that *Sneider* raised and purported to resolve fifty years ago.³¹³ Nevertheless, the foundational privilege cases from the nation’s highest Court must be given their due deference, especially inasmuch as various

(S.D.N.Y. July 19, 2011) (“Nevertheless, the unprivileged material will have to be produced in some form, as it is the transmission that is protected, not the underlying information. So even if the email were protected as within the common interest, the attachment (Document 3.1) will have to be produced.”); *Treat*, 2009 WL 1543651, at *12 (“As Kelley concedes (Defs.’ Br. 10), the documents attached to most of the faxes and emails (KEL000002, 6–8, 10–14, 16–23, 25–27, 191–203, 205–10) do not appear to be either confidential attorney-client communications or work product, as they consist of documents from personnel files and materials from the EEOC. However, because Kelley asserts that it has already produced these materials during discovery, the Court will not order Kelley to produce duplicative material.”) Elsewhere, *Treat* recited the rule from *Muro* as the governing principle. *Treat*, 2009 WL 1543651 at *12.

310. It arises also because the sagacious editors of this Journal suggested that this author bifurcate the submitted manuscript into two parts: one dealing with the past (*viz.* this Article, more or less) and the other with the future of the Part & Parcel Principle (the promised forthcoming article).

311. Kelly A. Lavelle, *Navigating the Shift: Understanding Modern Attachments in E-Discovery*, LEGAL INTELLIGENCER (June 10, 2024), <https://www.law.com/thelegalintelligencer/2024/06/10/navigating-the-shift-understanding-modern-attachments-in-e-discovery/> [https://perma.cc/GHN5-FDUE]; Lea M. Bays & Stuart A. Davidson, *The Missing Links: Why Hyperlinks Must Be Treated as Attachments in Electronic Discovery*, 92 U. CIN. L. REV. 979, 980 (2024); Staci D. Kaliner, Monica McCarroll & Ben Barnes, *Let’s Start by Calling Them What They Are for Discovery: “Pointers” not “Modern Attachments”*, ALM LEGALTECH NEWS (Aug. 11, 2022), <https://www.law.com/legaltechnews/2022/08/11/lets-start-by-calling-them-what-they-are-for-discovery-pointers-not-modern-attachments/> [https://perma.cc/93ES-859E].

312. See Lavelle, *supra* note 311; Bays & Davidson, *supra* note 311, at 999–00; Kaliner, McCarroll & Barnes, *supra* note 311.

313. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Fisher v. United States*, 425 U.S. 391, 403–405 (1976); *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980), *abrogated in unrelated part by In re Queen’s Univ. at Kingston*, 820 F.3d 1287 (Fed. Cir. 2016).

lower courts have sparred over their application to the matter of email attachments.³¹⁴ The forthcoming article will take on that duty as well, recognizing that the footnote offered by the original article on *Part & Parcel* raised more questions about reconciling the two cases than it answered.³¹⁵ Laying a thorough philosophical foundation grounded in what sparse guidance the Supreme Court has offered is a necessary predicate to a stable edifice of law.

Finally, there is hope. *Linet* did more than summarize the past; it offered a model of ratiocination for the future. Other cases of the last decade, notably *Willis* and *Elm*, but also *Lee* and *Intermountain*, and indeed their predecessors in elder times, will inform how the still-warring views of lower courts can be reconciled.³¹⁶ It would be foolish to predict again a swift juridical quietus after this author presumed too much ten years ago, only to find the debate avidly renewed after the original article was published. But it is only natural to hope for a decisive resolution to a pestersome conundrum that has vexed courts and litigants for half a century. Manifestly, this author has argued that the straightforward Principle should emerge victorious on the merits rather than by the prerogative of practicalities, but any durable resolution would be preferable to the present protracted uncertainty. Advancements in technology now growing in prominence demand a reevaluation of theoretical presumptions about attachments, as actual practice obviates or obsolesces the seemingly intractable debate on real-world application of the first principles of privilege. The third installment of this decadal inquiry will examine how modern technological practice can inform that aspirational judicial resolution in light of aging but still-potent precedents together with their recent progeny. The past is only prologue—a necessary if perhaps meandering preamble—but the future is now.

314. See, e.g., *Linet Ams., Inc. v. Hill-Rom Holdings, Inc.*, 740 F. Supp. 3d 685, 703–05 (N.D. Ill. Jul. 15, 2024) (discussed *supra* Part IV.C).

315. See *Sunshine, Part & Parcel*, *supra* note 3, at 66–67 n.73.

316. See *supra* Parts III–IV.