# CLARIFYING THE *KOVEL* CONUNDRUM

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## ABSTRACT

*Ever since the attorney-client privilege was expanded to sometimes include experts, courts and litigants have struggled with drawing the line between protected communications and discoverable information. The seminal case* U.S. v. Kovel *attempted to discern a bright-line test, but in the 50-plus years since that decision, courts remain unclear on how best to decide issues of privilege when third parties are involved. This is the* Kovel *conundrum.*

*This Article presents a new way of looking at the* Kovel *doctrine and untangles the conundrum from the ground up. By visualizing the foundational logic of the attorney-client privilege, analyzing courts' divergent rationales for applying the privilege to expert witnesses, and synthesizing commentators' proposed solutions, this Article proposes a modern solution to a longstanding issue. Then, armed with a logical framework for analyzing scenarios involving the attorney-client-expert privilege, this Article proposes a solution that provides clarification on this evidentiary conundrum.*

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*"[B]y reason of the complexity and difficulty of our law . . . it is absolutely necessary that a man should have recourse to the assistance of professional lawyers, and it is equally necessary that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret."*[1]

## INTRODUCTION

The attorney-client privilege was expanded in 1961 by the Second Circuit in *United States v. Kovel* to protect certain communications between attorneys, clients, and third-party consultants.[2] Unfortunately, *Kovel* did not create a definitive test for determining when and how to apply the attorney-client privilege to third-party experts in all situations.[3] This has led to

1. United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961) (quoting Jessel, M.R. in Anderson v. Bank, 2 Ch.D. 644, 649 (1876)).

2. *Id.* at 921–22.

3. *See id.* at 922–23.

decades of contradictory judicial decisions.[4] Now, courts endeavoring to rule on assertions of third-party attorney-client privilege are forced to untangle years of inconsistent case law that has done nothing but undermine the very privilege it was created to protect.

This Article examines the current state of the law regarding the applicability of the attorney-client privilege to third-party agents under the *Kovel* doctrine. It argues that federal courts have failed to apply the *Kovel* doctrine consistently, specifically in regards to these three questions: (1) what level of independent analysis should be allowed in the expert's work; (2) how necessary must the expert's work be in relation to the attorney's ability to provide effective legal advice, and (3) whether the expert's work is purely for legal advice or if it is intertwined with business advice. The result of decades of indeterminacy regarding these unanswered questions is what this Article calls "the *Kovel* conundrum."

This Article seeks to reconcile these inconsistencies and articulate a unitary standard for *Kovel* by expanding the proposed nexus test, developed by Professor Michele DeStefano Beardslee, of the University of Miami School of Law, in 2009.[5] While DeStefano Beardslee's original nexus test provides a solid doctrinal foundation for the future of *Kovel*, this Article recommends adding additional factors to the nexus to better assist experts, lawyers, and clients understand the limits of the attorney-client-agent privilege. Adding these factors would specifically address issues one and three of the *Kovel* doctrine.

## I. BACKGROUND

All evidentiary privileges are exceptions to the general rule that witnesses must always adhere to court orders requiring

4. *See, e.g.*, *Attorney-Client Privilege and the* Kovel *Doctrine: Should Wisconsin Extend the Privilege to Communications with Third-Party Consultants?*, 102 MARQ. L. REV. 605, 623, 630 (2018).

5. Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727, 785 (2009).

them to disclose all relevant information during litigation.[6] However, over time, some relationships have been deemed so important that a departure from the general rule is warranted.[7] These exceptions occur through judicial decisions and rarely through statutory enforcement.[8] The Federal Rules of Evidence do not explicitly establish any privileges and instead only ask that the courts interpret the common law "in light of reason and experience," unless otherwise codified by the Constitution, Congress, or Supreme Court.[9] Dean Wigmore, in his treatise on evidence, presented the following factors to assist courts in determining whether to recognize a privilege:

> (1) The communications must originate in a *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation[ship] between the parties. (3) The *relation[ship]* must be one [that] in the opinion of the community ought to be sedulously *fostered*. (4) The *injury* that would inure to the relation[ship] by the disclosure must be *greater than the benefit* thereby gained for the correct disposal of litigation.[10]

The relationship between a client and his attorney is one relationship that has been deemed important enough to depart from this general rule of automatic disclosure. The attorney-client privilege was founded on the concept that if the law allows a client to speak freely to her attorney, even about potentially detrimental information, the attorney will be able to

6. *See* United States v. Bryan, 339 U.S. 323, 331 (1950); Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (explaining that exceptions to the duty to give testimony are only justified by a public good overriding this duty).

7. *See Jaffee*, 518 U.S. at 8–10.

8. *See id.* at 8–9.

9. FED. R. EVID. 501.

10. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (McNaughton rev., vol. 8, 1961).

provide better legal advice.[11] Dean Wigmore asserted that "but for the assurance of confidentiality furnished by a formal . . . privilege," clients would be unwilling to make disclosures necessary to obtain legal advice.[12] Courts dating as far back as the sixteenth century have concluded that a client's communications to her attorney should be protected.[13] In fact, it is the common law's oldest privilege.[14]

Professor Imwinkelried noted in his treatise that "all American courts agree that the core rights conferred by the [attorney-client] privilege are the client's rights to refuse to disclose and to prevent the disclosure of his or her confidential communications to the attorney."[15] Under some circumstances, an attorney's statements to her client will be privileged.[16] While some courts restrict the attorney's privileged communications only to those that tend to reveal the content of a client's statement to the attorney,[17] the Supreme Court in *Upjohn* held that the attorney-client privilege protects "the giving of professional advice" to the client.[18] However, Professor Imwinkelried believes that there now exists a "virtually unanimous agreement that to some degree, most professional

11. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

12. *See* Edward J. Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 317 (2003).

13. *See* WIGMORE, *supra* note 10, § 2290 at 542 n.1 (citing examples of client-focused privileges during the 1500s and 1600s); *see also* Dennis v. Codrington, Cary 100, 21 Eng. Rep. 53 (Ch. 1580) ("A counsellor not to be examined of any matter, wherein he hath be of counsel.").

14. PAUL F. ROTHSTEIN & SYDNEY A. BECKMAN, FEDERAL TESTIMONIAL PRIVILEGES § 2:1 (2021) (citing WIGMORE, *supra* note 10, § 2290).

15. *See* Edward J. Imwinkelried & Andrew Amoroso, *The Application of the Attorney-Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need for a More Precise, Fundamental Analysis*, 48 HOUS. L. REV. 265, 267 (2011) (citing 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES §§ 6.6.1–6.3 (Richard D. Friedman ed., 2d ed. 2010)).

16. *Id.* at 268.

17. *Id.*; *see also* Gen-Probe Inc. v. Amoco Corp., No. 94 C 5069, 1996 WL 264707, at *3 n.10 (N.D. Ill. May 16, 1996) ("[C]ommunications from the attorney to the client should be privileged only if the statements do in fact reveal, directly or indirectly, the substance of a confidential communication by the client.").

18. Upjohn Co. v. United States, 449 U.S. 383, 390 (1981).

privileges are 'two-way' streets, applying to the professional's statements as well as those of the layperson consulting the professional."[19]

### A. *The Traditional Privilege*

The attorney-client privilege, upon closer technical examination, is a composition of two distinct privileges: one that protects what the client says to her attorney and another that protects the attorney's advice back to that client.[20] This Article illustrates the privilege through a series of graphics. The first aspect of this privilege, communications from a client ("C") to her attorney ("A"), is shown below in Figure 1:[21]

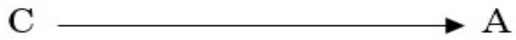


Figure 1

Direct Client-to-Attorney Communication[22]

The second aspect of the attorney-client privilege, relating to communications emanating from the attorney going back to the client, is shown below in Figure 2:[23]


Figure 2

Direct Attorney-to-Client Communication[24]

19. Imwinkelried & Amoroso, *supra* note 15, at 268 n.14.

20. *See id.* at 267–68 (analyzing the doctrinal bases for each direction of the privilege separately).

21. *See id.* at 267. This Article will rely on, and expand upon, Professor Imwinkelried's graphical depictions of discrete aspects of the attorney-client privilege.

22. *Id.* The first two uses of Professor Imwinkelried's figures will be identically replicated.

23. *See id.* at 268.

24. *Id.*

Having established the foundational premises of protecting communications from a client to her lawyer and vice versa, Professor Imwinkelried concluded that there is "virtually unanimous agreement that to some degree, most professional privileges are 'two-way' streets. . . ."[25] Accordingly, having established that both statements originating from the client to the attorney, and *vice versa*, are protected under the attorney-client privilege, it is appropriate to use Euclidian logic and the transitive property to condense Figures 1 and 2 to show the symmetry of this privilege.[26] Shown below is Figure 3, the "two-way street" attorney-client privilege:


Figure 3

Direct Attorney-Client Communication (two-way street)[27]

### B. *The Privilege and Third-Parties*

Now that the basic attorney-client privilege has been established, the complexities of expanding this doctrine to include additional parties can be discussed. As a general matter, if a privileged communication is intentionally made in the presence of a third party, it cannot be deemed to have been made in confidence and, therefore, is not entitled to protection under a privilege.[28] This is called a waiver of privilege.[29]

25. *Id.* at 268 n.14.

26. *See generally* ROBIN HARTSHORNE, GEOMETRY: EUCLID AND BEYOND (3d ed. 2013) (explaining Euclidian logic); *Transitive Law*, ENCYC. BRITANNICA, https://www.britannica.com/topic/transitive-law (last visited Oct. 20, 2022) (explaining the transitive property).

27. This figure was created by the author based on Figures 1 and 2 previously created by Imwinkelried. *See* Imwinkelried & Amoroso, *supra* note 15, at 267–68 figs.1 & 2.

28. ROTHSTEIN & BECKMAN, *supra* note 14, § 2:16.

29. *See, e.g.*, Alicia K. Corcoran, *The Accountant Client Privilege: A Prescription for Confidentiality or Just a Placebo?*, 34 NEW ENG. L. REV. 697, 721 (2000); DeStefano Beardslee, *supra* note 5, at 731.

Over time, exceptions to the waiver rule have grown out of the common law for various reasons, including, most importantly for this Article, the need for attorneys to have assistance with providing legal advice.[30] This exception has become known as the agency theory,[31] and the most famous expansion of this doctrine is the 1961 Second Circuit *Kovel* case.[32]

## II. *KOVEL* EXPANDS THE PRIVILEGE

The attorney-client privilege's concept of agency was extended to third-party experts for the first time in 1961 by the Second Circuit's decision of *United States v. Kovel*.[33] Kovel, an accountant and former Internal Revenue Service agent, had been an employee at a law firm that specialized in tax law since 1943.[34] In 1961, one of the firm's clients, Hopps, went under investigation for federal income tax violations.[35] Kovel was subpoenaed to appear in front of a grand jury in the Southern District of New York and was questioned about his involvement in Hopps' case.[36]

30. *See* ROTHSTEIN & BECKMAN, *supra* note 14, § 2:16 (first citing Conn. Indem. Co. v. Carrier Haulers, Inc., 197 F.R.D. 564, 572–73 (W.D.N.C. 2000) (noting that the privilege protects confidential communications between outside counsel, the lawyers assisting him, and his staff); then citing Owens v. First Fam. Fin. Serv., Inc., 379 F. Supp. 2d 840, 848 (S.D. Miss. 2005) ("When a paralegal works on behalf of a lawyer who is representing a client, '[t]he attorney-client privilege applies with equal force to paralegals.'")).

31. *See* DeStefano Beardslee, *supra* note 5, at 744.

32. United States v. Kovel, 296 F.2d 918, 921–22 (2d Cir. 1961); *see* FED. R. EVID. 503(b) advisory committee's note to 1972 amendment ("The privilege extends to communications (1) between client or his representative and lawyer or his representative, (2) between lawyer and lawyer's representative, (3) by client or his lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or the client and a representative of the client, and (5) between lawyers representing the client. All these communications must be specifically for the purpose of obtaining legal services for the client; otherwise the privilege does not attach."); *see also* FED. R. EVID. 503.

33. 296 F.2d at 921–22.

34. *Id.* at 919.

35. *Id.*

36. *Id.*

When Kovel was asked about his work on the case, he refused to answer, asserting attorney-client privilege.[37] Kovel maintained his assertion of privilege despite attacks from both the judge[38] and the prosecutor,[39] which eventually led to him being held in criminal contempt.[40] Kovel's contempt was immediately reviewed in an interlocutory appeal.[41]

On appeal, the inquiry into Kovel's contempt forced Judge Friendly, writing for the Second Circuit, to grapple with two conflicting forces foundational to the attorney-client privilege: (1) the general principle that courts should restrict, not expand, the scope of evidentiary privileges; and (2) the reality that the complexity of litigation demands lawyers have assistance from others.[42] In establishing the first principle, Friendly cited Dean Wigmore's treatise and concluded that the "general teaching [is] that '[t]he investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of [the attorney-client privilege].'"[43] He supported this proposition by plainly concluding that his opinion was not an attempt to broadly expand the scope of the attorney-client privilege to include every third-party agent an attorney merely "plac[es] . . . on their payrolls and maintain[s]. . . in their offices."[44] Nonetheless, he inevitably deviated from this general principle because of what he referred to as "the complexities of modern existence."[45]

In defending the second principle, that attorneys need assistance in order to effectively represent their clients, Judge

37. *Id.*

38. *See id.* at 919–20 (describing Kovel attempting to defend himself, and the judge responding that he was "not going to listen").

39. *See id.* at 919 (explaining that the Assistant United States Attorney told Kovel that "the attorney-client privilege did not apply to one who was not an attorney").

40. *See id.* at 920.

41. *See id.*

42. *See id.* at 918, 921.

43. *Id.* at 921 (quoting WIGMORE, *supra* note 10, § 2192).

44. *See id.*

45. *Id.* (citing WIGMORE, *supra* note 10, § 2290).

Friendly also found support from Dean Wigmore's treatise.[46] Dean Wigmore wrote, when deciding whether or not to protect the communications of an attorney's staff, including secretaries, file clerks, messengers, law clerks, legal interns, and others, that if "[t]he assistance of these agents [was] indispensable to [the attorney's] work and the communications of the client [was] often necessarily committed to them by the attorney or by the client himself, the privilege must include *all* the persons who act as the attorney's agent."[47] The government did not dispute this concept in its briefing and instead only argued that this exception should be restricted merely to employees who have "a menial or ministerial responsibility that involves relating communications to an attorney."[48] Judge Friendly disagreed and, in ruling to expand the scope of the attorney-client privilege, held that "[w]e cannot regard the privilege as confined to 'menial or ministerial' employees."[49]

Judge Friendly used a series of hypotheticals involving a foreign-language translator to rationalize his position that the attorney-client privilege can be expanded to third-party experts[50] as long as the "communication [was] made in confidence for the purpose of obtaining legal advice from the lawyer."[51] He introduced the hypothetical translator as an analogy to Kovel himself, an accountant,[52] because Judge Friendly believed that "[a]ccounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases."[53] He wrote:

> Thus, we can see no significant difference between a case where the attorney sends a client speaking a foreign language to an interpreter to

46. *Id.* (citing WIGMORE, *supra* note 10, § 2290).
47. WIGMORE, *supra* note 10, § 2301 (emphasis added).
48. *Kovel*, 296 F.2d at 921.
49. *Id.*
50. *Id.* at 921–22.
51. *Id.* at 922.
52. *Id.* at 919, 922.
53. *Id.* at 922.

> make a literal translation of the client's story; a second where the attorney, himself having some little knowledge of the foreign tongue, has a more knowledgeable non-lawyer employee in the room to help out; a third where someone to perform that same function has been brought along by the client; and a fourth where the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney's behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice.[54]

These four hypothetical scenarios (and their irreconcilability) are the source of the *Kovel* conundrum.[55]

### A. *Diagramming the* Kovel *Privilege*

First is the literal translation scenario. This is where "the attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client's story."[56] This scenario is diagrammed below, with attorney, client, and the Expert ("E") in Figure 4:

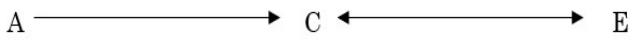


Figure 4

*Kovel* Scenario 1 (literal translation)

54. *Id.* at 921.

55. *See id.*; Imwinkelried & Amoroso, *supra* note 15, at 280–84; *see also* DeStefano Beardslee, *supra* note 5, at 730–31.

56. *Kovel*, 296 F.2d at 921.

This scenario involves an initial interaction between the attorney and the client, presumably where the attorney realizes that there needs to be some form of translation before satisfactory legal services can be provided. The attorney then sends the client to an expert, whose sole job is to provide a literal translation of the client's story to the attorney so that the attorney may understand the client's story and provide the requisite advice.[57] Professor Imwinkelried argues that "[t]he narrowest possible reading of *Kovel* is that the privilege protect[s] the client's communications to the expert and the expert's communications with the client,"[58] which would suggest that, similarly to the two-way street attorney-client privilege in Figure 3, there ought to be a bilateral arrow between the client and the expert for *Kovel* scenarios. This notion of the first scenario holding the narrowest possible reading of *Kovel* has grown, and as we will see, the first scenario forms the doctrinal bedrock for the "narrow approach" to agency theory, which courts have used to constrict the *Kovel* doctrine.[59]

Judge Friendly's second and third scenarios seek to erase the formality between whether the attorney or the client provides the expert translator.[60] These scenarios occur as follows: "where the attorney, himself having some little knowledge of the foreign tongue, has a more knowledgeable non-lawyer employee in the room to help out; [and] where someone to perform that same function has been brought along by the client."[61] Figures 5 and 6 lay out these two scenarios, the former

57. *See* Imwinkelried & Amoroso, *supra* note 15, at 281; DeStefano Beardslee, *supra* note 5, at 731.

58. Imwinkelried & Amoroso, *supra* note 15, at 282.

59. *See* DeStefano Beardslee, *supra* note 5, at 745–46.

60. *See Kovel*, 296 F.2d at 921.

61. *Id.*

where the attorney provides the expert and the latter where the client arrives with a translator.

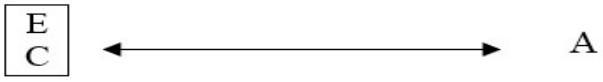


Figure 5

*Kovel* Scenario 2 (attorney provided expert)


Figure 6

*Kovel* Scenario 3 (client provided expert)

These two scenarios make logical sense since, in both scenarios, the same three parties are together, performing the same functions.[62] At the same meeting, a client and an attorney discuss privileged material with an expert present to translate as needed.[63] Recall that Figure 3 established a bilateral privilege between attorneys and their clients, and Figure 4 established a bilateral privilege between clients and an expert translator.[64] Therefore, there are bilateral arrows in Figures 5 and 6.[65] However, one meaningful distinction distinguishes the second and third *Kovel* scenarios: in the third scenario

Figure ,[66] communications between the client and the expert translator are not privileged until the attorney-client

62. *Id.* A discussion proving that an expert's subsequent communications to the client's attorney are privileged is forthcoming, but it is settled law that the conversations are in fact privileged. *See infra* Part II.B.

63. *Id.*

64. *See supra* 107 fig.3 & 112 fig.4.

65. *See supra* 113 figs.5 & 6.

66. *See supra* 113 fig.6.

relationship initiates.[67] This could present problems for clients who elect to bring an expert who has prior knowledge about the client's situation, but this will be discussed later in the Article.[68]

Finally, we arrive at Judge Friendly's fourth, and most interesting, scenario for attorney-client-expert communications: the expert knowledge scenario.[69] Judge Friendly explains that the fourth scenario occurs when "the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney's behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice."[70] This scenario is diagramed below in Figure 7:


Figure 7

*Kovel* Scenario 4 (expert knowledge)

On its face, the fourth scenario looks exactly like the first scenario, and, in many ways, it is. In both scenarios, the order of interactions is identical: the attorney and client meet first, at which point the attorney tells the client to go speak with the expert.[71] The expert interviews the client and reports back to the lawyer so that he may provide adequate legal advice.[72] So, why did Judge Friendly design this fourth scenario if it just is a

67. *See Kovel*, 296 F.2d at 921; *supra* 113 fig.6. *But see In re* Grand Jury Proc. Under Seal, 947 F.2d 1188, 1189, 1191 (4th Cir. 1991). Communications made by the client to his accountant prior to the meeting between the client, his accountant, and his attorney were held protected. However, not all communications are protected; the court held that the privilege only extends to those communications made immediately prior to the meeting with the accountant, such as those made by the client to his accountant while en route to the meeting. *Id.*

68. *See infra* Part V (discussing *Kovel*'s Scenario 4); *see also Kovel*, 296 F.2d at 921.

69. *See Kovel*, 296 F. 2d at 921.

70. *Id.*

71. *See id.*

72. *See id.*

repeat of the first? What is the difference? The difference is in the type of service the expert is providing, and it has become the crux of the current doctrinal split regarding third-party expansion of the privilege.

The first scenario suggests that the role of the expert is limited strictly to that of a literal translator, which suggests zero creativity, critical analysis, or professional judgment. The fourth scenario is not as simple. Judge Friendly implies that the expert in the fourth scenario is given more discretion in his role of assisting the attorney,[73] stating that the expert may "render *his own summary* of the situation, perhaps *drawing on his own knowledge* in the process."[74] Therefore, the difference between the first and fourth scenarios is not the actual *form* or order of privileged conversations (who speaks with whom in what order) but instead the *substance* of the expert's role (what advice or services are being provided).

Now, armed with a basic understanding of the four *Kovel* scenarios asserted by Judge Friendly, it is possible to see how successful other courts have been in utilizing this doctrine to assist in the resolution of other issues.[75]

73. *See id.*

74. *See id.* (emphasis added).

75. Yet, one question has not been answered: which scenario do the facts from *Kovel* fall into? Ironically, Judge Friendly himself noted that the "extreme positions taken both by appellant and by the Government, the latter's being shared by the [trial] judge, resulted in a record that does not tell us how Hopps came to be communicating with Kovel rather than with [his lawyer]." *See id.* at 919, 923. However, the facts from the case are helpful to discern at least the basic structures of *Kovel*'s form. We know that Kovel himself had begun working for a law firm in 1943. *Id.* at 919. However, this fact results in an ironic twist because it shows that the fact pattern in *Kovel* does not even involve a third-party accountant! *See id.* Since Kovel himself was directly employed by the lawyer, he should be considered more comparable to an investigator or paralegal than to a private investigator or tax consultant. *See id.* Judge Friendly did not let this factual quagmire impede his opinion, warning only that "[t]he application of these principles here is more difficult than it ought [to] be in future cases." *See id.* at 923. Also, upon closer investigation, it seems that Kovel and Hopps' encounters fall into the second *Kovel* hypothetical since a client approached an attorney who then instructed him to reach out to an accountant who was an employee of his firm to assist in the provision of legal advice. *See id.* at 919–21.

### B. *Implications of* Kovel*'s Fourth Hypothetical Scenario*

Before analyzing the impact of the substance of an expert's work on the attorney-client privilege, the form of third-party agency communication within the privilege must be discussed. One question that persists after laying out Judge Friendly's four hypotheticals is whether the expert's communication with the attorney, not the client, regarding the expert's translation or summarization would be privileged? Professor Imwinkelried argues that this question is answered in favor of privilege.[76] He posits:

> "[W]hat [was] vital" to Judge Friendly was that in communicating with the expert, the client's purpose was to obtain legal advice from the attorney. It would frustrate the purpose to refuse to extend the privilege to the expert's communication to the attorney, in which the expert explained the significance of the client's communications to the attorney.[77]

Professor Imwinkelried also pointed out that "it would make no sense" to grant attorney-client privilege to a client's conversation with his expert translator, only to have that very privilege then destroyed when that message was later conveyed from the expert to the client's attorney.[78] *Kovel* is also considered to have awarded attorney-client protection to one final form of communication: the expert's disclosure to the attorney.[79] The *Kovel* doctrine is generally seen as a sound and logical extension of the attorney-client privilege:

> The analysis in *Kovel* of the application of the attorney-client privilege to communications by a client to a non-lawyer employed by an attorney appears to be sound in principle. It is, after all,

76. *See* Imwinkelried & Amoroso, *supra* note 15, at 282–83.

77. *Id.* at 282 (second alteration in original) (emphasis added) (citation omitted).

78. *Id.* at 282–83.

79. *Id.*

> disclosures to the attorney which are protected by the privilege; and from this it would follow that the disclosures to the accountant must be shown to be, in effect, communications to the attorney for the purpose of seeking legal advice. The case seems to establish as the key requirement for the application of the privilege that the claimant of the privilege show that the client was communicating with the accountant at the direction of the attorney for the purpose of obtaining legal advice from the attorney. Any further scrutiny into the client-accountant-attorney relationship than the fact that the attorney requested the client to communicate to the accountant in connection with the rendition of legal services for the client by the attorney is undesirable since the further scrutiny would impinge on the privilege in the very process of establishing that it existed.[80]

The doctrinal foundation of *Kovel* can be used to understand how courts have applied the law to questions of third-party privilege.

## III. DIVERGENT INTERPRETATIONS OF *KOVEL*

Some courts hold the view that a third-party expert may only act as "a translator—solely interpreting the confidential client information without adding new information."[81] Other courts hold the position that all a third-party expert needs to do is "provide services that merely *facilitate* the attorney's ability to render legal advice."[82] These different opinions have become

80. *See* Robert L. Lofts, *The Attorney-Client Privilege in Federal Tax Investigation*, 19 TAX L. REV. 405, 433 (1964).

81. DeStefano Beardslee, *supra* note 5, at 746 & n.91.

82. *Id.* at 747 & n.92 (citing cases that adhere to this interpretation).

categorized as the narrow and broad approaches to *Kovel*, respectively.[83]

Professor Rothstein argues that protection of third-party agent speech requires that the germane communication meet the following conditions: "(1) the agent must be necessary, or at least highly useful, to the effectiveness of the consultation and the rendering of professional advice or assistance, and (2) the communications must be made or transmitted in confidence for the purpose of obtaining legal advice and assistance from the attorney."[84] The distinction between necessity, usefulness, translation, and drawing on knowledge presents the debate currently raging across the courts: when is an expert doing too much or too little to be awarded privilege?[85]

### A. *The Narrow Approach*

Pioneered by cases such as *United States v. Ackert*, the widely adopted narrow approach to *Kovel* stands for the proposition that an accountant may only "interpret information the client already has to improve comprehension between [the] attorney and client."[86] The implication of this is that attorney-client protection would only be bestowed upon the third-party accountant/interpreter in circumstances when they are "solely interpreting the confidential client information *without adding new information*."[87] The narrow approach turns almost entirely on whether the expert needed to participate in the conversation between the attorney and client so that the attorney and client could effectively communicate.[88] This narrow approach seems

83. *Id.* at 744–47 (discussing the narrow and broad approach to *Kovel*'s agency theory).

84. ROTHSTEIN & BECKMAN, *supra* note 14, § 2:7.

85. *See id.* § 2:7(5); *see also* DeStefano Beardslee, *supra* note 5, at 744–45 (noting that because attorneys sometimes must seek help from experts, "third-party agents should be protected when they are needed to accomplish the attorney's work").

86. *See* DeStefano Beardslee, *supra* note 5, at 745–46, 745 n.83 (citing United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999)) (discussing majority of courts' narrow interpretation of *Kovel*).

87. *Id.* at 746 (emphasis added).

88. *See id.* at 746, 746 n.91 (discussing majority of courts' narrow interpretations of *Kovel* and third parties' roles in communications between an attorney and a client).

most comparable to the first scenario presented by Judge Friendly in *Kovel*, the literal interpreter hypothetical.[89] Remember the story: "the attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client's story."[90] The crux of the first scenario has become the crux of the narrow approach – the accountant must not conduct any independent analysis.[91] For the translator in Judge Friendly's hypothetical, that means making a "literal translation" of the client's statements, thereby translating them word-for-word to then give to the attorney.[92] As a result, the exact communication made by the client is the exact statement read by the attorney.[93]

### B. *The Broad Approach*

Other courts have chosen to apply the third-party doctrine of *Kovel* more liberally, allowing for a wider umbrella of confidential communications between accountants, attorneys, and taxpayers.[94] The prerequisite for protection under this approach is only that the expert is assisting the attorney in his "ability to render legal advice."[95] Courts have used this approach to extend attorney-client privilege to experts in

89. United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961); *see also supra* pp. 10–12 & fig.4.

90. *Kovel*, 296 F.2d at 921.

91. *See supra* notes 86–93 and accompanying text.

92. *See Kovel*, 296 F.2d at 921; *see also supra* notes 86–90 and accompanying text.

93. *See supra* notes 90–93 and accompanying text.

94. United States v. Alvarez, 519 F.2d 1036, 1046 (3d Cir. 1975) ("We see no distinction between the need of defense counsel for expert assistance in accounting matters and the same need in matters of psychiatry. The effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting. If the expert is later used as a witness on behalf of the defendant, obviously the cloak of privilege ends. But when, as here, the defendant does not call the expert the same privilege applies with respect to communications from the defendant as applies to such communications to the attorney himself"); *see* DeStefano Beardslee, *supra* note 5, at 747 ("Often, courts adopting a generous view of *Kovel* . . . privilege lawyers' consultations with many external professional consultants.").

95. *See* DeStefano Beardslee, *supra* note 5, at 747.

various fields, such as: accountants,[96] patent agents,[97] jury consultants,[98] bankruptcy advisors,[99] and psychiatrists.[100]

This Article argues that the broad approach has actual doctrinal foundation in *Kovel*'s fourth scenario, and that courts have routinely ignored this concept and ruled against the broad approach. There will be additional discussion on the merits, foundations, and policy implications of both the narrow and broad approaches later in this Article.[101] The next section will examine a case that highlights the court's ability (or inability) to separate these two issues of form and substance.[102]

### C. *The Narrow and Broad Approaches in Practice*

Courts and scholars believe that the narrow reading of *Kovel* was solidified in the Second Circuit's decision, *United States v. Ackert*.[103] While *Ackert* has been cited as a doctrinal limitation on the substance of the *Kovel* doctrine,[104] closer examination reveals that the court actually decided the case based on the form of the conversations in the fact pattern.[105] As such, there was little to no change to the *Kovel* doctrine.[106]

The facts of *Ackert* are straightforward. Ackert was employed by Goldman, Sachs, an investment banking firm.[107] "In 1989, [during Ackert's employment,] Goldman, Sachs, and Co., . . .

96. Eglin Fed. Credit Union v. Cantor, Fitzgerald Sec. Corp., 91 F.R.D. 414, 418 (N.D. Ga. 1981).

97. Golden Trade v. Lee Apparel Co., 143 F.R.D. 514, 518 (S.D.N.Y. 1992).

98. *In re* Cendant Corp. Sec. Litig., 343 F.3d 658, 659–60, 667–68 (3d Cir. 2003).

99. *In re* Tri-State Outdoor Media Grp., Inc., 283 B.R. 358, 362–64 (Bankr. M.D. Ga. 2002).

100. United States v. Alvarez, 519 F.2d 1036, 1039, 1046 (3d Cir. 1975).

101. *See* discussion *infra* Part IV.

102. *See infra* Section III.C; United States v. Ackert, 169 F.3d 136, 139–40 (2d Cir. 1999).

103. *See, e.g.*, DeStefano Beardslee, *supra* note 5, at 745 & n.83; *Ackert*, 169 F.3d at 139–40.

104. *See, e.g.*, Ann M. Murphy, *Spin Control and the High-Profile Client—Should the Attorney-Client Privilege Extend to Communications with Public Relations Consultants?*, 55 SYRACUSE L. REV. 545, 565 (2005) (explaining that *Ackert* is an example of a court "strictly limit[ing] the scope of *Kovel*").

105. *But see Ackert*, 169 F.3d at 139–40.

106. *See id.*; United States v. Kovel, 296 F.2d 918, 921–22 (2d Cir. 1961).

107. *Ackert*, 169 F.3d at 138.

approached Paramount with an investment proposal."[108] Ackert was involved in pitching the investment proposal, and subsequently, was part of several follow up meetings with Paramount's Senior Vice President and tax counsel, Eugene Meyers.[109] "Meyers initiated these discussions to learn more about the details of the proposed transaction and its potential tax consequences, so that he could advise his client, Paramount, about the legal and financial implications of the transaction."[110]

Several years later, the IRS conducted an audit of Paramount and issued a summons to Ackert to testify about the investment proposal he made in 1989.[111] Paramount asserted that any of Ackert's conversations that occurred in the presence of Meyers, after the initial meeting, were shielded by attorney-client privilege.[112] The magistrate judge ruled to privilege the conversations between Ackert and Meyers, indicating only that "if Meyers had been collecting information from Ackert about the proposed investment in order to give legal advice to Paramount, the conversations would be privileged."[113] The government appealed the magistrate judge's decision.[114]

The Second Circuit began its discussion of *Ackert* with a simple conclusion that is illustrative of why Paramount's *Kovel* argument failed.[115] The court stated that "*Kovel* recognized that an accountant can play a role analogous to an interpreter in helping the attorney understand financial information *passed to the attorney by the client*."[116] The court elaborated on this idea by distinguishing Ackert's connection to Paramount, saying that Meyers never actually asked Ackert to look at any of

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 139.
113. *Id.* at 138–39.
114. *Id.* at 138.
115. *See id.* at 139.
116. *Id.* (emphasis added).

Paramount's documents.[117] Quite to the contrary, Ackert provided details on the tax maneuver, which meant that the only reason Meyers spoke with Ackert after their initial meeting was because Ackert possessed "information Paramount did not have about the proposed transaction and its tax consequences."[118] As a result, the court reversed the district court's order privileging the conversations between Ackert and Meyers, finding that they were not deserving of the third-party attorney-client privilege.[119]

Professor DeStefano Beardslee argues that *Ackert* is the poster child for the narrow approach to *Kovel*, stating that the privilege is limited by the court's ability to "analogize the third-party consultant's role to that of a translator—solely interpreting the confidential client information without adding new information. It is only when the third party's services are necessary for the client and attorney to effectively communicate that the privilege attaches . . . ."[120] While the Second Circuit attempted to decide this case based on the substance of the conversations between Ackert and Meyers, the court actually applied a form based argument.[121] Accordingly, this Article argues that the *Kovel* doctrine should not be deemed to have been substantially narrowed by this holding.

To analyze *Ackert* under the framework developed above, the first step is to analyze the order of conversations between the client (Paramount), attorney (Meyers), and expert (Ackert).[122] The below diagram of the conversations that took place in

117. *Id.* at 139–40.

118. *Id.* at 138–40.

119. *Id.* at 140.

120. *See* DeStefano Beardslee, *supra* note 5, at 745–46, 746 n.91 (summarizing *Ackert* and citing to other cases applying the narrow approach to *Kovel* analysis).

121. *See Ackert*, 169 F.3d at 138–41; DeStefano Beardslee, *supra* note 5, at 784.

122. *See generally* DeStefano Beardslee, *supra* note 5, at 785–86 (suggesting a nexus requirement between a third party's services and legal services provided to the client showing that the third party's communications were "necessary or indispensable" to the client's attorney); Imwinkelried & Amoroso, *supra* note 15 (analyzing the communication process between attorneys, third-party experts, and clients).

*Ackert* reveals immediately that the *Kovel* doctrine never should have applied.

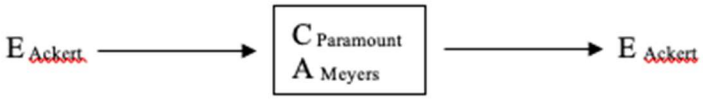


Figure 8
*Ackert* (not privileged)

*Ackert* can be decided based on the very first conversation, since it does not fit any of the four scenarios designed by Judge Friendly in *Kovel*.[123] No scenario in *Kovel* began with the expert approaching the client or the attorney,[124] which was the fatal mistake Paramount made when it argued "the Ackert-Meyers conversations mirror the accountant-attorney relationship described in *Kovel*."[125] *Kovel* was premised on the idea that an expert was used to interpret information provided by the client for the purpose of assisting a lawyer in providing legal advice.[126] Moreover, without a client's necessity for legal services (to be distinguished from the establishing of an attorney-client privilege), there is no need, or protection, for conversations between an expert and the client or her attorney.[127] Furthermore, when the expert is the one presenting the facts and the legal solution, there is no reason to suggest that either the client or attorney needed help in interpreting the opportunity.[128] Therefore, the Second Circuit in *Ackert* was

123. *See Ackert*, 169 F.3d at 138 (stating Paramount, Ackert's attorney, contacted Ackert to discuss the Goldman Sachs investment proposal and tax liability); United States v. Kovel, 296 F.2d 918, 921–22 (2d Cir. 1961); *see also supra* pp. 10–15 (discussing the four *Kovel* scenarios).

124. *Kovel*, 296 F.2d at 921–22; *see also supra* pp. 10–15 and accompanying figs.4–7 (discussing the four *Kovel* scenarios).

125. *See Ackert*, 169 F.3d at 139.

126. *See Kovel*, 296 F.2d at 922.

127. *See* DeStefano Beardslee, *supra* note 5, at 761.

128. *See id.* at 786.

correct in its holding that *Kovel* did not apply;[129] however, interpreting this holding as a "narrowing" of *Kovel* is unwarranted.[130]

In reviewing the *Ackert* analysis, it seems prudent to explain that the true reason why Ackert and Meyers' communications should never have been privileged is because there never was a *Kovel*-style relationship between them.[131] Because of that, nothing said between the two of them should have been protected under the attorney-client privilege according to the *Kovel* doctrine. Therefore, the Second Circuit erred in utilizing a substance argument to argue its position that *Kovel* did not apply in *Ackert*.[132] By arguing substance, the court ignored *Kovel*'s more expansive fourth hypothetical and instead further cemented the notion that the first scenario is the only possible scenario.[133]

In her attempt to argue that the narrow interpretation of *Kovel* is "too narrow," Professor DeStefano Beardslee tangentially suggests that the facts of *Ackert* are "meaningfully different from those in *Kovel*" and stated that some courts have also made a similar claim.[134] In *Byrnes v. Empire Blue Cross Blue Shield*, a magistrate judge distinguished *Ackert* from *Kovel* by concluding that the accounting services in *Ackert* were provided to assist the attorney in his legal duties while the services provided by the Segal Company were provided to assist "the attorney or the client . . . in [a] project for which the legal services were being

129. *See id.* at 745–46; *Ackert*, 169 F.3d at 139–40.

130. *See supra* pp. 20–24.

131. *See supra* pp. 10–15, 20–24; *Kovel*, 296 F.2d at 921–22; *Ackert*, 169 F.3d at 138–40.

132. *But see Ackert*, 169 F.3d at 139–40.

133. *Compare Ackert*, 169 F.3d at 138–40 (distinguishing the first *Kovel* scenario, involving a third-party interpreter, to communications between Meyers—the attorney—and Ackert—the third-party expert—because only literal translation of client communications to attorneys is permitted to invoke attorney-client privilege and not rendering of third-party advice), *with Kovel*, 296 F.2d at 921–22 (discussing the fourth scenario in which an attorney sends a client to a foreign language interpreter to translate the client's story and provide an opinion of the client's story to allow the attorney to better provide legal advice to the client).

134. *See* DeStefano Beardslee, *supra* note 5, at 760–61.

provided."[135] The *Byrnes* court's suggestion that there was "no indication" that Ackert had been retained by Paramount for assistance seems incorrect when looking at the facts from *Ackert*.[136] In fact, it is obvious that Ackert was not retained for his proposition but was compensated for his time.[137]

## IV. EXPLAINING THE CONUNDRUM

Differing interpretations of *Kovel* have led to a doctrine with many inherent contradictions, resulting in vastly different outcomes and a privilege that is uncertain.[138] This conundrum has resulted in different approaches to analyzing a *Kovel* problem, which have in turn resulted in inconsistent application of the doctrine between, and even within, circuits.[139] Ironically, some courts and legal scholars seemingly ignore this conundrum and simply assert that their approach is the only approach.[140] The conundrum revolves around three key

135. Byrnes v. Empire Blue Cross Blue Shield, No. 98-Civ-8520, 1999 WL 1006312, at *1, *6 (S.D.N.Y. Nov. 4, 1999) ("In [*Ackert*,] the attorney for the client had consulted an accounting firm for information useful to the attorney's performance of his legal duties to the client, but there was no indication that the accounting firm had been retained in whole or in part by the attorney or the client to assist in the project for which the legal services were being provided.").

136. *See id*.; *see also Ackert*, 169 F.3d at 138 ("Paramount ultimately decided to enter into the proposed investment, but used the services of another investment banker, Merrill Lynch & Co. Paramount paid Goldman, Sachs [the employer of Ackert,] a fee of $1.5 million for services rendered in connection with its proposal.").

137. *See Ackert*, 169 F.3d at 138.

138. *See, e.g.*, Allied Irish Banks v. Bank of Am., 240 F.R.D. 96, 104–05 (S.D.N.Y. 2007) (adhering to the narrow approach of *Kovel*); *In re* Grand Jury Subpoenas Dated March 24, 2003 Directed To (A) Grand Jury Witness Firm And (B) Grand Jury Witness, 265 F. Supp. 2d 321, 326, 332 (S.D.N.Y. 2003) (applying a more moderate approach of *Kovel*); H.W. Carter & Sons, Inc. v. William Carter Co., No. 95-Civ-1274, 1995 U.S. Dist. LEXIS 6578, at *7–8 (S.D.N.Y. 1995) (applying a broad approach of *Kovel*).

139. *See, e.g.*, *Allied Irish Banks*, 240 F.R.D. at 104–05; *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 326, 332; *H.W. Carter & Sons, Inc.*, 1995 U.S. Dist. LEXIS 6578, at *7–8.

140. *See* DeStefano Beardslee, *supra* note 5, at 780–81, 780 n.279 ("Many scholars and courts do not outwardly recognize that there is more than one standard applicable to third-party consultation or more than one approach to the agency exception or that application of the third-party doctrine is complex."); *see also In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 326, 332; Corcoran, *supra* note 29, at 698, 725 (explaining only the broadest interpretation); Steven B. Hantler, Victor E. Schwartz & Phil S. Goldberg, *Extending the Privilege to Litigation Communications Specialists in the Age of Trial by Media*, 13 COMMLAW CONSPECTUS 7, 25, 29 (2004)

questions: (1) what level of independent analysis should be allowed in the expert's work; (2) how necessary must the expert's work be in relation to the attorney's ability to provide effective legal advice; and (3) whether the expert's work is purely for legal advice or if it is intertwined with accounting or business advice.[141] This section explores these individual questions, discusses the courts' insufficient resolutions to them, and explains how each ultimately fails on its own to solve the *Kovel* conundrum.

### A. *The Problem with the Translator-Only Narrow Approach*

In defining the scope of the attorney-client privilege for third-party experts under *Kovel*, some courts have settled into a very extreme position when it comes to the level of independent analysis the experts may employ: *Kovel* experts may only directly translate client information to the attorney.[142]

The narrow approach is considered by some to be the majority view of *Kovel* and has been generally upheld since the 1960s.[143] Cases like *Ackert*,[144] and others, have adopted near

(claiming attorney-client privilege protects communications with non-testifying experts that assist attorneys in provision of legal services and failing to identify the varying ways courts apply the doctrine).

141. *See generally* WIGMORE, *supra* note 10, § 2292; United States v. Kovel, 296 F.2d 918, 920–22 (2d Cir. 1961) (discussing the need to protect third-party agent communications under attorney-client privilege and that such protection complies with the Wigmore § 2292 elements of privilege); *Ackert*, 169 F.3d at 139–40 (2d Cir. 1999) (discussing factors relevant to determining whether discussions between an investment banker and attorney regarding a client's investment decision and tax liability would be protected under attorney-client privilege).

142. DeStefano Beardslee, *supra* note 5, at 746, 746 n.91 (discussing *Ackert*, its progeny, and its holding that attorney-client privilege only applies if the third-party expert is asking as a translator between the client and attorney).

143. *Id.* at 745, 745 n.83; *see, e.g.*, Comm'r of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1198 & n.20 (Mass. 2009). In *Comm'r of Revenue* v. *Comcast Corp.*, the court "agree[d] with the majority of courts" that *Kovel* only applies to consultants acting as translators but that several courts have "applied the *Kovel* doctrine with less rigidity." DeStefano Beardslee, *supra* note 5, at 745, 745 n.83.

144. *Ackert*, 169 F.3d at 139–40 (finding the communications between the attorney and investment banker were not privileged because the investment banker "was not [acting] as a translator or interpreter of client communications").

identical restrictions.[145] For example, consider *In re G-I Holdings Inc.*, in which the court held that "the *Kovel* court . . . carefully limited the attorney-client privilege between an accountant and a client to when the accountant functions as a 'translator' between the client and the attorney."[146] Still, other courts, such as *United States v. Chevron Texaco Corp.*, stated "that *Kovel* did not intend to extend the privilege beyond the situation in which [an expert] was interpreting the client's otherwise privileged communications or data to enable the attorney to understand those communications or that client data."[147]

The narrow theory is also directly referred to as the "translator" and "interpreter" exception[148] and seems directly linked back to Judge Friendly's first hypothetical scenario in *Kovel* which restricted the efforts of the third-party expert solely to "mak[ing] a literal translation of the client's story."[149] While this restriction would allow for simple administration, scholars have shown that the narrow approach is flawed for not keeping with the spirit of the entirety of the *Kovel* doctrine.[150]

One reason that the narrow approach fails in keeping with the spirit of the *Kovel* doctrine is that it ignores the reality that third-party experts will inevitably integrate their own knowledge and expertise into their work on the attorney's case.[151] That is, experts will "not [be] merely transmitting information into a more understandable language or functioning as a set of merely ministerial agents."[152] Professor Imwinkelried, despite being an

145. *See* DeStefano Beardslee, *supra* note 5, at 745–46, 745 n.83; *Comcast*, 901 N.E.2d at 1198 & n.20; Black & Decker Corp. v. United States, 219 F.R.D. 87, 90 (D. Md. 2003).

146. 218 F.R.D. 428, 434 (D.N.J. 2003).

147. *E.g.*, 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002).

148. DeStefano Beardslee, *supra* note 5, at 746 n.91 (internal citations omitted) ("[T]he *Kovel* exception 'has been viewed as a narrow translator or interpreter exception.'").

149. United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

150. *See, e.g.*, DeStefano Beardslee, *supra* note 5, at 760–61; Imwinkelried & Amoroso, *supra* note 15, at 282–83.

151. *See* DeStefano Beardslee, *supra* note 5, at 761–62 (citing Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U.L.Q. 19, 31, 36–37 (1990)).

152. *Id.* at 761.

adamant opponent of expanding the *Kovel* doctrine, nevertheless acknowledges that, in reality, *Kovel* "expert[s] add[] an important increment of [their own] knowledge to evaluate the client's communications and other case-specific information."[153] In other words, the expert will inevitably "create[] new information and thereby become[] an independent source of information about the case."[154]

Some courts have also seen this discrepancy and held that an expert will inevitably do more than simply translate.[155] This is even more true for accountants.[156] This idea seems more akin to *Kovel*'s fourth scenario where Judge Friendly wrote that an expert is still protected even when he "render[s] his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice."[157]

This rejection of the narrow approach accepts the inevitability that experts will rely on their own cumulative knowledge in coming to conclusions.[158] As a result, some have concluded that

153. Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U.L.Q. 19, 31–32, 36 (1990) (quoting Jack H. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 463, 465 (1962)).

154. *Id.* at 36.

155. *See, e.g.*, United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1047 (E.D.N.Y. 1976) ("[T]he doctor's observations and conclusions [were] based upon far more than the client's communications . . . . [His knowledge] would be highly material to the case.") (citing Jack H. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 463–64 (1962)); NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 141 (N.D.N.Y. 2007) (explaining that public relations consultants do not meet the test outlined in *Kovel* and categorizing the *Kovel* and *Ackert* tests as "narrowly tailored"); Kim J. Gruetzmacher, Comment, *Privileged Communications with Accountants: The Demise of* United States v. Kovel, 86 MARQ. L. REV. 977, 980 (2003) (explaining that business advisors "do not translate information from the client to the attorney; rather, they provide information independently to the attorney").

156. *See* DeStefano Beardslee, *supra* note 5, at 762 ("For example, auditors conduct trend analyses and make judgments about the company's calculations when they certify that the company's financial statements are not materially misstated and are in accordance with applicable accounting standards. Ironically, even accountants (the type of third-party consultant originally protected by *Kovel*) do more than put the client's information into a more usable format.").

157. *See* United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

158. *See id.*

upon "closer scrutiny, the [translator] analogy breaks down"[159] and that "the narrow [literal] translation interpretation of *Kovel* . . . borders on pretense."[160] Nonetheless, courts across the country are split on how much independent knowledge experts may employ in a *Kovel* situation.[161]

### B. *Risks of the Facilitative Broad Approach*

If the narrow approach is rejected when ruling on a *Kovel* communication, the question becomes how important the communication is to the formulation of legal advice. As expected, courts have taken drastically different approaches. Some courts believe that necessity is the requirement while others assert that it need only be facilitative to be privileged.[162] Ultimately, however, both approaches are too extreme.

Necessity is one consideration adopted by courts for determining whether a *Kovel* communication should be protected.[163] The term "necessity" has its roots in the *Kovel* decision itself, but despite Judge Friendly's prefacing of necessity with "or . . . highly useful,"[164] courts have routinely ignored the latter language.[165] Instead, courts have insisted that necessity alone is the determinative factor for *Kovel* communications.[166] The Massachusetts Supreme Court in *Commissioner of Revenue v. Comcast Corp.*, in rejecting a *Kovel* claim, held that "the accountant's presence [must be] 'necessary' for the 'effective consultation' between client and

159. *E.g.*, Imwinkelried, *supra* note 153, at 36.

160. *E.g.*, DeStefano Beardslee, *supra* note 5, at 762.

161. *See* DeStefano Beardslee, *supra* note 5, at 778–79, 778 n.264; Imwinkelried & Amoroso, *supra* note 15, at 270, 270 n.22; Imwinkelried, *supra* note 153, at 24.

162. *Compare* Comm'r of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1197 (Mass. 2009) (holding privilege extends to a third-party expert where their presence is necessary for effective consultation between a client and attorney), *with* United States v. Alvarez, 519 F.2d 1036, 1046 (3d Cir. 1975) (holding that privilege applies where counsel must communicate with a third party to facilitate effective representation of a client); *see also infra* Section IV.B.

163. *See, e.g.*, *Comcast*, 901 N.E.2d at 1197.

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

165. *See, e.g.*, *Comcast*, 901 N.E.2d at 1197 (citing *Kovel*, 296 F.2d at 922).

166. *See, e.g.*, *id.*

attorney."[167] In reaching this conclusion, the court acknowledged that "necessity" has deep roots in the law for expansion of the attorney-client privilege.[168] Interestingly, courts often seem to conflate the concept of necessity with the translator/interpreter issue.[169]

Additionally, courts that require necessity have held it "to mean[] more than just useful and convenient."[170] This has been further refined as requiring that "[t]he involvement of the third party must be *nearly indispensable* or *serve some specialized purpose* in facilitating the attorney-client communications."[171] Specialized purpose has also seen its own development as a separate test.[172] Courts have gone as far as to hold that *Kovel* will not protect communications even if they prove to be "important to the attorney's ability to represent the client."[173]

These courts utilizing necessity, however, seem to limit *Kovel* to situations where the Defendant is already facing

167. *Id. modified by* McCarthy v. Slade Assocs., Inc., 972 N.E.2d 1037 (Mass. 2012) (citing *Kovel*, 296 F.2d at 922).

168. *Id.* "[T]he doctrine has deep roots in Massachusetts jurisprudence." *Id.*; *see* Foster v. Hall, 12 Pick. 89, 93 (Mass. 1831) (concluding privilege extends to communications with agents of attorney who are "necessary to secure and facilitate the communication between attorney and client"); Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 870 N.E.2d 1105, 1111 (Mass. 2007) (stating privilege protects "statements made to or shared with necessary agents of the attorney or the client, including experts consulted for the purpose of facilitating the rendition of such advice").

169. *See, e.g.*, *Comcast*, 901 N.E.2d. at 1197 (supporting propositions about necessity requirement with citations to cases with parentheticals explaining the literal translator and interpreter issue); *see supra* Section IV.A.

170. *See, e.g.*, Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002).

171. *Id.* (emphasis added).

172. Those cases reject assertions of privilege for communications with third-party professionals unless the involvement of the professionals serves some specialized purpose in facilitating attorney-client communications. *See, e.g.*, United States v. Ackert, 169 F.3d 136, 138–40 (2d Cir. 1999) (concluding that communications between taxpayer's counsel and investment banker were not protected by taxpayer's attorney-client privilege); L.A. Mun. Police Emps. v. Sealed Air Corp., 253 F.R.D. 300, 314 (D.N.J. 2008) (stating that parties must indicate a specialized purpose for protecting attorney-client communications disclosed to a third party); Nat'l Educ. Training Grp., Inc. v. Skilsoft Corp., No. M8–85, 1999 WL 378337, at *1, *5 (S.D.N.Y. June 10, 1999) (finding the attorney-client privilege did not apply to "professionals who also take notes and sometimes perform administrative tasks").

173. *See, e.g.*, *Ackert*, 169 F.3d at 139.

investigation or prosecution.[174] In *Comcast*, in explaining the necessity requirement for *Kovel*, the court cited two federal cases, *United States v. Schwimmer* and *United States v. Judson.*[175] The court in *Schwimmer* wrote that the "privilege applies where [the] attorney for [a] criminal defendant charged with financial crimes retained [an] accountant as necessary to analyze [the] defendant's financial transactions."[176] Similarly, in summarizing *Judson*, the court wrote that the "*Kovel* exception applies where [the] attorney advising [a] client for assistance with [an] IRS investigation hired [an] accountant to prepare [the] client's net worth statement."[177] Limiting *Kovel*'s necessity requirement this far is too strict to be useful and would undermine a large purpose of the attorney-client privilege: seeking advice before being under investigation.[178]

Other courts have chosen to apply the third-party doctrine of *Kovel* more broadly, allowing for a wider umbrella of confidential communications between experts, attorneys, and clients that only requires that the third-party expert's services are facilitative of the attorney's ability to render legal advice.[179]

For example, in *Eglin Fed. Credit Union v. Cantor Fitzgerald Sec. Corp.*, the court held that as long as there was some relation to

174. *Comcast*, 901 N.E.2d. at 1197 (first citing United States v. Schwimmer, 892 F.2d 237, 243–44 (2d Cir. 1989); then citing United States v. Judson, 322 F.2d 460, 462 (9th Cir. 1963)).

175. *Id.*

176. *Id.* (citing *Schwimmer*, 892 F.2d 237 at 243–44).

177. *Id.* (citing *Judson*, 322 F.2d at 462).

178. *See* Lofts, *supra* note 80, at 405 (citing WIGMORE, *supra* note 10, § 2291) ("[T]he policy of the privilege is the encouragement of free consultation by a client with his attorney without apprehension of subsequent compulsory disclosure of the attorney.").

179. Golden Trade v. Lee Apparel Co., 143 F.R.D. 514, 518 (S.D.N.Y. 1992); *see also* United States v. Alvarez, 519 F.2d 1036, 1046–47 (3d Cir. 1975); Willemijn Houdstermaatschaapij BV v. Apollo Comput., Inc., 707 F. Supp 1429, 1446 (D. Del. 1989); Cuno Inc. v. Pall Corp., 121 F.R.D 198, 202 (E.D.N.Y. 1988); Byrnes v. Empire Blue Cross Blue Shield, No. 98CIV.8520, 1999 WL 1006312, at *1 (S.D.N.Y. Nov. 4, 1999); *In re* Tri-State Outdoor Media Grp., Inc., 283 B.R. 358, 362–63, 365 (Bankr. M.D. Ga. 2002) (applying a broad interpretation of *Kovel* to protect communications with financial bankruptcy advisor but ultimately determining that the attorney-client privilege was waived in part by offering a third party as a testifying expert witness); *see supra* Section III.B ("Courts have used this approach to extend attorney-client privilege to experts in various fields, such as: Accountants, patent agents, jury consultants, bankruptcy advisors, and psychiatrists.").

the attorney's provision of legal advice to the client, the accountant's work would be protected:

> If the accountant is consulted in connection with the client's obtaining legal advice, the privilege extends to cover confidential documents in the accountant's possession. If the documents were turned over to the accountant for reasons totally unrelated to seeking legal advice, the accountant is viewed as an unrelated third party and the attorney-client privilege as to these formerly confidential documents is waived.[180]

However, this approach is also subject to criticism from judges and scholars and is ultimately ineffective at solving the *Kovel* conundrum.[181]

The broad approach is ultimately ineffective because it expands the attorney-client privilege too far. Judge Friendly, citing to Dean Wigmore, knew that any expansion of this privilege would have to be balanced against the risks of hiding the truth.[182] Courts have feared that adoption of the broad approach would result in attorneys acting as conduits for non-legal activities that the client wanted to hide from exposure.[183] Even *Kovel* itself required that "the presence of the accountant [be] necessary, or at least highly useful, for the effective consultation between the client and the lawyer,"[184] albeit the caveat that the communications need only be "reasonably related" to that goal will be protected.[185]

180. 91 F.R.D. 414, 418 (N.D. Ga. 1981) (internal citations omitted).

181. *See, e.g.*, NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 140 (N.D.N.Y. 2007) (suggesting that an attorney could be used as "intermediaries in name only - a mule - with the anticipated effect of concealing all conversations and all actions under the cloak of an attorney-client privilege or work product, without any particular professional involvement on [the attorney's] part").

182. *See* United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961) ("[T]he general teaching [is] that '[t]he investigation of truth and the enforcement of testimonial duty demands the restriction, not the expansion, of [the attorney-client] privilege[].'") (quoting WIGMORE, *supra* note 10, § 2192, at 73).

183. *See, e.g.*, *O'Hara*, 241 F.R.D. at 140.

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

185. *Id.*

In conclusion, when courts rely on necessity as the requirement for *Kovel* communications, possible defendants are restricted to utilizing this doctrine only after a pending investigation has begun, thereby unfairly restricting the attorney-client privilege.[186] Conversely, when courts rely on language like "merely facilitate" or "in connection with" as the test for a third-party expert's relation to the attorney's giving of advice,[187] it goes too broad in expanding the privilege. As a result, both doctrinal camps fail to establish a middle ground and do nothing more than perpetuate the *Kovel* conundrum.

### C. *Defining the Composition of the Expert's Work*

Some subject matters require a closer examination into the relationship between the client and the advice being provided to the client by his or her lawyer because of the issue's proximity to the law. For example, tax and accounting services require special attention because legal advice and non-legal services can be very closely intertwined, and since non-lawyers are able to provide the same advice or services as lawyers, the question of whether the assistance is legal or not is constantly being raised.[188]

It has been clearly established that tax advice given by an attorney to a client is sufficiently covered by attorney-client privilege.[189] However, there is a debate about whether the same privilege will attach when a client's tax return is actually prepared by an attorney.[190] One aspect of this argument that is

186. Comm'r of Revenue v. Comcast Corp., 901 N.E.2d 1185, 1197 (Mass. 2009) (first citing United States v. Schwimmer, 892 F.2d 237, 243–44 (2d Cir. 1989); then citing United States v. Judson, 322 F.2d 460, 462 (9th Cir. 1963)).

187. *See* DeStefano Beardslee, *supra* note 5, at 747 & n.92.

188. *See* ROTHSTEIN & BECKMAN, *supra* note 14, § 2:8.

189. *In re* Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987) (holding that attorney-client privilege will protect the giving of legal advice as to tax matters unrelated to the preparation of a return).

190. ROTHSTEIN & BECKMAN, *supra* note 14, § 2:8. Some courts believe generally that "the preparation of a tax return requires an attorney to use legal knowledge and skill." *Id.* nn.37–40. Other courts are more skeptical and require that there is already a "bona fide attorney-client

not in dispute is that anything disclosed in a filed tax return is unable to be considered privileged, including: "the underlying documents, worksheets, or schedules prepared . . . in connection with the preparation of the return."[191] On the other hand, if information is not reflected in the return, or given "to the attorney who is then left with discretion as to whether or not to include it in the return," then the privilege may still be applicable.[192]

When *Kovel* communications are involved, courts look to see whose advice is sought in order to determine if the communication should be protected.[193] This issue was part of Judge Friendly's original *Kovel* opinion: "if the advice sought is the accountant's rather than the lawyer's, no privilege exists."[194] However, courts have been inconsistent in establishing a system of proving what constitutes the expert's advice, which would be business or accounting advice, and the lawyer's advice, which would be legal advice, resulting in the present *Kovel* conundrum.

Some courts have allowed an extension of the privilege broadly to third-party consultants and experts assisting a client's attorney. One court held "that the privilege extends to communications involving consultants used by lawyers to assist in performing tasks that go beyond advising a client as to the law" when there exists "a close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body."[195] While this case dealt with the communications between public relations firms and attorneys, the court's general holding expands beyond any one particular

relationship, and . . . there are other significant legal services being rendered." *Id.* Other courts still "refuse[] to apply the privilege to attorney-prepared tax returns on the basis that it would make little sense to permit a taxpayer to invoke the privilege merely because he or she has hired an attorney to prepare the return, rather than an accountant." *Id.*

191. *Id.*

192. *Id.*

193. *See, e.g.*, United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961).

194. *Id.*

195. *In re* Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003).

type of *Kovel* expert.[196] It held that "the ability of lawyers to perform some of their most fundamental client functions . . . would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' [*Kovel* experts]."[197] It concluded with the following requirements for extending the privilege:

> (1) confidential communications (2) between lawyers and [third party *Kovel* experts] (3) hired by the lawyers to assist them [in their respective field for this case] (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege.[198]

This acceptance of non-legal advice from *Kovel* experts is one liberal approach to answering the question of whose advice is being requested.

Other courts have openly accepted the idea that business advice may be protected when it is material to the assistance of the attorney's ability to give legal advice.[199] In *Calvin Klein Trademark Trust v. Wachner*, the court was tasked with determining whether documents involving communications between an investment banking firm and a law firm could be protected under *Kovel*.[200] The court held that the investment firm's role was "more than ministerial, [and] involved rendering expert advice as to what a reasonable business person would consider 'material.'"[201] This question of materiality was important because

> a responsible law firm . . . would not be able to adequately resolve [this issue] without the benefit of an investment banker's expert assessment of

196. *See id.* at 331–32.

197. *See id.* at 330.

198. *See id.* at 331.

199. *See* Calvin Klein Trademark Tr. v. Wachner, 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000).

200. *Id.* at 208–09.

201. *Id.* at 209.

> which facts were 'material' from a business person's perspective. [The investment firm] was therefore serving . . . an interpretive function much more akin to the accountant in [*Kovel*].[202]

Therefore, in *Calvin Klein*, the court allowed a third-party expert to conduct factual analysis on behalf of the attorney and accepted it as the "interpretive" function allowed in *Kovel*—seemingly at odds with the narrow translator approach.[203]

In opposition to the liberal approach of *Calvin Klein,* the court in *United States v. Chevron Texaco Corp.* took a very conservative approach to answering this question by holding that accountants may not be hired "merely to give additional legal advice about complying with the tax code even where doing so would assist the attorney in advising the client."[204] The *Chevron* court concluded that because tax issues are "so closely governed by the Revenue Code and by IRS and Tax Court rulings about the meaning of the Code that an accountant's advice will be 'legal' in the sense that it is based in statute and interpretations of statutes" and that as a result, *Kovel* should not be expanded to protect those conversations.[205] This decision was made based on fact-specific issues, including: Chevron's in-house counsel's "significant expertise," employees' statements that Chevron's "attorneys needed no assistance in understanding" their financial situation, and that the *Kovel* expert was hired to "assist [his] attorneys . . . in evaluating the legal merits of the transaction."[206] The court recommended that *Kovel* only be extended "to communications with third parties that are necessary to effectuate the client's consultation."[207] By assuming that all accounting advice is legal advice, the *Chevron* court strikes a very narrow approach to *Kovel* communications.

202. *Id.*

203. *See id.*; United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

204. *See* United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002).

205. *Id.*

206. *Id.*

207. *Id.*

In *United States v. Cote*, the district court denied *Kovel* protection because "the accountant was not under direct control of the taxpayers' attorney" and because the documents were "not prepared to assist counsel in giving legal advice."[208] The court of appeals disagreed with the district court's determination that the interactions between a taxpayer's accountant and lawyer did not constitute a proper *Kovel* communication, and in doing so, established a clear example of determining what differentiates accounting services from legal advice.[209] While other courts have dismissed the requirement of direct control,[210] the fact that the district court concluded that the accountant's work was not legal advice, on its own, should be enough to destroy *Kovel* protection. However, the court of appeals interpreted the accountant's work as more than mere mathematics and concluded that this type of expert input was deserving of *Kovel* protection.[211] Specifically, "[t]he district court held that the privilege did not attach to these workpapers [because they] were not prepared to assist counsel in giving legal advice."[212] The court explained it

> would agree that if the advice to file the returns was first given by Murphy and thereafter the accountant was employed simply to make the correct mechanical calculations, the privilege would not apply. This did not happen here. Here the taxpayers did not consult Murphy for accounting advice. His decision as to whether the taxpayers should file an amended return undoubtedly involved legal considerations which mathematical calculations alone would not provide. It is clear that the accountant's aid to the

208. United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972).

209. *See id.* at 144–45.

210. *See, e.g.*, Bauer v. Orser, 258 F. Supp. 338, 342–43 (D.N.D. 1966).

211. *Cote*, 456 F.2d at 144.

212. *Id.*

> lawyer preceded the advice and was an integral part of it.[213]

The court then set forth "[a] more definitive test" to determine *Kovel* protection, "whether the accountant's services are a *necessary aid* to the rendering of effective legal services to the client."[214] It also rightfully concluded that "[w]hether the accountant performed services for the taxpayers in years prior to the attorney-client relationship is essentially immaterial."[215] Unfortunately, none of these tests establish a controlling doctrinal approach to resolving the issue of what is business advice, an accounting service, or actual legal advice. As a result, this issue does nothing more than help perpetuate the conundrum.

## V. CLARIFYING THE CONUNDRUM: A UNITARY NEXUS TEST

Since *Kovel*, courts have wrestled with three questions: (1) what level of independent analysis should be allowed in the expert's work; (2) how necessary must the expert's work be in relation to the attorney's ability to provide effective legal advice and (3) whether the expert's work is purely for legal advice or if it is intertwined with accounting or business advice. The *Kovel* conundrum is the result of decades of indeterminacy in these questions and until a singular standard detailing the scope of this privilege is enacted, the *Kovel* conundrum will remain uncertain. As the Supreme Court has said, "[a]n uncertain privilege . . . is little better than no privilege at all."[216] The current test to resolve this issue, the nexus text, still does not fully address the *Kovel* conundrum. Therefore, this Article will introduce additional considerations for this unitary solution and explain how these additions better resolve the conundrum.

213. *Id.*

214. *Id.* (emphasis added).

215. *Id.*

216. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

### A. *The Nexus Test*

Recently, scholars and courts have laid the groundwork for a unitary solution to the *Kovel* conundrum.[217] Professor DeStefano Beardslee developed the nexus test based on requirement of a "strong nexus between the consultant's service and the legal advice or services ultimately provided to the client."[218] The strong nexus was intended to lean more towards the requirement that the *Kovel* expert's involvement in the case was "necessary," "indispensable," or "highly useful" to the attorney's provision of legal advice, instead of it being simply helpful.[219] Professor DeStefano Beardslee explained her intention that the expert's assistance would need to be "*essential* to doing something related to being a lawyer, like fine-tuning a legal strategy, ensuring compliance, avoiding liability, protecting a legal defense, administering an estate, or litigating an antitrust issue, etc." and expounded on how the question of what was essential is a very open question.[220] She summarizes the rule: "[i]f the communication was necessary for the attorney's provision of legal advice and services and the proponent can identify a strong nexus between the consultancy and the attorney's role, then it should be protected."[221] Some courts have also considered approaches very similar to Professor DeStefano Beardslee's.[222]

The nexus test, as proposed by Professor DeStefano Beardslee, also included four non-exhaustive factors, drawn in part from the doctrine, to assist courts and litigants in determining whether the *Kovel* privilege will apply.[223] The factors are: (1) "whether the lawyers [involved are] skilled in

217. *See, e.g.*, DeStefano Beardslee, *supra* note 5, at 784; Haugh v. Schroder Inv. Mgmt., No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *8–9 (S.D.N.Y. Apr. 25, 2003).

218. DeStefano Beardslee, *supra* note 5, at 785.

219. *See id.* at 785–86 (quoting United States v. Kovel, 396 F.2d 918, 921 (2d Cir. 1961)).

220. *Id.* at 786–88.

221. *Id.* at 786.

222. *See, e.g.*, *id.* at 747 n.92, 786 n.300; *Haugh*, 2003 U.S. Dist. LEXIS 14586, at *8–9.

223. DeStefano Beardslee, *supra* note 5, at 788.

the area in which they sought expert assistance";[224] (2) "the way that the communication . . . was conducted or distributed";[225] (3) if there is "contemporaneous documentary proof supporting" the party's assertion of privilege;[226] and (4) "the substance of the law involved."[227] Additionally, the proposed nexus test intentionally omits several "artificial distinctions" that some courts adopting *Kovel* have applied.[228] These artificial distinctions include any prior consulting relationship between the client and the third-party consultant,[229] a determination of who hired the consultant,[230] and a determination of whether the communication would have occurred but for the client's need for legal advice.[231]

The nexus test is praised for its predictability and clarity, but does it actually solve all of the issues that exist in the *Kovel* conundrum? Answering this question involves considering what level of independent analysis should be allowed in the expert's work, how necessary must the expert's work be in relation to the attorney's ability to provide effective legal advice, and whether the expert's work is purely for legal advice or if it is intertwined with accounting or business advice.

224. *Id.* at 789 n.312 (explaining the importance of this factor and counterarguments).

225. *Id.* at 789.

226. *Id.* at 791 (quoting United States v. Adlman, 68 F.3d 1495, 1500 n.1 (2d Cir. 1995)).

227. *Id.* at 792.

228. *Id.* at 792–94; United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

229. *See* DeStefano Beardslee, *supra* note 5, at 792 & n.330 (quoting Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002) (alteration in original) ("[W]hen a party hires an accountant to provide accounting advice, and only later hires an attorney to provide legal advice, it is particularly important for the party to show that the accountant later acted as an agent necessary to the lawyer in providing legal advice.")).

230. *See id.* at 793 n.331 (citing Kim. J. Gruetzmacher, Comment, *Privileged Communications with Accountants: The Demise of* United States v. Kovel, 86 MARQ. L. REV. 977, 989 (2003) (explaining that "requiring a law firm to hire a consultant or requiring a client to hire a law firm first 'epitomize[s] form over substance [and does] nothing but create uncertainty and confusion in an area of the law in which certainty is crucial'")).

231. *See id.* at 793 n.334 (first citing First Chi. Int'l v. United Exch. Co., 125 F.R.D. 55, 57 (S.D.N.Y. 1989), then citing United States v. Adlman, 134 F.3d 1194, 1198 (2d Cir. 1998)).

### B. *Expanding and Improving the Nexus Test*

#### 1. *Interpretation versus translation*

The proposed nexus test does not explicitly address the requisite level of independent analysis the *Kovel* expert may use while assisting the attorney. Rather, it tangentially describes scenarios that would be considered acceptable under this standard. Professor DeStefano Beardslee provided examples of what would be acceptable applications of an expert's assistance: they would need to help the lawyer do something "related to being a lawyer, like fine-tuning a legal strategy, ensuring compliance, avoiding liability, protecting a legal defense," or assist in "any action by the attorney requiring peculiarly legal skills."[232] Professor DeStefano Beardslee intentionally made this definition extremely broad and further asserted that because of the "nimble[ness]" of the profession it would be nearly impossible to limit or define the scopes of an attorney's duty to a client. [233]

Nonetheless, this still does not answer the specific question of how much independent analysis the expert may employ in assisting the lawyer in any of these functions. As this Article has shown in Sections II.A, IV.A and IV. B, the distinction between limiting experts only to literal translation (*Kovel*'s first scenario) or allowing them to utilize their own independent analysis (*Kovel*'s fourth scenario) was considered by some as artificial and others as an actual impossibility.[234] Therefore, this Article proposes that the level of independent analysis be explicitly relegated to the position of a single, non-dispositive factor used to support or undermine a nexus between the *Kovel* expert and the attorney's provision of legal advice.

This issue should be relegated to the status of a single factor because certain situations require more independent analysis

232. *Id.* at 786 n.299 (citing John E. Sexton, *A Post-Upjohn Consideration of the Attorney Client Privilege*, 57 N.Y.U. L. REV. 443, 490–91 (1982)).

233. *See generally id.* at 785–87, 786 n.299.

234. *See supra* Section II.A, IV.A, and IV.B.

than others, but both may be of equal necessity to the attorney. For example, while *Kovel* experts conducting trend analysis for a potential business venture are forecasting future earnings, which inherently uses extrinsic information, other *Kovel* accountants could be creating a simple net worth statement using only receipts and books provided by the client. Neither one of these situations is any more or less necessary to the attorney's ability to provide accurate and adequate legal advice to the client, but one inherently relies on more extrinsic information and independent expert advice. To protect the ever-expanding role of lawyers in the modern business world, the level of independent analysis should not be dispositive of *Kovel* protection.

This change to the nexus test would allow the test to fit more squarely within Judge Friendly's original *Kovel* scenarios, where experts hired for literal translation and experts utilized for their independent analysis were equally protected, as long as the end result was effective consultation between a client and an attorney.[235] By relegating this question to a single factor in a multi-factor nexus test, courts may analyze the extent to which an expert deviated from the factual information in a case and, in extreme situations, developed an entirely independent analysis for the attorney, which could indicate a lack of nexus between the expert's work, the client's communications, and the attorney's legal advice. Additionally, it would relieve courts of the impossible task of differentiating between what is literal translation and what is independent knowledge from the expert. Finally, it would accept the reality that, in most situations, the expert is inherently applying independent knowledge to the factual situation at hand—and that those communications should still be privileged.

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

2. *The expert's level of necessity*

The proposed nexus test explicitly addresses the question of what level of importance the expert's work must reach to be considered sufficient: it defines a strong nexus using necessity, indispensability, and high usefulness. This decision is in line with what the majority of courts that have addressed in *Kovel* situations,[236] and is also closer to the language in Judge Friendly's original opinion.[237] Additionally, the idea that fact-specific factors may be used to support the determination of a strong nexus provides ample opportunity for *Kovel* experts to receive protection under this standard. Therefore, this Article sees the nexus standard as adequately answering this aspect of the *Kovel* conundrum.

3. *Separating business recommendations from legal advice*

The proposed nexus test does not explicitly answer the question of how to resolve situations where a *Kovel* expert's assistance to an attorney includes information that could be considered as supplying business advice (or accounting advice) as well as legal advice.[238] While some courts have held that only specialized services should be sufficient to allow *Kovel* protection, others have held that the type of work conducted by the expert is irrelevant.[239] However, once again, this is such a

236. *See, e.g.*, Haugh v. Schroder Inv. Mgmt., No. 02-Civ-7955, 2003 U.S. Dist. LEXIS 14586, at *8–9 (S.D.N.Y. Apr. 25, 2003).

237. *See Kovel*, 296 F.2d at 921–22.

238. Interestingly, the United States Supreme Court recently granted certiorari to review a Ninth Circuit case which held that attorney-client privilege does not protect dual-purpose communications where the primary purpose of that communication is not providing legal advice. *Supreme Court to Hear Case on Client-Attorney Privilege in the Context of Dual-Purpose Legal Advice*, ORBITAX, https://www.orbitax.com/news/archive.php/Supreme-Court-to-Hear-Case-on--50977 (Oct. 4, 2022); *In re* Grand Jury, 23 F.4th 1088, 1091, 1094 (9th Cir. 2021).

239. *See* DeStefano Beardslee, *supra* note 5, at 754–55 (first citing *Haugh*, 2003 U.S. Dist. LEXIS 14586, at *7–9, then citing *In re* Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 329 (S.D.N.Y. 2003)) ("Furthermore, in making the law-business distinction, some courts and scholars ask what type of advice the *third-party consultant* provided. They consider whether the consultant is providing typical as opposed to special services. Similarly, some scholars

fact-specific inquiry that allowing this question alone to be dispositive would undermine the overall predictability of the doctrine. As a result, this Article suggests that this issue also be relegated to a single factor used to support or undermine a finding of a strong nexus.[240]

An additional factor for the nexus test directly targeted at the business significance of the *Kovel* expert's advice, weighed against the level of legal value it provides to the attorney, would be the most equitable solution to this issue. Only in situations where the business advice aspect of the expert's work outweighs the legal value should this factor be used to undermine a finding of a strong nexus. As this Article has illustrated, and as Judge Friendly rightfully explained in *Kovel*,[241] the modern litigators job is very complex because of the interdisciplinary nature of the law. Accordingly, lawyers should not be punished for communicating with experts to assist them in solving their client's problems.

## CONCLUSION

The proposed nexus test provides the ideal foundation for creating a unitary standard for evaluating *Kovel* issues. However, it does not address all of the issues presented by the *Kovel* conundrum, specifically: the level of the expert's independent analysis and the inextricable business significance of the expert's advice. As a result, this Article has suggested that these issues become explicit factors of the nexus test, each with specific presumptions and guiding factors that follow the

contend that the attorney-client privilege should only extend to certain types of third-party *specialists* as opposed to *regular* consultants. On those same lines, others contend that communication should not be protected because the advice provided by the *third party* was not legal advice.").

240. The nexus test attempts to solve this question with one of its factors: the skill level of the attorney's involved. However, this factor is not a direct solution to the question. An attorney with decades of tax experience could still be faced with a case that is beyond his or her expertise, and if there was a presumption against finding a nexus simply because the attorney's area of expertise overlapped with the work the *Kovel* expert provided, attorneys could be more hesitant to seeking advice to solve problems.

241. *See Kovel*, 296 F.2d at 921–23.

doctrine. While these factors do not themselves solve the *Kovel* conundrum, by relegating them to non-dispositive factors, courts will be able to conduct a more transparent and predictable analysis to determine whether or not attorney-client protection should be extended.

Judge Friendly correctly predicted that solving the *Kovel* conundrum would be complex and "that the line we have drawn will not be so easy to apply," and that we "will scarcely be able to leave the decision of such cases to computers." [242] He also correctly acknowledged that these decisions must be complex in order to ensure that "the privilege is neither . . . unduly expanded nor [turned into] a trap."[243] By using a nexus test with factors explicitly laid out to resolve the questions created by the *Kovel* conundrum, courts will be able to ensure that the derivative attorney-client privilege is maintained in an equitable and just way.

242. *See id*. at 922–23.

243. *See id*. at 923.