In In Re: 3M Combat Arms Earplug Products Liability Litig., 2020 WL 1321522 (N.D. Fla. Mar. 20, 2020), a multidistrict litigation, Magistrate Judge Gary R. Jones of the Northern District of Florida applied the "most significant relationship" test in concluding that individual and corporate communications were governed by the same privilege standards and ruled that the work-product protection applied to documents created "because of" the prospect of litigation, not merely the smaller group of documents whose "primary motivating purpose" was the anticipation of litigation.

In this products liability action, plaintiffs alleged that defendants "were negligent in their design, testing, and labeling of the nonlinear dual-ended Combat Arms Earplug Version 2." *Id*. at *1. In the course of discovery, plaintiffs challenged both the inclusion of certain categories of documents on the defendants' privilege log and the adequacy of certain privilege log entries.

Plaintiffs challenged the adequacy of the privilege log on the basis that it failed "to state the length of each document in a privilege entry and [failed to] separate email threads or 'strings' into discrete privilege entries." *Id.* at *2. Magistrate Judge Jones opened his analysis by noting that Fed. R. Civ. P. 26 governed the dispute and that his pretrial order set forth the required contents of the parties' privilege logs. In rejecting plaintiffs' challenge to the adequacy of the privilege log entries, Magistrate Judge Jones pointed out that the local rules did not require a party to indicate the length of a withheld document and noted that plaintiffs had cited to no legal authority or compelling basis to require such a disclosure. *Id.* at *3. He also rejected plaintiffs' request that the privilege log itemize each email in a thread because the rules did not require such an undertaking and doing so "pose[d] a risk of revealing privileged information."

Plaintiffs also challenged the adequacy of privilege log entries associated with the work-product protection, arguing that the defendants had to identify the anticipated litigation underlying the work-product claim. Magistrate Judge Jones disagreed, explaining that "[p]laintiffs should be able to surmise the subject of anticipated litigation from the date of the entry and the limited litigation concerning defendants relevant to this action," but he did allow plaintiffs to request such information for particular privilege log entries.

In addition to challenging the adequacy of the privilege log entries, plaintiffs argued that a heightened level of scrutiny applies to claims of attorney-client privilege for corporate communications. Florida state courts apply this heightened scrutiny as a matter of state law, but federal common law does not provide for such heightened scrutiny to attorney-client claims for corporate communications. In determining whether to apply Florida, federal common or some other law, Magistrate Judge Jones noted that federal common law rules of attorney-client privilege apply to claims or defenses arising under federal law, "while a state's evidentiary privilege applies only in diversity cases." *Id.* at *4. For multidistrict litigation, however, the choice of law inquiry is not resolved simply because state law "supplies the rule of decision." In this proceeding, the federal contractor defense, a federal common law principle, had "been at the forefront of the litigation" and would be affected by resolution of the privilege law issue. Stating that he was not persuaded that Florida privilege law should apply, the magistrate judge observed that federal courts have tended to apply a "most significant relationship" test to determine "the state with the most significant relationship with the privileged communication — such as the law of the state where the communication is centered." *Id.* (quoting *In re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices and Prods. Liab. Litig.*, 2011 WL 1375011, at *8 (S.D. Ill. Apr. 12, 2011)). Under the

"most significant relationship" choice of law analysis, a court examines where the communications at issue took place, where the relationship between the speakers was centered and where the subject matter of the communication was centered. Magistrate Judge Jones noted that "[p]laintiffs do not contest defendants' assertion that Florida has no significant relationship to the privileged communications" and concluded that the court should apply "the law of the state with the most significant relationship to the communication."

Magistrate Judge Jones rejected plaintiffs' argument that the attorney-client privilege did not extend to corporate communications where neither the sender nor recipient of the communication is an attorney. He explained that "[c]orporate employees within complex organizations, such as defendants, may discuss legal advice sought and given without losing the privilege, even when an attorney is not an author or recipient of the communication." *Id.* at *5. "The same protections afforded to communications between counsel and client extend to communications between corporate employees who are working together to compile facts for in-house counsel to use in rendering legal advice to the company." *Id.* (quoting *Fed. Trade Comm'n v. Boehringer Ingelheim Pharm., Inc.*, 180 F. Supp. 3d 1, 34 (D.D.C. 2016)). Magistrate Judge Jones also noted that "the fact that a corporate communication is addressed to numerous employees and only "carbon copies" in-house counsel is not dispositive of whether the attorney-client privilege applies." The ultimate question for application of the attorney-client privilege is "whether the attorney is providing legal advice even though the attorney may be a copyee of an email that also contains business advice." *Id.* (quoting *In re Abilify (Aripipazole) Prods. Liab. Litig.*, 2017 WL 6757558, at *7 (N.D. Fla. Dec. 29, 2017)).

Plaintiffs argued that the work-product protection applies only to documents whose "primary motivating purpose" was anticipation of litigation. Defendants advanced a broader test, arguing that the work-product protection applies to any document created or obtained "because of" the prospect of litigation. Magistrate Judge Jones noted that the proper standard by which to judge the work-product protection is an open question in the Eleventh Circuit and endorsed the "because of" standard, noting that "the key determinations in assessing the applicability of the work-product privilege are when and why the document or thing was created." *Id.* at *6.

Plaintiffs also argued that the work product protection should "be limited to litigation 'closely related' to [the instant] action." Magistrate Judge Jones rejected this argument because "[b]y its express terms, work product protection applies to any litigation." Magistrate Judge Jones went on to note that "most federal courts have held work product protection survives the termination of litigation."

Following these rulings, Magistrate Judge Jones set forth the results of his *in camera* review of 84 challenged documents and issued rulings on whether those documents were protected by the work product protection or attorney-client privilege, finding that 73 documents were privileged and overturning privilege claims on 11 documents. *Id.* at *7.