Many courts hold that corporations might waive their privilege protection through purely internal circulation of privileged communications — beyond those employees with a "need to know." This does not make much sense, because it hands over to corporations' external adversaries internal corporate communications disclosed only to employees with a fiduciary, contractual, or other duty to keep them confidential.

Although a few courts have extended this troublesome approach to situations in which other employees merely had access to privileged communications, other courts have drawn the line. In Garvey v. Hulu, LLC, Case No. 11-cv-03764-LB, 2015 U.S. Dist. LEXIS 7042, at *7 (N.D. Cal. Jan. 21, 2015), the court rejected plaintiffs' argument "that confidentiality was destroyed by the fact that [privileged communications are] generally accessible to Hulu employees beyond those immediately participating" in the pertinent legal issue. The court noted that the privileged communications were "not public" and that "[o]nly Hulu employees may access" them. Id. at *10. The court ultimately concluded that "[c]onfidentiality is not destroyed by the possibility of other Hulu employees, not directly participating in the [issue], could have accessed" the privileged documents — quoting an earlier Central District of Illinois decision explaining that "[m]aterial need not be 'kept under lock and key to remain confidential' for purposes of the attorney-client privilege" (quoting United States v. Dish Network, L.L.C., 283 F.R.D. 420, 425 (C.D. Ill. 2012)). Id. at *10-11.

It is refreshing to see some courts' common-sense approach, but corporations should still take reasonable steps to limit privileged communications' internal circulation to employees with a "need to know" in order to perform their duties.