

HOT TOPICS IN ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT

Protection for board level communications,
disclosures in governmental investigations,
and communication with insurers

Presented by Hogan Lovells | August 6, 2019

Hogan
Lovells

Presenters:



KELLY HULLER
GENERAL COUNSEL, GLOBUS
MEDICAL



DANIEL METROKA
PARTNER, HOGAN LOVELLS



DAVID NEWMANN
PARTNER, HOGAN LOVELLS

Agenda

1 Introduction

2 Scenario 1: Protecting Board Communications

3 Scenario 2: Managing Joint Defense Agreements

4 Scenario 3: Disclosures to Insurers

5 Scenario 4: Disclosures to the Government

6 Questions

INTRODUCTION

Hot Topics in Attorney Client Privilege and Work Product

Today's focus

Board communications

- Protecting communications to the Board
- Waiver issues when dealing with interested Board members

Common interest doctrine

- Managing joint defense agreements
- Protecting disclosures to insurers

Disclosures to government and possible waiver

- Managing discovery disputes with government
- Disclosing findings of internal investigations

SCENARIO 1: PROTECTING BOARD COMMUNICATIONS

Hypothetical Facts

- Outside counsel has completed its investigation and is preparing a report for the Board of Directors
- **Questions:**
 - Will materials outside counsel uses to brief the board be protected from discovery?
 - How can you manage counsel's communications to the board to preserve privilege and work product protections?

Attorney Client Privilege In Board Communications

- Generally protects
 - A communication
 - Made between attorney and client
 - In confidence
 - For the purpose of obtaining or providing legal advice
- Key considerations:
 - Who's protected?
 - What's protected?

Attorney Client Privilege: Who's Protected?

- Communication between “attorney” and “client”
 - In-house counsel may wear two hats
 - **Pitfall:** Which hat are you wearing?
 - Communication with non-lawyer may be privileged if to facilitate advice
- *Upjohn Co. v. United States*, 449 U.S. 383 (1981) rejected “control group” test
 - Information provided by employees typically protected if
 - Communication made to counsel acting as counsel
 - At direction of management for the purpose of securing legal advice
 - Concerning subject within scope of employment
 - Employee knows purpose of the communication is for corporation to procure legal advice

Attorney Client Privilege: What's Protected?

- Legal advice and communications that will facilitate provision of advice
- Tests:
 - D.C. Circuit: “primary purpose” = legal advice was “one of the significant purposes”
 - Other Circuits: legal advice must be “predominant purpose”

U.S. Work Product Doctrine

Protection for Board Communications

- Generally protects documents prepared in anticipation of litigation and turns on motivation to prepare documents
 - Fifth Circuit: anticipation of litigation is “primary motivating purpose”
 - Other circuits: “because of” anticipation of litigation
 - Protection unlikely if documents would exist in same form absent litigation

U.S. Work Product Doctrine (con't)

- “Core” or “opinion” work product
→ nearly absolute protection
 - Encompasses “mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation”
- Other work product discoverable only if need + hardship



Recent Helpful Decision

- Decision in federal district of Maryland examined whether three documents were discoverable
 - A 62 page “Briefing Document” created by outside counsel in response to a request from in house counsel “for assistance and legal advice” at a time when litigation about the company’s medical device was both pending and anticipated
 - PowerPoint presentation presented to the Board
 - Minutes from Board of Directors meeting summarizing a report from the chief legal officer

In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prods. Liab. Litig., No. 1:17-md-2775, 2019 U.S. Dist. LEXIS 91795 (D. Md. May 31, 2019)

Briefing Document

Plaintiffs claimed portions were purely factual and subject to discovery

Attorney client privilege

- Court found clinical information in the document was interwoven with legal strategy
- HELD: Primary purpose was to provide legal advice to board so privileged

Work Product protection

- Document detailed both pending and anticipated litigation
- HELD: Because document was prepared in anticipation of litigation, work product protections apply

PowerPoint Presentation

- HELD: Presentation was developed in conjunction with Briefing Document in order to provide legal advice to the board and in anticipation of pending litigation. Thus, both attorney-client privilege and work product protection apply.
- Court found no waiver
 - PowerPoint had been inadvertently produced but court found company's efforts prior to and subsequent to inadvertent disclosures satisfied Rule 502(b)
 - PowerPoint had been shared with a consulting firm that had assisted company in making a presentation to the FDA but court found document shared pursuant to confidentiality agreement and no evidence that consulting company had intent inconsistent with an intent to invoke work product protections

Board of Director Meeting Minutes

- Most content redacted as unresponsive
- Privilege asserted regarding responsive portion of minutes that summarized a presentation by Chief Legal Officer
- Court reviewed n camera
- HELD: Both attorney-client privilege and work product protections apply because
 - Briefing Document was created in order to provide legal advice to the Board
 - Minutes summarize a presentation of the same information to the Board and detail the current state of pending and anticipated litigation against the company

Special Rules in Derivative Litigation

- PA Supreme Court recently confirmed that *American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994)* govern derivative actions in PA. See *Pittsburgh History & Landmarks Found. v. Ziegler*, 200 A.3d 58, 61 (Pa. 2019)
- §7.13(e) of those principles provides appropriate framework for application of attorney-client privilege in context of derivative litigation

Special Rules in Derivative Litigation (con't)

- When corporation moves to dismiss a derivative action, pursuant to § 7.13(a) of ALI Principles, it will submit a copy of the board committee's report that supported current management's decision not to pursue the claim
- § 7.13(e) addresses privilege
 - Requires that plaintiff's counsel be furnished not only legal opinions tendered to the court but also “related legal opinions received by the board or committee if any opinion is tendered to court pursuant to § 7.13(a)”
 - Additional language makes it clear providing these documents does not act as a broad waiver

Best Practices When Communicating with the Board

Document intent to conduct an investigation in a privileged manner in

- Board minutes
- Email
- Written communication from management or the board authorizing counsel to undertake an investigation for the purpose of providing legal advice
- Memo to file (if intent orally communicated)

Communication should also identify any actual or anticipated litigation or Government investigations arising from the conduct under investigation

Best Practices When Communicating with the Board (con't)

- Understand waiver rules
 - If counsel reports the findings of an investigation to members of management or board members who have engaged in conduct that could make them adverse to the company, a waiver may occur
 - Appointing Special Committee to run investigation may avoid such waiver
 - But waiver still possible if Special Committee provides report to full board. *Ryan v. Gifford*, C.A. No. 2213, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007)
- Given this risk, it's important that outside counsel knows *from the beginning* who is running the investigation on behalf of the company and be aware of any possible conflicts of interest

Best Practices When Communicating with the Board (con't)

- Maintain expectation of privacy
 - If counsel is providing legal advice to board members, presence of others could destroy expectation of privacy
 - Communicate only through email accounts that are consistent with an expectation of privacy (i.e. not board members' employer accounts managed by other companies)

Privilege Law Around the Globe

No global consensus

- Who qualifies as “attorney” and “client” differs

Common law countries

- Generally client can waive

Civil law countries

- Often *may not* be waived

SCENARIO 2: MANAGING JOINT DEFENSE AGREEMENTS

Scenario 2

- The company would like to communicate with counsel representing the regional sales manager who was responsible for bidding on the contracts at issue in the antitrust investigation.
- **Questions:**
 - How can the company communicate with this employee's counsel about its legal strategy without waiving privilege?
 - When should a joint defense agreement with the sales manager be severed?

Joint defense agreements

- JDAs are contracts through which two parties agree to exchange confidential information for their mutual benefit
- Aim to take advantage of the common interest doctrine, which prevents a waiver of attorney-client privilege protections that would protect these communications if not shared with a third party
- Requirements vary by jurisdiction, but parties generally must show that communications were
 - made in the course of a joint defense effort
 - designed to further that effort
 - privilege has not been waived

In re Condemnation by City of Philadelphia in 16.2626 Acre Area, 981 A.2d 391, 397 (Pa. Commw. Ct. 2009) (citing *In re Bevill, Bresler and Shulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986))



Practical Tips



- JDAs may be written or non-written
- “Noisy exit” requirements

- Company may want to preserve its right to disclose information learned from employees or former employees to the government in order to secure cooperation credit
- Including language in JDAs explicitly authorizing such disclosure may:
 - Discourage employees/former employees from cooperating
 - Support an argument that the JDA is illusory because it that the parties actually have a common interest

Ethical Issues Raised by JDAs

- Fallout from withdrawal
 - Some courts have held that information obtained from a party prior to withdrawal may not be used in the cross-examination of that cooperating witness by counsel for the remaining parties to the JDA
 - Courts reasoned that JDAs at issue created implied attorney-client relationships between counsel and all participants to the agreement that precluded cross-examination
- Perception matters
 - Company should proceed cautiously when encouraging current/former employees to cooperate with investigation – could be perceived to raise obstruction issues

When Should Joint Defense Agreement Be Severed?

- The agreement should be severed when the parties' interests diverge
 - Some courts require that the parties' interests remain at least “substantially similar.” See *e.g. Teleglobe Communications v. BCE*, 493 F.3d 345, 365 (3d Cir. 2007).
 - Others have required that the co-parties' interests remain identical in order to support the privilege *Id. (citing Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1172 (D.S.C. 1974)).
- Noisy exit requirement

SCENARIO 3: DISCLOSURES TO INSURERS

Hypothetical Facts

- You're in-house counsel for a global defense contractor and DOJ is investigating allegations that your company coordinated bids for government contracts with other contractors
- A DOJ complaint names the company and individual directors and officers as defendants in an industry-wide antitrust investigation and you submit the claim to your D&O insurance policy
- Pursuant to the cooperation obligation of that policy, the insurer wants to be briefed about factual findings, risk assessments, and strategy related to the covered litigation
- **Question:** Outside counsel has prepared a report for the insurer for your approval. Does this report risk a privilege waiver?

Does Common Interest Exception Apply?

An underlying privilege (such as the attorney-client privilege) protects the communication

Parties disclosed the communication to each other at a time when they shared a common interest

- Generally a legal one not solely a business one
- Must relate to a collaboration in pending or future litigation

Parties shared communication confidentially in furtherance of that common interest

Parties have not waived the privilege

Common Interest With Insurers?

- Common interest exception to privilege waiver rule typically applies where insurer and insured retain a lawyer to represent their common interests (until a conflict arises). *Graziani v. OneBeacon Ins. Inc.*, 2007 WL 5077409 (Pa. Ct. Com. Pl. 2007)
- “As with any liability-carrier coverage, counsel representing the [defendants] share with the liability carrier information, opinions, assessments, and strategy related to the covered litigation [and] ... [s]uch opinion work product documents, and attorney-client communications *made as part of a joint defense*, are almost certainly never subject to discovery.” *In Re: Blue Cross Blue Shield Antitrust Litigation*, MDL No. 2406, Case No. 2:13-cv-20000-RDP, Disc. Order No. 57 (N.D. Ala. July 6, 2017)

Underlying Privilege Required

- Even when there is a common interest, it will not protect documents that are not covered by underlying privilege
 - *Conley v. Graybeal*, 315 A.2d 609 (Del. Super. Ct. 1974) (documents prepared by insurer in regular course of business but not at request of an attorney were discoverable in litigation against insured)
 - Communications protected if “made to the [insurer] for the dominant purpose of the defense of the insured by the attorney and where confidentiality was the reasonable expectation of the insured.” *State v. Pavin*, 494 A.2d 834, 837-38 (N.J. App. Div. 1985).
 - NOTE: Disclosure to another party could waive otherwise applicable privilege

Common Interest Privilege Only Applicable To Third Parties

- Parties with common interest can both discover the others' communication to shared counsel
- Insured's communications to insured's attorney are discoverable by an insurer paying defense costs. *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 A.2d 1118, 1122-24 (Del. Super. Ct. 1992).
 - But, when insured reasonably suspects coverage issues might arise, communications between insured and its counsel from that point forward may be protected from discovery by insurer. *Id.*
 - NOTE: there are distinctions in state law about when litigation between insurer and insured waives any such privilege and any parallel privilege asserted by insurer

SCENARIO 4: DISCLOSURES TO THE GOVERNMENT

Hypothetical Facts

- DOJ issued broad discovery requests. Some responsive material is privileged and/or protected by work product doctrine. DOJ counsel has made it clear that although she does not require that your company produce privileged material, the “facts aren’t privileged” and she expects your investigation to discover and report all the key facts.
- **Questions:**
 - How can you best manage your productions to avoid waiver and also avoid angering DOJ?
 - What form should your outside counsel’s report to DOJ take to minimize risk of waiver?

Asserting Privilege in Response to Document Requests

- DOJ or other enforcement agencies may respond to broad assertion of privilege with a more aggressive enforcement posture (or may even draw a negative inference from refusal to produce)
- Counsel must weigh these possibilities against waiver risk
- Often best to resolve discovery disputes through negotiation and compromise. These strategies may help:
 - Promptly producing non-privileged, responsive documents
 - Attempting to narrow the scope of the document request
 - Clarifying the scope of any privilege claim
 - Negotiating confidentiality

Reporting the Findings of an Investigation to DOJ

- DOJ does not require privilege waiver but asserts that facts are not privileged
- Providing only oral report may minimize waiver risk
- BUT: Factual proffers based on witness interviews may waive work product protections if tied to specific witnesses. *See SEC v. Vitesse Semiconductor Corp.*, 2011 WL 2899082 at *1-3 (S.D.N.Y. July 14, 2011)
 - Don't make verbatim recitations of witness interviews
 - Consider instead summarizing facts around certain issues drawing on interviews from multiple witnesses and other documents

Other Considerations

- Enter a confidentiality agreement with DOJ that:
 - Limits government's discretion to disclose produced materials
 - Includes nonwaiver provisions in which the government agrees that the production of any privileged communication or attorney work product does not result in a waiver
 - Provides that government will not assert a broader subject-matter waiver based on such disclosures
 - Includes clawback provisions to address inadvertent disclosures
- Only minority of courts recognize selective waiver so decision to waive privilege must weigh possible discovery by third parties

QUESTIONS?

A reminder about the benefits of ACC membership...

- Free CLE, like the one you're attending right now
- Roundtables
- Networking meetings
- Special events (Spring Fling, Fall Gala, races, etc.)
- Access to ACC resources, including:
 - ACC Newsstand (customizable updates on more than 40 practice area)
 - ACC Docket Magazine
 - InfoPAKs
 - QuickCounsel Guides
- **For more information or to refer a new member, see your hosts today or contact Chapter Administrator, Chris Stewart, at ChrisStewart@ACCglobal.com.**

