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Recent Trends: How to Maximize Your Protections Under The Attorney-Client Privilege And Work Product Doctrine

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Today's Agenda



- Provide an overview of the law of the attorney-client privilege and work product doctrine, focused on issues often faced by in-house counsel
- Examine how and when the attorney-client privilege or work product doctrine can be waived
- Discuss case examples to illustrate major principles
- Offer practice tips for in-house counsel
- Answer your questions

The Attorney-Client Privilege

The purpose of the privilege is "to encourage full and frank communications between attorneys and their clients."

"The privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."

Upjohn Co. v. United States, 449 U.S. 383, 389, 391 (1981)

The Attorney-Client Privilege

Requirements:

- Communications made in confidence
- Between a client and his or her attorney
- For the purpose of seeking, obtaining, or providing legal advice



The Attorney-Client Privilege

Assume nothing is privileged and then ask:

- Is this a communication that fits the definition (client/attorney, in confidence, to obtain legal advice)?
- Does an exception apply (crime/fraud, at issue doctrine)?
- Is there any reason to believe there has been a waiver (third-party disclosure)?

In-House Dilemma: Legal vs. Business Advice



Three Part Analysis

- For what purpose was the lawyer contacted?
- Could a non-lawyer perform this function?
- Did client or lawyer acknowledge the nature of the in-house counsel's role?

Example: *MSF Holding* (S.D.N.Y)

Question Posed To In-House Counsel: Do we honor a letter of credit?

- SVP/Deputy GC gathers facts
- Does not conduct a legal analysis
- Makes a recommendation

Privileged?



Example: FTC v. AbbVie Inc. (E.D. Pa)

PRIVILEGED

- Documents handed out to employees that memorialize legal advice

PRIVILEGED

- E-mail about a business decision where legal advice was provided

NOT PRIVILEGED

- Business planning documents where advice of in-house counsel was referenced

NOT PRIVILEGED

- E-mails where counsel contended legal advice was redacted

BEST PRACTICES

- Segregate legal and business advice when possible
- Signal that legal advice is being given
- Avoid over-designating communications as privileged
- Avoid over-copying in-house counsel



COMMUNICATIONS WITH FORMER EMPLOYEES

- The communication is privileged if it relates to the former employee's conduct or knowledge gained during the employment, or if it concerns conversations with corporate counsel that occurred during the employment.
- Any adversity with a former employee may compromise the privilege.
- Former employees should be advised that counsel represents the employer, not the employee.
- Communications should be limited to matters within the scope of the former employee's employment.

The Work Product Doctrine

The Purposes of the Protection

- To protect an attorney's thought processes and mental impressions from disclosure;
- To limit the circumstances in which attorneys may piggyback on the fact-finding investigation of their more diligent counterparts; and

The Scope of the Protection

- The work-product protection is broader than the attorney-client privilege in that it protects a wider range of things and communications (includes not only written memoranda, but also photographs, diagrams, drawings).

The Work Product Doctrine

The FRCP 26(b)(3) test:



- Communication of a nature that qualifies for protection
- Prepared for or obtained in anticipation of litigation
- Prepared by or for a party asserting protection or that party's attorney or qualifying representative

Work Product Doctrine

Key Determination:

Was the material prepared because of the prospect of litigation or for an ordinary business purpose?



The Work Product Doctrine

What Qualifies as Anticipation of Litigation?

- Some courts require that a specific claim be “imminent” *Occidental Chem. v. OHM Remediation Servs. Corp.*, 175 F.R.D. 431, 439 (W.D.N.Y. 1997)
- Other courts hold that litigation need not be imminent, as long as: 1) the primary motivation for the creation of the document was its use in potential litigation; and 2) the anticipation of litigation was “objectively reasonable.” *Martin v. Bally’s Park Place Hotel & Casino*, 983 F.2d 1252 (3d Cir. 1993)

Work Product Doctrine

	Discoverable	Non-Discoverable
<i>Serrano v. Chesapeake Appalachia, LLC</i> (W.D. Pa. March 6, 2014)		
<i>Heinzl v. Cracker Barrel Old Country Store, Inc.</i> (W.D. Pa. Oct. 15, 2015)		
<i>Ebert v. C.R. Bard, Inc.</i> (E.D. Pa. Apr. 14, 2014)		

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Note: Work Product is a conditional protection that can be overcome by a showing of substantial need.

BEST PRACTICES

- “Attorney Work Product” label
- Document your concern of litigation (*i.e.*, litigation hold, engage outside counsel, etc.)
- Include opinions, conclusions, mental impressions, and legal theories throughout the product
- Avoid forms or practices used in the ordinary course of business
- Research the law of your jurisdiction



Are Internal Investigations Protected?



- Companies in heavily regulated industries are often required to perform internal investigations under various circumstances.
- Compliance departments may operate separately from legal departments.
- Non-lawyers may often be used in investigations.
- Litigation may or may not be imminent.
- Are these investigations protected from disclosure?

Example: *In re Kellogg* (D.C. Cir)

The Facts

- Investigation was mandated by government regulations
- Performed pursuant to Code of Business Conduct
- Interviews by non-lawyers
- Confidentiality agreements did not mention legal advice
- Final report sent to legal

The Rulings

- **District court held that investigation was not protected.**
- **Court of Appeals reversed, finding that the investigation was directed by in-house counsel, partially done to obtain legal advice, and identified that it was privileged.**

RECOMMENDED STEPS

- Use findings to obtain or provide legal advice.
- Clearly document that investigation is for obtaining legal advice in anticipation of litigation.
- Include attorney mental impressions, conclusions, and opinions.
- Communicate the privileged/confidential nature of the investigation.
- Lawyer-directed, outside counsel if possible.
- Establish processes to identify privileged investigations.



Guarding Against Waiver

The protections offered by the attorney-client privilege and work product doctrine can be lost, either intentionally or inadvertently.



WAIVER OF ATTORNEY-CLIENT PRIVILEGED INFORMATION

Historically, courts held that waiver could occur by operation of the law, even if it was unknowing, involuntary, or unintentional.

- “[t]he courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost ‘even if disclosure is inadvertent.’ ... In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of the attorney-client communications like jewels—if not crown jewels.” *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989)

FEDERAL RULE EVIDENCE 502

In 2008, Congress enacted Rule 502, which significantly limits waiver.

- Rule 502(b)-When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
 - (1) the disclosure is **inadvertent**;
 - (2) the holder of the privilege or protection took **reasonable steps to prevent disclosure**; &
 - (3) the holder **promptly took reasonable steps to rectify the error**

Inadvertent Disclosures Of Privileged Materials

- Rule 26(b)(5)(B)-If a party is informed that it has received information subject to a privilege claim, it must “promptly return, sequester, or destroy the specified information,” but it may also submit the information to the court under seal for a determination of the claim.
- Model Rule of Professional Conduct 4.4(b): A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

FEDERAL RULE EVIDENCE 502(d)

- Rule 502(b) provides a default level of protection
- Rule 502(d) -"A federal court **may order that the privilege or protection is not waived by disclosure** connected with the litigation pending before the court—in which event, the disclosure is also not a waiver in any other federal or state proceeding."
- Rule 502(d) claw-back orders can waive the requirements that:
 - Disclosures be inadvertent
 - Proper procedures were employed to prevent disclosure
 - The holder promptly took reasonable steps to rectify the error

AVOIDING WAIVER THROUGH INADVERTENT DISCLOSURE

- Segregate privileged documents in-house (if possible) through technology such as separate servers, or legal designations on emails.
- Clearly label documents and emails that are meant to be privileged.
- Ensure that you have established defensible review procedures.
- Put in place protective orders with expansive claw-back provisions consistent with FRE 502(d).



WAIVER OF ATTORNEY-CLIENT PRIVILEGED INFORMATION

- Sharing attorney-client privileged information with third parties, including outside consultants, can result in a waiver of the privilege.
- Limited exceptions exist where: (1) the individual's participation is necessary to provide background for the legal advice; or (2) the consultant is acting as a *de facto* employee.
- For example, the attorney-client privilege was deemed waived with respect to documents disclosed to an outside accountant where there was no showing that the disclosure was necessary for the representation. *Construction Industry Services Corp. v. Hanover Ins. Co.*, 206 F.R.D. 43 (E.D.N.Y. 2001)



WAIVER IN THE CONTEXT OF GOVERNMENT INVESTIGATIONS



- Disclosing documents to the government in connection with an investigation can result in a waiver of the privilege.
- Some courts will enforce government non-waiver agreements and protect material that has been disclosed. *See, e.g., In re Application of Financialright GmbH*, 2017 U.S. Dist. Lexis 107778 (S.D.N.Y. June 23, 2017).
- No guarantees. *See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3d Cir. 1991) (voluntary disclosure to government constituted waiver of attorney-client privilege even though the parties expected confidential treatment).
- Protection for Banks - 12 USC § 1828(x)

WAIVER OF THE WORK PRODUCT DOCTRINE

- Generally, the work product doctrine should only be deemed waived if the disclosure enables an adversary to gain access to the information. *In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011)
- This rule was recently adopted by the Pennsylvania Supreme Court in *BouSamra v. Excela Health*, 210 A.3d 967 (Pa. 2019).
- There, the Court held that that the company did not waive the work product doctrine by forwarding counsel emails to a public relations consultant.

RECOMMENDATIONS TO MINIMIZE THE RISK OF WAIVER

- Use caution when sharing privileged information with any third-parties, including consultants – use internal personnel when possible.
- Employ confidentiality and non-waiver agreements with clear language, but resist sharing highly sensitive information.
- Limit the dissemination of privileged information to only those who need to know.
- Insist on expansive language against waiver in any protective orders you are using for your litigation.
- Research the relevant law in your jurisdiction.



QUESTIONS?



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