Privilege Protection in a Technology and AI-Driven Legal World

ACC SoCal In-House Counsel Conference

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Presenters

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- Antitrust & Competition Law
- 20+ years of defense experience
- Government investigations & civil litigation, including:
  - Alleged criminal antitrust violations (price fixing, bid rigging)
  - Follow-on and stand-alone civil litigation alleging collusion
  - Single firm conduct (monopolization)
  - Class action jury trials
- Antitrust compliance training / counseling
- Involved in state antitrust amendments / expansions

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- White Collar & Regulatory Enforcement
- 20+ years of defense experience
- Government & internal investigations, including:
  - Anti-corruption / FCPA
  - Financial fraud
  - International Trade / Customs
  - False Claims Act
  - Environmental
- Anti-corruption transaction and due diligence reviews, compliance program design, and training

Agenda

- Overview of Privilege Law
  - Attorney-Client Privilege
  - Work Product Protection
  - Waiver

- E-discovery and F.R.E. 502(d) Orders

- Recent Decisions Addressing Ai and Privilege

- Key Takeaways

Overview of Privilege Law

The Attorney-Client Privilege

- Protects against the disclosure of:
  - Communications between a lawyer and a client
  - Made in confidence
  - For the purpose of obtaining or providing legal advice

- Includes written and oral communications

- Protects contents of the communication, not underlying facts

- Limited exceptions, e.g., crime-fraud, shareholder access under *Garner*
  - *Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW*, 95 A.3d 1264 (Del. 2014)

Overview of Privilege Law

The Work Product Doctrine

- Protects against the disclosure of:
    1. Documents or tangible things
    2. Prepared in anticipation of litigation

- Different tests for "anticipation of litigation"

- Different treatment of "fact" v. "opinion" work product
    - Adversary can obtain fact work product by showing:
        1. Substantial need
        2. Inability to obtain the equivalent without undue hardship

    - Heightened protection for opinion work product
        - Includes mental impressions, conclusions, opinions, or legal theories

Overview of Privilege Law

Federal Rule of Civil Procedure 26(b)(3)(A)

"Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial **by or for another party or its representative** (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."

→ *In criminal matters, may be limited to attorney work product*

Practice Pointer →
Evaluate applicable state and federal law on privilege and work product issues at the outset of an investigation and plan accordingly.

There are significant differences across jurisdictions.

Overview of Privilege Law

Waiver

- Attorney-Client Privilege waiver can occur by:
  - Disclosure to any third party
  - Putting privilege at-issue (e.g., advice of counsel defense)

- Work Product Protection waiver can occur by:
  - Disclosure to *certain* third parties
    - Adversary
    - Non-adversary that substantially increases the opportunities for potential adversaries to obtain
  - Putting work product at-issue

Practice Pointer →
Don't view privilege waiver decisions in isolation: consider the risk of subject matter waiver

Overview of Privilege Law

Waiver

- Limited exceptions, such as:
  - Common-interest or joint-defense agreements

  - *Kovel* arrangements

  - Selective waiver / selective waiver confidentiality agreements (limited acceptance by courts)

  - Statutory non-waiver provisions

  - FRE 502(e) agreements and 502(d) orders

E-discovery and F.R.E. 502(d) Orders

Controlling Effect of a Court Order

"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"

E-discovery and F.R.E. 502(d) Orders

Controlling Effect of a Court Order

- Purpose
  - Avoid excessive costs of pre-production review for privilege
  - Enforced via "claw-back" and "quick peek" arrangements

- Issues and Risks
  - Limited availability:
    - "litigation pending before the court"
    - Requires a court order
  - Potential for blurred lines with intentional disclosures / waiver

Recent Decisions Addressing Ai and Privilege: *U.S. v. Heppner*

Question Presented

"[W]hen a user communicates with a publicly available AI platform in connection with a pending criminal investigation, are the AI user's communications protected by the attorney-client privilege or the work product doctrine?"

U.S. v. Heppner

Factual Background

- Heppner receives a grand jury subpoena

- Heppner uses the generative AI platform Claude from Anthropic to create 31 AI documents
  - Documents outline defense strategy and arguments
  - NOT done at the direction of counsel, BUT:
    - Inputs included information learned from counsel
    - Created for the purpose of speaking with counsel to obtain legal advice
    - AI documents subsequently shared with counsel
    - Created in anticipation of a potential indictment

- Heppner arrested and 31 AI documents seized

U.S. v. Heppner

Attorney-Client Privilege Analysis

- Holdings re elements of privilege:
  - Communications between a lawyer and a client? NO

  - Made in confidence? NO

  - For the purpose of obtaining or providing legal advice? Closer call, but NO

U.S. v. Heppner

Attorney-Client Privilege Analysis

- Holdings
  - 1. Communications between a lawyer and a client? NO

- Rationale
  - Claude is not an attorney
  - Rejected argument that AI inputs are not communications and are more akin to cloud-based word processing

U.S. v. Heppner

Attorney-Client Privilege Analysis

- Holdings
  - 2. Made in confidence? NO

- Rationale
  - Claude privacy policy allows data collection, use in training, and disclosure to third parties
  - Rejected argument that AI documents were akin to confidential client notes intended to be shared with an attorney—because first shared with Claude

U.S. v. Heppner

Attorney-Client Privilege Analysis

- Holdings
  - 3. For the purpose of obtaining or providing legal advice? Closer call, but NO

- Rationale
  - Did not intend to obtain legal advice from Claude
    - o Irrelevant that client later shared Claude's output with counsel

  - If it had been done at direction of counsel, arguable Claude is akin to lawyer's agent (and within privilege)

U.S. v. Heppner

Work Product Protection Analysis

- Holding: Not protected because not prepared by or at direction of an attorney

- Rationale:

  – Work product doctrine intended to shelter the mental processes of *attorneys*

    o AI Documents affected counsel's strategy moving forward, but did not reflect counsel's strategy at the time

    o Preparing materials in anticipation of litigation is insufficient

  – Rejected authorities suggesting work product protection could apply absent attorney involvement

Warner v. Gilbarco et. al

Defendant's Motion to Compel

- Request: "all documents and information concerning [Plaintiff's] use of third-party AI tools in connection with this lawsuit"

- Holding: Not discoverable

- Rationale:
  - Protected by work product doctrine under FRCP 26(b)(3)(A)
  - Not relevant
    - And even if marginally relevant, not proportional under FRCP 26(b)(1)
  - Use of ChatGPT not a waiver
    - Not a disclosure to an adversary or in way likely to get in an adversary's hands
    - ChatGPT is a tool, not a person – even if there are administrators in the background
    - Materials were akin to "a litigant's internal mental impressions reformatted through software"

Warner v. Gilbarco et. al

Defendant's Motion to Compel

Granting motion to compel regarding use of AI

"would nullify work production protection in nearly every modern drafting environment"

Key Takeaways

- Recognize privilege law applied to AI is an evolving area
  - Courts are already diverging on analytic frameworks and outcomes
  - Stay abreast of both technological and legal developments

- Take steps to maximize privilege protections
  - Know the applicable privilege law in the relevant jurisdictions
  - Use, but do not over-use, F.R.E. 502(d) orders
  - Assess privacy / confidentiality policies of AI tools
    - Same for other software / cloud products
  - Develop protocols and training for AC privilege or WP protection
    - For matters within potential criminal risk, or where weaker privilege law applies, consider having attorneys direct creation of relevant work product

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