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ACC - St. Louis
2019 Golf Spa Event

Professional Responsibility CLE: Privilege, Investigations, and Multi-Jurisdictional Practice

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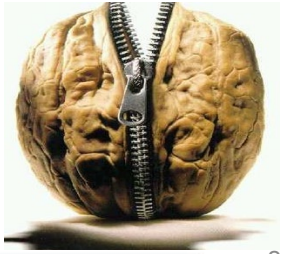
Attorney-Client Privilege in a Nutshell

- Protects communications (not facts)
- Made in confidence
- Between client (or an appropriate client representative) and lawyer (or the lawyer's representative)
- For the purpose of facilitating legal advice



Communication must be for the purpose of facilitating legal advice

- Communication not privileged simply because it is made by or to a lawyer
  - Including an attorney in meetings and on emails does not make that communication privileged
  - Privilege protects the discussions only if the predominant purpose of the meeting was to obtain legal advice

Belongs to client and can be waived by client

- Applies to communications **between client and lawyer**
- General rule is that disclosure to a third party destroys privilege unless the person is necessary to assist in the representation
  - Restatement (Third) of the Law Governing Lawyers, Section 70, comment f:
    - A person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer

Universal Standard v. Target
331 F.R.D. 80 (S.D.N.Y. May 6, 2019)

- Trademark suit brought by startup clothing company Universal Standard against Target
- Involving Target's sale and marketing of the "Universal Thread" clothing line – an allegedly infringing brand concept
- **At issue**: Communications among Universal Standard, its attorneys, and a PR firm - BrandLink

Universal Standard v. Target

- Emails between Universal Standard and its counsel were shared with BrandLink
- Discussion of PR strategy– in particular, whether a press release should issue in connection with the filing of lawsuit
    - Waiver of attorney-client privilege?

Universal Standard v. Target

- Highly fact-specific inquiry
- Court examines three exceptions to the general rule regarding wavier
- Is the third party PR firm:
  - necessary for the client to communicate with the attorney;
  - the “functional equivalent” of a client; and/or
  - a consultant used by the attorney to aid in a legal task

?

Interpreters/Facilitators

- Waiver not found where the presence of third-party is *needed* to allow the client to communicate information to the attorney
- *United States v. Kovel,* 296 F.2d 918 (2d Cir. 1961)
  - Extended privilege to communications made by client to accountant in the attorney's employ, provided that the facts were communicated to the agent in confidence for the purpose of obtaining legal advice from the lawyer

Kovel Doctrine Applied

- ***Universal Standard v. Target* – Privilege Waived**
  - BrandLink PR firm not **necessary** for Universal Standard to communicate with its attorneys about press release
  - Any questions that arose regarding the propriety of a press release could have been communicated to counsel without BrandLink's involvement

Kovel Doctrine – Results may vary…

- **Appraisers**
  - *Steele v. First Nat'l Bank,* 1992 WL 123818, *2 (D. Kan. May 26, 1992)
    - Appraiser who worked closely with bank and helped develop bank's strategy regarding plaintiff included in the scope of privilege for discussions at a meeting with bank and counsel
  - *U.S. v. Richey,* 632 F.3d 559 (9th Cir. 2011)
    - Communication related to preparation and drafting of an appraisal was not privileged because it was not made for the purpose of providing legal advice, but for the purpose of determining the value of an easement

Kovel Doctrine – Results may vary…

- **Investment Bankers/Financial Consultants**
  - *Calvin Klein Trademark Trust V. Wachner,* 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000)
    - Communications in connection with preparation of offering memoranda and other disclosure documents, involving company representatives, counsel, and an investment banking firm, were privileged
  - *In re Refco Sec. Litig.,* 280 F.R.D. 102, 105 (S.D.N.Y. 2011)
    - No privilege where financial consultant was not necessary to the lawyer's ability to understand a client's materials

Functional Equivalent Doctrine

- No waiver where third party is so thoroughly integrated into the company that it should be treated as "functionally equivalent" to an employee
- *In re Bieter Co.,* 16 F.3d 929 (8th Cir. 1994)
  - Independent contractor was "functional equivalent" of company where:

> *contractor who secured tenants for a real estate development worked with architects, consultants, and counsel; acted as company's sole representative at meetings; and possessed information possessed by no one else at the company*

Functional Equivalent Doctrine

- ***Universal Standard v. Target*** – **Privilege Waived**
  - BrandLink hired as a PR consulting firm, without decision-making authority
  - BrandLink's experience with PR and close work with Universal Standard not significant factors
  - Must be so fully integrated as to be a de facto employee

Functional Equivalent Doctrine

- Highly fact specific inquiry
  - *Indianapolis Airport Authority v. Travelers Prop. Casualty Co. of Am.,* 2015 WL 4715202, *6 (S.D. Ind. Aug. 7, 2015)
    - Architects and construction managers on site were "functional equivalents" of employees
  - *In re Flonase Antitrust Litig*., 879 F. Supp. 2d 454 (E.D. Pa. 2012)
    - Independent consultant for pharmaceutical company with high level of involvement with strategic planning was "functional equivalent of an employee"

Consultants used by lawyers to aid in legal tasks

Test is whether the third-party was rendering expert advice to assist the attorney in delivering legal advice to the company

- Courts routinely uphold privilege claims in cases involving consultants, accountants, investigators, PR firms, and other non-testifying experts

Consultant Exception

- *Universal Standard v. Target* – Privilege Waived
  - BrandLink hired not by the attorneys, but by Universal Standard for business purposes
  - Focus on ***purpose of the communications:***
    - No evidence that the purpose of the communications with BrandLink was to assist counsel with a legal tasks
    - Purpose was to perform standard PR services, helping Universal Standard make a decision about the nature of publicity to be sought

Results May Vary……

- *H.W. Carter & Sons, Inc. v. William Carter Co.,* No. 95 CIV. 1274 (DC), 1995 WL 301351, at *1 (S.D.N.Y. May 16, 1995)
  - No waiver where public relations consultants participated to assist the lawyers in rendering legal advice, including how defendant should respond to plaintiff's lawsuit
- *In re Grand Jury Subpoenas Dated Mar. 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003)
  - Communications between target of grand jury investigation and public relations consultants hired by her lawyers were privileged when communications were directed at giving or obtaining legal advice directed at handling client's legal problems

Other Issues – Common Interest Exception

- *Regents of the University of California v. Affymetrix, Inc.*, No. 17-cv-01394-H-NLS (S.D. Cal. Aug. 6, 2018)
  - Common interest applies where communication is
    - made by separate parties in the course of a matter of common interest;
    - designed to further the common legal strategy;
    - made in accordance with some form of agreement; and
    - not waived

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Common Interest Exception

Pitfalls

- Both parties to common interest communication should be represented by separate counsel at time of communications
- Need solid evidence of common interest, along with an agreement

Note: joint defense agreement need not be in writing and may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are codefendants or have common interests in litigation.

Other Issues

- Intra-organizational communications
  - General Rule: Conveyance of privileged communications by non-lawyers to others who have a need for the communications does **not** waive the privilege
    - Courts focus on whether the documents at issue were circulated on a "need to know" basis and/or relate generally to the recipient employee's duties.
      - *F.T.C v. GlaxoSmithKline*, 294 F.3d 141, 147-48 (D.C. Cir. 2002)
    - Also applies to information exchanged *prior* to a communication with counsel
      - Compiling documents to aid counsel and secure advice

Special Issues
Advance Planning for Internal Investigations

Establish clear protocols, lines of authority, roles and responsibilities, and communication paths in event the need for an investigation arises

- Who is in charge
- How is it staffed
- When is counsel involved
- Timelines for decision-making
- How to address conflicts
- Evidence collection issues/IT systems

"[C]ompanies should have in place an efficient, reliable, and properly funded process for investigating [an] allegation and documenting the company's response, including any disciplinary or remediation measures taken." DOJ FCPA Guidance

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Oversight of Investigation

- Oversight by Company
  - General counsel
  - Other management
  - Audit committee
  - Special committee
- Role of operational management
  - Investigation team coordination/facilitation
  - Project management

Who Should Conduct Investigation

- Internal HR, Security
- In-house counsel
- Outside counsel
- Non-attorney outside investigator
- Considerations
  - Privilege (U.S.A.M. §§ 9-28.710;.720)
  - Independence – recent SEC/DOJ comments
  - Specialized training
  - Potential attorney ethics issues with non-attorney third parties (ABA Model R. 5.3)

Attorney-Client/Work Product Privilege Considerations in Internal Investigations

- What is covered by the privilege?
  - Privilege applies to communications between company employees and counsel acting on behalf of the company where 1) **employees were acting at the direction of corporate superiors**; 2) employees were sufficiently **aware that the communications were intended to aid the company in obtaining legal advice**; 3) the communications concerned **matters within the scope of the employee's company duties** and involved needed information that was not available to upper echelon managers; and 4) the **employee was informed that the communications were considered highly confidential and steps were taken to protect that confidence**. *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981)

Privilege and Work Product in Internal Investigations

In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014)

District court employed the wrong legal test in refusing to apply the attorney-client privilege under Fed. R. Evid. 501 to confidential employee communications made during a corporation's internal investigation led by company lawyers.

A lawyer's status as in-house counsel does not dilute the privilege. It was permissible that the investigation was largely conducted by non-attorneys, at the direction of attorneys.

Privilege and Work Product in Internal Investigations

In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014) – continued

Nothing in *Upjohn* requires a company to use magic words to its employees to gain the benefit of the privilege for internal investigations. It is sufficient to instruct the employees that the investigation was highly confidential.

Investigation conducted pursuant to Department of Defense regulations does not remove the privilege as long as obtaining or providing legal advice was one of the significant purposes of the internal investigation.

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The "Primary Purpose Test"

KBR court applied the "primary purpose test," which examines whether "one of the significant purposes" of the communication was "to obtain or provide legal advice." *KBR*, 756 F.3d at 757-60.

The fact that the communication also served a business purpose does not necessarily render the attorney-client privilege inapplicable

The primary purpose test, "cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other."

Same rationale applies to work product doctrine – must be prepared in "anticipation of litigation"

***See also In re General Motors LLC Ignition Switch Litigation*, 14-MD-2543, 80 F.Supp.3d 521 (S.D.N.Y. January 15, 2015)**

- Report given to government; underlying notes, summaries, and memoranda protected from disclosure in subsequent private litigation
- Materials at issue were the product of the company's request for legal advice from its lawyers
- Unlike the report, the underlying materials had never been disclosed
- Privilege claim bolstered by fact that outside company counsel had conducted witness interviews and prepared the materials sought by plaintiffs
- Privilege protects only materials and communications, not facts
- Important that counsel delivered *Upjohn* warnings at outset of each interview, stressing confidentiality and stating purpose of interview was to assist the lawyers in providing legal advice to GM
- Court accepted the fact that GM's purpose in retaining counsel and preparing report was not exclusively legal, rejecting the "but for" test and applying the primary purpose test

However…

- Courts have held that if the company would have created documents even without anticipating litigation, the work product doctrine generally does not apply (see *Wultz v. Bank of China, Ltd.,* 304 F.R.D. 384, 395-97 (S.D.N.Y. 2015)
- Documents created because of some external (government) requirement or internal (company policy) requirement generally do not deserve work product protection, even if the company is in or anticipates litigation when it or its lawyer creates the documents.

Examples – no protection

- *Boone v. TFI Family Services, Inc.*, 2015 WL 5568348 at *2 (D. Kan. Sept. 22, 2015).
  - No work product protection because agency's policy required its attorney to oversee an investigation whenever a child died, and therefore the investigation was not motivated by anticipated litigation.
- *Gillespie v. Charter Communications*, 133 F. Supp.3d 1195 (E.D. Mo. 2015)
  - No work product protection for "Incident Investigation Report" generated in the ordinary course of business as part of a compliance program instituted by company for the reporting and investigation of internal employee complaints

Examples – no protection

- *Banneker Ventures, LLC v. Graham,* 253 F. Supp.3d 64 (D.D.C. May 16, 2017)
  - Outside law firm for Washington Metropolitan Area Transit Authority (WMATA) conducted investigation after receiving demand letter from developer regarding failed project
  - Created 51 memos with notes from interviews, marked “attorney work product,” along with a full investigative report (which was published)
  - No work product protection - interview memos would have been created in the ordinary course of business, with or without litigation
    - Stated purpose was “to formulate and recommend changes to policies, standards, and procedures”
  - Attorney-client privilege for memos waived when investigative report (derived from memos) was published

Avoiding Waiver – Disclosure to the Government

- Goal is to display candor and build trust with the government to enable client to earn maximum cooperation credit
- Countervailing consideration is avoiding waiver of privileged information
- Lack of bright line guidance
  - *United States v. Reyes*, 239 F.R.D. 591, 602-03 (N.D. Cal. 2006)(interview summaries, notes and internal memoranda and all reports or notes of presentations made to government not protected).

Avoiding Waiver – Disclosure to the Government

SEC v. Roberts, 254 F.R.D. 371 (N.D. Cal. 2008)(interview notes relied upon in presentations to the government and notes of meetings and communications with government not protected).

Ryan v. Gifford, 2008 WL 43699, No. 2213-CC (Del. Ch. 2008)(selective waiver of privilege in conversations with government and NASDAQ officials eliminated protection for interview notes, summary of investigation and communications with government)

Avoiding Waiver – Disclosure to the Government

But see Diversified Industries v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977)(selective waiver does not require production of internal interview notes, reports and minutes even though such documents produced to the SEC)

In re Grand Jury Proceedings, 841 F.2d 230, 234 (8th Cir. 1988)(rejecting selective waiver doctrine); *In re Chrysler Motors Corp.*, 860 F.2d 844, 846-47 (8th Cir. 1988)(same)

Fed. R. Evid. 502(a)

Disclosure of privileged information and work product information made to a federal office or agency any waiver of those protections "extends to an undisclosed communication or information in a federal or state proceeding only if:

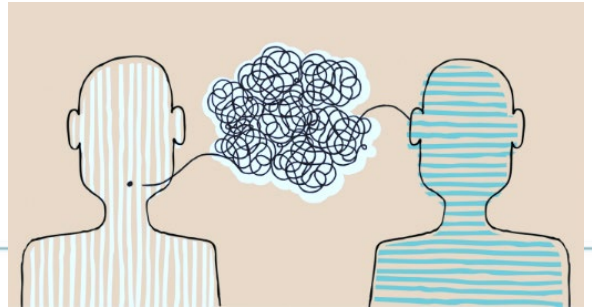
1) the waiver is intentional;
2) the disclosed and undisclosed communications or information concern the same subject matter; and
3) they ought in fairness to be considered together."

Other Tips – Avoiding Waiver

- Doctrine of implied waiver: the attorney-client privilege is waived when the client places otherwise privileged matters in controversy.
  - Discussing an investigation in a summary judgment brief
- Using interview notes to prepare a corporate representative witness for a 30(b)(6) deposition regarding a company investigation

Privilege Considerations

- Update corporate policies as to purpose of investigations
- Ensure attorney direction and oversight of investigation
- Document and communicate legal purpose of investigation



Multi-Jurisdictional Practice of Law and Unauthorized Practice of Law

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MJP and UPL

- Most States Have Adopted a Version of Model Rule 5.5
- Rule 5.5 of the Model Rules of Professional Conduct:
  - (a) **A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.**

MJP and UPL

Multijurisdictional Rule (in many but not all states):

- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
  - (1) establish an office or other systematic and continuous presence; or
  - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction

MJP and UPL

Rule 5.5(c) Exceptions for Temporary Practice:	(1) undertaken in association with a lawyer admitted in the jurisdiction and **actively participates in the matter**;
	(2) *pro hac vice*;
	(3) arbitration, mediation, or other ADR proceeding, *if* the services **arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice** and are not services for which the forum requires pro hac vice admission; or
	(4) are not within paragraphs (c)(2) or (c)(3) and **arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice**

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MJP and UPL

Services arising out of or reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice

Comment [14] – Multi-factor test:

- Client may have been previously represented by the lawyer
- Client resides in or has substantial contacts with lawyer's jurisdiction
- Matter may have significant connection with lawyer's jurisdiction
- Significant aspects of the lawyer's work might be conducted in lawyers' jurisdiction
- Significant aspect of the matter may involve the law of lawyer's jurisdiction
- Client's activities or legal issues involve multiple jurisdictions
- Services draw on lawyer's recognized expertise developed through the regular practice of law involving a particular body of federal, nationally-uniform, foreign, or international law

MJP and UPL

- *Ohio State Bar Ass'n v. Klosk*, No. 2018-Ohio-4864 (Dec. 11, 2018)
  - Ohio resident executed a power of attorney authorizing Klosk to communicate with creditors.
  - Klosk was licensed in California only and worked for firm in California.
  - Klosk sent creditor's counsel a letter on firm stationery saying the debtor was his client.
  - Unauthorized practice for a person who is not licensed to practice law in Ohio to negotiate legal claims for Ohio resident or advise the resident of his or her legal rights and holds himself out as representing the resident.

Modified Hypo

CA company retains attorney Klosk to communicate with debtors, who owe the company money

Klosk was licensed in California only and worked for firm in California.

Klosk sent debtors' counsel, in multiple states in which he is not admitted to practice law, a simple letter on firm stationery saying the creditor company was his client and demanding payment

Modified Hypo

Did Klosk violate the rules of professional conduct?

- A: Yes
- B: No
- C: Maybe so

MJP and UPL

Final Thoughts on MJP/UPL

- Know the MJP/UPL rules where your client resides or does business
- **Not all states follow the uniform rule**
  - Example: TX does not have 5.5(c)(4) (OK if reasonably related to the lawyer's home jurisdiction)
  - 50-state Chart: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.pdf

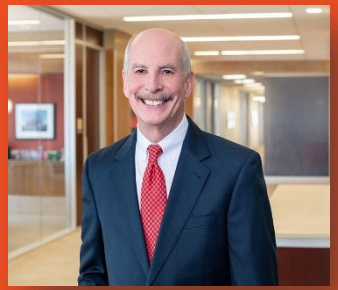
Lawyer Well-Being

Lawyer Well-Being

Virginia Supreme Court

- Adopted Comment [7] to Rule 1.1(competence)
  - A lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. *See also* Rule 1.16(a)(2) [requires withdrawal if lawyer's physical/mental condition materially impairs ability to represent client].

Thank You



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