

The Litigator

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The Chair's Comments



By L. Cooper Harrell

As the sun's path dips and dusk arrives sooner each day, we are reminded that the joys of summer are drawing to a close. Even though our sun-drenched days are numbered, excitement abounds. Some find excitement in the challenges of a new school year; others (like me)

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find it in the anticipation of football season. In whatever form excitement takes, most folks look forward to cooler nights and the change of seasons. Because many families organize their activities around the academic calendar, the end of summer also signals a time to plan and prepare for things to come. The sections of the NCBA are no different. The 2015-16 NCBA year began on July 1 and, as summer draws to a close, most NCBA sections are gearing up for their first round of Council meetings and planning for great things in the coming months. As the Litigation Section begins to roll up its sleeves, I want to take this opportunity to issue a bit of a challenge to our Section's members – consider it a call to membership!

I have been privileged to serve the NCBA Litigation Section for almost 10 years, first as a committee chair and later as a Council member and officer. For most of that time, I chaired the Litigation Section's Advocate's Award Committee. As most of you know, the Advocate's Award is the highest award given by the Section and is designed to recognize the true superstars within our membership. Unparalleled professionalism, public service, and a love of the law are just a few of the traits shared by past recipients of the Advocate's Award. Unfortunately, an increasing number of nominees are litigators who certainly are worthy of consideration for the Award, but are not members of the Litigation Section. Given the many benefits of membership in the Litigation Section, and the wonderful work of the larger NCBA, I find this trend quite troubling.

I encountered membership issues once more earlier this year, while working with the Nominations

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The Applicability of Privilege and Work Product Protection to Communications With Former Corporate Employees

By Rick Conner and Bradley R. Kutrow

A decision last year by the United States District Court for the Western District of North Carolina underscores the need for lawyers to exercise care, and plan ahead, when communicating with former corporate employees who may become witnesses in civil litigation. Although the attorney-client privilege and work product doctrine may offer some protection to your communications with former employees, they may not completely shield those communications from discovery. Practitioners must also thoughtfully consider asserting both privilege and work product protections when contesting discovery disputes.

In *Winthrop Resources Corporation v. Commscope, Inc. of North Carolina*, No. 5:11-CV-172, 2014 WL 5810457 (W.D.N.C. Nov. 7, 2014), Judge Richard Voorhees ruled that the defendant could not claim the protection of attorney-client privilege with respect to some communications between its attorney and a former senior executive, and that the de-

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defendant had waived its potential work product protection for these communications by failing to assert it before the magistrate judge in response to the plaintiff's motion to compel.

In this article, we will explore the principles governing the attorney-client privilege and the work product doctrine as they apply to communications between corporate counsel and former employees, summarize the *Winthrop Resources* decision, and offer some practical tips for preserving privilege and maximizing confidentiality in communications with former employees.

Background

In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court considered whether discussions between a corporation's attorney and its current employees would be subject to the attorney-client privilege. The Court rejected the "control group" test, which focused on the ability of the employee to take discretionary action on the advice of the corporate attorney, and indicated that communications with a corporate attorney would be protected by the attorney-client privilege if the communications (1) were made to the corporate counsel in his or her capacity as an attorney; (2) were made at the direction of superiors for the purpose of seeking legal advice; (3) concerned matters within the scope of the employee's corporate duties; and if (4) the employees were sufficiently aware that they were being questioned to assist in giving legal advice to the corporation. *Id.* at 394–395. The majority did not address the issue of communications with former employees, although Chief Justice Burger did so in a concurring opinion.

Burger wrote that "a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment." *Id.* at 402–403 (Burger, J., concurring). Most lower courts have since followed Chief Justice Burger's concurrence and extended the attorney-client privilege to cover communications with former employees, including the United States Court of Appeals for the Fourth Circuit. *In re Allen*, 106 F.3d 582, 605 (4th Cir. 1997).

North Carolina state courts have not expressly ruled on whether the attorney-client privilege applies to former employees under North Carolina law. The North Carolina Business Court, however, applying federal law, has followed *In re Allen* and extended the attorney-client privilege to a corporate attorney's communications with a former employee made in an effort to gather factual information necessary to provide legal advice to the corporation. See *Morris v. Scenera Research, LLC*, No. 09 CVS 19678, 2011 NCBC 33, 2011 WL 3808544 (N.C. Super. Ct. Aug. 26, 2011) and supplemental order, 2011 WL 8116566 (N.C. Super. Ct. Oct. 10, 2011).

The Peralta Decision

The now-familiar *Upjohn* rule has a number of practical applications. Should the privilege extend only to communications between the corporate attorney and former employee that occurred during the term of employment? Should it extend to post-employment communications about information that the employee learned during her employment? Should it cover post-

employment communications that relate to litigation, such as witness preparation?

In the wake of *Upjohn*, many courts that have considered these issues have followed *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999). In *Peralta*, the court addressed the boundaries and limits of privileged communications between a former corporate employee and the corporation's attorney. *Id.* at 38. The *Peralta* court offered the following guidepost to differentiate between attorney-client privileged and non-privileged communications with former employees:

[D]id the communication relate to the former employee's conduct and knowledge, or communication with defendant's counsel, during his or her employment? If so, such communication is protected from disclosure under *Upjohn*. As to any communication between defendant's counsel and a former employee whom counsel does not represent, which bear on or otherwise potentially affect the witness's testimony, consciously or unconsciously, no attorney-client privilege applies.

Id. at 41–42. Applying this guidepost in that case, the *Peralta* court held:

- Any privileged information obtained by the former employee during employment remains privileged after her termination. *Id.* at 41.
- Any post-employment interviews by the corporate attorney with the former employee for the purpose of learning facts related to the lawsuit that the former employee was aware of as a result of her employment are privileged. *Id.*
- To the extent any post-employment communications between the former employee and the corporate attorney went beyond her knowledge and activities that were within the course of her employment, such communications are not privileged. For example, if the attorney informed the former employee how other witnesses had testified, such communications would not be privileged and would have the potential to influence the witness to conform or adjust her testimony. *Id.*
- Communications during breaks in the deposition between the former employee and the corporate attorney regarding how a question should be handled are not privileged. *Id.*

However, the court also held that the work product doctrine may protect many of the communications at issue that were not protected by its strict application of the attorney-client privilege. *Id.* at 42. The court ruled that plaintiff's counsel would be precluded by the work product doctrine from asking the former employee questions about the corporate attorney's legal conclusions or opinions that may reveal her legal strategy. *Id.*

Judge Voorhees' Winthrop Resources decision

In *Winthrop Resources*, Judge Voorhees considered how North Carolina might apply the attorney-client privilege to various types

of communications with former employees. The defendant, Commscope, objected to an order by Magistrate Judge David Cayer granting the plaintiff's motion to compel additional testimony from a former Commscope executive. Commscope's counsel had instructed the former executive not to answer 21 questions at his deposition on the grounds of attorney-client privilege. *Winthrop Resources*, 2014 WL 5810457 at *1. The magistrate judge found that the questions at issue involved "communications occurring years after [the executive's] employment terminated" and related to "deposition preparation and matters that may have influenced his testimony," and ordered Commscope to make the former executive available for a second deposition to answer all 21 questions. *Id.*

Judge Voorhees reviewed the magistrate judge's order applying a "clearly erroneous" standard of review. *Id.* The court noted that the availability of an evidentiary privilege such as the attorney-client privilege is governed by the law of the forum state (*i.e.*, North Carolina), but held that federal law would govern the work product doctrine. *Id.* Finding no North Carolina decisions on point, the court predicted that North Carolina would follow the *Peralta* approach and "adopt a construction limiting the attorney-client privilege to matters within their personal knowledge and scope of employment." *Id.* at *2. The court ruled that the attorney-client privilege applied "where the discussions between the corporate attorney and the former employee concerned matters that involved the scope of her employment" but did not apply "where conversations went beyond the former employee's independent knowledge." *Id.* (citing *Peralta* 190 F.R.D. at 40-42). The court articulated a concern that an attorney might seek "to influence a witness to conform or adjust her testimony ... consciously or unconsciously." *Id.* The court then proceeded to make specific rulings on the applicability of the attorney-client privilege, "strictly construed," to different types of questions that were asked at the deposition of the former executive:

Questions relating to deposition preparation and conversations during deposition breaks: The court found that these questions were "squarely covered by the holding in *Peralta*" and were not privileged. *Id.* at *3.

Questions about the substance of conversations with counsel that occurred during employment: The court found this information clearly privileged and reversed the magistrate judge's order compelling the witness to answer. *Id.*

Questions about the former executive's discussions with any lawyers about the language of the agreement at issue, and what interpretation was correct: The court held that attorney-client privilege would only apply to protect any conversations that the executive had with attorneys on this topic while he was employed by Commscope. *Id.*

Questions about whether Commscope's lawyer had told the former executive his personal view about whose interpretation of the agreement was correct: The court said this could influence the opinion of the former executive and was outside the scope of his knowledge during employment, so any such communications were not subject to the attorney-client privilege. *Id.*

Questions about whether the former executive had asked any lawyer to determine whether plaintiff's or defendant's interpretation of the agreement was correct: The court said if such communications occurred during employment, they would be privileged, but any post-employment communications with Commscope's lawyers on this topic would not be privileged and would tend to influence the executive's testimony. *Id.* at *4.

Finally, the court addressed Commscope's fallback argument that the communications at issue were protected by the work-product doctrine. It held that Commscope had waived this argument by failing to make it before the magistrate judge in response to the motion to compel. *Id.* at *3-4.

Should Corporate Counsel Offer to Represent the Former Employee Individually?

When interviewing former corporate employees prior to a deposition or trial, it is not uncommon for the corporation's lawyers to offer to represent the former employee individually in the lawsuit or "for purposes of the deposition." Such a joint representation may raise ethical concerns, especially if there is any chance that the employee's interests may differ from those of his or her former corporate employer. Such representations should be undertaken only after careful analysis and with the informed consent of all clients. We cannot attempt to address the ethics and privilege implications of such a representation here, but helpful discussion can be found in our colleague Thomas E. Spahn's treatise, *The Attorney-Client Privilege and The Work Product Doctrine: A Practitioner's Guide* (3d ed. 2013), §§ 6.9 and 6.1203.

In practice, it is very common for corporate counsel to represent a former employee who may be a witness in a lawsuit involving his or her former employer. Typically, opposing counsel do not challenge privilege claims that result from an attorney-client relationship between corporate counsel and a former employee, so such a joint representation may practically help to preserve the confidentiality of post-employment communications with the former employee. One court, noting that Rule 501 of the evidence rules governs claims of privilege, allowed counsel for a corporate defendant to undertake the representation of third-party witnesses who had already been identified as witnesses and had provided affidavit testimony. *See Fed. Housing Fin. Agency v. Nomura Holding Am., Inc.*, No. 11cv6201 (DLC), 2015 WL 1004861 (S.D.N.Y. March 4, 2015). The FHFA court recognized Sullivan & Cromwell's representation of four appraisers, even though it commenced after they had provided direct testimony supporting S&C's client Nomura by affidavit and just after the FHFA's motion to depose them was granted. *Id.* at *1.

However, a few courts have been skeptical of corporate counsel's claim to represent an individual former employee witness and have refused to recognize an independent attorney-client privilege for the former employee's communications, even though the former employee was also being represented individually by the corporation's counsel. *See DCG Sys., Inc. v. Checkpoint Tech., LLC*, No. C 11-03792 PSG, 2012 WL 4940143 (N.D. Cal. Oct. 17, 2012) ("In situations such as this where a former employee is represented by counsel for a defendant corporation for the purposes of testifying at a deposition at

no cost to him, courts have not treated the former employee as having an independent right to the privilege, even where that employee believes that he is being represented by that counsel”); *Gary Friedrich Enter., LLC v. Marvel Enter., Inc.*, No. 08 Civ. 1533(BSJ)(JCF), 2011 WL 2020586 (S.D.N.Y. May 20, 2011) (same); *Wade Williams Distribution, Inc. v. American Broadcasting Co., Inc.*, No. 00 Civ. 5002, 2004 WL 1487702 (S.D.N.Y. June 30, 2004) (“The mere volunteered representation by corporate counsel of a former employee should not be allowed to shield information which there is no independent basis for including within the attorney-client privilege”); *Gioe v. AT & T Inc.*, No. 09 CV 4545(LDW)(AKT), 2010 WL 3780701 (E.D.N.Y. Sept. 20, 2010) (citing *Wade Williams Distribution*).

This skepticism is in tension with the expectations of both corporate employers and employees about their reliance on the corporation’s counsel. In some settings, non-lawyer employees frequently work with in-house and outside counsel to handle transactions, regulatory issues, and litigation involving the corporation. In the current economy, employees may leave one corporate employer for an opportunity with another while litigation is pending. Many senior managers who are corporate officers expect the corporation to assist them if they are drawn into litigation that arises about their work for the corporate employer and expect the corporation to indemnify them for any expense associated with post-employment testimony or litigation. In practice, when a team of employees was responsible for a particular project or transaction, it makes sense to be able to communicate in the same manner with current and former employees who were members of the team and whose communications with counsel were plainly privileged for the duration of the project or transaction.

Counsel must understand that agreeing to represent a former employee individually for purposes of a deposition may not necessarily protect all communications with that witness under the umbrella of attorney-client privilege. Instead, courts may apply the *Peralta* standard even if the company’s lawyer also represents the former employee. Formalizing and documenting the attorney-client relationship when a joint representation is undertaken should assist in establishing that the privilege protects post-employment communications between counsel and the former employee. Moreover, the work product doctrine may provide a separate source of protection. An alternative is for the corporation to retain separate counsel for the former employee, but that adds cost and additional complications as the individual’s counsel and corporate counsel may have overlapping obligations during the discovery process.

Application of the Work Product Doctrine to Communications with Former Employees

Some communications with former corporate employees and related records may be protected by the work product doctrine even if they are not protected by the attorney-client privilege. The work product doctrine, broadly defined, protects documents and communications generated in anticipation of litigation. It is a qualified protection that can yield to the needs of a particular case, but can also extend to individuals other than the party to the pending or anticipated litigation and its counsel. For example, work product protection can apply if the subject documents or communications are generated by a party or its non-attorney agent in anticipation

of litigation, although the highest level of protection adheres to documents reflecting “opinion” work product. Rule 26 of the Federal Rules of Civil Procedure and its North Carolina counterpart, which reflect the work product doctrine as applied to documents, both expressly protect documents prepared by or for a party or its representative, including non-lawyer agents for that party.

There are critical differences between the attorney-client privilege and the work product doctrine. The attorney-client privilege is nearly absolute, but fragile; if an attorney-client communication is shared outside the strictly-defined relationship between attorney and client, it shatters. The work product doctrine, although not absolute, is more robust and flexible. Disclosure of work product to a witness or other non-party in connection with litigation does not waive protection so long as the work product is not intended to be shared with or available to the opposing counsel or party. See *Morris*, 2011 WL 8116566 at *10-11.

The Fourth Circuit Court of Appeals has recognized the importance of protecting attorney work product from disclosure to opposing counsel. In the Fourth Circuit, fact work product is only discoverable “upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship,” while opinion work product “enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.” *In re Allen*, 106 F.3d at 607 (citations omitted). The Fourth Circuit recognized that revealing an attorney’s thoughts and opinions to an opposing party “runs contrary to the principles underlying the adversary process.” *Id.*

Some courts have concluded that the work product doctrine protects communications with former employees, while others have declined to apply the doctrine in some circumstances. The courts that have found the work product doctrine to be applicable also generally find that disclosure of the protected information and materials to the former employee does not waive the work product protection, because the purpose of the doctrine “is not to protect the evidence from disclosure to the outside world, but rather to protect it only from the knowledge of opposing counsel and his client.” *Peralta*, 190 F.R.D. at 42 (citing C. Wright, A. Miller, & R. Marcus, *Federal Practice and Procedure: Civil 2d* § 2024).

Courts in the Fourth Circuit have followed this approach and ruled that communications with third parties who do not have adverse interests, including former employees and potential witnesses, do not waive work product protection. See, e.g., *Carolina Power & Light Co. v. 3M*, 278 F.R.D. 156, 160–162 (E.D.N.C. 2011) (holding that protection for opinion work product is “nearly absolute,” and that non-opinion work product was not waived by disclosure to a former employee); *Lefkoe v. Jos. A. Bank Clothiers*, No. WMN-06-1892, 2008 WL 7275126, at *12, n. 17 (D. Md. May 13, 2008) (“[d]isclosure of protected work product information to third parties, however, does not constitute a waiver of the privilege”); *Chambers v. Allstate Ins. Co.*, 206 F.R.D. 579, 589 (S.D. W. Va. 2002) (holding that non-opinion work product is not waived when disclosed to someone with common, and not adversarial, interests); see also *Morris v. Scenera Research, LLC*, No. 09 CVS 19678, 2011 NCBC 33, 2011 WL 3808544 (N.C. Super. Ct. Aug. 26, 2011) (applying federal law and ruling that work product protection for a timeline prepared by corporate counsel was not waived when it was sent to a former employee).

Practically speaking, the work product doctrine may offer protection for documents prepared by corporate counsel and shared with the former employee, *see Morris*, 2011 WL 3808544; communications reflecting counsel's legal conclusions or opinions that reveal legal strategy, *see Peralta*, 190 F.R.D. 38; specific questions asked by counsel to a former employee in pre-deposition communications, *see Barrett Indus. Trucks v. Old Republic Ins. Co.*, 129 F.R.D. 515, 519 (N.D. Ill. 1990); summaries prepared by counsel of an interview with a former employee, *see In re Allen*, 106 F.3d 582; and counsel's choice and selection of selected relevant corporate records for review, *id.* Counsel must be careful to assert the protection of the work product doctrine, however, because failure to make the argument early and often in response to a motion to compel may lead the court to find that you have waived the protection. *See Winthrop Resources Corp.*, 2014 WL 5810457, at *4. In addition, documents shown to a witness in the course of deposition preparation may raise issues under Rule 612 of the state and federal rules of evidence if they are used to refresh the witness's memory.

Practical Tips for Counsel Representing Corporations in Litigation

While it is safe to assume that any privileged communications between corporate counsel and an employee will remain privileged after that employee is terminated, counsel would be wise to proceed with extreme caution in communications with former employees, because those communications could be subject to vigorous efforts by opposing counsel to obtain disclosure. Counsel who know that former employees may be witnesses in litigation should carefully consider how best to communicate with a prospective witness before making first contact.

First, corporate counsel should research and familiarize themselves with the law regarding privilege and former employees in the relevant jurisdiction. The extent to which your jurisdiction extends the attorney-client privilege and work product doctrine to cover post-employment communications with former employees could have a significant impact on what you ask the former employee, what information you disclose to the former employee, and whether and how you prepare the former employee for a deposition. As discussed above, in North Carolina, communications between an employee and corporate counsel relating to information, events, or knowledge gained during employment are protected by the attorney-client privilege, but any post-employment communications falling outside of these boundaries may not be protected by the privilege, which depends upon an existing attorney-client relationship. The work product doctrine, however, should offer protection for litigation-related communications, especially if they are documents created by counsel for litigation purposes or if they are oral communications that relate to counsel's legal conclusions or opinions.

Second, before you contact the former employee, find out his or her dates of employment, position, involvement with the facts at issue in your lawsuit, and reason for termination of employment. This information will guide you in determining what privileged communications that the former employee might have been involved with, the potential scope of the employee's knowledge, and whether the employee is likely to be adversarial or cooperative with the company. An adversarial relationship can thwart any claim of work product protection.

Third, in order to maximize the protection offered by the attorney-client privilege, consider whether you can and should offer to represent the employee individually, as long as such joint representation is ethically consistent with your obligations to your corporate client. Understand, however, that if challenged, courts may be skeptical of the employee's individual attorney-client privilege under such a relationship. You might also consider asking your corporate client to offer to pay for independent counsel for the employee.

Fourth, determine whether the former employee had communications with corporate counsel during his or her employment, and remind the former employee that communications that he or she had with counsel during employment remain privileged.

Fifth, assume that any communication of new factual information you provide to the former employee could be discoverable. Do not discuss what you have learned about the case from your client, the documents, or other witnesses, unless you are prepared for opposing counsel to discover that information.

Finally, plan ahead so that you will have appropriate grounds to assert both the attorney-client privilege and work product doctrine where applicable, and assert those protections timely so the court will not find that you have waived these protections. Be mindful that disclosure of work product to anyone who is adverse to your client will also likely be deemed a waiver.

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