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A Basic Guide to the Attorney-Client Privilege and the Work Product Doctrine

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Introduction

The attorney-client privilege is the single most important doctrine that every lawyer must master.

Differences between the attorney-client privilege and the ethics duty of confidentiality.

Creation advice versus assertion advice.

Introduction (cont.)

Differences between the attorney-client privilege and the work product doctrine

- The privilege is old, asserts a grand purpose, is absolute but fragile.
- The work product doctrine is new, serves a narrow purpose, is not absolute and not fragile.
- Communications or documents can be protected by both protections.

Introduction (cont.)

Clients cannot automatically contract into, or even out of, privilege or work product protection.

Always keep in mind how courts resolve privilege/work product disputes.

- Withheld documents will be described on a log.
- The log will not resolve many issues.
- Ultimately a judge will read the withheld documents.

Topics

1. Privilege: Creation
2. Privilege in the Corporate Setting
3. Privilege: Sources of Proof
4. How the Privilege Can be Lost: Defining Those Outside the Privilege

Topics (cont.)

5. Privilege: How it Can be Lost -- Waiver
6. Common Interest Doctrine
7. Work Product: Creation
8. Work Product Protection: How it Can be Lost

Privilege: Creation

What law will apply to privilege protection?

- State courts
- Federal courts: federal question cases
- Federal courts: diversity cases

Difference between privilege and work product choice of law

Privilege: Creation (cont.)

What is not covered by the privilege?

- Historical facts, circumstances and general subject matter of a representation or a communication.
- Historical documents.

Privilege: Creation (cont.)

Privilege protection primarily rests on content, not context.

To deserve protection, each communication must be primarily motivated by the client's request for legal advice.

Privilege in the Corporate Setting

Good News

- Most states follow the Upjohn standard, rather than the control group standard.
- Employee-to-employee communications can sometimes deserve privilege protection.
- Most courts apply privilege protection to communications with the "functional equivalent" of corporate employees.
- Most courts apply privilege protection to communications with former corporate employees.

Privilege in the Corporate Setting (cont.)

Bad News

- Lawyers must carefully define their "client."
- The Upjohn standard is not self-executing.
- Some courts look at the distribution pattern of intracorporate communications in determining that the communications were primarily motivated by business rather than legal concerns.
- Many courts require that every participant or recipient establish a "need to know" the communication in order to do her job.

Privilege: Sources of Proof

Pernicious effect of emails.

- Cryptic communication.
- Increasing volume.

What proof generally will not suffice?

- Stamps/headers.
- Sending a communication to a lawyer, or copying a lawyer.
- Arranging a lawyer's participation in a meeting.

Clients frequently think that these steps assure protection.

Privilege: Sources of Proof (cont.)

Client-to-Lawyer Communications

- Explicit requests for legal advice
- Implicit requests for legal advice

Many courts narrowly focus only on the four corners of a withheld document.

- These courts often ignore a document's context.
- Some courts ignore supporting affidavits.

Privilege: Sources of Proof (cont.)

Lawyer-to-Client Communications

- Some courts examine the lack of a lawyer's response as a factor or even as dispositive
- Courts look for legal rather than business advice.

Courts look for lawyer input in assessing privilege claims for draft documents.

Privilege: Sources of Proof (cont.)

Best Practices

- Train clients to explain the purpose of their communication in the document itself, rather than simply adding a header.
- Warn clients to circulate only to those with a "need to know."
- Respond to emails that either require a response or contain troublesome language.

How the Privilege Can be Lost: Defining Those Outside the Privilege

Attorney-client privilege protection is most frequently lost because outsiders are involved in the communication.

- Direct communications with outsiders do not deserve any protection.
- The presence of outsiders during otherwise privileged communications aborts privilege protection.
- Disclosure to outsiders waives privilege protection.

How the Privilege Can be Lost: Defining Those Outside the Privilege (cont.)

Client Agents

Most client agents are outside privilege protection.

- The vast majority of courts take a narrow approach -- finding inside the privilege only client agents "nearly indispensable" for the transmission of the communication.
- Clients do not appreciate this enormous threat to privilege protection.

How the Privilege Can be Lost: Defining Those Outside the Privilege (cont.)

Lawyer Agents

Lawyer agents are more likely to be inside the privilege.

- However, it is not enough to have the lawyer hire an agent.
- The agent must assist the lawyer in providing legal advice.
- Most courts require that an agent play a necessary role in assisting the lawyer.

Privilege: How it Can be Lost – Waiver

Express Waiver

An express waiver occurs with disclosure of privileged communications.

- Intentional express waiver involves the deliberate disclosure of privileged communications to an outsider
- Inadvertent express waiver involves an accidental unintended disclosure of privileged communications to an outsider.

Privilege: How it Can be Lost -- Waiver (cont.)

Implied Waiver

An implied waiver occurs without disclosure of any privileged communication

- Relying on the fact of a communication (such as pleading "advice of counsel") can trigger an implied waiver.
- The "at issue" doctrine represents the most extreme form of implied waiver.

Privilege: How it Can be Lost -- Waiver (cont.)

Subject Matter Waiver

The risk of a subject matter waiver has recently diminished.

- Pre-Rule 502 case law usually followed the von Bulow doctrine -- limiting a subject matter waiver to disclosure in a judicial setting.
- Rule 502 goes even further -- limiting a subject matter waiver to intentional reliance on privileged communications to paint a misleading picture and gain some advantage in litigation.

Common Interest Doctrine

The common interest doctrine is narrow, and courts disagree about its application.

- Most courts require litigation or anticipated litigation.
- Courts disagree about how "common" the legal interests must be.

Common Interest Doctrine (cont.)

Relying on the common interest doctrine can be very risky.

- Although parties usually cannot contract into a protection, common interest participants immediately share privileged communications.
- Some time later, some court in an unforeseeable jurisdiction may judge the common interest doctrine's effectiveness.
- By then, it will be too late to have avoided a privilege waiver.
- Over half of the common interest agreements fail.

Work Product: Creation

To deserve work product protection, a document's "primary purpose" must relate to litigation -- the document's creation must have been motivated by litigation or anticipated litigation.

- This is the work product equivalent to the privilege's requirement that a communication's "primary purpose" must involve the client's request for legal advice.

Any client "representative" can create protected work product.

- Some courts misunderstand this principle.
- Although unnecessary, a lawyer's participation helps.

Work Product: Creation (cont.)

Litigation Element

- Normal civil and criminal litigation satisfies this element.
- Administrative and other processes might not satisfy this element.

Anticipation Element

- Courts' standards range from "imminent" to "some possibility."
- The party asserting work product must identify the exact moment at which it anticipated litigation.
- The party must identify some "trigger" event that caused the anticipation.
- Contemporaneous documents help, but are not necessary.
- Parties risk a spoliation allegation by not preserving pertinent documents at the time they anticipate litigation.

Work Product: Creation (cont.)

Motivation Element

- To deserve protection, the work product must be primarily motivated by the litigation, and not by some external or internal requirement -- or created in the ordinary course of business.
- Ironically, companies with laudable internal requirements more frequently lose work product disputes.
- Courts disagree about the "aid/assist" test or the "because of" test.
- To deserve work product protection, a company must do something special or different that it only does when it anticipates litigation.

Work Product: Creation (cont.)

Practical Tips

- Contemporaneous documentation helps but creates a spoliation allegation risk.
- Lawyers and their clients' representatives should identify opinion work product.
- Clients should recognize that they have little power over where they will be sued, which creates uncertainty about work product protection.

Work Product Protection: How it Can be Lost

Unlike the privilege, the work product doctrine protection is not absolute.

An adversary can overcome a litigant's work product doctrine protection by proving:

- Substantial need.
- Inability to obtain the substantial equivalent.
- Without undue hardship.

Work Product Protection: How it Can be Lost (cont.)

Work product doctrine protection generally survives disclosure to a non-adverse third party.

- A waiver occurs upon disclosure to an adverse third party or someone who might give the work product to an adverse third party.

Work Product Protection: How it Can be Lost (cont.)

This more robust protection renders irrelevant several issues that play a key role in privilege waiver analysis.

- Whether client agents participating in the communication were necessary or "nearly indispensable" for transmission of the communications.
- Whether agents participating in the communication were instead assisting the lawyer, and whether they helped the lawyer understand raw data.

Work Product Protection: How it Can be Lost (cont.)

Given the very different waiver principles for privilege and work product, courts frequently find that disclosure to a third party waives privilege protection but not the separate work product doctrine protection.

While confidentiality agreements are irrelevant in avoiding privilege waiver, they are key in avoiding work product doctrine waiver.

Disclosing work product does not normally trigger a subject matter waiver.

Internal Corporate Investigations (cont.)

Best Practices

- Involving a lawyer very early in the process increases the chance of privilege and work product protection.
- Clients should memorialize the grounds for privilege and work product protection in the four corners of any documents they create.
- Companies might have to undertake a parallel or successive investigation.