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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.)

The work product doctrine differs dramatically from the attorney-client privilege.

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

Topics (cont.)

6. Privilege: How it Can be Lost -- Waiver
7. Joint Defense/Common Interest Doctrine
8. Work Product: Creation
9. Work Product Protection: How it Can be Lost
10. Internal Corporate Investigations

Choice of Law

Privilege

- State courts
  - Each state has its choice of law rules for determining which state's privilege law applies.
  - The major attorney-client variation among the states involves the control group test versus the Upjohn test.
  - Courts' possible reliance on contract choice of law provisions.

Choice of Law (cont.)

- Federal courts
  - Federal common law governs federal question cases.
  - In diversity cases, federal courts follow their host state's choice of law in selecting the appropriate state's privilege law.

Choice of Law (cont.)

- Foreign law
  - Courts follow the "touch base" test to determine whether to apply U.S. privilege law.
  - If not, a U.S. court might apply another country's privilege law.
  - Threat to in-house lawyers' privilege.

- Best practices

Choice of Law (cont.)

Work Product

- Each court applies its own work product rule
  - Huge variation among courts applying the very same sentence fragment in the federal rules.
  - Inability to predict the applicable law, because companies can be sued nearly anywhere.

Privilege: Creation

What is not covered by the privilege?

- Historical facts, circumstances and general subject matter of a representation or a communication.
- Historical documents.
- Most uncommunicated client documents.
- Most uncommunicated lawyer documents.
- Lawyer-to-client communications not disclosing or based on client confidences.

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.

Four types of communications might deserve protection.

- Clients: ask for legal advice, and give their lawyers facts about which the client seeks advice.
- Lawyers: ask for the facts they need, and provide 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.
- Some courts inexplicably hold that the privilege does not protect drafts of documents whose final version will be disclosed.

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.)

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.

Some courts examine a lawyer's response or lack of response to a client's communication.

- Some courts ignore supporting affidavits.

Privilege: Sources of Proof (cont.)

Courts also look at intracorporate distribution, and require strict evidence of each participant's "need to know."

Courts assessing draft documents look for a lawyer's input.

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.
- Bolster the "need to know" argument when appropriate.

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.

- Some courts take a broad approach.
- 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.
- Some courts (such as the Southern District of New York) require that an agent play a necessary role in assisting the lawyer in understanding raw data.

Privilege: How it Can be Lost -- Waiver

The privilege is not waived simply because a privileged communication becomes known to outsiders.

Two kinds of waiver:

- Express waiver involves the disclosure of privileged communications to an outsider.
- An implied waiver can occur without such a disclosure.

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

There are two kinds of express waiver:

- Intentional express waiver.
- Inadvertent express waiver.

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

An Intentional Express Waiver Occurs with the Deliberate Disclosure of Privileged Communications to an Outsider

- Disclosure does not cause a waiver if only non-privileged communications are disclosed.
- Disclosure does not cause a waiver if a court orders disclosure.
- A waiver can occur despite the disclaimer of an intent to waive.
- A waiver can occur despite a confidentiality warning or agreement.
- The law generally does not recognize selective waivers, although some courts misinterpret Rule 502 as allowing selective waivers.

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

An Inadvertent Express Waiver Occurs with the Accidental Disclosure of Privileged Communications to an Outsider

- The pre-Rule 502 majority Lois Sportswear test continues after Rule 502.
- This fact-intensive analysis looks at whether the producing party had a privilege review plan, whether it followed that plan, how many documents slipped through and how quickly the party sought their retrieval.
- Litigants can enter into clawback agreements, but must be careful.

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

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.

Joint Defense/Common Interest Doctrine

The common interest doctrine is not a separate privilege, but instead is a non-waiver doctrine allowing outsiders' involvement without forfeiting privilege protection or triggering a waiver.

Joint Defense/Common Interest Doctrine (cont.)

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.
- Courts apply the doctrine communication-by-communication.
- Some courts pick their own effective date.

Joint Defense/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.

Joint Defense/Common Interest Doctrine (cont.)

There is some good news.

- No court requires a written common interest agreement.
- Disclosure even under a failed common interest agreement is unlikely to trigger a subject matter waiver.
- Sharing work product with a non-adverse third party usually does not waive that separate protection.

Joint Defense/Common Interest Doctrine (cont.)

Best Practices

- Common interest agreements almost always work if the participants are already in litigation.
- Otherwise, the participants might want to consider a joint representation with prospective consents.
- Although a written agreement is not necessary for the protection, a prospective consent may be the most important part of a written common interest agreement.

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

- Courts disagree about the need for a specific identifiable claim.
- Courts disagree about whether administrative proceedings count as "litigation."
- Courts generally hold that a government's investigation does not amount to "litigation."

Work Product: Creation (cont.)

"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 readily 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.)

Other work product issues.

- Fact versus opinion work product.
- The Sporck doctrine.
- Can only a party create protected work product?
- Courts disagree about protection for intangible work product.
- Courts disagree about protection for non-substantive work product such as logistical emails, etc.

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.)

Opinion work product deserves a higher level of protection.

- Some courts recognize absolute protection.

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

Preliminary Issues

- Carefully identify the client.
- Consider the ramifications of a joint representation.
- Decide if the company wants to assert privilege or work product protection.
- Advise insurance carriers, consider issuing hold notices, train employees how to write.

Internal Corporate Investigations (cont.)

Initiation of the Investigation

Courts examine why the company initiated the investigation.

- To deserve privilege protection, the investigation must be primarily motivated by legal rather than business or other concerns.
- To deserve work product protection, the investigation must be primarily motivated by litigation or anticipated litigation.

Internal Corporate Investigations (cont.)

Courts frequently examine the four corners of initiating documents, and often ignore supporting affidavits.

- Companies which initiate investigations before involving an in-house or outside lawyer often miss the chance to articulate in the initiating documents the prerequisites for later claiming privilege or work product protection.

If it is too late to claim privilege or work product protection for an internal corporate investigation, the company may have to consider a parallel or successive investigation.

Internal Corporate Investigations (cont.)

Course of the Investigation

Courts examine an investigation's course.

- A lawyer's role is necessary for privilege protection and helpful for work product protection.
- Courts disagree about the role of the compliance function.
- Companies must follow through in complying with an internal requirement.

Internal Corporate Investigations (cont.)

Use of the Investigation

Courts examine an investigation's use.

- An investigation's fruits must be used for legal or litigation-related purposes.
- An investigation's report should buttress an asserted protection within the report's four corners.

Internal Corporate Investigations (cont.)

Companies do not waive either privilege or work product protection by providing unprotected historical facts to the government or some other third party.

- Companies should remember implied waivers, and the frightening possibility of an "at issue" 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.