

Key Attorney-Client Privilege and Work Product Doctrine Issues: Recent Caselaw

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TABLE OF CONTENTS

	Page
I. BASIC PRIVILEGE PRINCIPLES.....	1
A. Choice of Law	1
B. What Is Not Privileged	31
C. Primary Purpose Test.....	72
D. Joint Representations	109
II. CORPORATE PRIVILEGE: BASIC STANDARDS.....	119
A. Identifying the Client	119
B. Privilege Ownership After Corporate Transaction	151
C. Control Group, Upjohn and Bevill Doctrines	203
D. Communications Within Corporate Families	210
III. CORPORATE PRIVILEGE: EXPANSION.....	230
A. Employee-to-Employee Communications	230
B. Former Employees.....	250
C. Functional Equivalent Doctrine.....	260
IV. CORPORATE PRIVILEGE: RISKS	283
A. Widespread Intra-Corporate Circulation.....	283
B. Need to Know Standard	297
C. Access Issues.....	308
D. Employees' Personal Privileged Communications on Employers' Servers.....	317
E. Drafts	334
F. Garner Doctrine	353
V. SOURCES OF PROOF.....	357
A. Client-to-Lawyer Communications	357
B. Lawyer-to-Client Communications	390
VI. OUTSIDERS.....	401
A. Client Agents/Consultants.....	401
B. Lawyer Agents/Consultants	470
VII. COMMON INTEREST DOCTRINE	514
A. Basic Nature and Contrast with Joint Representations	514

TABLE OF CONTENTS
(continued)

	Page
B. Litigation Requirement.....	527
C. Commonality Requirement.....	541
D. Other Variations	571
E. Work Product Issues	591
VIII. WAIVER	602
A. Intentional Express Waiver.....	602
B. Unintentional Express Waiver	636
C. Implied Waiver and At Issue Doctrine	643
D. Scope of Waiver	698
IX. WORK PRODUCT DOCTRINE.....	729
A. Creation Issues and Variations	729
B. Litigation and Anticipation Elements, Spoliation Risk	772
C. Motivation Element	810
D. Opinion Work Product.....	847
E. Overcoming Work Product Protection	874
F. Waiver	884
X. CORPORATE INVESTIGATIONS	920
A. Identifying the Client in a Corporate Investigation	920
B. No Protection for Required or Ordinary Course Investigations	932
C. Protection for Corporate Investigations Different from Required or Ordinary Course Investigations	986
D. Waiver	1020
XI. PRIVILEGE LITIGATION	1053
A. Privilege Logs.....	1053
B. Evidentiary Support.....	1079
C. Interrogatories and Depositions	1094
D. Discovery About Discovery	1109
E. Appeal.....	1152

I. BASIC PRIVILEGE PRINCIPLES

A. Choice of Law

- [Privilege Point, 3/2/11]

Court Deals With Application of Swiss Privilege Law

March 2, 2011

With the EU and many European countries taking a narrow view of the attorney-client privilege available to in-house lawyers, many nervous U.S. companies focus on choice of laws issues involving communications with overseas affiliates or employees. The bottom line in most situations is that U.S. courts usually apply U.S. privilege law to communications that "touch base" with the U.S., but generally apply a foreign country's privilege law to communications occurring in those other countries.

In Morgan Stanley High Yield Securities, Inc. v. Jecklin, No. 2:05-cv-01364-LDG-LRL, 2011 U.S. Dist. LEXIS 6668, at *5 (D. Nev. Jan. 10, 2011), the court in an earlier order initially denied privilege protection for documents that the plaintiffs claimed to reflect purely internal Swiss communications involving a Swiss in-house lawyer – with "no nexus to Nevada." However, the court's later in camera review disclosed that several of the documents "discuss United States law, United States attorneys, are to or from United States attorneys, or reference legal strategy with regard to legal actions within the United States." Id. at *5-6. Other documents "are addressed to and/or from United States counsel or repeat the advice of United States counsel." Id. at *7. For these documents, the court found that there was "an obvious nexus or 'significant relationship' to the United States and [that they therefore] would be protected as privileged under federal and Nevada privilege law." Id. (citing Restatement (Second) of Conflict of Laws § 187 cmt. c (1989)).

Not many courts deal with this issue, so each decision deserves attention. Although courts disagree about the factors underlying the "touch base" test, the good news for U.S. companies is that U.S. courts will generally apply U.S. privilege law to documents generated overseas – if they have some relationship to the United States.

- [Privilege Point, 11/12/14]

Courts Apply Privilege Choice of Law Principles: Part II

November 12, 2014

Federal courts sitting in diversity should rely on their host jurisdiction's choice of law rules in selecting the proper privilege law. However, most federal courts inexplicably short-circuit this process -- automatically applying the host jurisdiction's privilege law rather than its choice of law principles. See, e.g., Camico Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP, Civ. A. No. 11 4753, 2013 U.S. Dist. LEXIS 10832 (E.D. Pa. Jan. 28, 2013). Courts undertaking the proper analysis sometimes reach surprising results. In Skepnek v. Roper & Twardowsky, LLC, the court handling a diversity case properly looked to Kansas choice of law rules -- almost apologetically explaining that Kansas follows the "older, minority approach" of the Restatement (First) of Conflict of Laws (1934). Case No. 11-CV-4102-DDC-JPO, 2014 U.S. Dist. LEXIS 122918, at *10 (D. Kan. Sept. 4, 2014). That approach "provides that '[t]he law of the forum determines the admissibility of a particular piece of evidence.'" Id. at *11 (quoting Restatement § 597). The court therefore applied Kansas privilege law principles to emails among "New Jersey clients communicating with their New Jersey law firm about a New Jersey lawsuit." Id. at *11-12. Not surprisingly, the court acknowledged that those New Jersey clients "may find it unusual that Kansas state law determines whether their e-mails are privileged." Id. at *12.

This type of counterintuitive result usually makes little difference, but in some cases Illinois state courts have relied on this analysis to apply that state's narrow "control group" privilege standard to communications that deserved privilege protection under the more corporate-friendly Upjohn standard of when and where the communications took place.

- [Privilege Point, 4/2/14]

Applying Another Country's Privilege Law Can Sometimes Expand Privilege Protection

April 2, 2014

As a matter of comity, U.S. courts usually apply other countries' privilege laws to purely overseas communications that do not "touch base" with the United States. Because most European countries (and the EU itself) do not extend privilege protection to in-house lawyers' communications, in many situations applying foreign privilege law decreases possible privilege protection for U.S. corporations.

However, in some contexts, foreign law offers a greater chance of privilege protection than U.S. law normally provides. In Cadence Pharmaceuticals, Inc. v. Fresenius Kabi USA, LLC, 996 F. Supp. 2d 1015 (S.D. Cal. 2014), the court assessed communications in Germany involving a patent agent, which dealt with a European patent application. The court concluded that the communications did not "touch base" with the U.S., and therefore applied German law. Id. at 1019. The court extended privilege protection to the communications – relying on a European patent lawyer's affidavit in holding that "[i]n Germany, communications with patent agents are afforded confidentiality, even though patent agents are not admitted to practice law." Id. at 1022. United States courts disagree about privilege protection for patent agents here. Buyer's Direct Inc. v. Belk, Inc., No. SACV 12-00370-DOC (MLGx), 2012 U.S. Dist. LEXIS 57543, at *7, *8-9 (C.D. Cal. Apr. 24, 2012) (recognizing "a split in authority" on privilege protection for registered patent agents proceedings before the U.S. PTO).

Because applying other countries' privilege law might expand or contract available privilege protection, lawyers whose clients communicate to or from other countries must always assess the possible risks and rewards.

- **[Privilege Point, 10/1/14]**

Another Court Deals With Foreign In-House Lawyers

October 1, 2014

Most foreign countries do not extend privilege protection to communications to and from in-house lawyers, so United States companies normally seek to apply U.S. privilege law when discovery disputes in U.S. courts involve overseas communications. Fortunately for such companies, the commonly-used "touch base" test normally applies U.S. privilege law to (1) communications to and from the United States, and (2) purely overseas communications whose content primarily focuses on the United States.

In Veleron Holding, B.V. v. BNP Paribas SA, No. 12-CV-5966 (CM) (RLE), 2014 U.S. Dist. LEXIS 117509 (S.D.N.Y. Aug. 22, 2014), plaintiff Veleron withheld purely overseas communications to and from in-house lawyers in Russia and the Netherlands — which did not meet the "touch base" standard justifying U.S. privilege law's application. The court therefore applied a "'predominant interest'" standard in selecting the applicable law. Id. at *13 (citation omitted). Significantly, the court rejected Veleron's reliance on contractual choice of law clauses indicating that British and Canadian law governed any disputes — instead applying Russia's and the Netherlands' privilege laws because those countries "have a strong interest in the uniform application of attorney client privilege law for Russian and Dutch attorneys and for communications that occur in their respective countries." Id. at *14. The court then noted that (1) Russia does not recognize privilege protection for in-house lawyers, or outside lawyers who are not licensed by the Russian Administrator of Justice, and (2) Dutch law does not extend privilege protection to "unlicensed lawyers." Id. at *14-15. The court ultimately rejected Veleron's privilege claim, because the company had not established with evidence that its Russian lawyers were licensed outside lawyers, or that its Dutch lawyers were licensed at all.

Companies with foreign operations or (especially) foreign lawyers should monitor the case law for developments in this area, and be prepared to present whatever evidence will support their privilege claims. When appropriate, company employees can also enhance the likelihood of U.S. privilege law's application by copying a U.S. lawyer (in-house or outside) or by focusing on U.S. issues in purely overseas communications.

- [Privilege Point, 11/9/16]

**Can Contracting Transactional Parties Select Favorable Privilege Law?:
Part I**

November 9, 2016

Federal privilege common law governs federal question cases, but federal courts hearing diversity cases must choose the applicable attorney-client privilege law.

Many litigants do not even focus on the choice of law issue. In Greyhound Lines Inc. v. Viad Corp., the court noted that "[t]he parties do not address this choice of law issue." No. CV-15-01820-PHX-DGC, 2016 U.S. Dist. LEXIS 121483, at *2-3 (D. Ariz. Sept. 8, 2016). The court eventually applied Arizona privilege law, because plaintiff cited Arizona law and defendant "does not cite contrary authority." Id. at *3. To be sure, in many cases the choice of laws does not make any difference. In Wellin v. Wellin, 211 F. Supp. 3d 793, Nos. 2:13-cv-1831-, -3595-DCN, & 2:14-cv-4067-DCN, 2016 U.S. Dist. LEXIS 135604 (D.S.C. Sept. 30, 2016), the court extensively analyzed the choice of law issue — correctly using South Carolina's standard for that analysis. The court ultimately concluded that South Carolina privilege law applied, but then acknowledged that "this may be something of a hollow victory for [plaintiffs] as the court is not convinced there is any significant difference between New York and South Carolina [privilege] law." Id. at 806.

But in some situations there are huge differences between states' privilege laws. Next week's Privilege Point will discuss a noteworthy case where such a difference was dispositive, and in which the Southern District of New York gave a road map for corporations seeking to maximize their privilege protection.

- **[Privilege Point, 11/16/16]**

**Can Contracting Transactional Parties Select Favorable Privilege Law?:
Part I**

November 16, 2016

Last week's Privilege Point described diversity cases in which litigants did not address the choice of laws issue, and in which the issue was irrelevant because there appeared to be no material difference between the possibly applicable privilege laws.

Del Giudice v. Harlan, No. 15 Civ. 7330 (LTS) (JCF), 2016 U.S. Dist. LEXIS 129938 (S.D.N.Y. Sept. 22, 2016), generated substantial news about its corporate governance holding – that under Delaware law even directors who are adverse to their corporation can sometimes access privileged communications about their dispute. But the news articles have not covered what could be a more broadly significant point. After noting that "[t]he parties engage in a half-hearted dispute about what state's law should determine whether the attorney-client privilege applies," respected Magistrate Judge Francis emphasized that "it appears that the Delaware [privilege] law differs from New York law in material ways" – so "[a] choice-of-law analysis is therefore necessary." Id. at *8-9. After tiptoeing into New York's elaborate choice of laws standard, Judge Francis short-circuited the analysis – holding "under New York state law, where the contract sued upon contains a choice-of-law provision, that choice will generally govern what state's privilege law applies." Id. at *11-12. Because the LLC's operating agreement specified Delaware law, Judge Francis applied Delaware privilege law. As it turned out, that was dispositive -- and resulted in the widely reported corporate governance decision.

This is not the first time a privilege choice of laws analysis played a decisive role. In 2010, a Delaware state court relied on a merger agreement's choice of law provision to apply Delaware rather than Massachusetts privilege law to communications that occurred in Massachusetts. 3Com Corp. v. Diamond II Holdings, Inc., C.A. No. 3933-VCN, 2010 Del. Ch. LEXIS 126 (Del. Ch. May 31, 2010). That conclusion made a huge difference – because Goldman Sachs was outside privilege protection under Massachusetts law but inside privilege protection under Delaware law. Although such situations may arise infrequently, lawyers should be looking for them.

- [Privilege Point, 1/4/17]

**Two Decisions Issued the Same Day Highlight Choice of Laws Issues:
Part I**

January 4, 2017

Every privilege analysis should start with determining the applicable law. In the corporate context, federal courts handling federal question cases and nearly every state follow the Upjohn standard. Upjohn v. United States, 449 U.S. 383 (1981). Under this standard, the privilege can protect a corporation's lawyer's communications with any corporate employee possessing information the lawyer needs. A handful of states continue to follow the pre-Upjohn "control group" standard – under which the privilege generally protects only communications with upper-level corporate management.

In Harris Management, Inc. v. Coulombe, 2016 ME 166, ¶ 15, 151 A.3d 7, 14, Maine's highest court reaffirmed Maine's reliance on the old "control group" standard – extending privilege protection only to employees (usually officers) who direct the corporation's response to its lawyers' legal advice, and other individuals with authority to make corporate decisions. Although Maine corporations feel the main brunt of this narrow approach, corporations from Upjohn states might also lose their privilege if they are sued in Maine.

In some cases, a choice of law analysis will result in application of the narrow "control group" corporate privilege standard. In other cases, courts applying other states' privilege law relieve corporations of that troublesome standard. Next week's Privilege Point will describe such a decision from another "control group" hold-out state – Illinois. Decided on the same day as Harris Management, the decision looked outside Illinois for applicable privilege law.

- [Privilege Point, 1/11/17]

**Two Decisions Issued the Same Day Highlight Choice of Laws Issues:
Part II**

January 11, 2017

Last week's Privilege Point described a Maine case applying the narrow pre-Upjohn "control group" standard for corporate communications. Harris Mgmt., Inc. v. Coulombe, 2016 ME 166, 151 A.3d 7. Illinois is by far the largest state that still follows the worrisome "control group" standard. Illinois federal courts sitting in diversity frequently apply that state's "control group" standard to strip away corporations' privilege protection.

But sometimes Illinois federal courts look elsewhere for privilege law. In In re Fluidmaster, Inc., the court noted that "[t]he parties agree that California law governs the attorney-client privilege issues now before the Court." Case No. 1:14-cv-05696, MDL 2585, 2016 U.S. Dist. LEXIS 154618, at *5 (N.D. Ill. Nov. 8, 2016). The court therefore applied several favorable California statutory law principles to the defendant corporation's privilege protection, including (1) communications "made in the course of an attorney-client relationship" are "presumed to have been made in confidence"; (2) the privilege's opponent must carry the burden of proving that the privilege does not apply; (3) "the privilege may extend to 'communications that merely transmit documents,' even if those documents are publicly available"; and (4) "no heightened [privilege] scrutiny exception [for in-house lawyers] exists in California's statutory regime." Id. at *6, *12, *46 (citations omitted). All of these positions represent a much more corporate-friendly privilege approach than the majority of case law nationally – and obviously much more favorable than Illinois' own harsh "control group" standard.

The Harris Management case should remind lawyers that pockets of unfavorable "control group" privilege law still exist, and the Fluidmaster case should prompt lawyers to look for ways to apply more favorable privilege law wherever they litigate.

- In re Application of Financialright GmbH, No. 17-mc-105 (DAB), 2017 U.S. Dist. LEXIS 107778, at *7-8, *8-9 (S.D.N.Y. June 23, 2017) (addressing plaintiffs' efforts to discover documents related to Jones Day's investigation into the Volkswagen "emissions scandal"; concluding that U.S. law applied to privilege and work product issues; "The parties discuss both United States federal common law and German law with respect to whether attorney-client privilege applies here. In determining what law to apply with respect to attorney-client privilege, this Court considers the country with which the allegedly privileged communications 'touch base.' Using this test, the Court 'appl[ies] the law of the country that has the predominant or the most direct and compelling interest in whether [the] communications should remain confidential, unless that foreign law is contrary to the public policy of this forum.'" (alterations in original) (citation omitted); "In this case, the attorney-client relationship was entered into in Germany involving both American and German attorneys. Many of the relevant interviews were conducted in Germany and in German, and many documents allegedly in Jones Day's possession came from Germany. However, in addition to having a presence in Germany, Jones Day is principally an American law firm, and American lawyers are working on the Volkswagen case. While Jones Day's investigation pertains to the whole of the emissions scandal, including in Germany, it was retained specifically to represent Volkswagen vis-à-vis American authorities. Furthermore, Jones Day has in fact represented Volkswagen before American authorities, specifically the Justice Department, in a proceeding involving U.S. law. Accordingly, the Court holds that United States law applies with respect to attorney-client privilege and the work product doctrine as to this Application.")

- **[Privilege Point, 11/22/17]**

Choice of Laws Analyses Can Be Dispositive

November 22, 2017 •

Although most jurisdictions agree on many basic privilege issues, some important variations remain. The most important involves a few states' rejection of the majority Upjohn v. United States, 449 U.S. 383 (1981) rule protecting corporations' lawyers' communications with middle and lower level corporate employees. But there are other significant distinctions among states that can make a big difference in a corporate context.

In Mooney v. Diversified Business Communications, 34 Mass. L. Rptr. 352, 2017 Mass. Super. LEXIS 133 (Mass. Super. Ct. 2017), a corporation's former CEO/director (now adverse to the corporation) sought access to privileged communications from his time at the corporation. The court acknowledged that "[t]he choice of law issue is an important one" -- because under Delaware law "former directors or officers are entitled to privileged communications created during their tenure," while other states (including Massachusetts) "do not permit former officers and directors to access privileged information for use in litigation where the corporation asserts a privilege." Id. at *6, *7. The court had to decide between applying (1) Delaware law (because that is the defendant's state of incorporation), or (2) Massachusetts law (under the Restatement (Second) of Conflict of Laws § 139 choice of law approach). The court applied the latter standard in denying plaintiff access to the privileged documents.

Although privilege choice of law disputes rarely arise, they occasionally have dispositive effects.

- Bartech Systems Int'l, Inc. v. Mobile Simple Solutions, Inc., Case No. 2:15-cv-02422-MMD-NJK, 2018 U.S. Dist. LEXIS 22296, at *18-19, *19-20, *20, *20- 21 (D. Nev. Feb. 12, 2018) (applying the "touch base" test to apply Canadian law to a privilege issue; "To determine whether American or a foreign country's privilege law applies, the 'touch base' analysis requires the court to look at (1) where the legal advice protected by the privilege was rendered; (2) what the legal advice relates to; and (3) whether foreign counsel was involved in rendering the advice. . . . Courts will 'defer to the law of the country that has the "predominant" or "the most direct and compelling interest" in whether the challenged communications should remain confidential, unless that foreign law is contrary to the public policy of the forum.' . . . To determine which country has the 'predominant interest,' the court looks to where the privileged relationship was entered into or where the privileged relationship was 'centered' at the time of the communication. . . . As a general matter, American law will apply when the communication concerns a legal proceeding in the United States or when the advice was regarding American law; a foreign country's law will apply when the communication relates to a foreign proceeding."; "In the instant case, the communications at issue pertain to the asset sale between Defendant and Defendant Mobile Canada. . . . Plaintiff filed a 'proof of claim' in the Canadian court regarding Defendant Mobile Canada's bankruptcy. . . . As part of that proceeding, Plaintiff deposed Defendant Pigeat as Defendant Mobile Canada's former CEO. . . . During the deposition, Plaintiff requested 'copies of Mobile Canada's and Pigeat's written communications to [GEM], and to its representative, Jacques Manardo.' . . . Defendant Pigeat's counsel objected on the grounds that the communications were protected by the attorney-client privilege. . . . The Canadian court found that the communications were privileged because 'Mobile Canada, Pigeat, and GEM were jointly seeking and obtaining legal advice from GBV' regarding the sale, despite the fact that non-parties were included on those communications."; "This Court applies the 'touch base' analysis. The Court assumes that the deposition took place in Canada, given that the deposition was taken pursuant to a legal proceeding initiated in Canada. . . . Therefore, as to the first factor, the legal advice was rendered in Canada. As to the second factor, the advice relates to communications made between a Canadian company (Defendant Mobile Canada) and a Belgian company (Defendant), regarding a business transaction between the two companies. . . . Therefore, as to the second factor, the legal advice relates to foreign countries and companies. As to the third factor, GBV is a Canadian law firm." (fourth alteration in original); "The Court further finds that Canada has the predominant interest in keeping the communications at issue confidential. The privileged relationship was centered in Canada at the time of the communication, the Canadian court conducted a hearing solely

on the issue of whether the attorney-client privileged [sic] applied to the communications, and found that the communications are privileged. . . . Canada, therefore, has the predominant interest in maintaining the privileged relationship determined by its court. Lastly, the Court finds that the attorney-client privilege, as applied in the Canadian proceeding, is not contrary to American public policy. The Canadian court found that 'for the privilege to exist there must be: i) a communication between solicitor and client; ii) which entails the seeking or giving of legal advice; and iii) which is intended to be confidential by the parties.'")

- [Privilege Point, 3/13/19]

Federal Courts Assess Privilege Protection for International Communications

March 13, 2019

American courts assessing privilege protection for international communications usually apply U.S. privilege law to communications that "touch base" with the U.S. But purely overseas communications present a more difficult analysis – which depends on the country's privilege tradition and attitude toward in-house lawyers, among things. Before undertaking this subtle overseas communication analysis, courts first must determine if the overseas participant involved in the communication is authorized to practice law in that country.

In In re Abilify (Aripiprazole) Products Liability Litigation, Case No. 3:16-md-2734, 2019 U.S. Dist. LEXIS 3279 (N.D. Fla. Jan. 8, 2019), plaintiffs claimed that two Japanese defendant companies had improperly withheld as privileged communications to and from Japanese nonlawyers. The court noted that "there are three types of legal personnel in Japan: Bengoshi, who are licensed attorneys; non-Bengoshi, who are non-licensed law undergraduates; and Benrishi, who are patent lawyers." Id. at *6. The court emphasized that "[t]his distinction is important because attorney-client privilege does not apply to communications with unlicensed counsel." Id. But the court found the issue moot, because the defendants assured the court that none of these privilege claims were "based solely on non-licensed legal personnel." Id. One day later, in Circuitronics, LLC v. Shenzhen Kinwong Electronic Co., the court rejected defendant's privilege claim for communications with "in house counsel who were not licensed Chinese lawyers." Case No. 17-22462-CIV-UNGARO/O'SULLIVAN, 2019 U.S. Dist. LEXIS 3971, at *3 (S.D. Fla. Jan. 9, 2019). The court explained that "[u]nder Chinese law, there is no attorney-client privilege and at least prior to the recent change in 2015, in-house counsel in China are not persons authorized to practice law." Id. at *4.

Lawyers dealing with international communications must start their analysis with determining the legal status of the overseas participants.

- [Privilege Point, 6/5/19]

Source And Choice Of Privilege Law In Diversity Cases: Part I

June 5, 2019

Not surprisingly, the federal rules govern all work product issues in all federal courts. But determining the correct attorney-client privilege law is much more complicated. The federal common law of privilege applies in federal question cases. In diversity cases, federal courts apply state privilege law. This requires such federal courts to: (1) find the source of state privilege law; and (2) determine which state's privilege law applies.

In Canton Drop Forge, Inc. v. Travelers Casualty & Surety Co., the court properly acknowledged that federal courts apply state law "to resolve attorney-client claims." Case No. 5:18-cv-01253, 2019 U.S. Dist. LEXIS 41668, at *2-3 (N.D. Ohio Mar. 14, 2019) (citation omitted). The court then described its host state's usual if not unique source of privilege law: "[t]he Supreme Court of Ohio has explained that the attorney-client privilege in Ohio is governed by statute . . . or, in cases not covered by the statute, by common law." Id. at *3. Most states look to one or the other of those sources, but not both. To further complicate such a search, some states also deal with privilege in their court rules.

Finding the source of states' privilege law can sometimes present a challenge for federal courts handling diversity cases. But determining which state's law applies in diversity cases can be even more troublesome – and many courts seem to get it wrong. Next week's Privilege Point will focus on that issue.

- [Privilege Point, 6/12/19]

Source And Choice Of Privilege Law In Diversity Cases: Part II

June 12, 2019

Last week's Privilege Point explained that federal courts handling diversity cases must find the source or sources of the appropriate state's privilege law – sometimes a mixture of statute, common law and court rules. In determining which state's privilege law applies, federal courts should apply their host state's choice of law rule. That analysis often results in the host state's privilege law applying, but not always.

Unfortunately, federal courts sometimes seem to reflexively apply their host state's privilege law – rather than applying their host state's choice of law principles. For instance, in Aerojet Rocketdyne, Inc. v. Global Aerospace, Inc., the court properly held that "[t]he law of the forum state governs claims of attorney-client privilege in diversity cases." No. 2:17-cv-01515 KJM AC, 2019 U.S. Dist. LEXIS 40911, at *10 (E.D. Cal. Mar. 13, 2019). That governing "law" includes the forum state's choice of law principles -- which may lead the court to apply some other state's privilege law. But the court immediately followed that correct statement with this blunt conclusion: "[a]ccordingly, California law controls here" – meaning its privilege law. Id. A couple weeks later, another court undertook the proper analysis. In Argos Holdings Inc. v. Wilmington N.A., No. 18cv5773 (DLC), 2019 U.S. Dist. LEXIS 53104, at *5-6 (S.D.N.Y. Mar. 28, 2019), the court applied its host state's privilege law, but explained its reasoning: "because this is a diversity action regarding a claim for which New York law supplies the rule of decision."

Federal courts usually apply their host state's privilege law in diversity cases, but it can be difficult to tell if they have: (1) erroneously done so by short-circuiting the proper approach; or (2) correctly applied their host state's choice of law rules. Next week's Privilege Point will address another choice of law issue.

- [Privilege Point, 6/19/19]

Source And Choice Of Privilege Law In Diversity Cases: Part III

June 19, 2019

The last two Privilege Points (Part I and Part II) addressed federal courts' identification of and choice of the appropriate state's privilege law in diversity cases. The latter process should start with federal courts' application of their host state's choice of law rules, but some courts seem to erroneously skip that process and automatically apply their host state's privilege law.

And there is another possible source of guidance for federal courts handling privilege issues in diversity cases. In Aerojet Rocketdyne, Inc. v. Global Aerospace, Inc., No. 2:17-cv-01515 KJM AC, 2019 U.S. Dist. LEXIS 40911 (E.D. Cal. Mar. 12, 2019), the court may have mistakenly applied California privilege law without making the necessary choice of law analysis. But the court correctly concluded that "in diversity cases, federal law governs procedure." Id. at *11. The court then recognized that "[t]he use of in camera review to determine whether attorney-client privilege is properly claimed is a procedural matter." Id.

Here is the choice of law breakdown in federal courts: (1) federal work product rules apply in all federal cases; (2) federal privilege common law applies in federal question cases; (3) federal law governs procedural issues; (4) state privilege law applies in federal diversity cases. Federal courts should choose the governing state privilege law after applying their host state's choice of law rules – not short circuit the process and automatically apply their host state's privilege law.

- [Privilege Point, 12/25/19]

Where Do States Articulate Their Attorney-Client Privilege Protection?

December 25, 2019

The attorney-client privilege started in Roman times, developed in England, and came to America with the English common law. Each state has adopted attorney-client privilege protection – but memorializes it in different places. Some courts continue to apply the common law, while others have adopted statutory privilege protection.

In Coneal v. American Commerce Insurance Co., the court explained that "Kentucky Rule of Evidence 503 supplies us with the attorney-client privilege for claims under Kentucky law." Case No. 5:18-CV-00095-TBR-LLK, 2019 U.S. Dist. LEXIS 160696, at *12 (W.D. Ky. Sept. 20, 2019).

In contrast to the work product doctrine that rests on court rules (sometimes supplemented by a murky common law parallel), the attorney-client privilege can come from one or more of several sources – depending on the state.

- **[Privilege Point, 9/23/20]**

Does Federal or State Privilege Law Govern Pendent State Law Claims in Federal Question Cases?

September 23, 2020

Federal common law governs federal question case privilege issues. Federal courts sitting in diversity should look to their host jurisdiction's choice of law rules when deciding which state's privilege law applies. But what about privilege issues involved in pendent state law claims in federal question cases?

In Williams & Cochrane, LLP v. Rosette, the court conceded "federal courts have split in their approach." Case No. 17cv1436-GPC-DEB, 2020 U.S. Dist. LEXIS 109750, at *11 (S.D. Cal. June 23, 2020). First, "[a] majority of federal courts have applied federal privilege law to claims of privilege in federal question actions with pendent state law claims." Id. Second, some courts "have held that both federal and state privilege law should apply in a federal question action with pendent state claims." Id. Third, "[s]till others have applied state privilege law in federal question actions with pendent state claims where the predominant nature of all the claims are based on state law." Id. at *12. The court linguistically threw up its hands, noting that "frankly, the law in this context is unclear and courts have adopted a multiplicity of approaches." Id. at *13. The court ultimately concluded that the magistrate judge had not erred in applying California privilege law – "given that this litigation is mostly centered on California based contract claims." Id. at *13-14.

Although this state law pendent claim privilege issue may arise only rarely, courts' surprising lack of consensus highlights lawyers' obligation to first conduct a privilege choice of law analysis.

- [Privilege Point, 1/27/21]

Second Circuit Applies the "Touch Base" Test

January 27, 2021

Most other countries do not permit the type of intrusive discovery U.S. companies face. But occasionally discovery in U.S. litigation seeks communications to or from the U.S., or even purely overseas communications -- requiring U.S. courts to assess which country's privilege protection applies.

In Mangouras v. Boggs, 980 F.3d 88, 92-93 (2d Cir. 2020), the captain of an oil tanker that sank off the coast of Spain in 2002 had successfully obtained an order from the Southern District of New York allowing "discovery in aid of foreign proceedings" from a Squire Patton Boggs lawyer -- who had represented Spain in a S.D.N.Y. action. The Second Circuit held that the lower court had not conducted the necessary choice of law analysis -- reversing and remanding the discovery issue. The Second Circuit explained that U.S. privilege law applies to foreign communications that "touch base" with the United States. Id. at 99. This "touch base" standard clearly applies to communications to or from the U.S. -- and can also apply to purely overseas communications that involve a U.S. matter.

Companies with operations overseas should train their overseas employees to memorialize a U.S. connection when appropriate.

- **[Privilege Point, 3/31/21]**

Court Gets the Diversity Case Choice of Law Analysis Right: Part I

March 31, 2021

As in other areas, a privilege analysis should always start with a choice of law assessment. In federal courts, federal common law governs federal question cases' privilege issues. In diversity cases, many federal courts reflexively apply their host jurisdiction's privilege law. This is wrong.

In Parimal v. Manitex International, Inc., the court refreshingly recognized that in "resolving [whether Connecticut or Illinois privilege law applied] the Court must apply Connecticut choice of law principles." Civ. No. 3:19CV01910 (MPS), 2021 U.S. Dist. LEXIS 20429, at *6 (D. Conn. Feb. 3, 2021). After carefully describing both states' privilege laws, the court dealt with the most obvious difference — "Connecticut generally provides greater protection to corporate communications," because Illinois is one of the few states rejecting the Upjohn standard and instead applying the old "control group" standard. Id. at *13. But the court correctly found that "any conflict between Illinois and Connecticut law is illusory because each of the communications at issue was between a member of defendant's control group . . . and its claimed attorney." Id. at *13-14. The court then recognized another difference: "by employing the 'primary purpose' test, Connecticut appears to afford greater protection to communications that implicate both legal and business advice By contrast, Illinois takes a stricter approach." Id. at *15. So the court had to choose one or the other.

Although the Upjohn vs. "control group" distinction represents the greatest difference among states' privilege laws, companies and their lawyers should always be looking for more possibly applicable advantageous privilege law. Next week's Privilege Point will describe the court's final answer.

- [Privilege Point, 4/7/21]

Court Gets the Diversity Case Choice of Law Analysis Right: Part II

April 7, 2021

Last week's Privilege Point described a wise Connecticut court's recognition that federal courts sitting in diversity should not automatically apply their host jurisdiction's privilege law — but instead apply their host jurisdiction's choice of law principles when determining applicable privilege law. Parimal v. Manitex Int'l, Inc., Civ. No. 3:19CV01910 (MPS), 2021 U.S. Dist. LEXIS 20429 (D. Conn. Feb. 3, 2021).

Applying Connecticut's Second Restatement's "most significant relationship" standard, the court first rejected plaintiff's focus on the pertinent contract's relationship with Connecticut — explaining that "the Court is not tasked to decide the breach of contract claim," but instead deal with privilege. Id. at *17. The court then settled on defendant's "focus[]" not on the state's relationship with the **contract**, but instead, on the state's relationship with the **communications**." Id. at *16. After noting that most of the communications involved Illinois residents, the court concluded that "it would be wholly unreasonable for a corporation located in Illinois discussing legal matters with attorneys located in, and barred by, other states, to anticipate that **those communications** would be subject to Connecticut law." Id. at *18. So the Connecticut court applied Illinois privilege law (including its "stricter approach" to "communications that implicate both legal and business advice"). Id. at *15.

Although federal courts sitting in diversity apply varying factors in their choice of law analyses, the most logical factor would seem to be the communicating persons' location — which presumably governed their confidentiality (and thus implicitly their privilege) expectations when they communicated.

- [Privilege Point, 10/6/21]

Be Sure to Check the Choice of Law Before Analyzing "At Issue" Waivers

October 6, 2021

The unpredictable "at issue" waiver doctrine can strip away privilege protection without any disclosure of, or explicit reliance on, privileged communications. But state courts and even federal courts take widely varying approaches to this most dangerous type of implied waiver.

In Keller v. Arrieta, Civ. No. 20-259 KG/SCY, 2021 U.S. Dist. LEXIS 139536 (D.N.M. July 27, 2021), the federal district court applied New Mexico privilege law in rejecting an "at issue" waiver argument. The court stressed that "[w]hen determining whether a privileged matter is at issue, the New Mexico Court of Appeals has adopted a restrictive approach" – finding that "a party only waives her attorney-client privilege where she 'directly relies on attorney-client communications in order to advance a claim or defense.'" Id. at *10-11 (citation omitted). This reflects a very favorable standard for companies hoping to avoid an "at issue" waiver.

Given states' varying approaches to important waiver issues like the "at issue" doctrine, lawyers must always carefully consider choice of law issues when asserting a waiver or defending against a claim of waiver.

- Flatiron Acquisition Vehicle, LLC v. CSE Mortg. LLC, No. 1:17-cv-8987-GHW, 2021 U.S. Dist. LEXIS 187586, at *4-5 (S.D.N.Y. Sept. 29, 2021) (pointing to a contract's choice of law provision in applying New York privilege law; "[I]n a diversity case the existence of a privilege is to be determined by reference to state law" Application of American Tobacco Co., 880 F.2d 1520, 1527 (2d Cir. 1989). The New York Court of Appeals has explained that 'courts should not engage in any conflicts analysis where the parties include a choice-of-law provision in their contract.' Ministers & Missionaries Benefit Board v. Snow, 26 N.Y.3d 466, 474, 25 N.Y.S.3d 21, 45 N.E.3d 917 (2015), reargument denied, 26 N.Y.3d 1136, 27 N.Y.S.3d 499, 47 N.E.3d 779 (2016); see also FPP, LLC v. Xaxis US, LLC, No. 14 Civ. 6172, 2016 U.S. Dist. LEXIS 57421, 2016 WL 1733466, at *2 (S.D.N.Y. Apr. 29, 2016) (applying New York law to question of privilege pursuant to underlying contract's choice-of-law provision); Fin. Techs. Int'l v. Smith, No. 99 Civ. 9351, 2000 U.S. Dist. LEXIS 18220, 2000 WL 1855131, at *2 ('Under New York's rules, a contractual choice of law provision will be honored as long as the chosen jurisdiction has a substantial relationship to the parties or their performance, and policy considerations of New York law are not violated.'). Here, the Purchase Agreement specifies New York law. Purchase Agreement § 10.9. Accordingly, New York law applies to issues of attorney-client privilege." (alterations in original))

- **[Privilege Point, 4/13/22]**

Court Assesses Foreign Communications' Privilege Protection

April 13, 2022

Most if not all United States courts apply what is called the "touch base" test when assessing privilege claims for foreign communications (to or from the U.S., or even totally overseas). That standard normally results in U.S. privilege law applying to a communication to or from the United States, or even to a purely overseas communication that relates to a United States matter. In the latter scenario, the "touch base" test is similar to the Second Restatement domestic choice of law analysis.

In In re Polygon Global Partners LLP, No. 21-mc-007 WES, 2022 U.S. Dist. LEXIS 6439 (D.R.I. Jan. 12, 2022), the court found it unnecessary to undertake a "touch base" analysis to determine whether U.S., Spanish or English privilege law applied to foreign communications. The court first explained "that the U.S. attorney-client privilege is more narrow than its English and Spanish analogues." Id. at *7. That meant that documents deserving privilege protection under United States privilege law "would also be shielded under the more protective foreign privileges of English and Spanish Law." Id. at *8. The court thus found it unnecessary to wrestle with "a number of declarations from a range of purported legal experts on Spanish law, many of whom offer inconsistent analyses of Spanish laws and doctrines." Id. at *9 (quoting In re Polygon Global Partners LLP, No. 21 Misc. 364 (ER), 2021 U.S. Dist. LEXIS 209512, at *19-20 (S.D.N.Y. Oct. 29, 2021)).

Some courts are lucky enough to avoid the difficult task of sorting out foreign privilege law.

- [Privilege Point, 4/27/22]

Why Is a D.C. Federal Court Analyzing a State "Control Group" Privilege Standard, but the Federal Work Product Rule?: Part I

April 27, 2022

All but a handful of states apply what is called the Upjohn privilege standard – under which the attorney-client privilege can protect a corporation's lawyer's communication with any corporate employee who has information the lawyer needs to provide the corporate client legal advice. A few states instead follow the old "control group" privilege standard – which only protects communications with those in a corporation's upper hierarchy. Choice-of-law rules sometime require courts in Upjohn jurisdictions to apply the rare "control group" standard.

In South Capitol Bridgebuilders v. Lexington Insurance Co., the Northern District of Illinois transferred a case filed there to the D.C. federal court under 28 U.S.C. § 1404(a) – which required the transferee court to "apply the choice-of-law rules that would be applied by the Northern District Court of Illinois." Case No. 1:21-cv-1436-RCL, 2022 U.S. Dist. LEXIS 26146, at *6-7 (D.D.C. Feb. 14, 2022). The court also noted that "[b]oth parties apply Illinois [control group] law in their filings," so the D.C. court did too. Id. at *7. Among other things, the D.C. court held that the company waived privilege protection by disclosing privileged communications to employees who were "merely supplying information or the factual bases upon which control group members relied for their decision." Id. at *10. The court even surprisingly warned that an in-house lawyer's "title does not, without more, establish that she was part of the control group" – although it is "relevant" to that determination. Id. at *11.

Even lawyers in Upjohn states may be called upon to analyze and apply the narrow "control group" privilege standard. Next week's Privilege Point will address the D.C. court's work product analysis.

- [Privilege Point, 5/4/22]

Why Is a D.C. Federal Court Analyzing a State "Control Group" Privilege Standard, but the Federal Work Product Rule?: Part II

May 4, 2022

Last week's Privilege Point addressed a D.C. federal court's application of the Illinois "control group" privilege standard in a transferred case. In South Capitol Bridgebuilders v. Lexington Insurance Co., Case No. 1:21-cv-1436-RCL, 2022 U.S. Dist. LEXIS 26146 (D.D.C. Feb. 14, 2022), the court: (1) explained that corporate employees were outside privilege protection if they only supplied facts to the decision-makers; and (2) surprisingly held that in-house lawyers were not automatically part of the protected "control group."

The court then turned to work product protection. That separate evidentiary protection comes from a federal rule, and thus does not require a choice of law analysis – so the D.C. court applied the D.C. Circuit's work product standard. Like most but not all courts, the court applied the broader "because of" work product standard – thus extending that protection beyond documents that would be used to "aid or assist in the litigation." But even under that generous standard, "if a document would have been created 'in substantially similar form' regardless of the litigation, work product protection is not available." Id. at *24-25. Among other things, the court pointed to that limitation in holding that the work product doctrine did not protect some of defendant's communications with its law firm Steptoe & Johnson, "because [defendant] nevertheless needed to determine whether the Policy covered [plaintiff]'s claim" – even without the prospect of litigation. Id. at *26-27.

Just as lawyers in Upjohn jurisdictions might have to wrestle with the "control group" privilege standard, lawyers everywhere must understand the forum court's approach to various work product principles.

- [Privilege Point, 8/24/22]

Source and Choice of Privilege Law in Federal Courts: Part I

August 24, 2022

Lawyers dealing with attorney-client privilege questions obviously must assess what privilege law applies. Federal courts understandably apply federal privilege common law (essentially garden-variety principles) in federal question cases. Federal courts sitting in diversity should apply their host jurisdiction's choice of law rule in selecting the appropriate privilege law – although many courts seems to reflexively apply their host state's privilege law without a choice of law analysis.

Federal courts applying a state's privilege law must then locate it. In Greco v. Ahern, the court first properly acknowledged that "[i]n diversity actions . . . questions of privilege are controlled by state law." Case No. 21cv155-RBM (MSB), 2022 U.S. Dist. LEXIS 103338, at *12 (S.D. Cal. June 8, 2022). The court next noted that in California, "evidentiary privileges, including the attorney-client privilege, are governed by statute." Id. at *12-13. But from there, the court's analysis became complicated – recognizing an "at issue" exception **not** found in the statute. The court quoted an earlier California state court case explaining that "the [California] Code does **not** bar the courts from creating by decisional law **new** exceptions to various privileges." Id. at *15 (citation omitted).

Lawyers searching for the applicable attorney-client privilege law must sometimes look in the nooks and crannies of common law even in states purporting to recognize their attorney-privilege solely in statutes. Next week's Privilege Point will address a decision decided one day earlier – involving an even more convoluted analysis.

- [Privilege Point, 8/31/22]

Source and Choice of Privilege Law in Federal Courts: Part II

August 31, 2022

Last week's Privilege Point summarized a California federal court decision confirming that California recognizes its privilege in a statute, but then inexplicitly acknowledging that courts can themselves create exceptions. One day earlier, a court dealt with privilege protection for overseas communications – in a complicated analysis of both the privilege's source and choice of law.

In Aviva Sports, Inc. v. Fingerhut Direct Marketing, Case No. 09-cv-1091 (JNC/HB), 2022 U.S. Dist. LEXIS 101007 (D. Minn. June 7, 2022), the court had earlier granted plaintiff's motion to compel the production of documents held by Liquidators of a defunct Hong Kong company. But the Liquidators explained that they needed permission to do so by a Hong Kong court or official. The court first noted that under U.S. law the Liquidator's failure to object to production waived privilege, but not so under Hong Kong law – which somewhat surprisingly, given Chinese political control, often follows "the law of other common law jurisdictions, such as England and New Zealand." Id. at *9. Clearly struggling with this choice of law issue, the court applied what is called the "touch base" test. The "touch base" test applies U.S. privilege law to communications to and from the U.S., but also (quoting an earlier case) to "communications related to legal proceedings in the United States, or that reflect the provision of advice regarding American law." Id. at *11-12 (citation omitted). The court found that under applicable U.S. privilege law the now-defunct company had "likely waived its claims of privilege as to those documents by failing to fulfill its obligation to respond to [plaintiff's] requests." Id. at *12. So the court ultimately ordered production of the documents governed by U.S. privilege law.

Perhaps not surprisingly, the court apologetically "agrees that it erred [initially] in assuming U.S. privilege law applied to all documents" – noting that Hong Kong privilege law "differs in significant respects from U.S. jurisprudence." Id. at *16. It can be difficult enough to locate the source of privilege law, let alone select and then apply it. But lawyers and courts must sometimes engage in such difficult tasks.

- [Privilege Point, 9/20/23]

Where Should Lawyers Look for the Applicable Attorney-Client Privilege?

September 20, 2023

The attorney-client privilege originated in Roman law, and flourished under what John Adams labeled “that most excellent monument of human art, the common of law of England.” But in America, some states articulate their key privilege in statutes, some in rules, some in pure common law and some with a mixture of those.

In Becker v. Baptist Health Medical Group, Inc., the court pointed to “Article V of the Kentucky Rules of Evidence [which] includes no provision for common law development of testimonial privileges.” No. 2022-CA-0074-MR, 2023 Ky. App. Unpub. LEXIS 410, at *12 (Ky. Ct. App. July 7, 2023). Not surprisingly, the court rejected a litigant’s privilege claim – pointing to this rejection of any common law expansion. The court indicated that it would “strictly construe KRE 503 in accordance with ‘the almost universally accepted rule that the testimonial privileges are generally disfavored and should be strictly construed.’” Id. at *15 (citation omitted).

Most states would not take such a narrow view – instead allowing the common law to provide nuance and some expansion of a statutory or rule-based attorney-client privilege standard.

- [Privilege Point, 10/18/23]

Work Product Protection Can Be Overcome in Some Circumstances, but the Privilege Is Absolute — Right?

October 18, 2023

Most lawyers know that fact work product protection can be overcome in certain circumstances, opinion work product is “absolutely or nearly absolutely” protected, and that the attorney-client privilege is absolute. But as with other supposedly universal concepts, there are exceptions.

Attorney-client privilege deserves absolute protection under federal common law and all but one state’s law. They recognize the societal benefit of such assured protection — allowing clients to feel totally safe in disclosing facts to their lawyers, knowing that the lawyers will keep them secret (our confidentiality duty) and that no third party will ever discover those conversations (the attorney-client privilege). But as in other key societal issues (such as motorists’ ability to pump their own gas), New Jersey stands alone. In Grand Maujer Development, LLC v. Hollister Construction Services, LLC, the court noted under New Jersey law the “privilege is ‘neither absolute or sacrosanct.’” No. A-0012-22, 2023 N.J. Super. Unpub. LEXIS 1208, at *8 (N.J. Super. Ct. App. Div. July 18, 2023) (citation omitted). The court then articulated the standard required “[t]o pierce the attorney-client privilege.” Id. at *9. That standard is frighteningly easy — there must be a “‘legitimate need . . . to reach the evidence sought to be shielded’”; “the evidence must be relevant and material”; and “there must be a finding, by a fair preponderance of the evidence, that the information sought cannot be obtained from a less intrusive source.” Id. (alteration in original) (citation omitted).

Much like motorists discovering to their surprise that they cannot pump their own gas on the New Jersey Turnpike, lawyers from other states should realize that in New Jersey the attorney-client privilege does not deserve absolute protection.

B. What Is Not Privileged

- Aiossa v. Bank of Am., N.A., No. CV 10-01275 (JS) (ETB), 2011 U.S. Dist. LEXIS 102207, at *31 (E.D.N.Y. Sept. 12, 2011) ("Not all material in a legal file is privileged. For example, the attorney-client privilege does not protect an attorney's thoughts which were not communicated to the client or memoranda to the file unless they contain otherwise privileged communications." (emphasis added))

- [Privilege Point, 1/8/14]

Court Takes a Very Narrow View of Legal Advice in a Corporate Setting

January 8, 2014

Attorney-client privilege protection depends on content, and the key issue normally involves distinguishing between primarily legal and primarily business advice. Courts disagree about where to draw that line.

In Koumoulis v. Independent Financial Marketing Group, Inc., 295 F.R.D. 28 (E.D.N.Y. 2013), the court examined communications between a Duane Morris lawyer and her corporate client's human resources employees. The court rejected privilege claims for most of the lawyer's communications. For instance, the court noted that the Duane Morris lawyer "sometimes told Human Resources employees exactly what questions to ask during interviews and what statements to make during meetings," and that "her advice would advance business goals, such as improving business relationships." Id. at 45. The court also noted that Duane Morris' "advice rarely involved 'the interpretation and application of legal principles to guide future conduct or to assess past conduct,' . . . and rarely explicitly considered future litigation." Id.

Not all courts would take this narrow view, but the decision provides a good lesson. Wise lawyers train their clients to explicitly explain in the four corners of their communications that they are seeking legal advice, that they are worried about litigation, etc. However, it is also important for lawyers to explicitly explain in their responses that they are providing legal advice (by mentioning legal principles, citing statutes or case law, etc.) and to mention litigation if the client reasonably anticipates it.

- Koumoulis v. Indep. Fin. Mktg. Grp., Inc., 29 F. Supp. 3d 142, 147-48 (E.D.N.Y. 2014) (not for publication) (upholding a Magistrate Judge's opinion that neither the attorney-client privilege nor the work product doctrine protected communications between a Duane Morris lawyer and a corporate client's human resource executive; finding the attorney-client privilege inapplicable because the advice was primarily business-related and not legal; "This document contains an e-mail from Defendants' outside counsel, Ann Bradley, Esq. [Duane Morris lawyer], setting forth more than a full page of detailed, multi-part instructions on how to deal with Mr. Komoulis's personnel issues, including a recommendation that Defendants call Mr. Komoulis 'to express concern and disappointment, identify the fundamental problem and find out who he trusts to advise him,' and goes so far as to prescribe detailed instructions to be given to Plaintiff on how he should conduct himself with Defendants' customers. . . . This advice plainly is not legal advice, but rather human resources advice on personnel management and customer relations." (emphasis added)).

- [Privilege Point, 5/6/15]

Do Lawyers' Memos to the File Deserve Privilege Protection?

May 6, 2015

Not surprisingly, many lawyers think the attorney-client privilege (if not the whole world) revolves around them. Actually, the privilege primarily protects clients' communications to lawyers, not vice versa. And because the privilege normally protects only client-lawyer communications, lawyers face an uphill climb when seeking privilege protection for documents they have not sent to their clients.

In Broadrock Gas Services, LLC v. AIG Specialty Insurance Co., No. 14 cv. 3927 (AJN) (MHD), 2015 U.S. Dist. LEXIS 26462 (S.D.N.Y. Mar. 2, 2015), defendant claimed privilege protection for a K&L Gates lawyer's memorandum to the file analyzing insurance coverage issues. In an opinion by Judge Dolinger, the court first noted that there was "no evidence in our record" that (1) K&L Gates sent the memo to the client; (2) K&L "used [it] to advise the client"; or (3) the memo "described or embodied the substance of any communication between the client and the attorney." Id. at *7. The court rejected defendant's privilege claim — emphasizing that the privilege "is limited to communications between client and attorney" or others facilitating the attorney-client relationship. Id. The court also quoted an earlier Southern District of New York decision holding that the privilege did not protect "documents embodying uncommunicated thoughts of counsel, as in the form of notes or memoranda to the file." Id. at *7-8 (quoting Bodega Invs., LLC v. United States, No. 08 Civ. 4065 (RMB)(MHD), 2009 U.S. Dist. LEXIS 48513, at *27 n.5 (S.D.N.Y. May 14, 2009)).

In assessing privilege protection, lawyers should recognize their secondary role — and not assume that their uncommunicated documents automatically deserve privilege protection.

- [Privilege Point, 11/11/15]

Can the Privilege Ever Protect Historical Documents?

November 11, 2015

The attorney-client privilege normally does not protect pre-existing historical documents, even if clients convey those to their lawyers. In the work product context, lawyers' selection of certain intrinsically unprotected historical documents can deserve opinion work product protection — but few courts have recognized a parallel protection for clients' selection of historical documents they consider important. This is one of the most mysterious gaps in privilege jurisprudence.

In GE v. United States, the government challenged GE's privilege assertion for "attachments to otherwise privileged email communications between [GE] attorneys and GE personnel." No. 3:14-cv-00190 (JAM), 2015 U.S. Dist. LEXIS 122562, at *4 (D. Conn. Sept. 15, 2015). The court refreshingly acknowledged that an intrinsically unprotected historical document the client sends a lawyer could "reveal that it was communicated in confidence to an attorney in connection with the seeking or receipt of legal advice." Id. at *5. The court even offered an example: an executive's sending to "the company's counsel a news article about alleged bid-rigging activities within the company's industry" — explaining that "the fact that the news article is a quintessentially public document would not defeat a claim of privilege." Id. at *5-6. Perhaps not surprisingly, the court cited no case law for this proposition.

Lawyers' selection of intrinsically unprotected documents can deserve opinion work product protection only if the adversary also has the documents. Although the GE court did not address this issue, presumably privilege protection would apply to clients' selection only if those intrinsically unprotected historical documents were otherwise produced to the adversary (not in conjunction with the privileged communication). Otherwise, clients could withhold responsive intrinsically unprotected historical documents just by giving them to their lawyers.

- Supreme Forest Prods., Inc. v. Kennedy, No. 3:16-cv-0054 (JAM), 2017 U.S. Dist. LEXIS 4421, at *9 (D. Conn. Jan. 12, 2017) ("[T]o the extent that any facts or information are known to either defendant without reference to their having been discussed in any privileged communication, then defendants shall fully respond to such discovery requests. For example, if an interrogatory can be answered without reliance on or reference to the occurrence of and content of a privileged communication, then defendants shall answer such interrogatory regardless of whether the interrogatory is directed at underlying factual matter that happened to be later discussed in a privileged communication. Only if disclosure of facts would unavoidably result in disclosure that the facts occurred or were learned in the context of a privileged communication may defendants assert the privilege as to the disclosure of such facts." (emphasis added))

- [Privilege Point, 6/28/17]

In-House Lawyers Should Avoid Being Employment Decision-Makers

June 28, 2017

In-house lawyers obviously can play an important role when their corporate clients decide whether to terminate employees. But they should avoid being the ultimate decision-makers, or playing a business role in any termination decisions.

In Price v. Jarett, No. 8:15CV200, 2017 U.S. Dist. LEXIS 61066 (D. Neb. Apr. 21, 2017), terminated employee plaintiff sought to depose a Union Pacific in-house lawyer. The lawyer had served on a panel that another witness testified "would have to come to a 'unanimous consensus to move forward on [a] termination.'" Id. at *2 (alteration in original) (internal citation omitted). Union Pacific claimed that the panel did not meet as a group to decide on terminations, and that the lawyer's "role in evaluating Plaintiff's termination was solely to review whether there were legal implications of concern for Union Pacific." Id. But the court allowed the deposition to proceed, noting that the testimony "regarding the need for unanimous consent for termination indicates that [the lawyer] may have some[] non-cumulative, non-privileged factual information relevant to the case." Id. at *6.

In-house lawyers should assure that their clients do not face a similar circumstance – in which there is (as the Price court put it) "uncertainty surrounding the 'hat' [they are] wearing while serving" on such panels or in some other way involved in termination decisions. Id. at *7.

- In re Syngenta AG MIR 162 Corn Litig., MDL No. 2591, Case No. 14-md-2591-JWL, 2017 U.S. Dist. LEXIS 92606 (D. Kansas June 13, 2017) ("Caselaw provides a wealth of guidance as to what is -- and is not -- protected by the attorney-client privilege. First, it is important to note that 'personal, confidential, [or] private information' is not necessarily privileged. 'As this Court has held repeatedly, "confidential" does not equate to 'non-discoverable' or privileged.' Second, it is clear that '[u]nderlying facts are not protected by the privilege.' "Similarly, neither the acts or services performed by an attorney during the course of his representation, nor the scope of representation, are within the attorney-client privilege because they are not 'communications.'" Nor are 'general topics of attorney-client discussions' or ultimate "'legal conclusions'" of counsel protected. Thus, for example, this court has held that the subject matters of an in-house attorney's discussions with company executives are not privileged. Fourth, where a communication contains both legal advice and business advice, attorney-client protection only applies if the legal advice predominates over the business advice; the privilege does not apply where legal advice is merely incidental to business advice. Fifth, '[d]rafts of documents to be submitted to third parties, although prepared by counsel, are not generally privileged. Submission of the document to the third party removes any cloak of privilege.' On the other hand, drafts of memoranda prepared for a client are protected. Sixth, the attorney-client privilege does not attach to simple editing or 'word-smithing' by counsel." (emphases added)).

- **[Privilege Point, 9/27/17]**

Does the Attorney-Client Privilege Protect a Lawyer's Retention Date?

September 27, 2017

Content is king in the privilege world, in contrast to the work product protection – which largely depends on context. For this reason, the privilege rarely if ever protects the facts and circumstances of (1) the attorney-client relationship, or (2) attorney-client communications.

In Wise v. Southern Tier Express, Inc., Case No. 2:15-cv-01219-APG-PAL, 2017 U.S. Dist. LEXIS 106321, at *2 (D. Nev. July 10, 2017), plaintiff Wise contended "that the date he hired his attorney necessarily reveals his communication to the lawyer that he wanted to hire him." The court rejected his intuitively attractive argument – noting that "[i]dentifying the date Wise contacted or hired his attorney discloses an act, not the substance of a confidential communication." Id.

With a few exceptions, the attorney-client privilege does not protect such background information as the clients' identities, the circumstances of lawyers' retention, what they billed, where lawyers and clients met, the duration of their conversations, etc.

- Sidibe v. Sutter Health, Case No. 12-cv-04854-LB, 2018 U.S. Dist. LEXIS 20350, at *10-11 (N.D. Cal. Feb. 7, 2018) ("The court finds that Sutter has not met its burden of establishing that this document is privileged. The court notes as an initial matter that Sutter's original privilege log stated that this document 'reflect[ed] legal advice' from an in-house attorney, but Sutter's revised submission to the court now states that this document was forwarded to the in-house attorney for her legal advice on the contents of the document. Either way, this document relates to business strategies and is not a communication seeking legal advice, and as discussed above, neither vaguely stating that a business document somehow 'reflects' legal advice nor forwarding a preexisting business document to an attorney for her review renders the document a privileged communication." (emphasis added))

- [Privilege Point, 5/30/18]

Federal Court Applies Privilege Axioms That Many Clients Misunderstand

May 30, 2018

Some clients who have not been adequately advised by their lawyers think that writing "privileged" on a document makes it so, or that copying a lawyer will assure privilege protection. These and other similar misunderstandings can doom protection for damaging documents whose authors have jumped to conclusions, needlessly self-criticized or engaged in harmful hyperbole – because they erroneously thought the privilege would protect those documents' from adversaries' access.

In Erickson v. Hocking Technical College, Case No. 2:17-cv-360, 2018 U.S. Dist. LEXIS 50075 (S.D. Ohio Mar. 27, 2018), plaintiff sought to depose a lawyer who had acted as defendant's General Counsel, HR Director and Risk Management Vice President. Among other things, defendant claimed that the privilege protected communications during meetings that the lawyer attended. The court rejected defendant's privilege claim, noting that the privilege did not protect the communications simply because the lawyer "subjectively believed that she was at the meeting in her capacity as counsel to gather information." Id. at *7. The court bluntly concluded that "the record contains no evidence reflecting that [the lawyer] was asked to attend in her capacity as a legal advisor rather than in her [other capacities]" (id. at *9); or that she provided or "was asked to provide legal advice" at the key meeting. Id. at *10. The court also held that a meeting participant's "Attorney-Client Privileged Information" label on an email "drafted three days after the at-issue meeting . . . does not operate to retroactively render the earlier, otherwise-unprivileged discussions subject to the attorney-client privilege." Id. at *6, *8.

As with other widely held but erroneous misconceptions, lawyers should advise their clients that asking a lawyer to participate in meetings does not assure privilege protection. If such lawyers provide legal advice, all the related documents should clearly reflect that – in their substantive content, not merely with a header or label.

- [Privilege Point, 8/29/18]

The Attorney-Client Privilege Does Not Protect All Lawyer Changes to Draft Documents

August 29, 2018

Some courts erroneously fail to extend privilege protection to draft documents prepared by or revised by a lawyer before their final disclosure beyond the attorney-client relationship. Even courts that properly acknowledge the availability of privilege protection for such documents must examine the revisions' primary purpose.

In Entrata, Inc. v. Yardi Systems, Inc., the court rejected defendant's privilege claim for "a draft letter showing edits made by ... Yardi's Vice President and General Counsel." Case No. 2:15-cv-00102-CW-PMW, 2018 U.S. Dist. LEXIS 104171, at *9 (D. Utah June 20, 2018). The court: (1) correctly noted that "[t]he mere fact that [defendant's General Counsel] was involved with [the draft letter] does not automatically render it subject to attorney-client privilege protection"; (2) erroneously stated that "documents prepared to be sent to third parties, like [the letter], even when prepared by counsel, are generally not attorney-client privileged"; (3) correctly rejected privilege protection after "conclud[ing] that the types of edits made by [defendant's General Counsel] constitute nothing more than simple editorial changes, which do not qualify for attorney-client privilege protection." Id.

Some lawyers mistakenly assume that the privilege protects all of their changes to clients' draft documents. However, every withheld change in such draft documents must meet the "primary purpose" test to deserve privilege protection. Typographical and stylistic revisions generally do not deserve privilege protection.

- [Privilege Point, 9/12/18]

Lawyers Serving on Corporate Boards Normally Do Not Deserve Privilege Protection

September 12, 2018

Not surprisingly, corporate board members realizing that a lawyer sits among them might turn to their colleague for legal advice. They may not understand that lawyers serving as board members hardly ever deserve privilege protection, but the lawyers should know that.

In Terrell v. Memphis Zoo, Inc., defendant Zoo withheld communications to and from one of its board members – “who is also Assistant General Counsel for AutoZone.” No. 17-cv-2928-JPM-tmp, 2018 U.S. Dist. LEXIS 112385, at *13 (W.D. Tenn. July 3, 2018). The Zoo argued that the board member's role “was to provide 'legal advice and legal guidance to the other members of the board.’” Id. at *13-14. But the court rejected the Zoo's privilege claim, noting that the Zoo “has not demonstrated the existence of the required [attorney-client] relationship” between the Zoo and the board member. Id. at *14.

Corporations' board members and lawyers play very different roles. Absent unusual circumstances and an explicit understanding by the corporation and its board members, outside or in-house lawyers sitting on boards should never assume that their communications deserve privilege protection (unless they are acting as clients rather than as lawyers).

- **[Privilege Point, 4/10/19]**

Deponents Usually May Not Rely On Privilege Protection In Refusing To Answer "Yes" or "No" Questions

April 10, 2019

The attorney-client privilege protects communications -- rather than historical facts, the circumstances of attorney-client relationships or communications, etc. This basic principle often precludes deponents from citing the privilege in refusing to answer "yes" or "no" questions.

In Montauk U.S.A., LLC v. 148 South Emerson Associates, LLC, the court explained that "questions pertaining to the existence of [privileged] communications generally are not covered by the privilege." No. CV 17-4747 (SJF) (AKT), 2019 U.S. Dist. LEXIS 9339, at *8 (E.D.N.Y. Jan. 17, 2019). The court specifically dealt with questions plaintiffs' lawyer posed to third party witnesses, such as asking a deponent "Did you sign a retainer agreement . . . ?"; "Have you paid fees for this case?"; "Have you seen a bill in this case?" Id. at *10. The court held that defendants' lawyer had improperly directed the witness "not to answer the questions regarding whether he had signed a retainer agreement and whether he had paid fees for this case." Id. at *10-11. As the court noted, "[t]he questions called for a simple 'yes' or 'no' answer and the responses would have revealed only facts." Id. at *11.

The court's holding might have been different if the deposition questions had implicitly sought disclosure of privileged communications -- such as asking "yes" or "no" questions about protected communications on some very specific topics. But lawyers should always remember that the privilege protects communications rather than historical facts or events.

- [Privilege Point, 5/1/19]

Does The Privilege Protect Internal Corporate Training Manuals?

May 1, 2019

Because the attorney-client privilege ultimately rests on clients' request for legal advice about facts they give their lawyers, most courts extend privilege protection to those communications and to lawyers' specific legal advice in return. Several courts have rejected privilege protection for corporations' generic internal training manuals. Many courts take the same attitude toward procedural instructions for claims handling, general deposition preparation videos, basic antitrust educational materials, etc.

But some courts take a broader view. In McKnight v. Honeywell Safety Products USA, Inc., the court generously extended privilege protection to Honeywell's "annual on-line training on U.S. wage-hour compliance conducted by in-house counsel." Civ. A. No. 16-132WES, 2019 U.S. Dist. LEXIS 18076, at *3 (D.R.I. Feb. 5, 2019). The court noted that the withheld document contained "sixty-three slides consisting of essentially pure legal advice regarding federal and state wage-hour laws, followed by three slides about how to exit the training and verify that it was viewed." Id. at *4. The court concluded that "[t]here is no business advice or recommendation regarding the classification of a specific Honeywell position," but did not address the specificity requirement that many other courts assess. Id.

Corporations should not expect all courts to take this helpful approach, but may find it helpful to cite this decision in asserting privilege protection for internal training materials.

- **[Privilege Point, 8/21/19]**

Court Rejects Advice of Counsel Waiver Argument

August 21, 2019

Privilege holders can waive their privilege protection without disclosing any privileged communications — for instance, by relying on an "advice of counsel" defense. But all or most courts wisely reject adversaries' attempts to trigger a "gotcha" advice of counsel implied waiver.

In Kleeberg v. Eber, plaintiffs argued that defendants had waived their attorney-client privilege protection as to "any legal advice they received" about the pertinent transactions, "because [defendants] testified at their depositions that they relied on the advice of counsel to effectuate some of the transactions at issue in this case." No. 16-CV-9517 (LAK) (KHP), 2019 U.S. Dist. LEXIS 80428, at *22 (S.D.N.Y. May 13, 2019). The court bluntly rejected plaintiffs' argument, noting that "it is well established that merely testifying that an attorney was consulted, without revealing the substance of those communications, does not waive privilege." Id.

Most corporate deponents would have to acknowledge that they relied on lawyers' advice before consummating transactions or taking other important steps. If such limited deposition testimony triggered a waiver, the privilege could be easily overcome. Instead, corporations waive their privilege only if their employees disclose that advice, or if they defend themselves by explicitly relying on the fact of that advice.

- [Privilege Point, 1/29/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part III**

January 29, 2020

The last two Privilege Points described four favorable analyses from a Southern District of New York decision (Judge Gorenstein) assessing defendant Barnes & Noble's privilege assertions covering its investigation and later firing of its CEO for sexual harassment. Parneros v. Barnes & Noble, Inc., 332 F.R.D. 482 (S.D.N.Y. 2019).

Fifth, the court addressed fired CEO Parneros's argument that Barnes & Noble waived its privilege by eliciting at his deposition extensive testimony about a meeting at which Parneros "apologized for his conduct" to the company's Senior VP, and another meeting attended by Barnes & Noble's Founder and Chairman. Id. at 489. The court rejected Parneros's argument – noting that the company had not asserted privilege for either one of the meetings, but rather "taken the position that certain notes taken at the apology meeting as part of the investigation overseen by [General Counsel] Feuer are privileged." Id. at 496. This meant that the deposition testimony about those non-privileged meetings did not waive any privilege. But the privilege still protected the "notes taken by an attorney or his designee at a non-privileged meeting . . . as long as the notes were taken for the purpose of allowing counsel to give legal advice." Id. As with other interview notes prepared by General Counsel Feuer, the court did not address work product protection – which would seem to be a more appropriate protection. Sixth, the court addressed fired CEO Parneros's argument that the privilege did not protect drafts of press releases that were sent to General Counsel Feuer and/or outside counsel at Paul, Weiss. The court rejected Parneros's argument, pointing to Feuer's declaration that the company's Senior VP of Corporate Communications of Public Affairs and VP of Investor Relations sent draft press releases to him and to Paul Weiss "for his 'review and legal advice' and were sent to 'outside counsel concerning the wording of the announcement for their review and legal advice.'" Id. at 498.

The next Privilege Point will describe other favorable language from this significant case.

- [Privilege Point, 2/26/20]

Whistleblower Complaints Normally Do Not Deserve Privilege Protection

February 26, 2020

Many if not most corporate and other institutions have established whistleblower "hotlines" or otherwise encouraged whistleblowers to come forward with complaints. Depending on the complaint, work product protection frequently kicks in. But do such communications from an employee themselves deserve privilege protection? After all, the communications often involve corporate employees communicating legally significant facts to their superiors and sometimes to the corporation's lawyers.

In Jett v. County of Maricopa, No. CV-19-02735-PHX-DLR 2019 U.S. Dist. LEXIS 205401 (D. Ariz. Nov. 25, 2019), plaintiff Jett claimed that defendant Maricopa County fired her for complaining about FLSA violations. The County moved to strike the paragraphs in her complaint describing her whistleblowing "conference call with the County's in-house counsel" -- during which she complained about the alleged violations. Id. at *3. The court rejected the County's efforts, holding that: (1) "[n]othing in these allegations indicates that Jett reported this information for the purpose of soliciting legal advice"; and (2) "[c]ommunications that trigger retaliatory conduct are excepted from the privilege." Id. (quoting Biggs v. City of St. Paul, Nos. 6:18-cv-506 & -507-MK, 2019 U.S. Dist. LEXIS 37996 (D. Or. Mar. 8, 2019)).

Companies normally should assume that whistleblower complaint communications will not deserve privilege protection.

- [Privilege Point, 4/29/20]

Courts Agree That Historical Facts Do Not Deserve Privilege Protection, But What If Those Come From A Lawyer?

April 29, 2020

Historical facts do not deserve privilege protection – something either happened or it didn't happen. The attorney-client privilege protects communications about those facts. But surprisingly few courts have dealt with what would seem to be a common scenario – clients asked during a deposition about historical facts they obtained only from their lawyer.

In Ex Parte Willimon, 299 So. 3d 934, 943 (Ala. 2020), a witness unsuccessfully sought to quash a deposition notice in litigation about a church's alleged sexual abuse – arguing that "[a]ny knowledge I have would be based on information provided to me by my attorney." The court rejected the witness's motion – which it criticized as "premised on an assumption that all information she received from her attorney is automatically protected by the attorney-client privilege." Id. at 944. The court bluntly stated that "[t]hat is not so" -- because "[t]he privilege protects communications between an attorney and client, not necessarily all information or documents transmitted by or accompanying those communications." Id.

At first blush, this reflexive approach makes sense. But in some circumstances it does not. For instance, suppose that a plaintiff has sued a corporation for selling a defective product that caused several deaths. The CEO's prior knowledge of those deaths might support a punitive damage claim. But what if the CEO was unaware of any deaths until learning about them from her lawyer while preparing for her deposition. During her deposition, the CEO cannot deny having heard of the deaths – but might risk waiver by explaining that she heard about them only from her lawyer. Some savvy courts have allowed deponents' lawyers to set deposition ground rules allowing the deponents to exclude from their answers any historical information they learned solely from their lawyers. Most courts require deponents to answer, thus requiring deponents' lawyers to muddle through an explanation of how the deponent learned those historical facts. Corporations and their lawyers should prepare for such scenarios.

- [Privilege Point, 8/19/20]

Nevada Supreme Court Hits the Jackpot on Two Privilege Principles

August 19, 2020

The attorney-client privilege protects communications between clients and their lawyers, not historical facts. Some courts misunderstand the real-world application of this basic principle, but other courts get it right.

In Canarelli v. Eighth Judicial District Court, 464 P.3d 114 (Nev. 2020), the court analyzed two aspects of the privilege. First, the court held that the attorney-client privilege can protect clients' notes even if the client did not physically deliver those notes to her lawyer – as long as the notes reflect what the client and the lawyer later discussed. Additionally, “we emphasize that the party asserting the privilege does not have to prove that the client spoke each and every word written in his or her notes to counsel verbatim.” Id. at 120-21. Second, and perhaps more importantly, the court held that the lower court had “clearly abused its discretion to the extent it found that the factual information contained in the [withheld] documents was not subject to the attorney-client privilege.” Id. at 121. Acknowledging that the “documents contain factual information,” the court properly held that “facts communicated in order to obtain legal advice do not fall outside the privilege’s protections.” Id.

Historical facts do not deserve privilege protection. But the adversary must discover those facts the old-fashioned way -- through other discovery, rather than by intruding into communications between clients and their lawyers.

- [Privilege Point, 12/16/20]

Sending Pre-Existing Historical Documents to a Lawyer Does Not Make Them Privileged, But...

December 16, 2020

It should go without saying that sending pre-existing historical documents to a lawyer does not automatically immunize them from discovery as privileged. If it did, clients could box up all of their files and send them to a lawyer — thus avoiding the documents' discovery. Many courts repeat this axiomatic principle. For instance, the court in Warren Hill, LLC v. Neptune Investors, LLC, Civ. A. No. 20-452, 2020 U.S. Dist. LEXIS 161106, at *3 (E.D. Pa. Sept. 3, 2020), categorically stated that “[a] document does not magically metamorphose into a document protected by the attorney client privilege simply because a client later sends it to his or her lawyer.”

But other courts properly recognize a more nuanced approach. Several years ago, the court in General Electric Co. v. United States, No. 3:14-cv-00190 (JAM), 2015 U.S. Dist. LEXIS 122562, at *5 (D. Conn. Sept. 15, 2015), correctly recognized that the identity of an intrinsically unprotected historical document a client sends to her lawyer could “reveal that it was communicated in confidence to an attorney in connection with the seeking or receipt of legal advice.” That wise court provided a common sense example: an executive’s sending to “the company’s counsel a news article about alleged bid-rigging activities within the company’s industry” would reflect the client’s concern — explaining that “the fact that the news article is a quintessentially public document would not defeat a claim of privilege.” *Id.* at *5-6. Not surprisingly, a privilege log would describe such a withheld historical document generically rather than specifically.

So like many seemingly simple privilege principles, this one does not automatically apply in every case.

- Popat v. Levy, No. 15-CV-1052W(Sr), 2020 U.S. Dist. LEXIS 205484 (W.D.N.Y. Nov. 3, 2020) (holding that attorney-client privilege does not protect historical facts about the relationship or communications; “The privilege does not extend to the structure and framework of the attorney client relationship or the fact of a meeting between an attorney and his client. Thus, in response to interrogatory No. 11, Dr. Levy and UBNS shall disclose the identity of any individual who assisted in providing responses to plaintiffs interrogatories.” (internal citation omitted))
- Adhikari v. KBR, Inc., Case No. 4:16-CV-2478, 2020 U.S. Dist. LEXIS 244198, at *7-8 (S.D. Tex. Dec. 29, 2020) (after reviewing withheld documents in camera; finding that the privilege did not protect some documents; “Finally, regarding Documents 10168 & 10169, Heinrich testified that Karolyn Stuver, KBR’s Communications Director, requested his legal advice on addressing a media inquiry and Jill Pettibone, KBR’s Vice President of Operational Excellence, discusses and follows up on the request for legal advice. The Court finds that this document is not privileged. Although Ms. Stuver asks for help responding to the media inquiry with input from legal or subcontracts, Ms. Pettibon responds, directing her to Sharon Steele, Procurement Director, for the response. On the face of the document, no legal advice is given. The affidavit is insufficient to cure this deficiency. These two documents must be produced. Minix, 2019 [WL 2524918], at *4 (no presumption communications with counsel are privileged, must involve obtaining or providing legal advice).” (internal citation omitted))

- Att'y Gen. v. Facebook, Inc., 164 N.E.3d 873, 887 (Mass. 2021)
(explaining that the attorney-client privilege can protect communications, but not facts; “This distinction is important and somewhat collapsed by the advocacy in the instant case. Facebook interprets the requests as seeking confidential communications between Facebook and its outside counsel or information that does not exist independently of such communications. This fails to take into account the fact that the underlying data about apps' breaches of privacy policies is all independently discoverable and cannot be protected by Facebook's initiation of its own factual investigation. The attorney-client privilege only protects communications between the attorney and the client about such factual information, not the facts themselves.”)

- [Privilege Point, 6/2/21]

The Attorney-Client Privilege Obviously Protects Internal Law Firm Communications, Right?

June 2, 2021

The attorney-client privilege protects communications primarily motivated by clients' request for legal advice, and lawyers' response. Although old and absolute, the attorney-client privilege undeniably hampers the justice system's search for truth. So the protection is narrow and fragile.

In IQL-Riggig, LLC v. Kingsbridge Technologies, the court dealt with tax-related communications between Nelson Mullins law firm lawyers and "Meilinger, an accounting firm [hired] to prepare and file [plaintiff]'s tax returns." No. 19 CV 6155, 2021 U.S. Dist. LEXIS 58939, at *2 (N.D. Ill. Mar. 29, 2021). After noting that "tax preparation services are accounting services, [so] communications relating to those services are not protected under the attorney-client privilege," the court held that even "emails between Nelson Mullins attorneys regarding work performed by Meilinger" were not protected by the attorney-client privilege. Id. at *5, *6-7. The court explained that "[c]ommunications between attorneys at the same firm may qualify for the attorney-client privilege only if they reflect privileged information relating to communications to or from the client." Id. at *7. The court bluntly criticized Meilinger for arguing that such internal law firm communication did not waive privilege protection – noting that "without showing that the privilege applies, focusing on waiver amounts to putting the cart before the horse." Id. at *8.

This proper analysis might surprise some lawyers. Several courts go even further, declining to extend privilege protection even to lawyers' communications to their clients – unless those communications reflect (and in some courts unless they contain) confidences those clients conveyed to their lawyers primarily for the purposes of seeking legal advice.

- Wier v. United Airlines, Inc., No. 19 CV 7000, 2021 U.S. Dist. LEXIS 73397, at *18 (N.D. Ill. Apr. 16, 2021) (“It is true that ‘[m]erely communicating with a lawyer or copying a lawyer on an otherwise non-privileged communication, will not transform the non-privileged communication or attachment into a privileged one.’” (alteration in original) (citation omitted))

- [Privilege Point, 1/19/22]

Delaware Federal Court Cleverly Finesses Frequently Arising Privilege Issue

January 19, 2022

Nearly every court requires that litigants analyze possible privilege and work product protection for each attachment included in a withheld email or other document. This understandable approach raises an obvious question posed by a Delaware court: "how to handle emails between privileged persons that attach articles that are clearly not privileged standing alone."

In ELM 3DS Innovations, LLC v. Samsung Electronics Co., Civ. A. No. 14-1430-LPS-JLH, 2021 U.S. Dist. LEXIS 198902 (D. Del. Oct. 15, 2021), the court analyzed that issue. The court noted that the clients "cannot immunize discovery of those" non-privileged documents by sending them to their lawyer. Id. at *15. But the court also wisely admitted that "I am sensitive to the possibility that the fact that a client sent (or received) a particular [non-privileged] article to (or from) his attorney on a certain date can implicate privilege concerns." Id. The court therefore cleverly required the litigant to either: (1) "produce the non-privileged attachment[]"; or (2) "confirm that the attachment has already been produced in discovery under circumstances that demonstrate which custodians had possession of it."

This approach makes great sense. The producing party thus assures that the adversary will receive each non-privileged document, but does not have to produce another copy of the non-privileged documents attached to a privileged email. Of course, that would not work for original documents clients send to their lawyers, but in the electronic age that never seems to happen anymore.

- Mauer v. Union Pac. R.R., No. 8:19CV410, 2021 U.S. Dist. LEXIS 204741, at *7 (D. Neb. Oct. 25, 2021) (holding that disclosing the factual portion of a document while withholding a privileged portion does not trigger a waiver requiring production of the redacted privileged portion; “And whether at a deposition or otherwise, disclosing a document redacted to exclude privileged and work product information while disclosing the fact information within that document does not waive confidentiality as to the redacted information.”)

- [Privilege Point, 3/16/22]

New York State Court Recognizes a General Privilege Rule, But The S.D.N.Y. Carries It To An Astoundingly Impractical Extreme: Part I

March 16, 2022

Every lawyer knows that attorney-client privilege protection depends on a communication's "primary" or "predominant" purpose. A handful of courts have been inching toward a more expansive view (which will be the subject of a future Privilege Point). But for now the "primary purpose" test applies in nearly every court.

In HK Capital LLC v. Rise Development Partners LLC, the court explained that "any communication that does not have any direct relevance to any legal advice, is collateral and not privileged." , Index No. 512749/2021, 2022 N.Y. Slip Op. 50024(U), at *2 (N.Y. Sup. Ct. Jan. 6, 2022). The court applied that standard to two categories of documents. First, the court explained that "[i]t is well settled that 'absent special circumstances,' retainer agreements, a client's identity, invoices and a payment of fees are not subject to the attorney-client privilege." Id. Second, the court cited an earlier decision in noting that "a client cannot assert the attorney-client privilege as to documents in the lawyer's possession if they were not prepared for litigation or for the purpose of seeking or imparting legal advice." Id. (citation omitted).

Some clients don't appreciate this basic principle – mistakenly thinking that any document a lawyer sends or receives (or is copied on) deserves privilege protection. About three weeks after the New York state court issued the HK Capital case, the Southern District of New York went wildly in the other direction. Next week's Privilege Point will discuss that remarkable decision.

- [Privilege Point, 3/30/22]

Courts Wrestle With the "Facts" vs. "Communications" Dilemma: Part I

March 30, 2022

In all or nearly all circumstances, historical facts do not deserve privilege protection – something either happened or it didn't happen. The privilege can protect communications about those historical facts. To make matters more complicated, the fact that a client and her lawyer communicated likewise does not deserve privilege protection, except in rare circumstances. Applying these axiomatic rules can be difficult.

In Valentin v. Salson Logistics, Inc., the court held that the privilege did not protect "when and with whom [client] consulted for the general purpose of discussing possible legal remedies." Case No. 8:20-cv-2741-VMC-CPT, 2022 U.S. Dist. LEXIS 3824, at *5 (M.D. Fla. Jan. 7, 2022) (citation omitted). In applying the same nuanced principle to the plaintiff's visit to a medical provider, the court cited an earlier case in distinguishing between: (1) the non-privileged "underlying fact of whether [a client] saw a particular physician"; and (2) the privilege-protected fact of "whether [a client] saw the physician at [the client's] attorney's request." Id. at *4 (citation omitted). The court ultimately held that "the fact that her attorney referred her to particular medical providers is protected by attorney-client privilege." Id.

It can be difficult to distinguish between non-privileged logistical information about a communication and the explicit or implicit privileged content of such a communication. Next week's Privilege Point describes another court's attempt to draw these lines about two weeks later.

- [Privilege Point, 4/6/22]

Courts Wrestle With the "Facts" vs. "Communications" Dilemma: Part II

April 6, 2022

Last week's Privilege Point described a court's careful delineation between the logistics (time, place, etc.) of a privileged communication and such communications' explicit or implicit privileged content. The stakes naturally become higher if the client seeks some litigation advantage based on the logistics or on the content.

In Klein v. Paskolite, LLC, defendant accused of a fraudulent transfer "asserted as a defense that the transfers were done in good faith, and . . . pointed to its conferral with counsel as one piece of evidence for that good faith." Case No. 2:19-cv-00832-DN-PK, 2022 U.S. Dist. LEXIS 11345, at *1-2 (D. Utah Jan. 19, 2022) (footnote omitted). But defendant's lawyer objected on privilege grounds to the question of whether the company "relied upon the communications it got from its counsel." Id. at *7. Not surprisingly, the court found that defendant's "good faith" defense waived its privilege protection as to the communication's content – bluntly rejecting defendant's argument "that it did not place the 'substance' of the communication at issue, but merely disclosed the fact a communication had been made." Id. at *6. The court explained that "[t]he mere fact a communication was made between [defendant] and its counsel has little relevance to a good faith defense alone. What is relevant is what was said in that communication." Id. at *7.

It can be difficult to distinguish between a communication's logistics and content, but litigants should not expect to gain some litigation advantage by tricky manipulation of the distinction.

- **[Privilege Point, 3/23/22]**

New York State Court Recognizes a General Privilege Rule, But The S.D.N.Y. Carries It To An Astoundingly Impractical Extreme: Part II

March 23, 2022

Last week's Privilege Point described a New York state court's unsurprising articulation of the nearly universally-applied "primary purpose" standard, and listing of the usual type of documents that fail to satisfy that standard. Most courts do not apply that test on a micro level, but some courts do.

In Enechi v. City of New York, No. 20-CV-08911 (AT) (BCM), 2022 U.S. Dist. LEXIS 14596 (S.D.N.Y. Jan. 26, 2022) (Moses, J.), the court allowed defendant to withhold "a series of emails" the court had reviewed in camera. But the court then took an ultra-literal approach – ordering production of the following phrases in those emails: "Good morning"; "Thank you, Maria"; "Good Day Maria"; "Thank you"; "Good Afternoon"; "Thanks again, and enjoy the weekend!"; "Good Evening"; "Sorry to bother you all about this again"; and "Thank you, Maria." Id. at *3.

Presumably most courts apply a "no harm no foul" approach, allowing the withholding of such immaterial verbiage. It is easy to imagine the logistical nightmare of going through thousands or more emails -- redacting around such inconsequential phrases.

- [Privilege Point, 5/11/22]

Can a Plaintiff Suing Holland & Knight for Fraud Discover Which Other Clients Received Similar Advice?

May 11, 2022

In most situations, a law firm's clients' identities do not deserve privilege protection. But as with so many other general privilege rules, there are exceptions.

In Berman v. Holland & Knight LLP, plaintiffs claimed that Holland & Knight "lured them into investing millions of dollars in a bogus tax shelter scheme by giving them knowingly false legal advice in opinion letters." Index No. 652466/2015, 2022 N.Y. Slip Op 30402(U), at *1 (N.Y. Sup. Ct. Feb. 4, 2022). They sought the identity of other Holland & Knight clients who received the firm's advice in connection with the same tax shelters. The court rejected plaintiffs' discovery effort, condemning it as "a reconnaissance mission." Id. at *8. Acknowledging that a law firm's clients' identities normally do not deserve privilege protection, the court noted that plaintiff's discovery "seeks more than just the identities of Holland & Knight clients; it seeks the identities of a subset of clients, based on whether those clients received certain advice from the firm." Id. at *4.

Respected law firms like Holland & Knight should take comfort in such common-sense application of the general inapplicability of privilege protection for their clients' identities.

- [Privilege Point, 6/8/22]

Privilege Protection for Deposition-Break Communications: It's Complicated

June 8, 2022

Some court rules explicitly prohibit communications between a deposition witness and her lawyer during a deposition break, except to discuss whether to assert a privilege objection to a pending question. See, e.g., Local Civ. Rule 30-04(E) (D.S.C.); D. Md. Local Rules, Appendix A, Discovery Guideline 6(f), (g). Absent such court-imposed prohibitions, determining whether deposition-break communications deserve privilege protection can involve very subtle distinctions.

In Pape v. Suffolk County Society for Prevention of Cruelty to Animals, the court acknowledged a court rule prohibiting such communications "**during the pendency of a question**," but then articulated what seemed like a clear rule in other circumstances: "the conversation . . . that occurred during a natural break in the deposition when no question was pending is protected by the attorney-client privilege." No. 20-cv-01490 (JMA) (JMW), 2022 U.S. Dist. LEXIS 68430, at *13-14 (E.D.N.Y. Apr. 13, 2022). Then the court began to back off – noting that the privilege would not protect such deposition-break communications if defense counsel instructed the witness "on how to answer Plaintiff's questions, or [if counsel] 'reminded' him of certain facts." Id. at *14. The court ultimately upheld the privilege assertion, emphasizing that: (1) plaintiff's lawyer had not asked "whether the conversation with counsel refreshed the witness's recollection," or whether a third party was present; and (2) "[t]here is no claim by Plaintiff that [the witness] changed the course of his testimony after speaking with Defense Counsel during the short recess." Id. at *14, 15 (footnote omitted).

Lawyers on either side of this issue should check the pertinent court's rule, and be prepared to deal with these subtle but critical questions.

- [Privilege Point, 6/22/22]

Adversaries Normally Can Explore Background Facts About Communications Withheld as Privileged

June 22, 2022

Attorney-client privilege protection focuses on communications' content, but those communications' context can shed light on their primary purpose, possible inapplicability because of third parties' presence, etc. So adversaries ordinarily can ask such context questions.

In Zerfoss v. Hinkle Trucking, Inc., No. 19-1126, 2022 W. Va. LEXIS 330 (W. Va. Apr. 26, 2022), employment plaintiff showed up early for her deposition, and reviewed two notebooks before her lawyer arrived and the deposition began. Her lawyer objected to defendant's lawyer's questions about whether plaintiff had reviewed the notebooks, whether she communicated what was in the notebooks to her lawyer, where she obtained the information she wrote in the notebooks, etc. Plaintiff's lawyer ended the deposition and left with her client. A "discovery commissioner" found the notebook's content to be privileged, but the lower court nevertheless found plaintiff's lawyer's objections improper – because plaintiff's lawyer "would not allow inquiry to establish a record regarding the facts and circumstances surrounding the creation of the information" in the notebooks. Id. at *6-7. The court ordered plaintiff to pay fees and costs incurred by the defendant's lawyer, the court reporter and the "discovery commissioner." Id. at *7. Plaintiff lost at trial, but appealed those sanctions. The West Virginia Supreme Court upheld the sanctions – noting that defendant's lawyer had explicitly disclaimed any attempt to learn the notebook's contents, and instead was properly "attempting to establish a record of whether the notebooks were protected by the attorney-client privilege." Id. at *17-18.

It sometimes can be difficult to distinguish between such background facts and a communication's content. But lawyers defending deponents must be careful not to block the former type of inquiry.

- [Privilege Point, 7/27/22]

The Oddly Named "Fiduciary Exception" and Its "Exceptions"

July 27, 2022

Under old English trust law, courts gave trust beneficiaries access to otherwise privileged communications between the trust fiduciary and its lawyer advising him or her on trust administration matters. The main case bringing this doctrine to America articulated what seems like a strange concept that "thus the beneficiaries were the 'real clients'" of the trustee's lawyer. Gomez v. Biomet 3i, LLC, Civ. A. No. 21-945 Section "H" (2), 2022 U.S. Dist. LEXIS 78796, at *7 (E.D. La. May 2, 2022) (quoting Riggs Nat'l Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976)).

This oddly named "fiduciary exception" (which isn't an "exception" to anything) itself has several "exceptions." As a Pennsylvania state court recently explained, trustees may withhold from trust beneficiaries their communications with and opinions received from "counsel retained for the trustees' personal protection in the course, or in anticipation, of litigation." In re Trust of Scaife, 276 A.3d 776, 792-93 (Pa. Super. Ct. 2022). In other words, a trustee seeking legal advice in defending herself from a beneficiary's claim understandably may withhold those communications from the beneficiary. Most courts call this "exception" to the "fiduciary exception" the "liability exception."

These somewhat counter-intuitive concepts and weird terms can apply far beyond traditional trust scenarios. For instance, the "fiduciary exception" and its "exceptions" apply to ERISA plan administrators who have fiduciary duties to the beneficiaries. ERISA plan administrators can rely on the "liability exception" as well as what is called the "settlor exception" – which allows them to withhold from beneficiaries communications about their non-fiduciary actions such as establishing or terminating an ERISA plan.

- Freeman v. Ocwen Loan Servicing, LLC, No. 1:18-cv-03844-TWP-DLP, 2022 U.S. Dist. LEXIS 120616, at *6-7, *7-8 (S.D. Ind. July 8, 2022) (analyzing withheld documents in camera to determine privilege protection; noting the absence of privileged content on the face of some documents; “[T]he Court finds that approximately half of the documents reviewed in camera are protected by the attorney-client privilege. The other half of the comments log contains updates on the status of the mortgage loan, or request case status updates from legal or outside counsel. As noted in the case law, routine status updates about the status of the Plaintiff’s mortgage loan or, the attorney fee amount are not protected by the attorney-client privilege, even if an attorney is involved in the communication. That information, which was undoubtedly created in the ordinary course of business and for the use of many legal and non-legal personnel, is not privileged. The Court was unable to identify any legal advice or strategy within these documents; rather, it appears that these comments are merely tracking the milestones for Plaintiff’s mortgage loan, which constitutes business advice or status updates related to scheduling and business needs.”; “For several of the entries, however, the Court finds that even though the comment is providing or seeking a status update, the intent of that update was for the purpose of requesting legal advice or memorializing advice from counsel regarding how Ocwen should proceed with the bankruptcy proceedings and the underlying litigation.”)
- Rodriguez v. Seabreeze Jetlev LLC, 620 F. Supp. 3d 1009, 1018 (N.D. Cal. 2022) (analyzing privilege and work product issues in a wrongful death case; concluding that the common interest doctrine protected communications among estate beneficiaries and the plaintiff eligible under maritime law to pursue the litigation, but that non-beneficiaries did not have such a common interest even though they had a financial interest in maximizing the recovery; “Furthermore, material concerning the dates and duration of meetings with attorneys ‘is not attorney-client privileged and it is not attorney work product. And the fact that a client reached a decision on some issue is not necessarily privileged ‘even if that decision was informed by advice from legal counsel’ because ‘[t]he privilege protects only communications, not facts.’ In re MacBook Keyboard Litig., No. 18-cv-02813-EJD (VKD), 2020 U.S. Dist. LEXIS 47365, 2020 WL 1265629, at *3 (N.D. Cal. Mar. 17, 2020).” (alteration in original) (citation omitted))

- Under Seal 1 v. United States (In re Grand Jury 2021 Subpoenas), 87 F.4th 229, 254 (4th Cir. 2023) (explaining the rare possibility of interlocutory appeal possibilities; “One such privilege-eroding circumstance is when the protected material’s purpose is to further a crime or fraud. See In re Grand Jury Proceedings #5 Empanelled Jan. 28, 2004, 401 F.3d 247, 251 (4th Cir. 2005). This is colloquially known as the crime-fraud exception.”; “‘The party asserting the crime-fraud exception . . . must make a prima facie showing that the privileged communications fall within the exception.’ Id. (citation omitted). Specifically, the invoker must show that ‘(1) the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme, and (2) the documents containing the privileged materials bear a close relationship to the client’s existing or future scheme to commit a crime or fraud.’ Id. (citation omitted). The first prong is satisfied by an evidentiary showing that ‘would establish the elements of some violation that was ongoing or about to be committed.’ Id. (citations omitted). The second prong is satisfied by ‘a showing of a close relationship between the attorney-client communications and the possible criminal or fraudulent activity.’ Id. (citation omitted).” (alteration in original); “In the context of tangible work product, a showing that the crime-fraud exception applies does not require proof either by a preponderance of the evidence or beyond a reasonable doubt. See id. Instead, the proof ‘must be such as to subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left un rebutted.’ Id. (simplified). But because opinion work product is more strictly protected, ‘more than prima facie evidence’ is required to overcome the privilege. Id. at 252 n.3 (citation omitted). However, this Court has clarified that ‘[p]rima facie evidence of the illegal activities of an attorney clearly suffices as an extraordinary circumstance’ justifying the discovery of opinion work product. Id. (citation omitted). Finally, although such a showing may warrant a finding in favor of the offering party—here, the government—it does not compel such a finding. Id. at 251.” (alteration in original))

- **[Privilege Point, 6/14/23]**

Drawing the Line Between a Privileged Communication's Occurrence and Its Content

June 14, 2023

All or most courts assessing deposition objections distinguish between questions focusing on: (1) the occurrence of a privileged communication; and (2) its content. Not surprisingly, that line can sometimes be hard to draw.

In Jorjani v. New Jersey Institute of Technology, the court overruled objections to the following questions, because they simply sought “to elicit the fact of consultation, and if so, when the consultation occurred”: “Did you discuss [plaintiff] with [your general counsel] at this time?”; “Did you seek legal advice in November of 2016, from [general counsel]?” Civ. A. No. 18-11693 (WJM), 2023 U.S. Dist. LEXIS 67501, at *12-13 (D.N.J. Apr. 18, 2023). In contrast, the court upheld an objection to the following question: “In April of 2017, were you discussing [plaintiff]’s OAQ compliance with [in-house lawyers]?” Id. at *15. Thus, the court drew the line between a privileged communication’s general subject matter (plaintiff) and more specific subject matter (plaintiff’s compliance with a regulation).

Courts trying to determine such lines face a difficult task. Consider the following spectrum: “Did you talk with your lawyer about the contract?”; “Did you talk with your lawyer about the contract’s enforcement provisions?”; “Did you talk with your lawyer about paragraph 7 of the contract?” Courts probably would permit the first question, not permit the third question, and disagree about the second question.

- [Privilege Point, 7/5/23]

Southern District of Ohio Acknowledges the “Fiduciary Exception’s” Applicability to ERISA Communications — With a Twist

July 5, 2023

Under what is called the “fiduciary exception,” the law essentially deems a fiduciary’s beneficiary to be the fiduciary’s lawyer’s actual “client.” This normally enables the beneficiary to access communications between the fiduciary and her lawyer about fiduciary functions. Most “fiduciary exception” cases involve ERISA fiduciaries.

In Kramer v. American Electric Power Executive Severance Plan, Civ. A. No. 2:21-cv-5501, 2023 U.S. Dist. LEXIS 65544 (S.D. Ohio Apr. 13, 2023), defendant’s former Chief Digital Officer sued for severance benefits after he was terminated. Not surprisingly, he pointed to the fiduciary exception that generally applies in ERISA cases. But the court carefully analyzed the severance plan, and concluded that “it primarily provides deferred compensation.” Id. at *18. Because the plan “serves a select group of management or highly compensated employees,” the plan’s status as a “top-hat plan” meant that under ERISA the fiduciary exception did not apply. Id.

As noted in previous Privilege Points, the so-called “fiduciary exception” has its own “exceptions” — allowing defendants to withhold from ERISA beneficiaries communications about non-fiduciary action such as the Plan’s creation or termination (the “settlor exception”) and communications about the fiduciary’s defense to a claim against him or her (the “liability exception”). The inapplicability of normal ERISA fiduciary exception rules to “top-hat plans” can be seen as another exception to the exception.

- SEC v. Covington & Burling, LLP, Case No. 23-mc-00002 (APM), 2023 U.S. Dist. LEXIS 127205, at *11, *11-12, *12, *13-14 (D.D.C. July 24, 2023) (in an opinion by Judge Mehta, explaining that Covington & Burling could not withhold the names of its clients who had been the victims of cyber attacks; “The court starts with the privilege assertion. ‘Federal courts have found that, absent special circumstances, client-identity is not protected by the attorney-client privilege.’ United States v. Hunton & Williams, 952 F. Supp. 843, 856 (D.D.C. 1997) (citing Clarke v. Am. Com. Nat’l Bank, 974 F.2d 127, 129-30 (9th Cir. 1992))”; “There is a limited exception to that general rule. ‘[A] client’s identity is privileged if disclosure would in essence reveal a confidential communication.’ In re Grand Jury Subpoena, 204 F.3d at 520; see also In re Shargel, 742 F.2d 61, 64 (2d Cir. 1984) (recognizing that ‘there may be circumstances under which the identification of a client may amount to prejudicial disclosure of a confidential communication’) (internal quotation marks and citation omitted). Covington argues that the exception applies here for two reasons.” (alteration in original); “It first maintains that ‘the SEC’s demand for client names is only the first step toward an inevitable demand for privileged information and work product’ because the Commission seeks the client list in part to investigate insider trading; thus it ‘will need to probe for details about the content of the files accessed by the threat actor’ to determine whether they contained material nonpublic information that ‘could be exploited for insider trading.’ Covington Opp’n at 19; Hr’g Tr. at 41 (arguing that the Commission ‘would need more information, they’d need to know what information was accessed, they’d need more details in order to conduct this investigation’). But the mere prospect that the SEC might demand actual confidential matter cannot transform a present request for nonprivileged client identities into a privileged one. If the SEC eventually does demand client confidences, that request will rise or fall on its own merits.”; “Covington’s second argument fares no better. Covington contends that ‘the SEC’s demand for client names will effectively reveal the content of privileged client communications.’ Covington Opp’n at 19.”; “Covington’s disclosure of a client name would tell the SEC nothing about what, if any, legal advice the client sought, or how the firm responded, with respect to the cyberattack. Only through guesswork and speculation could the SEC discern from the name of the client alone any communication’s contents.”), appeal filed, No. 23-5212 (D.C. Cir. Sept. 26, 2023)

- [Privilege Point, 10/25/23]

Two Federal Courts Assess a Prospective Client's Privilege Protection on the Same Day

October 25, 2023

Communications between a lawyer and a prospective client can involve ethics (confidentiality and conflicts) issues, as well as privilege protection issues. Not surprisingly, the availability of privilege protection depends on the context.

In Glover v. EQT Corp., Civ. A. No. 5:19CV223, 2023 U.S. Dist. LEXIS 147435, at *18 (N.D. W. Va. Aug. 14, 2023), the court held that a would-be client “appear[ed] to be actively seeking representation regarding a perceived royalty dispute with” defendant, followed by the would-be lawyer’s “requesting additional information and attempting to coordinate meetings to discuss representation.” The court understandably extended privilege protection, although the client did not ultimately retain that lawyer. On the same day, another federal court addressed privilege protection for the EEOC’s four thousand solicitation letters sent to current and former employees of a company accused of failing to provide reasonable accommodations under federal law. In EEOC v. Scottsdale Healthcare Hospitals, No. CV-20-01894-PHX-MTL, 2023 U.S. Dist. LEXIS 141769, at *9 (D. Ariz. Aug. 14, 2023), the court found privilege protection for communications to and from employees who responded to the EEOC’s solicitation letter, but that “attorney-client privilege does not cover the EEOC’s solicitation letters that were not responded to, or those that were responded to, but the response declined the invitation to speak to an EEOC attorney.” On the other hand, the court found work product protection for the identity of the letters’ recipients.

Lawyers considering either privilege or work product protection for their communications with would-be clients sometimes face difficult privilege issues in addition to the ethics considerations.

C. Primary Purpose Test

- [Privilege Point, 12/18/13]

Courts Deny Privilege Protection for Compliance-Related Documents

December 18, 2013

Many corporate clients erroneously assume that the attorney-client privilege or the work product doctrine will protect their compliance-related communications. However, such communications face the same impediments to either protection as other internal corporate communications.

For instance, the attorney-client privilege only protects communication primarily motivated by clients' request for legal advice. In United States ex rel. Gale v. Omnicare, Inc., the court found that the privilege did not protect "Compliance Committee meetings and the documents drafted by [the company's CCO]," – because the company's previous agreement with the government required such meetings. Case No. 1:10-CV-00127, 2013 U.S. Dist. LEXIS 143831, at *4 (N.D. Ohio Oct. 4, 2013). The court concluded that "[t]he meetings and documents sought to comply with its contract with the United States, not to obtain legal advice." Id. The privilege also normally depends on lawyers' involvement. In Wultz v. Bank of China Ltd., 979 F Supp. 2d 479 (S.D.N.Y. 2013), Judge Scheindlin held that the privilege did not protect documents created during the Bank of China Chief Compliance Officer's investigation into the bank's possible dealings with terrorists. Judge Scheindlin noted that after the Bank's CCO received Plaintiff's demand letter, "he called outside counsel, then set about performing the investigation within the Compliance Department – without the involvement of any counsel." Id. at 495-96 (citation omitted). Judge Scheindlin cited an earlier case's blunt conclusion that "[p]rivilege does not apply to 'an internal corporate investigation . . . made by management itself.'" Id. at 496 (alteration in original) (citation omitted).

Companies and their lawyers should not assume that the compliance function automatically, or even usually, deserves privilege protection.

- [Privilege Point, 1/8/14]

Court Takes a Very Narrow View of Legal Advice in a Corporate Setting

January 8, 2014

Attorney-client privilege protection depends on content, and the key issue normally involves distinguishing between primarily legal and primarily business advice. Courts disagree about where to draw that line.

In Koumoulis v. Independent Financial Marketing Group, Inc., 295 F.R.D. 28 (E.D.N.Y. 2013), the court examined communications between a Duane Morris lawyer and her corporate client's human resources employees. The court rejected privilege claims for most of the lawyer's communications. For instance, the court noted that the Duane Morris lawyer "sometimes told Human Resources employees exactly what questions to ask during interviews and what statements to make during meetings," and that "her advice would advance business goals, such as improving business relationships." Id. at 45. The court also noted that Duane Morris' "advice rarely involved 'the interpretation and application of legal principles to guide future conduct or to assess past conduct,' and rarely explicitly considered future litigation." Id. (citation omitted).

Not all courts would take this narrow view, but the decision provides a good lesson. Wise lawyers train their clients to explicitly explain in the four corners of their communications that they are seeking legal advice, that they are worried about litigation, etc. However, it is also important for lawyers to explicitly explain in their responses that they are providing legal advice (by mentioning legal principles, citing statutes or case law, etc.) and to mention litigation if the client reasonably anticipates it.

- Koumoulis v. Independent Financial Marketing Group, Inc., 29 F. Supp. 3d 142, 147-48, 149, 149-50, 149 n.4, 150 (E.D.N.Y. 2014) (upholding a Magistrate Judge's opinion that neither the attorney-client privilege nor the work product doctrine protected communications between a Duane Morris lawyer and a corporate client's human resource executive; finding the attorney-client privilege inapplicable because the advice was primarily business-related and not legal; "This document contains an e-mail from Defendants' outside counsel, Ann Bradley, Esq. [Duane Morris lawyer], setting forth more than a full page of detailed, multi-part instructions on how to deal with Mr. Komoulis's personnel issues, including a recommendation that Defendants call Mr. Komoulis 'to express concern and disappointment, identify the fundamental problem and find out who he trusts to advise him,' and goes so far as to prescribe detailed instructions to be given to Plaintiff on how he should conduct himself with Defendants' customers. . . . This advice plainly is not legal advice, but rather human resources advice on personnel management and customer relations." (emphasis added); finding the work product doctrine inapplicable for a number of reasons; "Based on its review of the Submitted Documents, the Court concurs with Judge Scanlon's assessment that the communications between Defendants and outside counsel related to human resources issues, e.g., the internal investigation related to Mr. Komoulis and responding to his complaints. Such advice would have been provided even absent the specter of litigation, and therefore do [sic] not constitute litigation-related work product."; "Defendants concede that 'LPL [defendant] ha[d] an obligation to investigate' Koumoulis's complaints about alleged discrimination and retaliation,' regardless of the potential for litigation. . . . The alleged motivation for which these documents were sought is not enough to overcome what appears on the face of the documents themselves." (second alteration in original) (footnote omitted); "[E]ven assuming the internal investigation was conducted in anticipation of litigation, otherwise work-product privileged communications relating to the investigation would still be discoverable once Defendants assert a Faragher/Ellerth [Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998)] defense. Indeed, Defendants acknowledged as much when they disclosed their in-house attorneys' notes and correspondence regarding the investigation. Defendants offer no justification for treating their outside counsel's communications regarding the investigation differently than their in-house counsel's communications on that topic."; "Defendants acknowledge that this advice was intended, in part, to prevent Plaintiff from bringing claims of retaliation. . . . Legal advice given for the purpose of preventing litigation is different than advice given in an anticipation of litigation." (emphasis added); "[S]imply declaring that something is prepared in 'anticipation of litigation' does not necessarily make it so. . . . [T]he

contents of the communications directly contradict Defendants' privilege claim. These communications, on their face, relate to advice given by Ms. Bradley on how to prevent a lawsuit, not on how to defend one."
(emphasis added)).

- [Privilege Point, 7/16/14]

District of Columbia Circuit Court Dramatically Expands Privilege Protection for Internal Corporate Investigations: Part II

July 16, 2014

Last week's Privilege Point described the legal standard and some of the factual bases for the District of Columbia District Court's denial of privilege protection for Kellogg Brown & Root's (KBR) internal corporate investigation. This week's Privilege Point tells the good news -- when about three months later, the D.C. Circuit Court of Appeals issued a writ of mandamus reversing the District Court's holding. In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).

The District of Columbia federal appellate court first rejected the district court's legal standard, holding that the privilege could protect a company's investigation if its need for legal advice was one of the "primary" or "significant" motivating purposes -- even if not the only purpose, or the primary purpose. Id. at 759-60. The appeals court also explicitly addressed several factual indicia the district court relied on, holding that (1) KBR's requirement under government regulations to investigate alleged fraud did not preclude KBR's argument that another "significant purpose[]" was seeking legal advice; (2) non-lawyers could conduct privileged employee interviews while "serving as agents of attorneys"; (3) the absence of Upjohn warnings did not prevent privilege protection, because "nothing in Upjohn requires a company to use magic words"; and (4) although the employees' confidentiality agreements did not "expressly" mention KBR's need for legal advice, employees knew the law department was conducting a "sensitive" investigation and were warned not to discuss their interviews without KBR's General Counsel's authorization. Id. at 758-59.

The appeals court's legal standard represents a much more privilege-friendly approach than most courts apply. The standard permits companies to claim privilege protection even for investigations they must undertake pursuant to external requirements -- rather than having to initiate parallel or successive investigations to gain the protection. And the court's analysis of the factual issues provides a much more lenient standard for claiming privilege than most courts would apply.

- [Privilege Point, 12/17/14]

It Can be Nearly Impossible to Satisfy Some Courts' Privilege Protection Standards: Part I

December 17, 2014

Although federal courts generally articulate the same basic attorney-client privilege principles, they can demonstrate enormous variation when applying those principles. In some situations, it might be nearly impossible for companies to successfully assert privilege protection.

In United States ex rel. Schaengold v. Memorial Health, Inc., No. 4:11-cv-58, 2014 U.S. Dist. LEXIS 156595 (S.D. Ga. Nov. 5, 2014), defendants sought to retrieve one document (out of 30,000 documents produced) that they claimed to have inadvertently produced to the government. They described the document as a draft sent to the company's lawyer, portions of which the client deleted at the lawyer's request before disclosing the final version to third parties. The court found that the document did not deserve privilege protection, because the lawyer's supporting affidavit "fails to show who exactly sent the Draft Document, whether the primary purpose of the communication was for legal advice, or whether the communication was indeed confidential." Id. at *9. Turning to the inadvertent production issue, the court found defendants' "naked assertion of a privilege review" inadequate — because defendants did not describe "when [the] review occurred, how much time [Prior Counsel] took to review the documents, what ['certain'] documents were reviewed, and other basic details of the review process." Id. at *17 (citation omitted; alterations in original).

The next Privilege Point will describe another federal court's similar decision issued seven days later.

- [Privilege Point, 2/4/15]

Game Changer? The S.D.N.Y. Endorses a Company-Friendly Privilege Standard

February 4, 2015

In In re General Motors LLC Ignition Switch Litigation, 80 F. Supp. 3d 521, 523, 532 (S.D.N.Y. 2015), Judge Furman upheld General Motors' claim of privilege and work product protection for "notes and memoranda relating to the witness interviews" Jenner & Block conducted while investigating GM's ignition switch issue. The opinion naturally has received extensive media coverage, given the high profile. But many reports do not focus on the court's groundbreaking adoption of a company-friendly privilege standard.

Most courts provide privilege protection only to communications whose "primary purpose" relates to legal rather than business advice. Last year, the D.C. Circuit rejected that rule, and extended privilege protection to investigation-related documents if "legal advice was one of the significant purposes." In re Kellogg Brown & Root, Inc., 756 F.3d 754, 758-59 (D.C. Cir. 2014) (emphasis added) (also known as the Barko decision). Although acknowledging that the D.C. Circuit's decision did not bind it, the General Motors court adopted that standard. This appears to represent the first time another court has adopted the D.C. Circuit's favorable privilege standard. Most significantly, the court held that "the D.C. Circuit's holding is consistent with - if not compelled by - the Supreme Court's logic" in the seminal Upjohn decision. Gen. Motors, 80 F. Supp. 3d at 530 (citing Upjohn v. United States, 449 U.S. 383, 394 (1981)).

The General Motors court's rejection of the "primary purpose" test and powerful endorsement of a "one of the significant purposes" standard could extend privilege protection in other contexts, such as with compliance-related communications.

- [Privilege Point, 1/13/16]

Second Circuit Offers Bad News, Good News and No News

January 13, 2016

When the Second Circuit speaks, people listen. That court recently dealt with privilege and work product issues.

In Schaeffler v. United States, 806 F.3d 34 (2d Cir. 2015), the Second Circuit reversed a district court's holding that (1) a taxpayer waived his privilege protection by disclosing protected legal advice to his lenders, and (2) the work product doctrine did not protect documents the taxpayer prepared in anticipation of IRS litigation. First, the Second Circuit offered bad news on the privilege front -- explaining that for privilege to apply "the purpose of the communications must be solely for the obtaining or providing of legal advice." Id. at 40 (emphasis added). This is a narrower approach than the majority "primary purpose" standard, and much narrower than the D.C. Circuit's one "significant" purpose standard. See In re Kellogg Brown & Root, Inc., 756 F.3d 754, 758-59 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 1163 (2015). Second, in discussing the common interest doctrine, the Second Circuit offered good news -- acknowledging that the taxpayer and his lenders shared a common legal interest rather than just a common financial interest. Schaeffler, 806 F.3d at 42. Third, the Second Circuit also offered good news on the work product front -- essentially rejecting the district court's "construct of a hypothetical scenario" in which the taxpayer and his lenders faced the same business issues without a litigation threat. Id. at 44. The court explained that the enormous financial stakes and business complexity meant that the lower court's hypothetical was "at odds with reality." Id. This meant that the taxpayer by definition would not have created his documents in the same form absent an IRS litigation threat. Fourth, the Second Circuit offered no news on a key issue -- whether the common interest doctrine can apply in the absence of anticipated litigation. The court acknowledged that "[p]arties may share a 'common legal interest' even if they are not parties in ongoing litigation," but did not take a position either way on the doctrine's applicability in a purely transactional setting. Id. at 40 (citation omitted).

The Second Circuit's off-handed description of the privilege standard may not represent a legal shift, so overall the Schaeffler decision represents primarily good news -- on the common interest and work product fronts.

- [Privilege Point, 6/28/17]

In-House Lawyers Should Avoid Being Employment Decision-Makers

June 28, 2017

In-house lawyers obviously can play an important role when their corporate clients decide whether to terminate employees. But they should avoid being the ultimate decision-makers, or playing a business role in any termination decisions.

In Price v. Jarett, No. 8:15CV200, 2017 U.S. Dist. LEXIS 61066 (D. Neb. Apr. 21, 2017), terminated employee plaintiff sought to depose a Union Pacific in-house lawyer. The lawyer had served on a panel that another witness testified "would have to come to a 'unanimous consensus to move forward on [a] termination.'" Id. at *2 (alteration in original) (internal citation omitted). Union Pacific claimed that the panel did not meet as a group to decide on terminations, and that the lawyer's "role in evaluating Plaintiff's termination was solely to review whether there were legal implications of concern for Union Pacific." Id. But the court allowed the deposition to proceed, noting that the testimony "regarding the need for unanimous consent for termination indicates that [the lawyer] may have some[] non-cumulative, non-privileged factual information relevant to the case." Id. at *6.

In-house lawyers should assure that their clients do not face a similar circumstance – in which there is (as the Price court put it) "uncertainty surrounding the 'hat' [they are] wearing while serving" on such panels or in some other way involved in termination decisions. Id. at *7.

- Pitkin v. Corizon Health, Inc., Case No. 3:16-cv-02235-AA, 2017 U.S. Dist. LEXIS 208058, at *10, *10-12 (D. Or. Dec. 18, 2017) (finding that the attorney-client privilege protected an investigation undertaken by a jail health services contractor into the death of an inmate; adopting the one “primary purpose” privilege standard from the D.C. circuit court case in Kellogg Brown & Root; “I am persuaded by the Kellogg [In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014)] court’s reasoning, and I adopt it here. Because the Ninth Circuit has not adopted a characterization of the ‘primary purpose’ test that aids in categorizing the kinds of mixed-motive investigations specifically at issue here, I will apply the gloss provided by the D.C. Circuit Court of Appeals in Kellogg.”; “Accordingly, the attorney-client privilege protects the results of the Sentinel Event investigation undertaken by Corizon in the aftermath of Ms. Pitkin’s untimely and unfortunate death. Corizon has satisfied each element of the attorney-client privilege standard, showing that it sought factfinding and advice at the direction of Corizon’s in-house legal team. Moreover, it showed that at least one primary purpose of the investigation was to ‘assess the situation from a legal perspective, provide legal guidance, and prepare for possible litigation and/or administrative proceedings.’ . . . That Corizon was fulfilling its obligations under its own corporate policies or its contract with Washington County — or both — is of no moment. As the Kellogg court explained, ‘[i]t is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B.’ . . . Common sense suggests that the death of an inmate would trigger numerous obligations for the organization charged with her care, not the least of which would be an assessment of liability. Accordingly, the attorney-client privilege applies to the Sentinel Event investigation, and Corizon is not required to produce it.”)

- [Privilege Point, 12/19/18]

Privilege and Work Protection for Lawyers' Communications With Third Parties and Reports of Those Communications: Part II

December 19, 2018

Last week's Privilege Point described a court's recognition that the work product doctrine can protect lawyers' communications with third party witnesses. Five days later, another court dealt with lawyers' reports to their clients about such third party communications.

In Finjan, Inc. v. SonicWall, Inc., Case No. 17-cv-04467-BLF (VKD), 2018 U.S. Dist. LEXIS 177061 (N.D. Cal. Oct. 15, 2018), defendant sought discovery of what apparently were plaintiff's lawyer's reports to his client about the lawyer's communications with third parties. Although its opinion contained several redactions, the court held that some of the emails deserved privilege protection because they were "not merely a neutral recording" of the lawyer's communications with those third parties. Id. at *8. The court also noted that even defendant acknowledged that such reports deserved privilege protection if they were "so interwoven with legal advice [they] may be considered privileged as a whole." Id. The court also found work product protection, because the reports "reflect counsel's mental processes and reveal the information he considered significant" – rather than "merely verbatim summaries." Id. at *9.

Lawyers' reports of their communications with third parties can deserve privilege protection if: (1) they infuse their summaries with their legal advice or opinion; or (2) their recitation of certain portions of those communications reflects their legal advice or opinion. Some courts' statements that "verbatim reports" cannot deserve privilege or work product protection seems incorrect – if those verbatim reports memorialize legal opinions, or reflect lawyers' series of opinion-revealing specific questions to the third parties, and the third parties' responses.

- Pearlstein v. Blackberry Ltd., No. 13-CV-07060 (CM)(KHP), 2019 U.S. Dist. LEXIS 45098, at *11-12 (S.D.N.Y. Mar. 19, 2019) (in an opinion by Judge Parker, analyzing privilege protection for in-house lawyers, applying the “predominate purpose” standard; “The privilege applies to a company’s communications with its external and in-house lawyers. But, in light of the two hats often worn by in-house lawyers, communications between a corporation’s employees and its in-house counsel though subject to the attorney-client privilege must be scrutinized carefully to determine whether the predominant purpose of the communication was to convey business advice and information or, alternatively, to obtain or provide legal advice. If the former, the communication is not protected by the attorney-client privilege. In re County of Erie, 473 F.3d at 418, 420; In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1036-37 (2d Cir. 1984). When determining the predominant purpose of a communication between a company’s employees and its in-house lawyers, a court must assess the communication ‘dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting legal authorities and advice that can be given by a non-lawyer.’ In re County of Erie, 473 F.3d at 420-421. The determination ‘also may be informed by the overall needs and objectives that animate the client’s request for advice.’ Id. at 421. Importantly, the fact that a lawyer may highlight collateral non-legal risks and costs relating to ‘expense, politics, insurance, commerce, morals and appearances’ or report ‘what other persons are doing or thinking about the matter’ in the course of rendering legal advice does not compromise the privilege so long as the predominant purpose of the communication was to render legal advice. Id. at 420.”)

- [Privilege Point, 9/4/19]

Court Adopts A Favorable Privilege Standard But Unfavorable Work Product Standard: Part I

September 4, 2019

Most courts apply a "primary" or "predominant" purpose standard when assessing privilege protection for communications serving both business and legal purposes. While on the D.C. Circuit, Judge Kavanaugh articulated a much more favorable standard – protecting as privileged communications if "obtaining or providing legal advice was one of the significant purposes" of the communication. In re Kellogg Brown & Root, Inc., 756 F.3d 754, 759-60 (D.C. Cir. 2014) (commonly called the KBR case).

Only a handful of courts have moved in that direction. In Smith-Brown v. Ulta Beauty, Inc., No. 18 C 610, 2019 U.S. Dist. LEXIS 108021, at *8 (N.D. Ill. June 27, 2019), the court initially explained that "[t]he Second, Fifth, Sixth, and D.C. Circuits all use the predominant purpose test." But the court then quoted and applied the D.C. Circuit KBR decision's "one of the significant purposes" standard, which those other circuits have not adopted. Id. at *8-10.

KBR's "one of the significant purposes" standard is so much more favorable to corporations than the "primary" or "predominant" purpose standard that corporations' lawyers should welcome any court joining the KBR ranks. Next week's Privilege Point will discuss the recent Smith-Brown decision's work product standard – which takes the narrowest view of that separate evidentiary protection.

- [Privilege Point, 1/15/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part I**

January 15, 2020

The Southern District of New York (Magistrate Judge Gorenstein) issued an extensive privilege decision with several favorable analyses in a high-profile corporate sexual harassment case. In *Parneros v. Barnes & Noble, Inc.*, 332 F.R.D. 482 (S.D.N.Y. 2019), Barnes & Noble's General Counsel Bradley Feuer investigated alleged sexual harassment misconduct by then CEO Demos Parneros. Feuer hired Paul Weiss to represent the company in investigating the allegations, and also enlisted the company's Senior VP of Corporate Communications and Public Affairs Mary Ellen Keating to assist with the investigation. The company eventually fired Parneros and refused to pay him severance. Parneros sued the company for defamation and breach of contract. The Southern District of New York dealt with several privilege issues implicated by Parneros's discovery requests.

First, the court found that General Counsel Feuer's investigation was primarily motivated by his need for legal advice. The court first pointed to the potentially serious misconduct by "the company's top executive" as "provid[ing] some circumstantial evidence" supporting the primary purpose assertion. *Id.* at 494. The court also emphasized that Feuer's retention of Paul Weiss as "litigation counsel the same day that he learned of the allegations" bolstered the privilege assertion – recognizing courts' frequent conclusion that "the retention of outside litigation counsel to advise an internal investigation [is] an important factor in determining whether an internal investigation is being conducted for the purpose of obtaining legal advice for the company." *Id.* Second, although acknowledging that Senior VP Keating "does not appear to have any particular expertise that would enable her to conduct the investigation in a more skilled manner than [the Company's General Counsel] himself," the court explained that there was no case law "suggesting that a corporate employee who conducts an investigation for an attorney must have a particular skill to qualify as the attorney's agent." *Id.* Thus, Senior VP Keating's involvement was inside privilege protection. In-house lawyers often "deputize" employees to assist in such investigations – and Judge Gorenstein's analysis will be very helpful in asserting privilege for their involvement.

The next three Privilege Points will describe other favorable language from this significant case.

- [Privilege Point, 1/22/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part II**

January 22, 2020

Last week's Privilege Point described two favorable analyses from a Southern District of New York decision (Judge Gorenstein) assessing defendant Barnes & Noble's privilege assertions covering its investigation and later firing of its CEO for sexual harassment. Parneros v. Barnes & Noble, Inc., 382 F.R.D. 482 (S.D.N.Y. 2019).

Third, the court addressed fired CEO Parneros's argument that the investigation-related documents "are not privileged because they were created for business purposes, rather than for legal purposes" – noting that the Barnes & Noble policy "requires that all complaints of alleged sexual harassment be investigated." Id. at 495. The court rejected Parneros's argument, holding that "[t]he mere fact that there was a business benefit obtained from conducting the investigation does not detract from the circumstances here indicating that the predominant purpose of the investigation was to gather facts for the General Counsel so he could give legal advice to the corporation." Id. This is a very favorable standard, perhaps based in part on the high-level nature of the investigation and outside counsel Paul Weiss's involvement. Fourth, the court addressed fired CEO Parneros's complaint that neither he nor his Executive Assistant were given Upjohn warnings before they were interviewed by the company's General Counsel and the Senior VP of Corporate Communications and Public Affairs – thus aborting any privilege protection for the interviewers' notes of that interview. The court rejected Parneros's argument, noting that "courts have found the attorney-client privilege to shield notes of interviews undertaken as part of an internal investigation without discussing whether an Upjohn warning was first given." Id. at 496. Interestingly, the court did not address the privilege's applicability to the interview itself.

The next two Privilege Points will describe other favorable language from this significant case.

- [Privilege Point, 1/22/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part II**

January 22, 2020

Last week's Privilege Point described two favorable analyses from a Southern District of New York decision (Judge Gorenstein) assessing defendant Barnes & Noble's privilege assertions covering its investigation and later firing of its CEO for sexual harassment. Parneros v. Barnes & Noble, Inc., 382 F.R.D. 482 (S.D.N.Y. 2019).

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The next two Privilege Points will describe other favorable language from this significant case.

- [Privilege Point, 1/29/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part III**

January 29, 2020

The last two Privilege Points described four favorable analyses from a Southern District of New York decision (Judge Gorenstein) assessing defendant Barnes & Noble's privilege assertions covering its investigation and later firing of its CEO for sexual harassment. Parneros v. Barnes & Noble, Inc., 332 F.R.D. 482 (S.D.N.Y. 2019).

Fifth, the court addressed fired CEO Parneros's argument that Barnes & Noble waived its privilege by eliciting at his deposition extensive testimony about a meeting at which Parneros "apologized for his conduct" to the company's Senior VP, and another meeting attended by Barnes & Noble's Founder and Chairman. Id. at 489. The court rejected Parneros's argument – noting that the company had not asserted privilege for either one of the meetings, but rather "taken the position that certain notes taken at the apology meeting as part of the investigation overseen by [General Counsel] Feuer are privileged." Id. at 496. This meant that the deposition testimony about those non-privileged meetings did not waive any privilege. But the privilege still protected the "notes taken by an attorney or his designee at a non-privileged meeting . . . as long as the notes were taken for the purpose of allowing counsel to give legal advice." Id. As with other interview notes prepared by General Counsel Feuer, the court did not address work product protection – which would seem to be a more appropriate protection. Sixth, the court addressed fired CEO Parneros's argument that the privilege did not protect drafts of press releases that were sent to General Counsel Feuer and/or outside counsel at Paul, Weiss. The court rejected Parneros's argument, pointing to Feuer's declaration that the company's Senior VP of Corporate Communications of Public Affairs and VP of Investor Relations sent draft press releases to him and to Paul Weiss "for his 'review and legal advice' and were sent to 'outside counsel concerning the wording of the announcement for their review and legal advice.'" Id. at 498.

The next Privilege Point will describe other favorable language from this significant case.

- **[Privilege Point, 3/25/20]**

Illinois Courts Deal With Privilege Presumptions: Part I

March 25, 2020

All courts agree that litigants asserting attorney-client privilege or work product protection must establish the protection's applicability. But courts take different positions on whether any presumptions guide their analysis.

In Urban 8 Fox Lake Corp. v. Nationwide Affordable Housing Fund 4, LLC, 334 F.R.D. 149, 156 (N.D. Ill. 2020), the court could not have been more blunt: "[i]t cannot be stressed enough that there is no presumption in favor of finding a document to be immune from discovery under either the attorney-client privilege or the work product doctrine." Ten days later, in BMM North America, Inc. v. Illinois Gaming Board, 2020 IL App (1st) 190910-U, ¶ 72, an Illinois state appellate court quoted the Illinois Supreme Court in taking exactly the opposite position: "when there is an attorney-client relationship in which an attorney and client have communicated in a professional capacity . . . there is a rebuttable presumption that their communication is privileged" (quoting In re Marriage of Decker, 606 N.E.2d 1094, 1108-09 (Ill. 1992). Interestingly, the BMM court found that presumption inapplicable, because the withheld communications "pertain to [the litigant's] business efforts and were not made within the confines of an attorney-client relationship." Id.

Corporations and their lawyers should always check the applicable jurisdiction's law for any legal boost to a privilege or work product assertion. Next week's Privilege Point will address another presumption -- that should worry in-house lawyers.

- [Privilege Point, 4/1/20]

Illinois Courts Deal With Privilege Presumptions: Part II

April 1, 2020

Last week's Privilege Point discussed Illinois federal court and Illinois state court decisions issued just ten days apart -- disagreeing about whether litigants asserting attorney-client privilege or work product protection can rely on a presumption favoring the protections' availability. Unfortunately, many courts agree on a worrisome presumption that disfavors in-house lawyers.

In the Illinois federal court decision, Urban 8 Fox Lake Corp. v. Nationwide Affordable Housing Fund 4, LLC, the court followed its rejection of any general presumption favoring privilege or work product protection with an acknowledgment of an opposite presumption: "courts presume that where in-house counsel is involved, 'the attorney's input is more likely business rather than legal in nature.'" 334 F.R.D. 149, 158 (N.D. Ill. 2020) (quoting Smith v. Bd. of Educ., No. 17 C 7034, 2019 U.S. Dist. LEXIS 102326, at *4 (N.D. Ill. June 19, 2019)). Even courts that do not recognize a presumption against in-house lawyers' privilege claims normally give such privilege assertions more scrutiny. For instance, in United States v. Microsoft Corp., No. C15-102RSM, 2020 U.S. Dist. LEXIS 8781, at *13 (W.D. Wash. Jan. 17, 2020), the court held that companies claiming privilege protection for communications to or from their in-house lawyers must make a "clear showing that the speaker made the communication for the purpose of obtaining or providing legal advice" (quoting Chandola v. Seattle Hous. Auth., No. C13-557RSM, 2014 U.S. Dist. LEXIS 132193, at *6 (W.D. Wash. Sept. 19, 2014)).

In-house lawyers should keep in mind this nearly universal judicial hostility, and consider: (1) training their colleagues to explicitly ask for legal advice on the face of any documents if that is what they seek; and (2) themselves memorializing that primary purpose on the face of their responses to those colleagues.

- [Privilege Point, 6/3/20]

Courts Point to Several Factors in Addressing The “Primary Purpose” Privilege Standard

June 3, 2020

Nearly every court protects as privileged only those communications or documents whose “primary purpose” was for the clients to request legal advice or the lawyers to provide the requested legal advice. A few courts have taken a more liberal “one significant purpose” approach, but that favorable doctrine has not widely taken root.

In assessing privilege protection, courts primarily focus on the communications’ content. But some other factors can help. In Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 U.S. Dist. 24203, at *6 (D. Kan. Feb. 12, 2020), the court found that Spirit “has met its burden to establish privilege-specifically, that legal advice predominated over business advice.” The court reached this conclusion “[a]fter reviewing the subject documents in camera and taking into account the timing of these emails.” Id. The timing factor focused on the then-tense relationship between Spirit and its former CEO plaintiff seeking retirement benefits, which weighed in favor of privilege protection. Six days later, in Carman v. Signature Healthcare, LLC, No. 4:19-CV-00087-JHM-HBB, 2020 U.S. Dist. LEXIS 27156, at *7-8 (W.D. Ky. Feb. 18, 2020), the court similarly held that an in-house lawyer’s communications deserved privilege protection, after explaining that “[n]otably, [the in-house lawyer’s] e-mail signature block identifies her position as ‘Associate Counsel, Litigation,’ suggesting that her primary duties lie in litigation-related matters as opposed to general business consulting.” Of course, the court also reviewed the documents’ content.

In the privilege world, content is king. But corporations should keep in mind that other factors might help tip the scales in favor of privilege protection.

- **[Privilege Point, 11/18/20]**

Dartmouth Strikes Out on Privilege Claim for Email Threads

November 18, 2020

Courts analyzing privilege assertions for email threads often look for some indicia of that protection on the face of those emails.

In Anderson v. Trustees of Dartmouth College, Case No. 19-cv-109-SM, 2020 U.S. LEXIS 153785 (D.N.H. Aug. 25, 2020), an expelled student sued Dartmouth for applying a faulty disciplinary process. Dartmouth withheld approximately 5,000 pages of documents, many of which were email threads. The court rejected most of Dartmouth's privilege claims. One group of withheld documents constituted emails between non-lawyer Dartmouth employees. Although one email "discusses the relevant New Hampshire statute, . . . that fact does not render the email subject to an attorney-client privilege. And, while in-house counsel . . . is copied on the email, neither [of the Dartmouth employees] requests legal advice, nor does [Dartmouth's in-house lawyer] offer any." Id. at *6. Another batch of withheld emails "invite[d] feedback or comment on potential draft email responses to the plaintiff" – but "[t]hose requests were not made specifically to counsel, [and] instead generally requested responses from all email recipients." Id. at *7-8. The court also rejected Dartmouth's argument that its employees sent Dartmouth's lawyer documents seeking legal advice – bluntly holding that "[o]f course, merely saying so does not make the documents privileged." Id. at *9. The court also noted that "Dartmouth fail[ed] to provide any sort of affidavit or declaration from an individual with personal knowledge of that practice, or any other evidence that might establish that practice." Id. at *9 n.2.

Lawyers should educate their clients about the importance of including on the face of their emails indicia of those emails' privileged nature (normally, that the clients seek the lawyers' legal advice). And of course lawyers must support privilege claims with whatever necessary affidavits the pertinent court would expect.

- Shenandoah Coatings, LLC v. Xin Dev. Mgmt. East, LLC, No. 517102/18, 2020 N.Y. Misc. LEXIS 10893, at *5 (N.Y. Sup. Ct. Dec. 24, 2020) (holding that merely copying a lawyer does not assure privilege protection; “Emails where the attorney is merely a CC recipient ostensibly could not relate to primarily legal matters or constitute the transmission of legal advice and that the receipt of otherwise privileged documents by third parties outside of the attorney and the client constitutes a waiver of the privilege.”)
- Adhikari v. KBR, Inc., Case No. 4:16-CV-2478, 2020 U.S. Dist. LEXIS 244198, at *6 (S.D. Tex. Dec. 29, 2020) (after reviewing withheld documents in camera, holding that some documents deserved privilege protection because they sought legal advice; “The Court’s determines [sic] that the email is protected under the attorney-client privilege. It is an email from an employee to counsel and other employees with responsibility for the issues raised, seeking advice on how to respond to a media inquiry. While there is no doubt there is a mixed purpose to the email, it clearly raises legal issues and seeks legal advice. The email along with the supporting affidavit satisfy KBR’s burden of proof to maintain the privilege.”)

- **[Privilege Point, 3/17/21]**

Can the Privilege Protect Documents Prepared by Someone Who Has Never Hired a Lawyer?

March 17, 2021

The attorney-client privilege protects communications between clients and their lawyers. But in certain admittedly limited circumstances, the protection can apply to documents created by someone who has not yet hired a lawyer.

In Nelson v. City of Hartford, No. 3:20 CV 221 (JAM), 2021 U.S. Dist. LEXIS 8204 (D. Conn. Jan. 15, 2021), a retired Hartford police detective sued the City for employment discrimination leading to his constructive discharge. The City sought production of notes Nelson described at his deposition as "basically a journal" that "he typed contemporaneously as a 'running history of what had been happening in the department.'" Id. at *7. The court dismissed as "not determinative" the fact that Nelson "created the notes before he retained counsel" -- because the privilege can protect a "party's notes . . . made for the purpose of ultimately communicating with an attorney." Id. at *8. The court then wisely reminded the parties that "the facts contained in this diary are not protected." Id. at *9. Thus, "the defendant could have inquired into the facts that underlie [Nelson's] allegations" -- but "would be precluded from inquiring into what [Nelson] communicated to his attorney." Id. at *9-10.

Not surprisingly, this scenario plays out most often in the labor and employment context.

- Coventry Capital US LLC v. EEA Life Settlements Inc., Civ. A. No. 17 Civ. 7417 (VM) (SLC), 2021 U.S. Dist. LEXIS 181137, at *8-9 (S.D.N.Y. Sept. 22, 2021) (finding that the attorney-client privilege protected a draft document prepared by a corporate executive with the input of its general counsel; “The Court finds that each of the drafts of the Manager Recommendations (and their cover emails) are protected by the attorney-client privilege because they constitute communications for the purpose of seeking or providing legal advice. Each document reflects communications between Mr. Piscaer [Corporate Executive] and Mr. Harrop [General Counsel] concerning legal review of the contents of the respective draft of the Manager Recommendations. It is undisputed that the withheld drafts were not shared with third parties, and EEA Inc.’s production of versions of the Manager Recommendations, which did not contain such a request for or provision of legal advice, did not act as a waiver of the privilege.”)
- Mauer v. Union Pac. R.R., No. 8:19CV410, 2021 U.S. Dist. LEXIS 204741, at *3 (D. Neb. Oct. 25, 2021) (recognizing that an in-house lawyer’s advice about employee discipline or termination could include legal advice, rather than being exclusively business advice; “Here, Plaintiff argues that when in-house counsel advises on employee discipline, including termination, they are providing business advice and not legal advice protected by the attorney-client privilege. But not all advice offered by in-house counsel, including advice stating termination is an acceptable response to Plaintiff’s arrest, is business rather than legal advice. The essence of providing legal advice is applying the facts to the law and providing an opinion to the client on how to lawfully proceed. Whether provided by in-house or outside counsel, an attorney offers legal advice when providing opinions in response to supervisory personnel questions on whether termination is legally allowed, or is appropriate upon weighing the company’s legal exposure from the employee if fired, or from third parties if the employee is retained. A contrary result would certainly dissuade employers from having full and frank communications with counsel to encourage compliance with the law.”)

- [Privilege Point, 4/20/22]

Ninth Circuit Mildly Praises Judge Kavanaugh's Expansive Privilege Approach to Corporate Investigation Materials

April 20, 2022

Essentially all courts apply a "primary purpose" test when assessing privilege protection. But while on the D.C. Circuit Court, Judge Kavanaugh articulated a far more corporate-friendly standard in analyzing an internal corporate investigation's materials: "[w]as obtaining or providing legal advice a primary purpose of the communication, meaning **one of the significant purposes** of the communication?" In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014) (emphasis added). Significantly, under the Kellogg standard an externally-mandated corporate investigation might deserve privilege protection – if gathering facts necessary for the provision of legal advice was "one significant purpose" of the investigation. But only a handful of courts have tiptoed toward that standard.

In In re Grand Jury, 23 F.4th 1088 (9th Cir. 2022), the court did not adopt the "one significant purpose" standard. But the court cited several district courts that have, and also explicitly stated that "[w]e see the merits of the reasoning in Kellogg." Id. at 1094. But the court also conceded that "[n]one of our other sister circuits have openly embraced Kellogg," and "recognize[d] that Kellogg dealt with the very specific context of internal corporate investigations" (concluding that "its reasoning does not apply with equal force in the tax context"). Id. at 1094-95.

No previous circuit court opinion has said anything nice about the Kellogg "one significant purpose" standard. It is too early to tell if this is a trend, but corporations might keep their fingers crossed that other courts will move toward the more favorable standard.

- In re Grand Jury, 23 F.4th 1088, 1094-95, 1094 n.4 (9th Cir. 2022) (finding the “one significant purpose” standard inapplicable, but recognizing the “merits” of that approach; “We see the merits of the reasoning in Kellogg. But we see no need to adopt that reasoning in this case. None of our other sister circuits have openly embraced Kellogg [In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014)] yet. . . . We thus see no need to adopt or apply the Kellogg formulation of the primary-purpose test here.”; “That said, some district courts have adopted Kellogg's ‘significant purpose’ analysis. See In re Gen. Motors LLC Ignition Switch Litig., 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015) (‘To be sure, the D.C. Circuit's decision in Kellogg Brown & Root is not binding on this Court. Nevertheless, its analysis of the “primary purpose” test as applied to internal investigations in the corporate setting is consistent with the Second Circuit's analysis in County of Erie’); In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prods. Liab. Litig., No. 1:17-md-2775, 2019 U.S. Dist. LEXIS 91795, 2019 WL 2330863, at *2 (D. Md. May 31, 2019); Edwards v. Scripps Media, Inc., No. 18-10735, 2019 U.S. Dist. LEXIS 97006, 2019 WL 2448654, at *1-2 (E.D. Mich. June 10, 2019).” (alteration in original)), cert. dismissed as improvidently granted, 143 S. Ct. 543 (2023) (per curiam)

- United States v. Coburn, Civ. No. 2:19-cr-00120 (KM), 2022 U.S. Dist. LEXIS 21429, at *15-16 (D.N.J. Feb. 1, 2022) (analyzing privilege and work product issues involving defendant's third party subpoena on another company (Cognizant); "The first category in dispute consists of Cognizant's draft press releases and public disclosures. I agree with Defendants that these materials were not created for the predominant purpose of obtaining legal advice, or in order to prepare for litigation. See In re Grand Jury Investigation, 599 F.2d at 1233. Instead, they fall squarely within the type of non-legal, business or public relations advice that are not privileged. See Fisher, 425 U.S. at 403; Westinghouse, 951 F.2d at 1423-24. Similarly, Cognizant's communications with public relations firms Finsbury and CLS Strategies concerning 'public disclosure, communications, potential litigation and related legal strategy' relevant to Cognizant's internal investigation, (Mot. To Compel Cognizant, Cat. A at 76-77, [sic]) are not protected by either privilege because they bear too tenuous a connection to the provision of legal advice or confidential preparations for litigation. See, e.g., Dejewski, No. 19-CV-14532-ES-ESK, 2021 WL 118929, at *1-2; Louisiana Mun. Police Emps. Ret. Sys., 253 F.R.D. at 305-06.")
- Wagner Aeronautical, Inc. v. Dotzenroth, Case No. 21-cv-0994-L-AGS, 2022 U.S. Dist. LEXIS 158665, at *7-8 (S.D. Cal. Sept. 1, 2022) (finding that the attorney-client privilege protected a document that was not sent; "Defendants also challenge the privilege claims on two unsent documents drafted by Tarpley and saved to his hard drive. Both documents reflect legal advice. The first document, PLE 45, is 'comparable to notes a client would make to prepare for a meeting with [his] lawyer.' See ChevronTexaco Corp., 241 F. Supp. 2d at 1077. Tarpley spoke with his lawyer about the legal issue. (See PLE 16 (reflecting Tarpley's communications with his lawyer on the same issue).) He then drafted a document reflecting that advice (PLE 45), which he sent to his lawyer for further advice. (See PLE 111 (email to attorney attaching a copy of PLE 45).) And then his lawyer returned advice on the issue in a Word document, which Tarpley saved to his hard drive. (PLE 110.) The second document, PLE 110, directly 'memorializes and reflects legal advice' rendered by his attorney. See ChriMar, 2016 U.S. Dist. LEXIS 53706, 2016 WL 1595785, at *3. Accordingly, both are privileged." (alteration in original) (internal citation omitted))

- In re Apple Inc. Sec. Litig., Case No. 4:19-cv-2033-YGR, 2022 U.S. Dist. LEXIS 172182, at *6-7 (N.D. Cal. Sept. 12, 2022) (rejecting the KBR standard and instead applying the “primary purpose” standard; “[D]efendants argue that Judge Spero erred by applying ‘the’ primary purpose test for determining if documents with multiple purposes are privileged rather than the more expansive ‘a’ primary purpose test, as articulated by the D.C. Circuit in In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760, 410 U.S. App. D.C. 382 (D.C. Cir. 2014)). The Ninth Circuit in In re Grand Jury affirmed ‘that the primary-purpose test governs in assessing attorney-client privilege for dual-purpose communications’ and ‘left open’ whether the more expansive ‘a primary purpose’ test articulated by the D.C. Circuit in Kellogg should ever be applied. In re Grand Jury, 23 F.4th 1088, 1090 (9th Cir. 2021). Kellogg is not the standard in the Ninth Circuit and it was not clearly erroneous for Judge Spero not to apply it.”)

- [Privilege Point, 3/15/23]

Supreme Court Fumbles Attempt to Define Privilege Standard: Part I

March 15, 2023

On January 23, 2023, the U.S. Supreme Court took the unusual step of dropping a case after oral argument. In re Grand Jury, 23 F.4th 1088 (9th Cir.), cert. granted, 143 S. Ct. 80 (2022), cert. dismissed as improvidently granted, 143 S. Ct. 543 (2023) (per curiam). Many commentators have noted the bizarre oral argument, in which both the plaintiff and the government seemed to shift their positions on the proper privilege standard. But what was the basic issue, why did the Supreme Court back away, and where does the Supreme Court's move leave the law?

The story starts in 2014. In United States ex rel. Barko v. Halliburton Co., the court adopted a narrow version of the widely articulated "primary purpose" test for privilege protection — holding that "[t]he party invoking the privilege must show the 'communication would not have been made 'but for' the fact that legal advice was sought.'" 37 F. Supp. 3d 1, 5 (D.D.C. 2014) (citation omitted). The court held that the privilege did not protect communications during Kellogg Brown & Root (KBR)'s investigation into possible overseas fraud, because the investigation "resulted from the Defendants[] need to comply with government regulations." Id. The D.C. Circuit Court vacated, with Judge Kavanaugh noting that the privilege could apply to KBR's investigation and other similar investigations "even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion." In re Kellogg Brown & Root, Inc., 756 F.3d 754, 758-59 (D.C. Cir. 2014).

Only a few district courts have adopted what became known as Judge Kavanaugh's "one significant purpose" standard, and only one circuit court (In re Grand Jury, supra) had anything nice to say about it. The next two weeks' Privilege Points will surmise why the Supreme Court backed away, and what might happen next.

- [Privilege Point, 3/22/23]

Supreme Court Fumbles Attempt to Define Privilege Standard: Part II

March 22, 2023

Last week's Privilege Point described the Supreme Court's failure to decide between a "primary purpose" and a "one significant purpose" privilege standard. Everyone wonders why the Supreme Court dropped the case. The best explanation may be that the court realized that it should have waited for an internal corporate investigation case like KBR. In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).

In re Grand Jury, 23 F.4th 1088 (9th Cir.), cert. granted, 143 S. Ct. 80 (2022), cert. dismissed as improvidently granted, 143 S. Ct. 543 (2023) (per curiam), involved a government-initiated criminal tax investigation. Since the District Court's file was under seal, we don't know much about the context or the substance of the withheld documents — unlike many civil investigation cases. And of course our common law advances most efficiently and fairly when based on incremental rulings in specific situations (even about specific withheld documents) — rather than in some one-size-fits-all legal doctrine pronouncement. So the Supreme Court might have done better by waiting for a civil investigation case with a lengthy document-specific district court opinion to sink its teeth into. It is unfortunate that the Supreme Court did not at least reject the extreme "but for" standard, under which the privilege presumably would not protect most if any documents created during an investigation mandated by government regulations or even some internal corporate policy.

The good news is that the government did not argue for a draconian "but for" standard during the Grand Jury oral argument. In fact, the government lawyer said "we completely agree with the result" in KBR (Transcript of Jan. 9, 2023, Oral Argument at 76, In re Grand Jury, 143 S. Ct. 543 (2023)). Next week's Privilege Point describes the opportunity for the Supreme Court to address a similar dichotomy of approaches in the work product arena.

- [Privilege Point, 3/29/23]

Supreme Court Fumbles Attempt to Define Privilege Standard: Part III

March 29, 2023

The last two Privilege Points (Part I and Part II) addressed the Supreme Court's abandoned attempt to address the abstract "primary purpose" versus "one significant purpose" privilege standard in the absence of specific facts about particular documents. Interestingly, the Ninth Circuit's In Grand Jury decision mentioned what it called the "because of" test in the work product arena — before noting the inherent differences between the attorney-client privilege and work product protection. 23 F.4th 1088 (9th Cir.), cert. granted, 143 S. Ct. 80 (2022), cert. dismissed as improvidently granted, 143 S. Ct. 543 (2023) (per curiam). We will see if the Supreme Court takes the hint.

For decades, some circuits (most notably, the Fifth Circuit) have limited work product protection to documents that will be used to "aid or assist" in litigation. Other circuits have endorsed a much broader "because of" standard, which extends work product protection beyond that narrow range — as long as the documents were created "because of" litigation or anticipated litigation, and would not exist in the same form but for that litigation. In some situations, courts from different parts of the country have simultaneously disagreed. For instance, the court in Hempel v. Cydan Development, Inc., Case No. PX-18-3040, 2020 U.S. Dist. LEXIS 153208, at *15 (D. Md. Aug. 24, 2020), rejected work product protection because a document was "not written with any purpose of actually assisting Plaintiffs or their counsel." Just three days later, the court in Profit Point Tax Technologies, Inc. v. DPAD Group, LLP, 336 F.R.D. 177, 182-83 (W.D. Wis. 2020), protected as work product documents "prepared because of disputes that would otherwise have been litigated." It is easy to envision documents that fail the "aid or assist" standard but satisfy the "because of" standard. For example, a company worried about having to raise money to pay for a possible loss in pending litigation might create documents focusing on where it will find the money — which presumably would satisfy the "because of" standard, but not the "aid or assist" standard.

This dichotomy differs from — but parallels — the privilege standard debate that will continue after Grand Jury. With any luck, the Supreme Court will address this inherently federal issue while on the lookout for an extensively litigated document-intensive case to use in rejecting the frighteningly narrow "but for" privilege standard.

- [Privilege Point, 10/18/23]

Work Product Protection Can Be Overcome in Some Circumstances, but the Privilege Is Absolute — Right?

October 18, 2023

Most lawyers know that fact work product protection can be overcome in certain circumstances, opinion work product is “absolutely or nearly absolutely” protected, and that the attorney-client privilege is absolute. But as with other supposedly universal concepts, there are exceptions.

Attorney-client privilege deserves absolute protection under federal common law and all but one state’s law. They recognize the societal benefit of such assured protection — allowing clients to feel totally safe in disclosing facts to their lawyers, knowing that the lawyers will keep them secret (our confidentiality duty) and that no third party will ever discover those conversations (the attorney-client privilege). But as in other key societal issues (such as motorists’ ability to pump their own gas), New Jersey stands alone. In Grand Maujer Development, LLC v. Hollister Construction Services, LLC, the court noted under New Jersey law the “privilege is ‘neither absolute or sacrosanct.’” No. A-0012-22, 2023 N.J. Super. Unpub. LEXIS 1208, at *8 (N.J. Super. Ct. App. Div. July 18, 2023) (citation omitted). The court then articulated the standard required “[t]o pierce the attorney-client privilege.” Id. at *9. That standard is frighteningly easy — there must be a “‘legitimate need . . . to reach the evidence sought to be shielded’”; “the evidence must be relevant and material”; and “there must be a finding, by a fair preponderance of the evidence, that the information sought cannot be obtained from a less intrusive source.” Id. (alteration in original) (citation omitted).

Much like motorists discovering to their surprise that they cannot pump their own gas on the New Jersey Turnpike, lawyers from other states should realize that in New Jersey the attorney-client privilege does not deserve absolute protection.

- Orlando v. Neal, Civ. A. No. 5:23-cv-00012, 2023 U.S. Dist. LEXIS 201688, at *17-18 (W.D. Va. Nov. 9, 2023) (in an opinion by Judge Hoppe, holding that a paralegal not working under a lawyer's directions could not engage in holding privileged communications; not addressing possible work product protection for those communications; "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.' Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). The purpose of this privilege 'is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' Id. The attorney-client privilege applies not only to confidential communications between clients and their attorneys, but also to such communications between clients and their attorneys' subordinates, including paralegals. N.L.R.B. v. Interbake Foods, LLC, 637 F.3d 492, 502 (4th Cir. 2011); Kain v. Bank of New York Mellon (In re Kain), No. 08-08404, 2011 Bankr. LEXIS 3679, 2011 WL 4625297, at *1 (Bankr. D.S.C. Sept. 30, 2011).")

- Orlando v. Neal, Civ. A. No. 5:23-cv-00012, 2023 U.S. Dist. LEXIS 201688, at *18-19 (W.D. Va. Nov. 9, 2023) (in an opinion by Judge Hoppe, holding that a paralegal not working under a lawyer's directions could not engage in privileged communications; not addressing possible work product protection for those communications; "Here, Briggman argues that the Court should quash the deposition subpoena because he is Pollack's paralegal and attorney-client privilege applies to the information Orlando seeks, making it undiscoverable. Movant's Br. 5-6; Movant's Reply 5-6. However, '[b]ecause the attorney-client privilege exists for the benefit of the client, the client holds the privilege.' United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247, 250 (4th Cir. 2005). While attorneys may assert the privilege on behalf of their clients, In re Search Warrant Issued June 13, 2019, 942 F.3d 159, 173 (4th Cir. 2019) (citing Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967); Model Rules of Pro. Conduct r. 1.6(a), (c) (Am. Bar Ass'n 1983)), the Fourth Circuit has never held that a paralegal may do the same. Moreover, the Fourth Circuit has reasoned that attorneys may—and sometimes must—assert the privilege on behalf of clients because attorneys' rules of professional conduct impose certain duties on them, including the duty of confidentiality. Id. ('lawyers are obliged to protect the attorney-client privilege to the maximum possible extent on behalf of their clients'). These rules do not apply to or bind paralegals, see generally Model Rules of Pro. Conduct (Am. Bar Ass'n 1983), and in Virginia, paralegals do not have similar duties, Becoming a Paralegal in Virginia - VA, ParalegalEDU, <https://www.paralegaledu.org/virginia/#:~:text=As%20in%20other%20state%2C%20Virginia's,responsibility%20for%20their%20professional%20conduct> ('Virginia does not regulate its paralegals.'). Indeed, paralegals may not practice law or hold themselves out to the public as qualified to do so. Rather, they act solely at the direction of an attorney who represents the client. Thus, it makes sense to impose a duty on the lawyer to assert a privilege for his client, but not extend that same duty to the paralegal who works for the lawyer."; "Here, Briggman asserts that he is Pollack's paralegal. Movant's Br. 5. In support of this assertion, Briggman offers only an invoice attached to an unauthorized filing showing that Pollack paid Briggman for 'Motion for Stay Research and Writing Draft' in this case. ECF No. 50-1, at 6. Based on this evidence alone, Briggman asserts that 'communications between [him] and [Rebecca Neal] have been in the capacity of paralegal for . . . Pollack'; thus, his 'discussions with [Bristol and Rebecca Neal] since this matter was filed [are] clearly covered by attorney-client privilege[.]' Movant's Br. 5-6. This invoice does not satisfy Briggman's burden of proof. The invoice does not show that Briggman was necessarily Pollack's subordinate in this matter. It shows, at most, that Briggman invoiced Pollack for ghostwriting a brief in this

matter. Briggman's evidence and representations do not show that Pollack generally retained Briggman's services to communicate with the Defendants as their lawyer's paralegal or perform any other services in this case. Furthermore, Briggman has not shown that any communications between him and Defendants otherwise meet the criteria for attorney-client communications. See Jones, 696 F.2d at 1072 (noting that for a communication to be privileged it must be made in private, to an attorney, for legal services, regarding fact(s), and for a proper purpose). Therefore, Briggman has not adequately shown that attorney-client privilege protects the information Orlando seeks. I do not find, however, that the Defendants or their attorney cannot assert the attorney-client privilege, or that they have waived the privilege. Rather, I find that Briggman, as a purported paralegal, cannot assert the privilege on Defendants' behalf and that even if he could, he has not carried his burden to show that the privilege applies." (alterations in original))

- [Privilege Point, 11/15/23]

Rare Opinion Extends Privilege Protection to Implicit Request for Legal Advice

November 15, 2023

Overworked judges assessing possible privilege protection for the increasing volume of often-cryptic emails withheld from production understandably look for a client's explicit request for legal advice from a lawyer. Occasionally a judge will extend privilege protection without such an explicit request.

In Rawlings v. Marcum, Civ. A. No. 1:22-CV-00001-GNS-HBB, 2023 U.S. Dist. LEXIS 149086 (W.D. Ky. Aug. 24, 2023), the court reviewed emails about an inmate's death. The court noted that a licensed practical nurse's reports went to the detention center's general counsel and others who "all held positions within the corporation relevant to the investigation and assessment of liability." Id. at *14. The court helpfully explained that "[t]he request for advice need not be express, and communications intended to keep the attorney advised of continued developments, with an implied request for legal advice thereon . . . may also be protected." Id. at *12. The court may have been influenced by factors it relied on in also extending work product protection — such as the detention center's inmate population "tends to be extremely litigious." Id. at *15.

Despite this helpful acknowledgment that the privilege can protect implicit requests for legal advice, wise lawyers train their corporate clients' employees to be explicit. For example, rather than sending a counterparty's proposed contract to the company's lawyer with an "FYI," employees should be educated to send it with an email such as this: "I have been asked to sign this — please let me know if it sufficiently protects the company's rights."

- Bonde v. Wexler & Kaufman, PLLC, --- F.R.D. ---, 2023 U.S. Dist. LEXIS 219112, at *16-18 (S.D.N.Y. Dec. 8, 2023) (in an opinion by Judge Moses, explaining that courts have a difficult time analyzing whether communications to and from in-house lawyers are predominately legal rather than business-related; “When the attorney-client privilege is invoked by a corporation or other business entity, it applies to communications with ‘corporate staff counsel’ as well as with outside counsel. Rossi v. Blue Cross & Blue Shield of Greater New York, 73 N.Y.2d 588, 592, 540 N.E.2d 703, 704-05, 542 N.Y.S.2d 508 (1989). However, ‘difficult questions may arise’ in such circumstances, because in-house counsel often have ‘mixed business-legal responsibility’ which can ‘blur the line between legal and non-legal communications.’ Id. at 592, 540 N.E.2d at 705. Hence, ‘the need to apply [the attorney-client privilege] cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure.’ Id. at 593, 540 N.E.2d at 705. In such cases, the court must carefully scrutinize the relevant communications to ensure that they are ‘primarily or predominantly of a legal character.’ Spectrum Sys., 78 N.Y.2d at 379, 581 N.E.2d at 1061 (‘The critical inquiry is whether, viewing the lawyer’s communication in its full content and context, it was made in order to render legal advice or services to the client.’ (citation omitted)); see also Charlestown Cap. Advisors, 2020 U.S. Dist. LEXIS 26565, 2020 WL 757840, at *1-4 (concluding, after an in camera review, that various communications to and from individuals allegedly acting as Charlestown’s in-house counsel could not be withheld from discovery because, inter alia, they were not ‘primarily or predominantly of a legal character’); Saran v. Chelsea GCA Realty P’ship, L.P., 174 A.D.3d 759, 760-61, 104 N.Y.S.3d 698, 700 (2d Dep’t 2019) (holding that emails with defendants’ in-house counsel were not privileged, because they ‘relate to the business of the defendants, rather than legal issues, and nothing stated by in-house counsel in the emails sets him apart as a legal advisor in the discussion’).” (alteration in original))

D. Joint Representations

- Glidden Co. v. Jandernoa, 173 F.R.D. 459, 472-73 (W.D. Mich. 1997) (Glidden (now called Grow) sold its subsidiary (Perrigo) to the subsidiary's management; Grow then sued its old subsidiary and the subsidiary's management; the court ordered the former subsidiary to produce all of the requested documents to the former parent; the court also rejected the argument that the former subsidiary's management could assert their own privilege; "The universal rule of law, expressed in a variety of contexts, is that the parent and subsidiary share a community of interest, such that the parent (as well as the subsidiary) is the 'client' for purposes of the attorney-client privilege. See Crabb v. KFC Nat'l Man. Co., 1992 U.S. App. LEXIS 38268, 1992 WL 1321 (6th Cir. 1992) ('The cases clearly hold that a corporate "client" includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary and affiliate corporations.') (quoting United States v. AT&T, 86 F.R.D. 603, 616 (D.D.C. 1979)). Consequently, disclosure of legal advice to a parent or affiliated corporation does not work a waiver of the confidentiality of the document, because of the complete community of interest between parent and subsidiary. Id. at *2. Numerous courts have recognized that, for purposes of the attorney-client privilege, the subsidiary and the parent are joint clients, each of whom has an interest in the privileged communications. See, e.g., Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 49 (S.D.N.Y. 1989); Medcom Holding Co. v. Baxter Travenol Lab., 689 F. Supp. 841, 842 (N.D. Ill. 1988). Simply put, a sole shareholder has a right to complete disclosure about the legal affairs of its wholly owned subsidiary.").

- In re Equaphor Inc., Ch. 7 Case No. 10-20490-BFK, 2012 Bankr. LEXIS 2129, at *9-10, *15 (Bankr. E.D. Va. May 11, 2012) (analyzing the ramifications of a law firm jointly representing a company and two of its executives in a derivative case; noting that the company later declared bankruptcy, and that the bankruptcy trustee moved to compel the turnover of documents the law firm created during the joint representation; inexplicably confusing the joint defense/common interest doctrine and the joint representation situation; ordering the law firm to produce the documents; "WTP and the Individual Defendants place great reliance on the fact that the corporation is named as a 'nominal defendant' in the shareholders' Complaint. In doing so, WTP and the Individual Defendants imply that the interests of the Individual Defendants are entitled to greater weight than those of the Debtor (and now, its creditors). However, while the Debtor may have been named as a nominal defendant, there is no such thing as a nominal client of a law firm. Further, there is no support in the case law for a 'nominal defendant exception' to the principle that all clients are entitled to an attorney's files. The corporation's status as a nominal defendant is of no consequence in considering the common interest privilege of the parties." (emphasis added); "But this is not a discovery dispute in the ordinary sense of the term. It is a motion to compel the turnover of the law firm's files under 11 U.S.C. § 542(e) to the party who now stands in the shoes of the former client, the Debtor. Under these circumstances, the courts have been uniform in holding that the work product doctrine does not prevent the turnover of the files.").

- [Privilege Point, 9/4/13]

Joint Representations Can Spawn Complicated Waiver Issues

September 4, 2013

If adversity develops among former joint clients, any of the joint clients generally can obtain access to all of the joint communications and use them in the dispute. On the other hand, none of the joint clients can disclose such communications to outsiders without the former joint clients' unanimous consent. These general principles can complicate situations when former joint clients become adversaries.

In Arkin Kaplan Rice LLP v. Kaplan, 967 N.Y.S.2d 63 (N.Y. App. Div. 2013), the court dealt with a lawsuit filed by several plaintiffs (including Lisa Solbakken) against a number of defendants – including some of her previous joint clients – and the lawyer who had represented all of them. The court first confirmed that the communications that had occurred during the previous joint representation "are not privileged within the context of Solbakken's adverse litigation" against her former joint clients and their joint lawyer. Id. at 64. But the court then held that "those communications are privileged as against Solbakken's co-plaintiffs," who had not been previously represented by the same lawyer in the earlier joint representation. Id. Thus, "Solbakken cannot unilaterally waive [the privilege] on defendants' behalf so as to benefit her coplaintiffs [sic]." Id.

The court did not explain how these two principles would apply. For instance, the court did not indicate whether Solbakken could disclose privileged communications from the earlier joint representation to the lawyer who was representing her and her fellow plaintiffs in the current litigation.

- SCR-Tech LLC v. Evonik Energy Services LLC, 2013 NCBC 42, ¶¶ 18, 15, 26 (N.C. Super. Ct. Aug. 13, 2013) (reviewing the very sparse case law on privilege protection for communications with partially owned subsidiaries; dealing with communications to and from plaintiff SCR-Tech (1) when the company was partially owned by Ebinger; (2) when the company was then sold to, and wholly owned by, Catalytica, and (3) when the company later entered into a "common interest agreement" with Ebinger, because both faced similar litigation; applying a sort of sliding scale, considering both the percentage of ownership and any "shared legal interest"; concluding that the privilege protected communications during all three situations, because (1) SCR-Tech's shared legal interest with Ebinger meant that the court did not have to determine whether Ebinger's 37.5% ownership (which gave it control) was "too limited" to assure privilege protection by itself; (2) Catalytica's 100% ownership of, and shared legal interest with, SCR-Tech assured privilege protection; and (3) the "common interest" doctrine could protect communications between SCR-Tech and its former controlling shareholder Ebinger even in the absence of any corporate affiliation at that time.).

- Estate of Jackson v. General Electric Capital Corp. (In re Fundamental Long Term Care, Inc.), 515 B.R. 874 (Bankr. M.D. Fla. 2014) (addressing a situation in which Kirkland & Ellis represented several corporate affiliates on various matters, including a corporate transaction and Ohio litigation; noting that a state receiver took over one of Kirkland's former clients, and other affiliates in the corporate family declared bankruptcy (and thus had a trustee now calling the shots); carefully scrutinizing Kirkland & Ellis's work for the related corporations when the corporations became litigation adversaries; concluding that Kirkland had not jointly represented two of the affiliated corporations in the transaction – which meant that the trustee (standing in the shoes of the bankrupt joint client) could not obtain the other corporation's responsive but privileged documents about the transaction; holding in contrast that Kirkland had jointly represented two of the affiliated corporations in the Ohio litigation, allowing the trustee to rely on what the court called the "co-client exception" to obtain privileged documents relating to that litigation).

- [Privilege Point, 5/18/16]

Court Issues a Surprising Common Interest Doctrine Decision

May 18, 2016

The common interest doctrine can sometimes allow separately represented clients to avoid the normal waiver implications of disclosing privileged communications to each other. However, courts take widely varying views of the doctrine's reach, and reject its applicability in about half of the reported cases — after the participants have already shared privileged communications, and therefore waived their respective privileges.

In IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal District, plaintiff claimed that defendant's in-house lawyer (who jointly represented the defendant and its "direct subsidiary") waived privilege protection by sending an email to several of defendant's employees — and one subsidiary employee. No. 16-cv-00146, 2016 U.S. Dist. LEXIS 42223, at *4 (W.D. La. Mar. 29, 2016). Defendant argued that such disclosure did not waive defendant's privilege, because the defendant shared a common interest with its own subsidiary. The court found the common interest doctrine inapplicable — because the subsidiary did not face any litigation threat. The court quoted plaintiff, which indicated that "it has no intention of ever making [the subsidiary] a party to this litigation." Id. at *5. Thus, the court held that defendant waived its privilege by disclosing the communication "to an employee of a non-party" — its own subsidiary. Id. Fortunately for defendant, the court also found the work product doctrine applicable, and held that disclosing the email to the subsidiary did not waive that separate protection.

This is a remarkable decision. The common interest doctrine should never have become an issue, because the in-house lawyer jointly represented the parent and its subsidiary. And the court's apparent insistence that every common interest participant must itself anticipate litigation could reward some obvious mischief — plaintiffs could threaten a number of possible defendants, but later disclaim any intent to sue one of them. All in all, cases like this highlight the risk of relying on the common interest doctrine.

- Naturalock Solutions, LLC v. Baxter Healthcare Corp., No. 14-cv-10113, 2016 U.S. Dist. LEXIS 66982, at *4, *6, *6 n.1, *7-8, *9, *9-10 (N.D. Ill. May 20, 2016) (analyzing a product inventor's efforts to obtain the files of K&L Gates, which were obtained by Baxter, but which also assisted the inventor in prosecuting a patent; ultimately concluding that K&L Gates jointly represented Baxter and the inventor, which meant that the inventor could obtain the law firm's files in connection with its later dispute with Baxter; "The parties have submitted numerous exhibits that they claim support their respective positions as to whether Naturalock was a client of K&L Gates." (emphasis added); "Given the extensive nature of Baxter's involvement in the patent prosecution, this Court does not find persuasive Naturalock's attempt to cast itself as K&L Gates's sole client. Thus, the question is whether Naturalock was a joint client along with Baxter." (emphasis added); "Baxter asserts that Delaware, not federal, law applies to this privilege dispute. Baxter does not, however, show that the privilege analysis would be different under Delaware and federal law. . . . In fact, Baxter itself cites federal law in support of its arguments."; "Here, based on the record before the Court, it is clear that K&L Gates provided legal advice and services to Naturalock and acted at the direction of Naturalock in addition to Baxter. This is not a situation where there is no evidence of the nature of communications between the licensor and licensee's counsel. . . . It does not matter what K&L Gates or Baxter perceived the relationship to be." (emphasis added); "Baxter focuses on the facts that Naturalock had separate counsel and that all of the parties involved referred to K&L Gates as Baxter's counsel. But those facts do not lead to the conclusion that K&L Gates's representation of Baxter was to the exclusion of Naturalock. Furthermore, Baxter does not contend that Naturalock was ever explicitly informed that K&L Gates represented only Baxter. To the contrary, the record makes clear that K&L Gates had a professional relationship with both Naturalock and Baxter, and that both Naturalock and Baxter manifested an intention to seek professional legal advice from K&L." (second emphasis added); "In sum, it appears that Naturalock and Baxter were joint clients of K&L Gates, and thus there is no basis for Baxter to assert the attorney-client privilege to deny Naturalock discovery regarding correspondence regarding the prosecution of patents for Naturalock's technology. This is true even if Naturalock is correct that Baxter, unbeknownst to Naturalock at the time, was actually acting in a manner that was adverse to Naturalock's interests and even if K&L Gates was complicit in Baxter's scheming." (emphasis added)).

- DePuy Orthopaedics, Inc. v. Orthopaedic Hospital, Cause No. 3:12-cv-299-JVB-MGG, 2016 U.S. Dist. LEXIS 166537, at *12-13, *13 (N.D. Ind. Dec. 1, 2016) (addressing a situation in which plaintiff DePuy and defendant Hospital had worked together on patent prosecutions – but later become litigation adversaries; noting that DePuy resisted the Hospital's attempt to discover communications to and from DePuy's in-house counsel, which was based on the Hospital's contention that DePuy's in-house lawyer jointly represented her employer/client DuPuy and the Hospital; further noting that DuPuy's in-house counsel claimed that DePuy and the Hospital had only entered into a common interest agreement – noting that O'Melveny & Myers had acted as patent "prosecution counsel" on behalf of both companies; reciting facts that could have proven either a common interest agreement or a joint representation: DePuy and the Hospital shared confidential information and cooperated on a common legal strategy; DePuy's in-house counsel communicated with and gave direction to O'Melveny, etc.; ultimately concluding that DePuy's in-house counsel had jointly represented DePuy and the Hospital – rather than represented just DePuy in a common interest arrangement with the separately represented Hospital; emphasizing that "the evidence does not show that DePuy's in-house counsel . . . provided any kind of disclaimer about representation when answering the Hospital's questions with legal information or consequence regarding the patent prosecution" (emphasis added); delivering the punchline impact -- because DePuy's in-house counsel had jointly represented DePuy and the Hospital, the former joint client Hospital could discover "DePuy's internal communications related to the [patent] prosecution").

- Newsome v. Lawson, 286 F. Supp. 3d 657, 662, 663, 664, 665 (D. Del. 2017) (applying the Teleglobe [In re Teleglobe Commc'ns Corp.], 493 F.3d 345 (3d Cir. 2007)] standard, and finding that a liquidating trustee could obtain privileged documents from a lawyer that jointly represented the bankrupt company and its parent; also finding that the Eureka [Eureka Inv. Corp., N.V. v. Chi. Title Ins. Co.], 743 F.2d 932 (D.C. Cir. 1984)] case did not change that result; also finding that the “breach of duty exception” allowed the lawyer for a joint client to obtain privileged communications between either of the joint client and their lawyer; “The magistrate judge relied on Teleglobe to hold that neither the adverse-litigation exception nor the breach of duty exception were proper grounds to compel Defendants' production of privileged documents from the joint representation of Mahalo USA and Mahalo Canada. . . . Other courts addressing the same factual scenario have uniformly reached a different conclusion: A joint client suing only the joint attorney may compel disclosure of privileged documents from the joint representation.” (emphasis added); “In a lawsuit between a joint client and the joint attorney, all of the courts found to have addressed the issue relied on the adverse-litigation exception to compel disclosure of the privileged communications from the joint representation.”; “[A] joint attorney may not withhold from one joint client privileged communications from the joint representation, even if the other (non-party) joint client refuses to consent to the disclosure.” (emphasis added); “Ultimately, the documents Plaintiff seeks would not be disclosed to a third party, but would remain among the joint clients and the joint attorney that participated in the joint representation. Accordingly, it is not enough that Mahalo Canada, a non-party joint client, objects to the disclosure of privileged documents from the joint representation. The court finds that the magistrate judge erred in holding that the adverse-litigation exception was not a proper legal basis for compelling disclosure of privileged documents from the joint representation.” (emphasis added); “The adverse-litigation exception does not entitle Plaintiff to unbounded discovery. A joint client is entitled to only those communications relevant to the matter of common interest that was the subject of the joint representation.” (emphasis added); “Although the parties do not dispute that there was a joint representation, they have not identified the matter of common interest that was the subject of the joint representation. It is possible that Mahalo Canada has some privileged documents which reference Mahalo USA, but which are not the subject of the joint representation. Because the parties did not identify the matter of common interest, it is difficult to determine where exactly that line would be drawn. Nevertheless, once the parties have agreed on the matter of common interest, Plaintiff is entitled to all communications that fall within the scope of the joint representation, including communications where one joint client is not present.” (emphases added))

- JAE Properties, Inc. v. AMTAX Holdings 2001-XX, LLC, No. 19cv2075-JAH-LL, 2020 U.S. Dist. LEXIS 80797, at *7, *8, *24 (S.D. Cal. May 7, 2020) (addressing a situation in which Investor Limited Partner Amtax sought communications between co-General Partner JAE and lawyer Hartman; noting that Hartman claimed that he only represented JAE – and not the limited partnership itself; explaining that "JAE has produced documents in this litigation where Hartman identified himself in writing in at least three instances as legal counsel for both the Partnership and the General Partners (including JAE)"; further explaining that Hartman admitted representing the limited partnership "in certain limited capacities," but argued that language mentioning a more general representation was merely "boilerplate language" resulting from "my unintentional failure to remove such language left over from prior correspondence" and "essentially an inadvertent oversight on my behalf" (internal citations omitted); rejecting Hartman's excuses – concluding that "it was reasonable for [Investor Limited Partner] Amtax to believe that Hartman would protect Amtax's individual interests as a member of the Partnership"; requiring General Partner JAE and Hartman to produce their otherwise privileged communications).

II. CORPORATE PRIVILEGE: BASIC STANDARDS

A. Identifying the Client

- Weiser v. Grace, 683 N.Y.S.2d 781, 786 (N.Y. Sup. Ct. 1998) (assessing plaintiff shareholders' efforts to obtain documents from the special litigation committee of defendant company; "The court recognizes that some of the documents sought may contain privileged matter which may be immune from discovery, notwithstanding their relevance to issues of good faith and the reasonableness of the investigation. Thus, an in camera review is the appropriate procedural vehicle to ensure that those privileges are not violated, while permitting plaintiffs to obtain the discovery necessary to challenge the SLC's [Special Litigation Committee] good faith. However, the court notes that the application of the attorney-client privilege is problematic. The SLC's counsel represents both the SLC and the corporation as a whole (e.g., the plaintiff shareholders). Under such circumstances, the attorney-client privilege would not bar discovery of all communications between counsel and the SLC."; noting that the Garner doctrine might entitle plaintiffs to review the documents, and ordering an in camera review to assist in that determination).

- In re BCE West, L.P., No. M-8-85, 2000 WL 1239117, at *2 (S.D.N.Y. Aug. 31, 2000) (holding that Shearman & Sterling -- which represented Boston Chicken's Special Committee in considering possible acquisition transactions -- could assert privilege protection for its communications with the Special Committee, and refuse to disclose those communications to Boston Chicken's bankruptcy trustee; holding that the Special Committee was a separate entity which could hire its own lawyer, and rejecting the trustee's argument that the Special Committee waived its privilege protection by disclosures to the full board; "Here, the board resolutions expressly provided that the Special Committee could retain counsel independent from the counsel representing the Board of Directors and the management. Shearman & Sterling at no time provided counsel to the general Board of Directors or the management. It is counterintuitive to think that while the Board permitted the Special Committee to retain its own counsel, the Special Committee would not have the benefit of the attorney-client privilege inherent in that relationship or that the Board of Directors or management, instead of the Special Committee, would have control of such privilege. The attorney-client privilege, therefore, applied to and protected the confidential communications between the Special Committee and Shearman & Sterling."; "The Plan Trustee's counsel argues that any such privilege was waived due to communications that Shearman & Sterling had with the Board of Directors and the Corporation's management. As already stated, Shearman & Sterling did not provide advice to the Board of Directors or the management, and solely represented the Special Committee and its interests. However, as is the case in most transactions, the parties much communicate with each other. To the extent that Shearman & Sterling had communications with the Board of Directors and the management, as evidenced by the exhibits attached to the parties papers, the Court finds that such communications were part of the transaction process and did not destroy or waive the Special Committee's attorney-client privilege. The privilege remained intact. Therefore, the only remaining question is whether the Plan Trustee had the ability to waive the privilege on behalf of the Special Committee." (emphasis added); also holding that the trustee could not waive the Special Committee's privilege; "Because the Special Committee is a separate and distinct group from the Board of Directors, with separate legal representation, the privilege afforded it is not the privilege of the corporation, but rather, is the privilege of the Special Committee. Accordingly, the Plan Trustee cannot waive it." (emphasis added)).

- Home Care Indus., Inc. v. Murray, 154 F. Supp. 2d 861, 869-70 (D.N.J. 2001) (disqualifying Skadden, Arps from representing a company in an action against its former CEO; agreeing with the CEO that, because the lawyers created an environment in which he comfortably confided in them, his "belief that the [law] firm represented him personally was reasonable").
- Under Seal v. United States (In re Grand Jury Subpoena Under Seal), 415 F.3d 333, 336-37 (4th Cir. 2005) (addressing a corporate employee's claim that he subjectively believed that the company's in-house and outside lawyers jointly represented him and the company; ultimately rejecting his claim; noting but not working into the analysis the fact that company's in-house and outside lawyers represented the executive during an interview before the SEC; explaining that both lawyers "stated that they represented [the executive] 'for purposes of [the] deposition.'")
- United States v. Stein, 463 F. Supp. 2d 459, 466 (S.D.N.Y. 2006) (in an opinion by District Judge Lewis Kaplan, assessing an effort by a KPMG partner to prevent KPMG from waiving the attorney-client privilege otherwise covering communications between KPMG's lawyers and a partner; finding that the partner could not prevent KPMG from waiving the privilege because the partner was not a joint client of KPMG's lawyers; rejecting the partner's argument that KPMG's lawyer had previously represented a partner on two occasions; "To begin with, the occasions on which Warley and KPMG were jointly represented occurred in circumstances in which Warley was a witness, not a party, to the litigation. The Court is not persuaded that representation of an employee by employer-retained counsel where the employee's role is that of a witness in a lawsuit against the employer could give rise to a reasonable expectation on the part of the employee that all communications she might have with employer-retained counsel, even a long time thereafter, were made in the context of an individual attorney-client relationship.")

- Ryan v. Gifford, Civ. A. No. 2213-CC, 2008 Del. Ch. LEXIS 2, at *3, *10, *10-11, *11, *12, *12 n.9, *16, *17-18 (Del. Ch. Jan. 2, 2008) (unpublished opinion) (addressing a situation in which the law firm of Orrick Herrington and forensic accounting firm LECG conducted an investigation into possible options backdating by executives and directors of Maxim; noting that Maxim's board established a Special Committee composed of a single director, which was not an "independent Special Litigation Committee" under Delaware law; explaining that the single-member Special Committee retained Orrick, who did not provide a written report but instead presented an oral report to a Maxim board meeting attended by three directors represented by the law firm of Quinn Emanuel in the derivative action that prompted Orrick Herrington's investigation; noting that Maxim's board found that some directors received backdated options, but did not take any action to recover any damages; further explaining that Maxim "provided details of this work to third-parties, including NASDAQ and publicly to investors (through the SEC Form 8-K). Moreover, the Special Committee itself provided a number of documents to the SEC, the United States Attorney's Office, and Maxim's current and former auditors."; also noting that "the director defendants in this case have specifically made use of the Special Committee's findings and conclusions for their personal benefit and have argued to this Court that the Special Committee's exoneration of them should be accorded deference. The director defendants have made these arguments in a brief, opposing plaintiffs' motion to amend the complaint, in which coincidentally Maxim has expressly joined. Further, the director defendants have extensively relied upon the Special Committee's findings both in opposing plaintiffs' motion for summary judgment and in support of their own motion for summary judgment. At the time of the November 30 decision, in their unamended summary judgment brief, the director defendants explicitly rely upon the unwritten 'findings' of the Special Committee that purport to absolve the director defendants of liability." (footnote omitted); "[T]he director defendants have submitted an amended brief in support of their motion for summary judgment that purports to disavow reliance on the Special Committee's findings, despite their explicit reliance thereon in the first brief in support of their motion."; noting that in an earlier opinion "the Court ruled that Maxim, its Special Committee and Orrick must produce all material[s] related to the Special Committee's investigation that were withheld on grounds of attorney-client privilege."; "The Court also directed Orrick to turn over its work-product, including its interview notes, for in camera review. Orrick does not seek to appeal any aspect of this Court's ruling, including the ruling that plaintiffs have made a showing of good cause to obtain its non-opinion work product."; "[I]t is worthwhile to repeat that the relevant factual circumstances here include the receipt of purportedly privileged information by the director defendants in their

individual capacities from the Special Committee. The decision would not apply to a situation (unlike that presented in this case) in which board members are found to be acting in their fiduciary capacity, where their personal lawyers are not present, and where the board members do not use the privileged information to exculpate themselves."; noting that Maxim did not appeal the court's earlier decision that the Garner doctrine overcame any privilege claim; after explaining that the court's Garner determination "provides an independent basis" for its conclusion requiring Maxim to disclose the documents; also noting the directors' essentially inaccurate description about whether they were relying on Orrick Herrington's report; "At the time of the November 30 decision, however, the director defendants explicitly asserted that the findings of the Special Committee were entitled to deference from this Court. Moreover, even if this Court ignores the suspicious timing of the director defendants' purported disavowal of reliance on the investigation, Maxim seeks to further avail itself of the Special Committee's report, which will redound to the benefit of the director defendants."; declining to certify an appeal).

- SEC v. Roberts, 254 F.R.D. 371, 378 n.4, 378 (N.D. Cal. 2008) (assessing privilege issues in connection with an internal corporate investigation of possible options backdating at McAfee, conducted by the Howrey law firm; concluding that the McAfee Board and the Special Committee did not share a common interest; "The court notes that not only is the Board not Howrey's client such that the attorney-client privilege does not attach, the Board also does not have a common interest with the Special Committee since it was the Special Committee's mandate to ascertain whether members of the Board . . . may have engaged in wrongdoing. In this respect, this court disagrees with the conclusion reached in In Re BCE West, L.P., No. M-8-85, 2000 U.S. Dist. LEXIS 12590, 2000 WL 1239117 (S.D.N.Y. Aug. 31, 2000)."; finding that Howrey's disclosure to the Board triggered a waiver; "Certain instances of waiver are straightforward. When Howrey 'detailed for the Board the various stock option issues, improprieties and erroneous option grant dates that were discovered in the investigation,' . . . it waived the work product privilege with respect to its conclusions regarding which option grant dates were improper or erroneous."; ultimately finding a broad scope of waiver, although applied on an interviewee-by-interviewee basis -- so that Howrey's disclosure of its opinions about the interview or the interviewee triggered a subject matter waiver covering materials that the law firm created during that interview; allowing discovery by McAfee's former executive, who was defending against an SEC action).

- Kennedy v. Gulf Coast Cancer & Diagnostic Center at Se., Inc., 326 S.W.3d 352, 358 (Tex. App. 2010) (in a TRO proceeding, ordering a former in-house lawyer to return privileged documents that he had taken with him when he left the client's employment; holding that the company rather than any individual executives or directors own the privilege; "Kennedy's subjective intent notwithstanding, no evidence objectively manifests that EBGWH [Epstein Becker Law Firm, who represented the in-house lawyer even before he left the client's employment] secured the parties' consent or undertook any of the other steps that Texas law requires for dual representation of Gulf Coast and either the officers and directors or Kennedy individually. . . . We therefore hold that the trial court did not abuse its discretion in determining that Gulf Coast alone holds the attorney-client privilege applicable to the memo.").

- [Privilege Point, 2/2/11]

Can the Privilege Ever Protect Communications with a Hostile Company Employee?

February 2, 2011

The attorney-client privilege can protect communications between a company's lawyer and company employees providing facts that the lawyer needs to give legal advice to the company. But what happens if the lawyer communicates with hostile employees, who later become members of a class suing the company?

In Winans v. Starbucks Corp., No. 08 Civ. 3734 (LTS) (JCF), 2010 U.S. Dist. LEXIS 134136 (S.D.N.Y. Dec. 15, 2010), Magistrate Judge Francis addressed communications between Starbucks' lawyers and Assistant Store Managers who claim that they should have shared in each store's tip pool. In opposing certification of a store manager class, Starbucks submitted declarations from several managers – and then instructed the managers not to answer any questions during their depositions about their conversations with Starbucks' lawyers. Judge Francis upheld the instruction. Noting that Starbucks' lawyers could communicate ex parte with the managers (before class certification), Judge Francis emphasized that the privilege belonged to Starbucks and not the managers. Therefore, the store managers "are forever precluded from revealing the content of their communications with counsel absent a waiver by Starbucks." Id. at *9.

A corporation's ownership of the privilege normally means that no employee can waive that privilege, even if the employee later sues the company.

- Gary Friedrich Enterprises, LLC v. Marvel Enterprises, Inc., No. 08 Civ. 1533 (BSJ) (JCF), 2011 U.S. Dist. LEXIS 54154, at *11-12 (S.D.N.Y. May 20, 2011) ("In situations such as this where a former employee is represented by counsel for a defendant corporation for the purpose 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.").

- [Privilege Point, 7/4/12]

Court Applies Standard Joint Representation Principle

July 4, 2012

In most situations, any jointly represented client can access the files of the lawyer who represents the joint clients. This basic principle can have a dramatic effect if the jointly represented clients become adversaries.

In In re Equaphor Inc., Ch. 7 Case No. 10-20490-BFK, 2012 Bankr. LEXIS 2129 (Bankr. E.D. Va. May 11, 2012), the court dealt with files that a law firm created during its joint representation of Equaphor and three individual co-defendants in a derivative action. When Equaphor later declared bankruptcy, the bankruptcy trustee moved to compel the law firm to turn over its litigation files. The individual clients resisted the turnover – emphasizing that Equaphor had been only a "nominal defendant" in the derivative action. Id. at *9. The court rejected this argument, noting that "while [Equaphor] may have been named as a nominal defendant, there is no such thing as a nominal client of a law firm," and that "there is no support in the case law for a 'nominal defendant exception' to the principle that all clients are entitled to an attorney's files." Id. at *9-10, *10.

As in many other contexts, a corporate client's bankruptcy can put the client in the hands of someone whose interests are dramatically different from those of the pre-bankruptcy corporation.

- Am. Airlines, Inc. v. Travelport Ltd., Civ. A. No. 4:11-CV-244-Y, 2012 U.S. Dist. LEXIS 198417, at *16-17, *18-19 (N.D. Tex. July 16, 2012) (in an opinion by Judge Cureton, holding that the privilege can protect communications among corporations under “common ownership or control,” if some of the subsidiaries are not wholly owned; “the Court finds that ‘corporations related through common ownership or control are treated as one entity for attorney-client privilege purposes.’” Pasadena Refining Sys. Inc. v. United States, No. 3:10-CV-0785-K(BF), 2011 U.S. Dist. LEXIS 54743, 2011 WL 1938133, at *2 (N.D. Tex. Apr. 26, 2011). This exception to waiver of the attorney-client privilege is sometimes referred to as the ‘related companies exception’ and applies ‘wherein the corporation which retained the attorney, its parent, and its subsidiaries are considered the same person for purposes of the privilege.’ Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth., No. 86-2911, 1989 U.S. Dist. LEXIS 14601, 1989 WL 149227, at *2 (E.D. La. Dec. 5, 1989); see United States v. Am. Tel. and Tel. Co., 86 F.R.D. 603, 616 (D.D.C. 1979) (stating that the attorney-client protection provided for corporate clients includes the corporation who retained an attorney, its parent, and its wholly-owned and majority-owned subsidiaries collectively). ‘The purpose of the attorney-client privilege is to “encourage frank and full communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”’ Mobil Corp., 149 F.R.D. at 537 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)).’ (footnote omitted); “Furthermore, contrary to American’s arguments, the Court finds that the fact that the Travelport Defendants are not wholly-owned subsidiaries of Blackstone does not change the fact that the communications it shared with Blackstone are privileged. Although there are some cases that appear to lend support to American’s position, the Courts finds that the more reasoned view, at least based on the facts of this case, is that disclosure of communications between a parent and its majority-owned subsidiaries does not result in waiver of the attorney-client privilege. See, e.g., Weil Ceramics & Glass, Inc., 110 F.R.D. 500 (E.D.N.Y. 1986) (stating ‘the attorney-client protection provided for corporate clients, includes the corporation who retained an attorney, its parent, and its wholly-owned and majority-owned subsidiaries considered collectively’); Am. Tel. and Tel. Co., 86 F.R.D. at 616-18 (finding that the wholly owned and majority-owned subsidiaries of AT&T but not the minority-owned companies and formerly affiliated companies were considered the ‘client’ for attorney-client purposes). Consequently, American’s motion to compel as to the remaining exemplars in this category is DENIED. Thus, as to all other similar documents withheld by the Travelport Defendants, the attorney-client privilege will be upheld as long as all elements of the attorney-client privilege are present, including that the communication involved an attorney and contained a confidential communication.” (footnote omitted))

- Weingarden v. Milford Anesthesia Assocs., P.C., No. NNHCV116016353S, 2013 Conn. Super. LEXIS 1239, at *20, *20-21, *22-23 (Conn. Super. Ct. May 30, 2013) (unreported) ("The other basis for the plaintiff's claim under rule 1.9 is that by representing Milford Associates, Mathieson represented the shareholders and thus the plaintiff as a shareholder is a former client of Mathieson. Such an argument is easily rejected in light of clear authority to the contrary. . . . Rule 1.13 makes clear that a shareholder of an organization is not the client of that organization's lawyer absent some set of facts independently creating an attorney-client relationship." (emphasis added); "This principle is further supported in case law. In the analogous context of partnerships, '[a] partnership usually is a legal entity and is the lawyer's client. Thus a lawyer who represents a partnership does not thereby become counsel or owe a duty to the partners.'" (alteration in original) (citation omitted); "The plain language of rule 1.13, the official comment to that rule, appellate case law explaining entity theory and the overwhelming stance taken in other Superior Court decisions makes it abundantly clear that the plaintiff cannot establish an attorney-client relationship with Mathieson simply by relying on his status as a shareholder of an organization that Mathieson represented. The plaintiff would have to demonstrate some other facts creating such a relationship, none of which have been shown here." (emphasis added)).

- Ky. Bar Ass'n v. Hines, 399 S.W.3d 750, 769 (Ky. 2013) (suspending for two years a lawyer who ignored a majority of a board and filed an action on behalf of the corporation; "[T]he simple fact is that Hines [lawyer] was hired by the corporation, which acts through its board and officers. . . . If some of the board members and shareholders were dissatisfied, they had remedies available, namely, a shareholder derivative suit. But that is not what Hines did. Instead, he filed suit directly on behalf of the corporation. He even admitted that his suit should have been a shareholder derivative suit as the litigation progressed. The fact that some of the board and shareholders were dissatisfied did not justify Hines's decision to side with them and presume they were the lawful controllers of the company, and then to file suit directly on behalf of the corporation."; "In fact, the decision whether to pursue litigation directly on behalf of the corporation is lodged solely with the board of directors." (emphasis added)).

- Sprengel v. Zbylut, No. B256761, 2015 Cal. App. LEXIS 971, at *1-2 (Cal. Ct. App. Oct. 29, 2015) (adding a footnote to a previous opinion; "Defendants contend that, in this particular case, we may reject Sprengel's claim of an implied attorney-client relationship under the first prong of the section 425.16 test because (1) the undisputed evidence shows they 'were hired only to represent the LLC [Purposeful Press],' not Sprengel and (2) under 'settled,' 'black letter law,' an attorney for an LLC owes no professional duties to the LLC's individual members. Even if we were to assume that defendants' evidence established they were properly retained to represent the LLC only (a fact Sprengel disputes), defendants have cited no authority holding that an attorney for an LLC has no obligations to the LLC's individual members. Instead, defendants rely solely on cases holding that an attorney for a corporation generally does not represent the corporation's officers or shareholders in their individual capacities. . . . Our courts have applied a different rule in the context of partnerships, explaining that a five-part factual inquiry is used to 'determine whether in a particular case the partnership attorney has established an attorney-client relationship with the individual partners.'" (emphasis added) (citations omitted)).

- [Privilege Point, 12/9/15]

Who Controls an Audit Committee's Privilege and Work Product Protection if the Company Declares Bankruptcy?

December 9, 2015

Many courts recognize that a corporation's constituent (such as an audit committee or a group of independent directors) can own the privilege and work product protection covering the constituent's internal corporate investigation. Under this approach, the company's bankruptcy trustee cannot access or waive that privilege or work product protection. See, e.g., Ex parte Smith, 942 So. 2d 356 (Ala. 2006) (denying a bankruptcy trustee's attempt to access pre-bankruptcy communications between the company's independent directors and its Skadden Arps lawyers).

In Krys v. Paul, Weiss, Rifkind, Wharton, & Garrison LLP (In re China Medical Technologies, Inc.), 539 B.R. 643 (S.D.N.Y. 2015), Judge Abrams dealt with privilege and work product protection covering an internal corporate investigation conducted by China Medical's Audit Committee lawyers at Paul Weiss. The court acknowledged "that the Audit Committee was 'independent' in some sense" -- "[i]t could retain counsel, and it legitimately expected that its communications with counsel would be protected against intrusion by management." Id. at 655. But the court held that the company's bankruptcy changed the analysis -- because depriving the bankruptcy liquidator of the privilege protection's ownership would "thwart the statutory obligation of a trustee in bankruptcy to maximize the value of the estate by conducting investigations into a corporation's pre-bankruptcy affairs." Id. at 654. The court thus held that the company's liquidator "now owns and can thus waive the Audit Committee's attorney-client privilege, regardless of the Committee's pre-bankruptcy independence." Id. at 658. In contrast, the court held that the liquidator could not unilaterally waive any work product protection -- because Paul Weiss either solely or jointly owned that separate protection. Id.

Constituents of a company's board (such as an audit committee or group of independent directors) should bear in mind the possible post-bankruptcy ownership of their protected communications -- remembering that the answer might be different for privileged communications and work product.

- [Privilege Point, 5/18/16]

Court Issues a Surprising Common Interest Doctrine Decision

May 18, 2016

The common interest doctrine can sometimes allow separately represented clients to avoid the normal waiver implications of disclosing privileged communications to each other. However, courts take widely varying views of the doctrine's reach, and reject its applicability in about half of the reported cases — after the participants have already shared privileged communications, and therefore waived their respective privileges.

In IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal District, plaintiff claimed that defendant's in-house lawyer (who jointly represented the defendant and its "direct subsidiary") waived privilege protection by sending an email to several of defendant's employees — and one subsidiary employee. No. 16-cv-00146, 2016 U.S. Dist. LEXIS 42223, at *4 (W.D. La. Mar. 29, 2016). Defendant argued that such disclosure did not waive defendant's privilege, because the defendant shared a common interest with its own subsidiary. The court found the common interest doctrine inapplicable — because the subsidiary did not face any litigation threat. The court quoted plaintiff, which indicated that "it has no intention of ever making [the subsidiary] a party to this litigation." Id. at *5. Thus, the court held that defendant waived its privilege by disclosing the communication "to an employee of a non-party" — its own subsidiary. Id. Fortunately for defendant, the court also found the work product doctrine applicable, and held that disclosing the email to the subsidiary did not waive that separate protection.

This is a remarkable decision. The common interest doctrine should never have become an issue, because the in-house lawyer jointly represented the parent and its subsidiary. And the court's apparent insistence that every common interest participant must itself anticipate litigation could reward some obvious mischief — plaintiffs could threaten a number of possible defendants, but later disclaim any intent to sue one of them. All in all, cases like this highlight the risk of relying on the common interest doctrine.

- Naturalock Solutions, LLC v. Baxter Healthcare Corp., No. 14-cv-10113, 2016 U.S. Dist. LEXIS 66982, at *4, *6, *6 n.1, *7-8, *9, *9-10 (N.D. Ill. May 20, 2016) (analyzing a product inventor's efforts to obtain the files of K&L Gates, which were obtained by Baxter, but which also assisted the inventor in prosecuting a patent; ultimately concluding that K&L Gates jointly represented Baxter and the inventor, which meant that the inventor could obtain the law firm's files in connection with its later dispute with Baxter; "The parties have submitted numerous exhibits that they claim support their respective positions as to whether Naturalock was a client of K&L Gates." (emphasis added); "Given the extensive nature of Baxter's involvement in the patent prosecution, this Court does not find persuasive Naturalock's attempt to cast itself as K&L Gates's sole client. Thus, the question is whether Naturalock was a joint client along with Baxter." (emphasis added); "Baxter asserts that Delaware, not federal, law applies to this privilege dispute. Baxter does not, however, show that the privilege analysis would be different under Delaware and federal law. . . . In fact, Baxter itself cites federal law in support of its arguments."; "Here, based on the record before the Court, it is clear that K&L Gates provided legal advice and services to Naturalock and acted at the direction of Naturalock in addition to Baxter. This is not a situation where there is no evidence of the nature of communications between the licensor and licensee's counsel. . . . It does not matter what K&L Gates or Baxter perceived the relationship to be." (emphasis added); "Baxter focuses on the facts that Naturalock had separate counsel and that all of the parties involved referred to K&L Gates as Baxter's counsel. But those facts do not lead to the conclusion that K&L Gates's representation of Baxter was to the exclusion of Naturalock. Furthermore, Baxter does not contend that Naturalock was ever explicitly informed that K&L Gates represented only Baxter. To the contrary, the record makes clear that K&L Gates had a professional relationship with both Naturalock and Baxter, and that both Naturalock and Baxter manifested an intention to seek professional legal advice from K&L." (second emphasis added); "In sum, it appears that Naturalock and Baxter were joint clients of K&L Gates, and thus there is no basis for Baxter to assert the attorney-client privilege to deny Naturalock discovery regarding correspondence regarding the prosecution of patents for Naturalock's technology. This is true even if Naturalock is correct that Baxter, unbeknownst to Naturalock at the time, was actually acting in a manner that was adverse to Naturalock's interests and even if K&L Gates was complicit in Baxter's scheming." (emphasis added)).

- DePuy Orthopaedics, Inc. v. Orthopaedic Hospital, Cause No. 3:12-cv-299-JVB-MGG, 2016 U.S. Dist. LEXIS 166537, at *12-13, *13 (N.D. Ind. Dec. 1, 2016) (addressing a situation in which plaintiff DePuy and defendant Hospital had worked together on patent prosecutions – but later become litigation adversaries; noting that DePuy resisted the Hospital's attempt to discover communications to and from DePuy's in-house counsel, which was based on the Hospital's contention that DePuy's in-house lawyer jointly represented her employer/client DuPuy and the Hospital; further noting that DuPuy's in-house counsel claimed that DePuy and the Hospital had only entered into a common interest agreement – noting that O'Melveny & Myers had acted as patent "prosecution counsel" on behalf of both companies; reciting facts that could have proven either a common interest agreement or a joint representation: DePuy and the Hospital shared confidential information and cooperated on a common legal strategy; DePuy's in-house counsel communicated with and gave direction to O'Melveny, etc.; ultimately concluding that DePuy's in-house counsel had jointly represented DePuy and the Hospital – rather than represented just DePuy in a common interest arrangement with the separately represented Hospital; emphasizing that "the evidence does not show that DePuy's in-house counsel . . . provided any kind of disclaimer about representation when answering the Hospital's questions with legal information or consequence regarding the patent prosecution" (emphasis added); delivering the punchline impact -- because DePuy's in-house counsel had jointly represented DePuy and the Hospital, the former joint client Hospital could discover "DePuy's internal communications related to the [patent] prosecution").

- Illinois LEO 17-05 (5/2017) (analyzing the loyalty (conflicts) and confidentiality implications of parent company's in-house lawyer's dealings with corporate subsidiaries of the lawyer's client/employer; recommending: (1) that lawyer treat subsidiaries as separate clients for loyalty/conflicts purposes, including even obtaining consents or prospective consents in the event of any "competing interests"; and (2) also treat subsidiaries as separate clients for confidentiality purposes, including even analyzing how confidential information will be shared among the corporate affiliates; "For the in-house lawyer, there is no one size fits all test for identifying the client. It may change depending on the circumstances of the representation. Is it the single corporate parent (whose interests may be considered to preempt the interests of any subsidiary, or in any case, be able to provide informed consent to any conflict waiver or disclosure of confidential information)? Or is it the legally distinct individual subsidiaries? Recognizing subsidiaries as separate clients seems to be acknowledged in the IRPC noted above, particularly IRPC 1.13. For practical purposes, treating subsidiaries as distinct clients would seem the better practice if for no other purpose than to focus the in-house lawyer's attention on identifying and addressing problematic legal and ethical issues."; "With respect to conflicts of interests, when an in-house lawyers is called upon to provide legal services to a related corporate entity that is not the lawyer's direct employer, the lawyer must be careful to recognize the potential for competing interests. . . . As with any representation, the in-house lawyer must consider and, if applicable, apply IRPC 1.7. Although impacted by client identification, the interests of intra-family corporate entities may or may not be considered aligned. If the interests are determined to conflict, an in-house lawyer can consider a number of actions to address and resolve the conflict. First and foremost is to obtain, if possible, the subsidiary's and parent's consent to the representation as permitted by IRPC 1.7(b). Counsel may also consider obtaining advance conflict waivers, limiting the scope of the representation to eliminate the potential conflict, or retaining outside counsel."; "Perhaps even thornier issues than conflicts arise with respect to confidentiality under IRPC Rule 1.6. Virginia State Bar Opinion 1838 provides that an in-house lawyer must maintain a subsidiary's confidences unless the subsidiary consents to disclosure. In most corporate contexts, maintaining this confidentiality from the corporate parent, and perhaps other subsidiaries, is likely unworkable and doesn't reflect the work of an in-house legal department. . . . Attempting to maintain confidentiality between related corporate entities, but particularly between a subsidiary and a parent, tends to disregard corporate ownership and hierarchy. . . . In these situations, as with conflicts of interest, a prudent course for the in-house lawyer may be to memorialize in writing how confidential information will be treated, obtain advance consent for disclosure, or retain outside counsel.")

- Clemens v. NCAA (In re Estate of Paterno), 168 A.3d 187, 196-97, 197 (Pa. Super. Ct. 2017) ("In summary, the Engagement Letter consistently draws a distinction between Penn State's board of trustees and the Task Force. The letter consistently identifies the Task Force as the party for whom FSS was performing services. Appellants do not cite any legal authority precluding an entity such as Penn State from hiring and paying a law firm to represent a task force of the entity's creation. Nor do Appellants cite any authority precluding the parties from limiting the attorney-client relationship to the law firm and the task force, if desired. Furthermore, Appellants cite no authority to support their contention that the Task Force, in order to become a client of FSS, needed to be a distinct legal entity. The signature on the Engagement Letter Steve A. Garban, chair of Penn State's board of trustees was necessary, given that the trustees were paying FSS's bills. We therefore do not view Garban's signature as 'fatally inconsistent' with a conclusion that the Task Force was the client, as Appellants claim." (footnote omitted) (emphasis added); "In summary, Appellants have failed to offer any authority upon which we can conclude that the trial court erred, as a matter of law, in finding that FSS confined its representation to the Task Force. We will not disturb the trial court's finding, supported by the record, that Penn State cannot assert attorney-client privilege because it was not the client of FSS." (footnote omitted) (emphasis added)).

- [Privilege Point, 5/16/18]

Privilege Ownership in High-Stakes Corporate Contexts: Part I

May 16, 2018

Under the traditional so-called "bright-line" test: (1) selling or otherwise transferring a corporation's stock transferred its privilege ownership; while (2) selling or otherwise transferring its assets did not. But most if not all courts now apply a more common sense approach, frequently called the "practical consequences" test.

In United States v. Adams, Case No. 0:17-CR-00064-DWF-KMM, 2018 U.S. Dist. LEXIS 41165 (D. Minn. Mar. 12, 2018), the government seized emails between defendant (and lawyer) Adams and his former clients ("Apollo"). Many of the emails deserved privilege protection, but the government argued that the privilege belonged to Scio, a company which earlier had purchased (in the words of the asset purchase agreement) "certain of [Apollo's] property, assets, rights and privileges." Id. at *3. The government noted that Scio was willing to waive its privilege. Adams argued that although defunct, Apollo "retained the authority to waive," and could therefore assert, the privilege. Id. at *5. The court applied the "practical consequence[s]" test, and thus focused on the "practical realities of the Apollo-Scio transactions." Id. at *11. The court noted that: (1) Apollo had sold Scio "all of its intellectual property" (id.); (2) the transactional parties' contemporaneous communications "support the conclusion that [the transactions] effectively constituted the sale of a business that transferred control of the privilege as well" (id. at *14); and (3) there was no evidence that after the transactions "Apollo continued operating in any meaningful way." Id. at *10. The court ultimately concluded that Scio owned and could therefore waive the privilege – even though Apollo continued to exist as a corporate entity.

Courts' adoption of the "practical consequences" test should prompt transactional lawyers to carefully negotiate privileged communications' ownership in any asset transaction. Next week's Privilege Point will address privilege ownership when a corporate board splits into rival camps.

- [Privilege Point, 5/23/18]

Privilege Ownership in High-Stakes Corporate Contexts: Part II

May 23, 2018

Last week's Privilege Point focused on privilege ownership when corporations sell assets rather than stock. Privilege ownership issues can also arise when competing board factions claim to be acting on a corporation's behalf.

In Eagle Forum v. Phyllis Schlafly's American Eagles, two Eagle Forum board members retained lawyer Rohlf on behalf of that corporation "to provide ... 'representation and counsel with respect to governance matters, Board disputes and litigation as necessary.'" Case No. 3:16-cv-946-DRH-RJD, 2018 U.S. Dist. LEXIS 53284 at *3 (S.D. Ill. Mar. 29, 2018) (internal citation omitted). Rohlf's firm even entered an appearance on Eagle Forum's behalf in an Illinois state court action filed by other Board members (which named Eagle Forum as a nominal defendant). Those other Board members soon exercised their power "as the majority of the Eagle Forum Board of Directors" to suspend Eagle Forum's President and Treasurer – and sought to depose Rohlf. Id. at *4. Not surprisingly, Plaintiffs (having a Board majority) argued that "Eagle Forum, not Joel Rohlf, controls its privilege and can waive it." Id. at *5. Rohlf resisted the deposition, contending that Eagle Forum's privilege "did not, and could not, pass to the individual Plaintiffs from the control group. . . who retained [Rohlf] for the purpose of preventing the individual Plaintiffs from taking control of the organization." Id. at *7. The court rejected Rohlf's argument that the "clear fissure in Eagle Forum's Board and management" was "an occurrence akin to an acquisition." Id. at *9-10. The court ultimately concluded that "at all relevant times hereto [Plaintiffs] constituted the majority of Eagle Forum's Board of Directors" – and therefore "have had control over Eagle Forum, and ultimately its privilege." Id. at *9.

Lawyers involved in corporate transactions and in corporate board disputes must keep track of who owns the corporation's attorney-client privilege and who can waive it.

- United States v. Drake, Nos. 1:16CR205-2 to -4, 2018 U.S. Dist. LEXIS 63798, at *25-26 (M.D.N.C. Apr. 16, 2018) (finding that Smith Moore represented a bank and not an individual executive, so the bank could disclose the documents to the government; “[T]his court finds that in September 2012, no attorney-client relationship was established between Earnest, individually, and Smith Moore. This court first finds that Earnest did not seek to become a client; instead, Earnest engaged Smith Moore to represent the Bank, of which he was President. Based upon Earnest's statements to the Bank's board of directors, this court finds Earnest understood and believed that he engaged Smith Moore to represent the Bank and was consulting with Smith Moore on behalf of the Bank in his capacity as an officer of the Bank. . . . Any suggestion by Earnest now that he believed Smith Moore was engaged to represent him individually in September 2012 or that he held such an understanding . . . is not credible and is, at a minimum, subjectively unreasonable.”)

- **[Privilege Point, 2/27/19]**

Who Owns the Privilege?: Part II

February 27, 2019

Last week's Privilege Point described a Colorado state court case holding that absent contrary direction in a decedent's will, the decedent's personal representative owns all the files generated by the decedent's lawyer. Ten days earlier, another court dealt with privilege ownership issues in a corporate context.

In Utilisave, LLC v. Fox Horan & Camerini, LLP, one of Utilisave's two managing members (MHS, which was owned by Michael Steifman) had earlier successfully "pursued both direct and derivative claims against Utilisave and its then-CEO." 2018 NY Slip Op 33320(U), *2 (N.Y. Sup. Ct. Dec. 17, 2018). MHS and Steifman then: (1) purchased Utilisave's assets from a liquidation trustee; (2) caused Utilisave to file a malpractice case against Utilisave's law firm that had lost the earlier action, and (3) sought access to communications between that law firm and Utilisave's then-CEO. The law firm argued that "Utilisave is not entitled to any privileged communications because the company was purchased by Steifman, who was adverse to Utilisave in the Prior Action." Id. at *3. The court acknowledged that "had Steifman or MHS sought privileged communications during the pendency of that [earlier] action, defendants' documents would have been prohibited from disclosure." Id. at *9. But now that MHS and Steifman owned Utilisave, they could rely on what is called the "practical consequences" standard to assert ownership of Utilisave's attorney-client privilege and its former law firm's files. Id. at *8. The court therefore ordered Utilisave's former law firm to describe the files in its possession so some could be produced. Inexplicitly, the court in contrast "note[d] that [Utilisave] has not advanced any argument that it is entitled to [its former law firm's] work product." Id. at *11.

It might seem odd that a corporation's litigation adversary can later buy the corporation and thereby gain access to its law firm's privileged files. But the privilege and privileged documents are assets that can be conveyed by operation of statute, under a will, or in a corporate asset purchase agreement. Corporations and their lawyers must always "keep their eye on the ball," and know who owns the privilege.

- Morristown Heart Consultants, PLLC v. Patel, No. E2018-01590-COA-R9-CV, 2019 Tenn. App. LEXIS 362, at *18-19, *19-22 (Tenn. Ct. App. July 24, 2019) (addressing a situation in which two doctors owned a PLLC; noting that the doctor who owned 50 percent of the financial rights and 66 percent of the governing rights hired a lawyer to represent the PLLC in advising it about the doctors' memorandum of understanding and the effect of the other doctor's suspension by a hospital; noting that the other doctor, with 50 percent financial ownership but only 33 percent of the governing rights, sought access to the lawyer's files; acknowledging that the doctor who hired the lawyer had the majority of governing rights, but explaining the operating agreement required actions such as retaining counsel to be discussed and voted on at an official PLLC meeting; also pointing to the "at issue" waiver doctrine; finding no reversible error in the trial court's granting the 33 percent owner doctor access to the lawyer's files; noting that the trial court had found that the managing member doctor had not followed the proper procedure for voting on the lawyer's retention or arranging for the other doctor's written consent under the Operating Agreement – meaning that PLLC "had not properly authorized" the lawyer's hiring).

- Gilmore v. Turvo, Inc., C.A. No. 2019-0472-JRS, 2019 Del. Ch. LEXIS 316, at *3, *7 (Del. Ch. Aug. 19, 2019) (unpublished opinion) (addressing a situation in which several Turvo directors met on May 21, 2019 to investigate another director's (also the CEO) expense account misconduct; noting that those directors retained Latham & Watkins to advise them and adopted a resolution retaining Latham & Watkins "effective as of May 10, 2019" – explaining that "the resolution's retroactive language was intended to allow Turvo to pay [Latham's] legal fees"; explaining that the ousted director/CEO pointed to Delaware law in seeking privileged communications between the other directors and Latham between May 10 and May 21; denying the effort, and explaining that "it was entirely within [the board's] business judgment to determine that the company should pay the Preferred Directors' fees by deeming Latham to have been working on behalf of the company prior to May 21").
- In re Sampedro, No. 3:18-MC-47 (JBA), 2020 U.S. Dist. LEXIS 24114, at *6 (D. Conn. Feb. 11, 2020) (relying on a corporation board member's declaration "affirming that '[i]n February 2018, the subset of the [corporate] board of directors engaged [a law firm] to provide advice on the appropriate structure'" of an engagement (first alteration in original); noting that this meant that "the attorney from [that law firm] was not a third party to an attorney-client relationship, and no waiver occurred by virtue of her inclusion in the email communication").

- JAE Properties, Inc. v. AMTAX Holdings 2001-XX, LLC, No. 19cv2075-JAH-LL, 2020 U.S. Dist. LEXIS 80797, at *7, *8, *24 (S.D. Cal. May 7, 2020) (addressing a situation in which Investor Limited Partner Amtax sought communications between co-General Partner JAE and lawyer Hartman; noting that Hartman claimed that he only represented JAE – and not the limited partnership itself; explaining that "JAE has produced documents in this litigation where Hartman identified himself in writing in at least three instances as legal counsel for both the Partnership and the General Partners (including JAE)"; further explaining that Hartman admitted representing the limited partnership "in certain limited capacities," but argued that language mentioning a more general representation was merely "boilerplate language" resulting from "my unintentional failure to remove such language left over from prior correspondence" and "essentially an inadvertent oversight on my behalf" (internal citations omitted); rejecting Hartman's excuses – concluding that "it was reasonable for [Investor Limited Partner] Amtax to believe that Hartman would protect Amtax's individual interests as a member of the Partnership"; requiring General Partner JAE and Hartman to produce their otherwise privileged communications).
- Rackwise, Inc. v. Foley Shechter Ablovatskiy, LLP, Civ. A. No. 19 Civ. 11094 (AT) (SLC), 2020 U.S. Dist. LEXIS 234559, at *16-17 (S.D.N.Y. Dec. 14, 2020) (analyzing a situation in which a corporation fired its CEO, who then retained a law firm and argued in several settings that he still controlled the corporation; explaining that the lawyer's engagement letter identified the law firm as representing the corporation; "The engagement letter dated April 5, 2017 (the 'Engagement Letter'), however, by its terms is between Defendant Foley Shechter LLP and Rackwise, and is signed by Archbold on behalf of Rackwise, in his capacity as CEO. (ECF No. 57-2 at 2, 5). On the face of the Engagement Letter, Defendants were not counsel for the Archbold Board, they were counsel for Rackwise. Defendants attempt to distinguish their representation of Rackwise, but the privileges at issue do not belong to a corporate board, they belong to the corporation itself, even after it retains an entirely new board. . . . At the time the Communications were made, Defendants represented Rackwise, the entity, Not only does the Engagement Letter demonstrate that the Defendants' fiduciary duties ran to Rackwise and not the Archbold Board (ECF No. 57-2), Defendants repeatedly held out that they represented the company, and not any officer or director in their personal capacity." (emphasis added); in the corporation's malpractice action against the law firm, ordering the law firm to turn over its files to the corporation that it claimed to have been representing)

- [Privilege Point, 8/18/21]

The Eureka Doctrine – At the Intersection of Conflicts and Privilege

August 18, 2021

Not surprisingly, joint clients do not waive their privilege protection when they communicate with their joint lawyer or (in some situations) with each other. But what if a lawyer improperly represents joint clients whose interests are so adverse that the ethics rules prohibit such a joint representation?

In Cantu Services, Inc. v. Worley, No. CIV-12-129-R, 2021 U.S. Dist. LEXIS 106266 (W.D. Okla. June 7, 2021), the court dealt with this scenario. A law firm represented several clients in connection with their provision of food services to an Army base. The plaintiff claimed that those joint clients (now defendants) waived their privilege protections by continuing to communicate with each other after their interests diverged. But the court rejected plaintiff's waiver argument, citing Eureka Investment Corp. v. Chicago Title Insurance Co., 743 F.2d 932, 937-38 (D.C. Cir. 1984), for the principle that "when an attorney fails to end joint representation despite a conflict . . . the clients retain the privilege notwithstanding the conflict." Id. at *11. The court noted that "[t]hrough the parties' interests may have diverged, [plaintiff] offers no evidence that [defendants], as co-clients, believed their joint representation ended." Id. at *12. The court thus found no waiver.

This somewhat counter-intuitive Eureka doctrine can protect from third-party intrusion otherwise privileged communications among joint clients – even if those joint clients' interests have diverged.

- [Privilege Point, 8/3/22]

Delaware Court Addresses the Privilege Implications of an Evenly Split Corporate Board's Feud

August 3, 2022

Not surprisingly, Delaware state courts frequently address privilege issues triggered by corporate board disputes. Those often guide other states' courts' analyses of similar scenarios.

In In re Aerojet Rocketdyne Holdings, Inc., C.A. No. 2022-0127-LWW, 2022 Del. Ch. LEXIS 106 (Del. Ch. May 5, 2022), a company's board split evenly between a bloc supporting the board's chairman and a bloc supporting the CEO (who, among other things, had arranged for a Special Committee to investigate the board chairman's alleged misdeeds). As the company prepared for contested board elections, the CEO's management team (represented by Gibson Dunn) denied the chairman's board allies access to company-related privileged communications. Although understandably acknowledging that his bloc was not entitled to the Special Committee's documents, the chairman argued that his bloc was entitled to all other privileged communications under Delaware law. The court agreed – even ordering Gibson Dunn to withdraw as the company's lawyer. Id. at *6. The court bluntly stated that "where two halves of a deadlocked board are competing in a proxy contest, can one half assert the corporation's privilege against the other? I conclude that, in these circumstances, it cannot." Id. at *2.

In describing the two board bloc's claims against each other in light of the upcoming board election, the court wisely noted that "[w]hy one slate should be considered hostile to the Company and the other friendly is unclear." Id. at *11. Lawyers should remember that generally corporations just want to thrive – they really do not care who runs them.

- [Privilege Point, 1/18/23]

FLSA Cases Raise Interesting Privilege Issues: Part II

January 18, 2023

Last week's Privilege Point described a case predictably holding that an FLSA defendant could not present defensive evidence at trial of the advice it received from its lawyer about plaintiff employee's classifications after asserting privilege protection for such advice during discovery.

Three days later, the court in Walters v. Professional Labor Group, LLC, addressed a fascinating issue triggered when defendant's Rule 30(b)(6) witness "appeared to assert an advice of counsel defense" based on advice he had received from the defendant's lawyer. No. 1:21-cv-02831-JRS-MJD, 2022 U.S. Dist. LEXIS 197345, at *1 (S.D. Ind. Oct. 31, 2022). As it turned out, the witness had received that advice fourteen years earlier — when he was employed by a different company which was then represented by the same lawyer. Understandably labeling the situation a "conundrum," the court held that: (1) the previous employer owns the privilege protection covering that earlier advice; (2) absent that previous employer's waiver, the defendant would be prohibited "from offering testimony or other evidence relating to any advice of counsel" its executive received while employed at the previous company that owned the privilege. Id. at *2-3.

This strange case highlights the importance of identifying the attorney-client privilege protection's ownership, especially in the corporate context.

- [Privilege Point, 4/12/23]

Are All Government Agencies Part of One “Client” for Privilege Purposes?

April 12, 2023

Courts take differing positions on the “client’s” identity in the government setting. Among other things, such differing positions might affect the waiver implications of one government agency disclosing its privileged communications to another government agency.

In Amann v. Office of the Utah Attorney General, Case No. 2:18-cv-00341, 2022 U.S. Dist. LEXIS 230056 (D. Utah Dec. 20, 2022), a former Utah Attorney General’s Office lawyer sued for wrongful termination based on his whistleblowing activities. He argued that the Attorney General’s Office waived its privilege protection for documents on a flash drive it disclosed to the Utah Department of Human Resources Management (DHRM) as part of that agency’s investigation. Surprisingly, the court found a waiver, because the disclosure was not made “for the purpose of obtaining legal advice.” Id. at *14. The court held that DHRM was “an outside entity” for privilege purposes. Id. Perhaps even more surprisingly, the court held that the waiver extended beyond the “approximately 100 emails the DHRM investigator actually reviewed” — and instead extended to all 53,750 documents on the flash drive (to the extent those were owned by the Attorney General’s Office rather than owned by some other client). Id. at *14-15.

Other courts might well reach a different conclusion both on the waiver issue and the scope of waiver issue. Cases like this highlight the risk of disclosing privileged communications to anyone or any entity outside the intimate attorney-client relationship.

- [Privilege Point, 10/4/23]

Court Addresses “Client” Identity in a Closely Held Corporation

October 4, 2023

Identifying the “client” in closely held corporations can be difficult, but critical. That determination can affect both privilege protection for communications, and the right to access privileged communications between the corporation’s management and its lawyer.

In Mehwald v. Atlantic Tool & Die Co., a feud erupted between generations in a family-owned closely held corporation. 2023-Ohio-2778, 222 N.E.3d 138 (Ohio Ct. App. 2023). A minority-owning son sought access to privileged communications between the corporation and its lawyer, but the court rejected his efforts — noting that “Ohio courts have declined to extend the attorney-client relationship to minority shareholders in close corporations and we also decline to do so.” Id. ¶ 39. The court then also found the son ineligible to rely on an Ohio statute that allows some shareholders access to books and records.

As difficult as it can be to properly identify the “client” in publicly held corporations, that issue can be even more acute in closely held corporations — sometimes exacerbated by stressful family dynamics.

B. Privilege Ownership After Corporate Transaction

- Medcom Holding Co. v. Baxter Travenol Labs., Inc., 120 F.R.D. 66, 70 (N.D. Ill. 1988) (bluntly stating that corporate clients and their lawyers can shape the privilege's control in corporate transactions; "It is reasonable then to treat the parties to a subsidiary divestiture by sale of stock as having contracted on the assumption that after the sale management of the divested corporation will control its attorney-client privilege. The parties are free to vary this rule by agreement. For example, if the selling parent will have a continuing interest after the sale in contracts, assets or liabilities of the subsidiary the parent can negotiate for special access or control to protect that interest. Similarly, if the attorneys who represent a corporate parent also represent its subsidiary in the sale of the subsidiary's stock they run the resulting risk that after the acquisition subsidiary management will waive the privilege with respect to its communications with those attorneys. A seller who wishes to avoid that result can do so by agreement with the purchaser or by employing separate counsel for the subsidiary and limiting to the parent's own attorneys those communications which the parent wishes to protect."; ultimately concluding that the new owners of a corporate subsidiary could waive the attorney-client privilege relating to pre-transaction communications, but explaining that parties to the transaction could have arranged for a different result).

- Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 51 (S.D.N.Y. 1989) ("Polycast acquired this authority to waive the joint privilege when it purchased the stock of Plastics. The power to waive the corporation's attorney-client privilege rests with corporate management, who must exercise this power consistent with their fiduciary duty to act in the best interest of the corporation. Just as Plastics' new management has an obligation to waive or preserve the corporation's privileges in a manner consistent with their fiduciary duty to protect corporate interests, Polycast, as parent and sole shareholder, has the power to determine those interests. Because there are ample grounds for a finding that the privilege is held jointly by Polycast and Uniroyal, and because Polycast acquired control over Plastics' privilege rights when it purchased the company, Polycast and Plastics' new management may now waive the privilege at their discretion." (citations omitted); finding that the purchaser of a subsidiary of Uniroyal was entitled to obtain copies of notes of the subsidiary's vice president that he prepared before the transaction).

- In re Grand Jury Subpoenas 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 248 (4th Cir. 1990) (finding that the new management of a subsidiary created by divestiture could waive the privilege).
- McCaugherty v. Siffermann, 132 F.R.D. 234, 245 (N.D. Cal. 1990) ("[T]he purchaser of a corporate entity buys not only its material assets but also its privileges. . . . Since the attorney-client privilege over a corporation belongs to the inanimate entity and not to individual directors or officers, control over privilege should pass with control of the corporation, regardless of whether or not the new corporate officials were privy to the communications in issue.").
- In re Santa Fe Trail Transp. Co., 121 B.R. 794 (Bankr. N.D. Ill. 1990) (in-house lawyers represented both a parent and a subsidiary; the former subsidiary went bankrupt, and its trustee sought documents from the former parent; although the court found that the situation did not involve a joint litigation defense arrangement (but instead was a joint representation), the court held that the former subsidiary could obtain documents from the parent that were created before the closing of the spin (and certain document created after that date)).
- Rayman v. American Charter Fed. Sav. & Loan Ass'n, 148 F.R.D. 647, 652 (D. Neb. 1993) ("a surviving corporation following a merger possesses all of the privileges of the pre-merger companies").
- Bass Pub. Ltd. v. Promus Cos., No. 92 Civ. 0969 (SWK), 1994 U.S. Dist. LEXIS 5474, at *6-7 (S.D.N.Y. Apr. 25, 1994) ("Had Promus [parent] wished, it could have sold only Holiday Inn's [subsidiary's] physical assets, which could have avoided the consequences [of allowing new management of the subsidiary to waive the privilege].").

- In re In-Store Advertising Sec. Litig., 163 F.R.D. 452, 455, 455-56, 458 (S.D.N.Y. 1995) (addressing the waiver implications of a company's purchase of another corporation's assets; addressing the following factual context; "[P]laintiffs request the production of documents held by Peat Marwick as stakeholder for Emarc, Inc. . . . , the successor to In-Store. . . . Peat Marwick is holding documents produced to it by Emarc because Kirkland & Ellis, attorneys for the Director Defendants, and Baer Marks & Upham . . . , former counsel for In-Store, have asserted that the documents are attorney-client privileged, or are protected from discovery by the work product doctrine."; "At issue are roughly 250 documents (the 'Emarc Documents') in the possession of Peat Marwick which were produced to it, pursuant to a subpoena relating to this litigation. The Emarc Documents were produced by Valassis Communications, Inc. ('Valassis'), which received them as part of a transfer of assets from Emarc, the successor to In-Store."; finding a waiver; "[A] change in management or a change in control of the corporation does not effect a disclosure such that the privileged is waived. . . . However, '[a] transfer of assets, without more, is not sufficient to effect a transfer of the privileges; control of the entity possessing the privileges must also pass for the privileges to pass.' In re Grand Jury Subpoenas 89-3 and 89-4, 734 F. Supp. [1207,] 1211 n.3 [(E.D. Va. 1990)]. Therefore, where confidential attorney-client communications are transferred from a corporation selling assets to the corporation buying the assets, the privilege is waived as to those communications."; "Baer Marks represented In-Store in this action until 1993 when O'Sullivan was substituted as counsel for In-Store. . . . In-Store was reorganized in bankruptcy proceedings and was succeeded by Emarc. The attorney-client privilege was controlled at this point by Emarc . . . , and Emarc therefore had the power to assert or waive the privilege When those communications were transferred to Valassis in connection with a sale of the assets by Emarc to Valassis, Emarc thereby waived any privilege still in effect as to those communications. See In re Grand Jury Subpoenas 89-3 and 89-4, 734 F. Supp. at 1211 n.3. The former attorney of In-Store, Baer Marks, cannot claim the privilege that has been waived by the successor to its former client."; not finding a subject matter waiver).

- Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 668, 669, 670, 670-71, 671, 671-72, 672 (N.Y. 1996) (applying the "practical consequences" test in connection with a corporate acquisition; noting the general rule that "[w]hen ownership of a corporation changes hands, whether the attorney-client relationship transfers as well to the new owners turns on the practical consequences rather than the formalities of the particular transaction"; including the purchasing control of pre-merger privileged communications; "That Acquisition, rather than old Tekni-Plex, was designated the surviving corporation, however, is not dispositive. Acquisition was a mere shell corporation, created solely for the purpose of acquiring old Tekni-Plex. Following the merger, the business of old Tekni-Plex, remained unchanged, with the same products, clients, suppliers and non-managerial personnel. Indeed, under the Merger Agreement, new Tekni-Plex possessed all of the rights, privileges liabilities and obligations of old Tekni-Plex, in addition to its assets. Certainly, new Tekni-Plex is entitled to access to any relevant pre-merger legal advice rendered to old Tekni-Plex that it might need to defend against these liabilities or pursue any of these rights."; addressing the buyer's motion to disqualify the seller's law firm in a dispute between the buyer and the seller; noting that the seller's law firm would be able to represent the seller if the dispute related to the merger "as opposed to corporate operations" of the seller before the merger; explaining that the dispute at issue before the court related to the seller's corporate operations, so that the seller's law firm could not represent the seller in a dispute with the buyer; "The dispute here, however, unlike Flanzer [Int'l Elecs. Corp. v. Flanzer], 527 F2d 1288 (2d Cir. 1975)], goes beyond the merger negotiations. It also involves issues relating to the law firm's longstanding representation of the acquired corporation on matters arising out of the company's business operations -- namely, M&L's [seller's law firm] separate representation of old Tekni-Plex [Seller] prior to the merger on environmental compliance matters. Any environmental violations will negatively affect not only the purchasers but also the business interests of the merged corporation. In this regard, the interests of M&L's current client Tang [seller's sole shareholder at the time of the merger] are adverse to the interests that new Tekni-Plex [Buyer] assumed from old Tekni-Plex."; "M&L's earlier representation of old Tekni-Plex provided the firm with access to confidential information conveyed by old Tekni-Plex concerning the very environmental compliance matters at issue in the arbitration. M&L's duty of confidentiality with respect to these communications passed to new Tekni-Plex; yet its current representation of Tang creates the potential for the law firm to use these confidences against new Tekni-Plex in the arbitration."; "[N]ew Tekni-Plex now has the authority to assert the attorney-client privilege to preclude M&L from disclosing the contents of these confidential communications to Tang. Likewise, ownership of the

law firm's files regarding its pre-merger representation of old Tekni-Plex on environmental compliance matters passed to the management of new Tekni-Plex."; rejecting the seller's argument that the law firm jointly represented the seller and seller's sole shareholder; "Appellants urge that because Tang and old Tekni-Plex were co-clients of M&L, none of the communications made by corporate actors to the law firm are confidential from Tang. Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients While M&L jointly represented Tang and old Tekni-Plex during the acquisition, with respect to the environmental compliance matters the record before us establishes only M&L's representation of the corporation."; concluding that the buyer did not acquire ownership of privileged communications between the seller and the seller's lawyer; "To allow new Tekni-Plex access to the confidences conveyed by the seller company to its counsel during the negotiations would, in the circumstances presented, be the equivalent of turning over to the buyer all of the privileged communications of the seller concerning the very transaction at issue. The parties here, moreover, recognized the community between the selling shareholder and his corporation and expressly provided that it be preserved in any subsequent dispute regarding the acquisition." (emphasis added); "[C]orporate actors should not have to worry that their privileged communications with counsel concerning the negotiations might be available to the buyer for use against the sold corporation in any ensuing litigation. Such concern would significantly chill attorney-client communication during the transaction." (emphasis added); "In light of the facts of this particular transaction and the structure of the underlying agreement, new Tekni-Plex is without authority to assert the attorney-client privilege to preclude M&L from revealing to Tang the contents of communications conveyed by old Tekni-Plex concerning the merger transaction. Similarly, new Tekni-Plex does not control M&L's files relating to its prior representation of old Tekni-Plex during the acquisition. Of course, nothing in our decision today prevents new Tekni-Plex from obtaining through the normal course of discovery any non-confidential documents, or confidential documents for which the privilege has been waived, to which it is entitled." (emphasis added)).

- Fogel v. Zell (In re Madison Mgmt. Grp., Inc.), 212 B.R. 894 (Bankr. N.D. Ill. 1997) (the same lawyers represented a parent and a subsidiary; when the subsidiary went bankrupt, the trustee for the subsidiary sought to give to a third party (a creditor) documents created during the time of the joint representation; the court distinguished the situation from that in Santa Fe [121 B.R. 794 (Bankr. N.D. Ill. 1990)] (in which the former subsidiary wanted to obtain documents for itself), and held that the parent could block the trustee for the former subsidiary from providing privileged documents to the third party creditor (although the parent and the former subsidiary were now adverse to one another)), rev'd on other grounds, 221 F.3d 955 (7th Cir. 2000).
- Glidden Co. v. Jandernoa, 173 F.R.D. 459, 472-73 (W.D. Mich. 1997) (Glidden (now called Grow) sold its subsidiary (Perrigo) to the subsidiary's management; Grow then sued its old subsidiary and the subsidiary's management; the court ordered the former subsidiary to produce all of the requested documents to the former parent; the court also rejected the argument that the former subsidiary's management could assert their own privilege; "The universal rule of law, expressed in a variety of contexts, is that the parent and subsidiary share a community of interest, such that the parent (as well as the subsidiary) is the 'client' for purposes of the attorney-client privilege. See Crabb v. KFC Nat'l Man. Co., 1992 U.S. App. LEXIS 38268, 1992 WL 1321 (6th Cir. 1992) ('The cases clearly hold that a corporate "client" includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary and affiliate corporations.') (quoting United States v. AT&T, 86 F.R.D. 603, 616 (D.D.C. 1979)). Consequently, disclosure of legal advice to a parent or affiliated corporation does not work a waiver of the confidentiality of the document, because of the complete community of interest between parent and subsidiary. Id. at *2. Numerous courts have recognized that, for purposes of the attorney-client privilege, the subsidiary and the parent are joint clients, each of whom has an interest in the privileged communications. See, e.g., Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 49 (S.D.N.Y. 1989); Medcom Holding Co. v. Baxter Travenol Lab., 689 F. Supp. 841, 842 (N.D. Ill. 1988). Simply put, a sole shareholder has a right to complete disclosure about the legal affairs of its wholly owned subsidiary.").

- Robbins & Myers, Inc. v. J.M. Huber Corp., No. 01-CV-0201E(F), 2003 U.S. Dist. LEXIS 10001, at *3-4, *16 (W.D.N.Y. May 9, 2003) (analyzing the waiver impact of the sale of a subsidiary's stock to a buyer, in connection with the buyer's later lawsuit against the selling parent for fraud; finding a waiver; describing the factual setting as follows: "Robbins & Myers, Inc. ('R&M') bought the stock of Flow Control Equipment, Inc. ('FCE') from J.M. Huber Corporation ('Huber') pursuant to a stock purchase agreement ('the Agreement') dated November 20, 1997. . . . Subsequently, R&M brought this suit for various claims of fraud based on its contention that Huber had induced R&M to buy FCE by misrepresenting the scope of the off-specification closure liability. R&M contends that Huber had represented that the liability was limited to 194 units whereas the liability now appears to be for several thousand units."; among other things, finding a waiver; "[D]efendants have waived any attorney-client privilege or work-product protection that otherwise might have attached to any documents that were left in the possession of FCE after November 20, 1997. See In re Grand Jury Subpoenas, 734 F. Supp. 1207, 1213 (E.D. Va. [1990]) (holding that parent waived attorney-client privilege with respect to documents left in subsidiary's possession after sale of the subsidiary), rev'd on other grounds, 902 F.2d 244 (4th Cir. 1990). Accordingly, defendants may not claim the attorney-client privilege or work product protection with respect to any documents that were left in FCE's possession after it had been purchased by R&M." (emphasis added) (footnote omitted); inexplicably failing to address the buyer's possible ownership of the privileged documents belonging to the subsidiary that it had purchased it from the defendant parent corporation; similarly not addressing the possible implications of the waiver analysis, such as third parties' possible right to access the same documents if there had been a waiver.).

- [Privilege Point, 11/19/03]

Does the Buyer of Corporate Assets Also Purchase the Attorney-Client Privilege?

November 19, 2003

Because the ability to assert and waive the attorney-client privilege constitutes a corporate asset, most courts hold that corporate successors (purchasing a corporation's stock) can assert or waive the privilege. Courts have taken differing positions in dealing with corporations which purchase assets rather than stock.

In Zenith Electronics Corp. v. WH-TV Broadcasting Corp., No. 01 C 4366, 2003 U.S. Dist. LEXIS 13816 (N.D. Ill. Aug. 6, 2003), Zenith sold assets from one of its corporate divisions to General Instrument Corp. (GI) and another buyer. WH-TV (a company engaged in litigation with Zenith) sought the production of documents that Zenith provided to GI as part of the asset sale, arguing that the sharing had waived the privilege. GI resisted the discovery, noting that its purchase agreement with Zenith included "all intangible personal property" (including all "privileges") used in the conduct of the business that it had purchased. Id. at *5. The court rejected GI's argument, as well as the notion that "the attorney-client privilege is a corporate asset that can be sold." Id. The court acknowledged that a company's new management may assert or waive the privilege, but explained that "the mere transfer of some assets from one corporation to another . . . does not transfer the attorney-client privilege." Id. at * 6.

Companies selling assets should not assume that they can avoid waiving the attorney-client privilege by adding a provision in the sales agreement, and may wish to consider restructuring the transaction to protect the privilege.

- [Privilege Point, 8/11/04]

Court Deals with a Successor's Ownership of the Attorney-Client Privilege

August 11, 2004

Courts must sometimes deal with “ownership” of the attorney-client privilege in situations involving the sale of corporate control. One case has dealt with this issue in an interesting situation.

In Venture Law Group v. Superior Court, 12 Cal. Rptr. 3d 656 (Cal. Ct. App. 2004), plaintiffs (minority shareholders and former employees of Soft Plus) sued Soft Plus and three of its former officers and directors. The plaintiffs alleged that Soft Plus and the individual defendants deprived them of their statutory rights as minority shareholders when a new owner bought Soft Plus. The three individual defendants asserted an “advice of counsel” defense, and the trial court agreed with plaintiffs that the defense created a subject matter waiver of the attorney-client privilege. The appellate court disagreed, finding that Soft Plus’s privilege now belonged to its new owner, and that the individual defendants could not waive (impliedly or otherwise) Soft Plus’s attorney-client privilege “over the wishes of the current managers” of the company. Id. at 662. Interestingly, the court did not indicate whether the individual defendants could continue to assert an “advice of counsel” defense in light of its ruling.

Lawyers should remember that situations involving the transfer of corporate control can present complicated privilege issues.

- [Privilege Point, 4/13/05]

Can a "Dead" Corporation Claim the Attorney-Client Privilege?

April 13, 2005

Every court acknowledges that a corporation's Chapter 7 bankruptcy trustee "owns" the corporation's attorney-client privilege. Who owns the privilege if the bankrupt company has no assets, liabilities, directors, shareholders or employees?

In Lewis v. United States, No. 02-2958 B/An, 2004 U.S. Dist. LEXIS 26680 (W.D. Tenn. Dec. 6, 2004), the IRS subpoenaed the well-known firm of Baker Donelson, seeking documents it generated in connection with an investigation the firm conducted into financial problems at the firm's client VisionAmerica. Baker Donelson asserted the privilege, but the court ordered the documents produced. In addition to finding that the firm's lead lawyer's activities for VisionAmerica "resembled those of a business advisor and not of a legal counselor" (thus making the privilege unavailable), the court noted that the bankrupt VisionAmerica "has no assets, liabilities, directors, shareholders, or employees." Id. at *9, *12. Explaining that "courts are split over whether a corporation is entitled to protection from the attorney-client privilege after the corporation's 'death,'" [t]he court concluded that "the attorney-client privilege cannot be applied to a defunct corporation." Id. at *10, *14.

As participants in capitalism's "creative destruction" process, lawyers should remember that their dead clients may lose the privilege.

- Coffin v. Bowater, Inc., No. 03-277-P-C, 2005 U.S. Dist. LEXIS 9395, at *7-8, *9 (D. Me. May 13, 2005) (rejecting a bankruptcy trustee's attempt to waive a bankrupt company's privilege; rejecting a "bright-line rule" that only a stock sale conveyed the privilege; finding that privilege now belonged to the purchaser of the company's assets (including all the company's "tangible and intangible rights"); explaining that because the "practical consequences" of the asset purchase "was to transfer virtually all control and continuation of the [company's] business to [the new owner]," the new owner -- not the company's bankruptcy trustee -- had the right to waive or assert the privilege.).

- Ex parte Smith, 942 So. 2d 356, 357-58, 360-61 (Ala. 2006) (addressing efforts by a bankruptcy trustee to obtain communications that the bankrupt company's outside directors had with the Skadden law firm before the bankruptcy; finding that the following language in the outside directors' retainer letter with Skadden created a separate attorney-client relationship between the outside directors and Skadden, that allowing them to withhold the documents from the bankruptcy trustee: "'We are pleased that you as outside directors (the 'Outside Directors') of Just For Feet, Inc. (the 'Company') have decided to engage [the Skadden law firm] to assist you in your review of various matters relative to the Company. . . . With respect to the Company and its subsidiaries and parties affiliated with the Outside Directors generally, it is our understanding that the [Skadden law firm] is not being asked to provide, and will not be providing, legal advice to, or establishing an attorney-client relationship with, the Company, its subsidiaries, any such affiliated party or any Outside Director in his individual capacity and will not be expected to do so unless the [Skadden law firm] has been asked and has specifically agreed to do so."; explaining that "if a corporate officer or director can have a personal attorney-client privilege with regard to communications with corporate counsel concerning the general affairs of the company, then directors and officers can have their own personal outside counsel and their communications with counsel regarding their personal rights and liabilities will be privileged, even though those communications pertain to matters relating to the affairs of the company. We hold that the outside directors and the Skadden law firm were free to form their own attorney-client relationship, to which JFF was not a party, regarding the directors' individual personal rights and liabilities stemming from 'various matters relative to the Company.'").

- MacKenzie-Childs LLC v. MacKenzie-Childs, 262 F.R.D. 241, 246, 248, 249, 250, 251, 252, 252-53, 253, 254, 255 (W.D.N.Y. 2009) (addressing privilege issues in a trademark case; explaining that a lawyer had represented a closely-held business, which had eventually declared bankruptcy, with the assets sold to a number of successors; analyzing the ability of the former sole owners of the company to obtain privileged documents from the lawyer -- thus raising the issue of whether the lawyer had represented them individually or their closely-held company; explaining the co-owners' position that the lawyer represented them; "Victoria and Richard argue that Salai [lawyer] 'act[ed] as their personal attorney and not as attorney for their wholly owned company.' . . . Because they were fifty percent shareholders of a closely-held corporation, they continue, they had 'every right' to assume that Salai was acting as their personal attorney when he provided trademark and copyright advice. . . . In support of their position, they also offer copies of nearly thirty supplementary copyright registrations that Salai submitted on January 16, 1997, correcting earlier registrations for works previously identified as works for hire. . . . Salai signed each of the filings and certified that he was the 'duly authorized agent of Victoria and Richard [co-owners] MacKenzie-Childs.'" (second alteration in original); explaining the basic rule involving an asset sale; "Where one corporation merely sells its assets to another, however, the privilege does not pass to the acquiring corporation unless (1) the asset transfer was also accompanied by a transfer of control of the business and (2) management of the acquiring corporation continues the business of the selling of the corporation."; also explaining how the joint representation and common interest doctrine apply in a corporate setting; "The concept of joint representation and the related common interest doctrine are particularly complex in the corporate setting. . . . Under this rule, courts presume that the corporation owns the privilege -- rather than the individual corporate representatives, or the individuals and the corporation jointly -- and the individuals bear the burden of rebutting the presumption."; "Despite this 'default' rule, courts have been willing to recognize that an individual corporate representative may assert an individual attorney-client privilege in communications with corporate counsel provided that certain requirements are met. . . . Some courts, such as the First, Third and Tenth Circuits, apply the following five-part test enunciated in Bevill to determine whether an individual has demonstrated a personal privilege in communications with corporate counsel."; "Thus, although this authority permits an individual to assert a personal privilege in certain communications with corporate counsel, it does not stand for the proposition that an individual and a corporation may enjoy a joint privilege in the same, non-segregable communication with counsel by a corporate representative in both his representative and individual capacity."; "Although the Second Circuit has acknowledged the

Bevill test, it has not clearly adopted it. It has made it clear, however, that whether Bevill is or is not applied, a prerequisite to assertion of a personal privilege by a corporate representative is proof that the employee 'ma[de] it clear to corporate counsel that he [sought] legal advice on personal matters.'" (alterations in original) (citations omitted); noting the lawyer's testimony; "He testified that he always believed that he was acting as counsel to the corporation, and not as counsel to Richard and Victoria, individually. . . . He further testified that he never spoke to either of them about any matters, but instead communicated with other corporate employees, some of whom he identified in his testimony. . . . Invoices for his services were paid by the corporation, and not by Victoria and Richard personally. . . . On this record, defendants' contention that Salai never provided legal advice or services to the corporation strains credulity and cannot be accepted."; holding that the privilege passed with the assets sole to various successors; "I find that MacKenzie-Childs II purchased substantially all of the assets then-owned and the business then-operated by MacKenzie-Childs I and thereafter continued the business in which MacKenzie-Childs I had been engaged. . . . Thus, I conclude that the attorney-client privilege passed from MacKenzie-Childs I to MacKenzie Childs II."; "I likewise conclude that the privilege passed again in 2008, this time from MacKenzie-Child II to MacKenzie-Childs III. The record demonstrates that MacKenzie-Childs III purchased substantially all of the assets of MacKenzie-Childs II, including its intellectual property, and has continued the business of MacKenzie-Childs II and III. . . . Considering these facts, plaintiffs have the authority to assert -- as they did in Salai's deposition -- the attorney-client privilege to protect confidential communications made between representatives of MacKenzie-Childs I and Salai, as counsel to the corporation."; rejecting the co-owners' argument that they reasonably believe they were the lawyer's client; "[T]he fact that an attorney represents a corporation does not make that attorney counsel to the corporation's officers, directors, employees or shareholders." (emphasis added); "[W]hether Richard and Victoria believed that Salai was acting as their individual attorney and whether that belief was reasonable are simply irrelevant to the pending privilege dispute." (emphasis added); "Rather, whether Richard and Victoria may establish a personal privilege in communications with Salai depends on proof that they sought legal advice from Salai about personal matters and that they made it clear to him that they were seeking advice in their individual, not representative, capacities." (emphasis added); "First, it does not allege that Victoria or Richard ever actually communicated directly with Salai, as opposed to communicating through other corporate representatives. Defendants have cited no authority, and the Court is unaware of any, to support the novel proposition that a privileged relationship may be created between an individual and a corporate

attorney with whom the individual has never spoken nor directly communicated." (emphasis added); "Moreover, [there is] the dearth of any evidence showing that Victoria or Richard ever personally paid for Salai's legal advice."; "In sum, defendants' reliance on their 'reasonable belief' that Salai represented them personally because they were the sole shareholders and ultimate decisionmakers of a closely-held corporation is insufficient to establish a personal attorney-client privilege. Because they cannot even establish that they ever communicated directly with Salai, let alone that they made clear to him that they were seeking legal advice in their individual capacities, their contention that they possess a privilege capable of being waived must be rejected."; also finding that the lawyer must honor the current privilege owner's direction about documents; "Consistent with my determination that any attorney-client privilege belongs to the companies, and not to Victoria and Richard personally or jointly with the companies, Salai and HSE [lawyer's present firm] must respect plaintiffs' assertion of privilege concerning the requested documents.").

- **[Privilege Point, 1/13/10]**

Does the Attorney-Client Privilege Survive a Corporation's Death?

January 13, 2010

In today's economic environment, courts must sometimes address the privilege effect of a corporation's dissolution.

In TAS Distributing Co. v. Cummins Inc., Case No. 07-1141, 2009 U.S. Dist. LEXIS 93750 (C.D. Ill. Oct. 7, 2009), an inventor deposed a lawyer who had worked with the inventor and a company which had acquired licensing rights to the invention -- but was dissolved in the 1980s. The lawyer claimed privilege protection for his communications with company employees. The court explained that the attorney-client privilege "survives the death of a client when the client is a natural person," but cited several cases in concluding that "[a]bsent some compelling reason to the contrary, the attorney-client privilege does not survive the death of the corporation" -- so the lawyer could not refuse to answer the deposition questions. Id. at *4, *5.

Lawyers should remember that they generally will not be able to prevent discovery of their communications with employees of deceased corporate clients.

- [Privilege Point, 6/9/10]

Court Takes a Harsh View of Waiver in a Significant Corporate Transaction

June 9, 2010

Some lawyers overlook the waiver impact of such transaction-related activities as allowing their client's potential buyer to conduct due diligence (which can waive the attorney-client privilege protection for the disclosed documents), or the sale of assets to a buyer (which can be seen as transferring the privilege's ownership to the buyer, or waiving the privilege). However, courts sometimes seem to go too far in finding a waiver in a company's transaction-related actions.

In Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001 v. Boeing Co., Case Nos. 05-1251- & 07-1043-MLB, 2010 U.S. Dist. LEXIS 27093 (D. Kan. Mar. 22, 2010), several labor unions sued Boeing in connection with its sale of a Wichita, Kansas, facility to buyer Spirit. Boeing and Spirit sought the return of protected e-mails that they claimed to have inadvertently produced to the unions. The court refused to order the documents' return, finding that they did not deserve any protection – because Boeing had waived any attorney-client privilege protection during the sale to Spirit. As the court explained it, to "facilitate a smooth transition" after the sale of the Wichita facility, Boeing allowed 8,000 former Boeing employees (now working for Spirit) to continue using the Boeing e-mail system. Id. at *12. Boeing argued that this disclosure of pre-transaction privileged documents in its e-mail system to another company's employees did not waive the privilege, because there were "unique circumstances" resulting from "the need for Spirit employees to have access to the Boeing e-mail messages in order to continue their work at the Wichita facility." Id. at *18. The court rejected Boeing's argument – concluding that Boeing had made "an educated business decision" to allow employees who no longer worked for Boeing to have access to Boeing electronic records. Id. at *21. Although the court acknowledged that the 8,000 Spirit employees with access to the Boeing records had themselves been Boeing employees, it nevertheless found a waiver.

Although presumably the same harsh result would not apply to the less-fragile work product protection for some e-mails, this surprisingly strict application of the attorney-client privilege waiver doctrine should remind all lawyers to carefully consider the waiver impact of large corporate transactions.

- [Privilege Point, 11/10/10]

Do Defunct Corporations Still Have a Privilege?

November 10, 2010

Given recent economic troubles, it should come as no surprise that courts sometimes deal with privilege claims on behalf of defunct corporations. The typical scenario involves a subpoena directed to a law firm which formerly represented a now-defunct corporation that no longer exists. Can anyone assert the privilege in that setting?

In Favila v. Katten Muchin Rosenman LLP, 115 Cal. Rptr. 3d 274, 298 (Cal. Ct. App. 2010), a California court held that the privilege could be asserted by "persons authorized to act on the dissolved corporation's behalf during the windup process" – which the court recognized as "ongoing management personnel." One week later, the Southern District of Ohio reached the same conclusion based on an Ohio statute. In Wallace v. Huntington National Bank, Civ. A. Nos. 2:09-CV-104 & 2:10-CV-469, 2010 U.S. Dist. LEXIS 94958 (S.D. Ohio Sept. 10, 2010), the court allowed a defunct corporation's former director to assert the privilege.

Although law firms most typically face this issue, others who had some involvement in a now-defunct corporation might also want to avoid discovery.

- Schleicher v. Wendt, No. 1:02-cv-1332-WTL-TAB, 2010 U.S. Dist. LEXIS 48084, at *3-7 (S.D. Ind. May 14, 2010) ("[t]he parties agree on the applicable legal standard: the power to assert or waive a corporation's attorney client privilege is an incident of control of the corporation. . . . Whether control of a corporation transfers from 'old' to 'new' depends on the practical consequences of the transaction at issue. . . . The Defendants and Consecoco assert that 'New Consecoco is essentially the same business enterprise' as Old Consecoco because all the assets, sources of revenue and expense, and management of New Consecoco are the same as that of Old Consecoco just prior to the bankruptcy confirmation. . . . Because New Consecoco acquired substantially all of Old Consecoco's business operations, it also acquired Old Consecoco's right to assert the attorney client privilege.").
- M-I LLC v. Stelly, Civ. A. No. 4:09-cv-1552, 2010 U.S. Dist. LEXIS 52736, at *11 (S.D. Tex. May 26, 2010) (holding that the company acquiring another company in a merger became the owner of the acquired company's privilege; explaining that the new owner's "management stood in the shoes of prior management and controlled GCS's attorney client privilege as it related to the company's operations").

- [Privilege Point, 12/22/10]

Does a Company's Sale of Assets Pass Control of the Attorney-Client Privilege to the Purchaser?

December 22, 2010

Traditionally, a company's sale of a subsidiary's stock passed control of the privilege to the buyer, while the company's sale of assets did not have that effect. However, that "bright line" rule has weakened over the past several years.

In Gilday v. Kenra, Ltd., No. 1:09-cv-229-TWP-TAB, 2010 U.S. Dist. LEXIS 106310, at *5 (S.D. Ind. Oct. 4, 2010), the court held that the privilege passed with the sale of "substantially all" of a company's assets, and the purchaser's continuation of operations "'at the exact same location using the same computer systems, file cabinets, documents and other assets'" (internal citation omitted). The court explained that "[w]hether control transfers from one entity to another depends on the practical consequences of the transaction at issue," and that "[a]cquisition of substantially all of the corporation's assets and continuity of business operations support transfer of the privilege." Id. at *6.

Lawyers representing companies contemplating either a stock or an asset sale should keep this trend in mind.

- Girl Scouts-Western Okla., Inc. v. Barringer-Thomson, 252 P.3d 844, 847, 849 (Okla. 2011) (holding that a successor after a merger owned the entities' attorney-client privilege; "Western [plaintiff] alleged ownership of all of Sooner's documents and materials based on the merger. In support of its counter-motion for summary judgment, Western attached the merger agreement, annual meeting minutes of Sooner and Red Lands adopting the merger agreement, the Certificate of Merger submitted to the Secretary of State and the Certificate of Merger issued by the Secretary of State. The merger agreement provides that all of the assets, properties, rights, privileges, immunities, powers and franchises of Sooner shall vest in the surviving entity. Likewise, under the merger agreement, all debts, liabilities and duties of Sooner shall become the debts, liabilities and duties of the surviving entity. Thus, under the merger agreement, what belonged to Sooner now belongs to Western. Western recognizes that matters that were confidential in the hands of Sooner must remain confidential in the hands of Western."; explaining that "[i]f the client is a corporation, the privilege may be claimed by the successor, trustee, or similar representative."; implying that the companies could have altered this general rule in the agreement; "Sooner did not exempt or exclude confidential or any other materials from the merger agreement; it adopted a merger agreement that transferred all assets, properties and privileges to the surviving corporation. Ownership of Sooner's assets, as well as its attorney-client privilege, has now transferred to Western by operation of law as a result of the merger. To allow Attorney to assert Sooner's attorney-client post-merger would be in derogation of the merger agreement transferring ownership to Western.").

- Safeco Ins. Co. of Am. v. M.E.S., Inc., 289 F.R.D. 41, 53 (E.D.N.Y. 2011) ("[E]ven in those circumstances where the successor company is deemed to have acquired the predecessor's privilege, New York courts have carved out an exception for confidential communications related to the acquisition itself. . . . Otherwise, the successor company would have access to the confidential information of its direct adversary in the recently concluded negotiations. . . . Such a scenario, the courts reason, 'would significantly chill attorney client communication during such transactions.' . . . Moreover, the court is reluctant to imply such a provision into the parties' agreements when the parties could have provided it expressly." (emphases added)).
- In re Equaphor Inc., Ch. 7 Case No. 10-20490-BFK, 2012 Bankr. LEXIS 2129, at *9-10, *15 (Bankr. E.D. Va. May 11, 2012) (analyzing the ramifications of a law firm jointly representing a company and two of its executives in a derivative case; noting that the company later declared bankruptcy, and that the bankruptcy trustee moved to compel the turnover of documents the law firm created during the joint representation; inexplicably confusing the joint defense/common interest doctrine and the joint representation situation; ordering the law firm to produce the documents; "WTP and the Individual Defendants place great reliance on the fact that the corporation is named as a 'nominal defendant' in the shareholders' Complaint. In doing so, WTP and the Individual Defendants imply that the interests of the Individual Defendants are entitled to greater weight than those of the Debtor (and now, its creditors). However, while the Debtor may have been named as a nominal defendant, there is no such thing as a nominal client of a law firm. Further, there is no support in the case law for a 'nominal defendant exception' to the principle that all clients are entitled to an attorney's files. The corporation's status as a nominal defendant is of no consequence in considering the common interest privilege of the parties." (emphasis added); "But this is not a discovery dispute in the ordinary sense of the term. It is a motion to compel the turnover of the law firm's files under 11 U.S.C. § 542(e) to the party who now stands in the shoes of the former client, the Debtor. Under these circumstances, the courts have been uniform in holding that the work product doctrine does not prevent the turnover of the files." (emphasis added)).

- Kirschner v. K&L Gates LLP, 46 A.3d 737, 742, 743, 744, 746, 749, 749 n.3, 749, 749-50, 750, 751, 753, 753 n.6, 754 (Pa. Super. Ct. 2012) (holding that a liquidation trustee can pursue malpractice, breach of fiduciary duty, and other claims against K&L Gates on behalf of a bankrupt company, despite a retainer letter explicitly indicating that K&L Gates did not represent the company, but instead represented only the special committee of a board of directors; explaining that after several of its senior financial executives resigned after accusing CEO Podlucky of financial improprieties, Le-Nature's board of directors determined that it was "in the best interest of the Company to appoint a special committee of independent directors" to investigate matters; noting that the Special Committee determined that "it was critical to retain on behalf of the company, legal counsel with experience in conducting such investigations; noting that K&L Gates's retainer letter contained the following provision: "We understand that we are being engaged to act as counsel for the special committee and for no other individual or entity, including the Company or any affiliated entity, shareholder, director, officer or employee of the Company not specifically identified herein. We further understand that we are to assist the Committee in investigating the facts and circumstances surrounding the aforementioned resignations and assist the Special Committee in developing any findings and recommendations to be made to the full Board of the Company with respect thereto. The attorney-client relationship with respect to our work, including our work product, shall belong to the Committee. Only the Committee can waive any privilege relating to such work."; noting that K&L Gates hired P&W as a financial expert pursuant to a retainer letter that contained the following sentence: "P&W shall provide general consulting, financial accounting, and investigative or other advice as requested by K&L [Gates] to assist it in rendering legal advice to Le-[Nature's." (alterations in original); explaining that K&L gave a draft of its investigation report to Podlucky, even though he was not a member of the Special Committee; reciting the report as finding no evidence that Podlucky had engaged in impropriety; pointing out that Podlucky later hired K&L Gates on behalf of the company to prepare an initial public offering, but that eventually a custodian found "massive fraud" at the company, which caused it to declare bankruptcy; acknowledging that the trial court had dismissed the liquidation trustee's legal malpractice/negligence claim against the firm, because the firm had been retained to protect the interests of the shareholders rather than the company itself; reversing the trial court's finding, concluding "[t]he averments of the Amended Complaint, taken as true, establish that Le-Nature's, acting through its Board and the Board's Special Committee, sought the legal advice and assistance of K&L Gates. Specifically, Le-Nature's sought K&L Gates's legal advice and assistance in investigating allegations of fraud, and in preparing findings and

recommendations for action to be taken by Le-Nature's."; "As a committee of the Board, the Special Committee had the fiduciary duty to act in the best interests of not only the shareholders, but also the corporation."; "Contrary to the arguments of K&L Gates and Ferguson, no conflict of interest existed between Le-Nature's and the Special Committee as the Special Committee owed a fiduciary duty to act in the best interests of the company."; "By its Resolution, the Board authorized the Special Committee to retain counsel to conduct an investigation 'on behalf of the company.'"; "Under Delaware law, the Board could not authorize the Special Committee to act solely on behalf of investors. Such authorization would violate the Board's fiduciary duty to Le-Nature's. . . . [U]nder Delaware law, the Special Committee only could act in the best interests of Le-Nature's and its shareholders." (last alteration in original); "K&L Gates retained P&W to provide, inter alia, consulting, financial and investigative advice to K&L Gates 'to assist it in rendering legal advice to Le[-]Nature's.'" (alteration in original); "In addition to the foregoing, the Amended Complaint asserts that K&L Gates provided a draft of its Report not only to the Special Committee, but also to Podlucky. . . . Podlucky was not a member of the Special Committee."; also reversing the trial court's finding that the liquidation trustee could not seek damages because the company was already insolvent when K&L Gates prepared its report; the "trial court rejected Trustee's claim for damages because Le-Nature's was insolvent at the time K&L Gates prepared its Report in December 2003"; "[W]e conclude that Trustee seeks traditional tort damages. The fact of Le-Nature's insolvency does not negate the harm allegedly resulting from K&L Gates's professional negligence."; "Despite the fact that other courts may have determined that similar complaints involving Le-Nature's have alleged deepening insolvency as damages, we conclude that the Complaint before this Court does not, under Pennsylvania law."; "According to the Amended Complaint, these damages were reasonably foreseeable and K&L Gates's malpractice enabled Podlucky and the interested directors to continue their fraudulent activity." (emphasis added)).

- Solis v. Bruister, Civ. A. Nos. 4:10-cv-77 & -95-DPT-FKB, 2013 U.S. Dist. LEXIS 29108, at *4-5, *8-9 (S.D. Miss. Jan. 22, 2013) (concluding that transfer of privileged communications as part of a stock sale of a company waived the seller's attorney-client privilege; analyzing the following situation: "Plaintiff's Motion to Compel seeks an order compelling the production of documents subpoenaed by Plaintiff from DirecTV [nonparty], the purchaser of Southeastern Ventures, Inc. f/k/a Bruister & Associates, Inc. These documents were stored on Defendant Amy Smith's Bruister & Associates computer, which DirecTV acquired in the purchase. . . . The instant motion seeks production of the DirecTV documents withheld by Defendants. DirecTV asserts no objection to the production of the documents at issue in Plaintiff's Motion."; "Plaintiff has argued that because all the documents at issue were provided to a third party, DirecTV, the privilege, if any ever existed, was waived on that basis. See Allread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993) ('Patently, a voluntary disclosure of information which is inconsistent with the confidential nature of the attorney-client relationship waives the privilege.'). Along those lines, other federal district courts have held that a sale and transfer of assets, including allegedly privileged information, waives the attorney-client and work product privileges. See Robbins & Myers, Inc. v. J.M. Huber Corp., 2003 U.S. Dist. LEXIS 10001, 2003 WL 21384304, *3 (W.D.N.Y. May 9, 2003); and In re In-Store Adver. Secs. Litig., 163 F.R.D. 452, 458 (S.D.N.Y. 1995). Defendants have not convinced the Court that any privileges were not waived when Amy Smith's computer was turned over to DirecTV." (emphasis added); inexplicably failing to address DirecTV's ownership of the documents contained on the computer it purchased, and DirecTV's acquiescence to their production; not addressing the other possible impact of a "waiver" -- such as the availability of other third parties to assess the documents; also finding a waiver based on defendant's inadequate log and on the fiduciary exception.).

- SCR-Tech LLC v. Evonik Energy Services LLC, 2013 NCBC 42, ¶¶ 18, 15, 26 (N.C. Super. Ct. Aug. 13, 2013) (reviewing the very sparse case law on privilege protection for communications with partially owned subsidiaries; dealing with communications to and from plaintiff SCR-Tech (1) when the company was partially owned by Ebinger; (2) when the company was then sold to, and wholly owned by, Catalytica, and (3) when the company later entered into a "common interest agreement" with Ebinger, because both faced similar litigation; applying a sort of sliding scale, considering both the percentage of ownership and any "shared legal interest"; concluding that the privilege protected communications during all three situations, because (1) SCR-Tech's shared legal interest with Ebinger meant that the court did not have to determine whether Ebinger's 37.5% ownership (which gave it control) was "too limited" to assure privilege protection by itself; (2) Catalytica's 100% ownership of, and shared legal interest with, SCR-Tech assured privilege protection; and (3) the "common interest" doctrine could protect communications between SCR-Tech and its former controlling shareholder Ebinger even in the absence of any corporate affiliation at that time.).

- Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 156, 160, 161 n.27, 161 (Del. Ch. 2013) (addressing a situation in which the buyer of a company's stock claimed that the seller shareholders had defrauded it in the purchase transaction; noting that the buyer discovered privileged communications between the seller and its outside counsel Perkins Coie in the company's computer system because the seller had not removed those documents from its computer system before the closing, and had "done nothing to get these computer records back" since the closing a year earlier; explaining that the seller claimed that the attorney-client privilege nevertheless protected those communications "on the ground that it, and not the surviving corporation [buyer], retained control of the attorney-client privilege," rejecting the seller's privilege claim – relying on the Delaware General Corporation Law's clear statement that after a merger the surviving company (the buyer here) owns "all" property, privileges, etc.; concluding that the buyer could read and use the intimate privileged communication between the seller's executives and Perkins Coie about the transaction; noting that sellers can "negotiate[] special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger"; noting that pointing to a 2008 Delaware decision approving a purchase transaction provision specifically excluding from such a sale "all rights of the Sellers under this Agreement and all agreements and other documentation relating to the transactions contemplated hereby." (citing Postorivo v. AG Paintball Holdings, Inc., Consol. Civ. A. Nos. 2911- & 3111-VCP, 2008 Del. Ch. LEXIS 17, at *6 n.5 (Del. Ch. Feb. 7, 2008) (unpublished opinion)); reiterating that "the answer to any parties worried about facing this predicament in the future" is to "exclude from the transferred assets the attorney-client communications they wish to retain as their own." (emphasis added)).

- Estate of Jackson v. General Electric Capital Corp. (In re Fundamental Long Term Care, Inc.), 515 B.R. 874 (Bankr. M.D. Fla. 2014) (addressing a situation in which Kirkland & Ellis represented several corporate affiliates on various matters, including a corporate transaction and Ohio litigation; noting that a state receiver took over one of Kirkland's former clients, and other affiliates in the corporate family declared bankruptcy (and thus had a trustee now calling the shots); carefully scrutinizing Kirkland & Ellis's work for the related corporations when the corporations became litigation adversaries; concluding that Kirkland had not jointly represented two of the affiliated corporations in the transaction – which meant that the trustee (standing in the shoes of the bankrupt joint client) could not obtain the other corporation's responsive but privileged documents about the transaction; holding in contrast that Kirkland had jointly represented two of the affiliated corporations in the Ohio litigation, allowing the trustee to rely on what the court called the "co-client exception" to obtain privileged documents relating to that litigation).

- Newspring Mezzanine Capital II, L.P. v. Hayes, Civ. A. No. 14-1706, 2014 U.S. Dist. LEXIS 169900, at *6-7, *8, *10-11, *11 (E.D. Pa. Dec. 9, 2014) (holding that a company sold the privilege when it sold the stock of a company, because the law firm assisting the company did not represent the individual selling shareholders as personal clients; "The Baxter Parties insist that they retain the right to assert attorney-client privilege over communications with Wishart Norris pre-merger because they were the sellers of a controlling interest in Old Utilipath. In support of this position, they analogize the current situation to Tekni-Plex v. Meyner and Landis, 89 N.Y.2d 123, 674 N.E.2d 663, 651 N.Y.S.2d 954 (Ct. Ap. N.Y. 1996)."; "The most useful point of departure is the contract of representation whereby Wishart Norris was retained. The retention letter stated that it related to 'this Firm's representation of Utilipath, LLC ('the Company').' The letter also cautioned, 'The advice and communications which we render on the Company's behalf are not intended to be disseminated to or relied upon by any other parties without our written consent' (emphasis added). The signature line identified Utilipath LLC and identified Jarrod Hayes as a 'manager.' Jarrod Hayes did not separately sign as an individual, and neither did his father, Baxter Hayes, Jr., or brother, Baxter Hayes, III."; "I also find nothing in Wishart Norris' actions that indicate it was representing any of the Baxter Parties as individuals in addition to representing the corporations. Further supporting my conclusion is the fact that Baxter, Jarrod, and Lindon Hayes had retained their own personal counsel."; "In contrast, in the situation before me, Wishart Norris was explicitly retained by Old Utilipath to carry out the Utilipath transaction, and other lawyers were retained to personally represent the parties in the transaction. Under Bevill [In re Bevill, Bresler & Schulman Asset Mgmt. Corp.], 805 F.2d 120 (3d Cir. 1986)], the individuals asserting the privilege have a specific burden, which they have failed to meet."; "Because Wishart Norris represented the corporation, the corporation's post-merger owners took control of the corporation's attorney-client privilege." (emphasis added)).

- [Privilege Point, 11/4/15]

Another Court Deals with Privileged Communications' Ownership after a Corporate Transaction

November 4, 2015

Most if not all courts recognize that selling a corporation's stock transfers ownership of the corporation's privileged communications. These can include even communications about the sale transaction. Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155 (Del. Ch. 2013). Asset sales present a more subtle analysis.

In HunterHeart Inc. v. Bio-Reference Laboratories, Inc., Case No. 5:14-cv-04078-LHK, 2015 U.S. Dist. LEXIS 123921, at *2 (N.D. Cal. Sept. 16, 2015), Hunter Laboratories sold "the bulk of its assets" to defendant. The asset purchase agreement explicitly identified the transferred assets as including Hunter's "computer equipment," software, e-mail addresses and "other records, data and communications . . . in the cloud." Id. (internal citation omitted). Hunter's owner used the company email system both before and after the asset sale. Hunter's remaining business (now called HunterHeart) later sued defendant, and sought a protective order preventing defendant from using privileged communications on the servers and other systems the defendant had purchased. The court denied the protective order, finding that as for the pre-transaction privileged communications: (1) Hunter waived its privilege "when it agreed to hand over all of its servers, files and communications"; and, if not, (2) the "[privilege] passed from Hunter to [Defendant] by virtue of the [asset purchase agreement]'s transfer of the other company assets." Id. at *5, *6. The court then held that post-transaction communications never deserved privilege protection, because Hunter's owner who continued to use the email system "could not have expected these emails to remain confidential." Id. at *7.

Many lawyers remember from law school that selling a company's stock transfers the privilege, but selling its assets does not. Courts increasingly apply what is called the "practical consequences test" when analyzing privilege ownership, under which selling assets can also convey privileged communications.

- Krys v. Paul, Weiss, Rifkind, Wharton, & Garrison LLP (In re China Med. Techs., Inc.), 539 B.R. 643, 654, 655, 656, 658 (S.D.N.Y. 2015) (holding that a bankruptcy liquidator could waive the attorney-client privilege that belonged to a company's Audit Committee, but could not waive the Audit Committee's work product protection, which belonged solely or jointly to the Audit Committee's lawyer's at Paul Weiss; "The issue now before the Court is whether the capacity of the Audit Committee to retain independent counsel and to conduct unfettered internal investigations that implicate corporate management should thwart the statutory obligation of a trustee in bankruptcy to maximize the value of the estate by conducting investigations into a corporation's prebankruptcy affairs."; "Weintraub [CFTC v. Weintraub, 471 U.S. 343 (1985)] did not squarely address the circumstances here. Its analysis was limited to whether privileges asserted by a corporation's counsel were waivable by that corporation's trustee in bankruptcy. The asserted privileges here relate to an investigation by Appellees on behalf of a corporation's audit committee, and the precise relationship between that committee and the corporation is disputed. Despite these factual distinctions, however, the same considerations that weighed in favor of the trustee in Weintraub weigh in favor of Appellant here."; "It is true that the Audit Committee was 'independent' in some sense. It could retain counsel, and it legitimately expected that its communications with counsel would be protected against intrusion by management. But the Audit Committee is not an individual, nor is its status analogous to that of an individual. Instead, it was a committee constituted by CMED's Board of Directors, and thus a critical component of CMED's management infrastructure."; "[T]he justifications for protected attorney-client communications dissipate in bankruptcy. Prebankruptcy, audit committees 'play a critical role in monitoring corporate management and a corporation's auditor.' Without the prebankruptcy protection of attorney-client privilege, audit committees could not provide 'independent review and oversight of a company's financial reporting processes, internal controls and independent auditors,' nor could they offer a 'forum separate from management in which auditors and other interested parties [could] candidly discuss concerns.' SEC Release No. 8220, 'Standards Relating to Listed Company Audit Committees,' File No. 87-02-03, 79 SEC Docket 2876, 2003 WL 1833875, at *19 (Apr. 9, 2003). But as the Bankruptcy Court noted in its Opinion, 'any miscreants have left the company' in bankruptcy; corporate management is deposed in favor of the trustee, and there is no longer a need to insulate committee-counsel communications from managerial intrusion. Without a legitimate fear of managerial intrusion or retaliation in bankruptcy, Appellees' assertions as to a potential chilling effect ring hollow." (alteration in original) (citations omitted); "Although the Court recognizes that this is a difficult issue in a largely ill-defined area of the

law, it nevertheless respectfully disagrees with the legal determination of the Bankruptcy Court below. The Court finds that Appellant, as CMED's Liquidator, now owns and can thus waive the Audit Committee's attorney-client privilege, regardless of the Committee's prebankruptcy independence. The Bankruptcy Court's ruling to the contrary is hereby reversed."; "The Court's ruling as to attorney-client privilege does not extend, however, to Appellees' assertion of work product protections, which the Bankruptcy Court Opinion only peripherally addressed. Importantly, because 'work product protection belongs to the Audit Committee's counsel and cannot be waived by the client,' it does not fall within the ambit of Weintraub. Thus, even assuming that the Liquidator owns those documents for which Appellees have asserted work-product protection, he cannot waive this protection unilaterally. Appellant, at the very least, has not cited any cases suggesting otherwise." (citations omitted)).

- SEC v. Present, Civ. No. 14-14692-LTS, 2015 U.S. Dist. LEXIS 170245, at *2-3, *3, *9-10 (D. Mass. Dec. 21, 2015) (concluding that a former CEO could not obtain documents from a bankrupt company he founded and ran in order to use the documents to defend himself from an SEC action by asserting advice of counsel; "In 2013, the Securities and Exchange Commission ('SEC') commenced an investigation into both F-Squared and Present. . . . In August 2014, during the course of this investigation, F-Squared, with Present as CEO, refused the SEC's request to waive its attorneyclient [sic] privilege In November 2014, Present left F-Squared . . . and thereafter F-Squared admitted liability for making materially false statements . . . and paid a \$35 million fine. . . . F-Squared has now filed for bankruptcy protection, where it faces a variety of creditor claims, including a potential class action lawsuit."; "On the day the SEC settled with F-Squared, the SEC sued Present for various violations of the Advisers Act . . . and associated SEC regulations."; "Among other affirmative defenses, Present asserted in his Answer that he 'reasonably relied upon the work, advice, professional judgment, and opinion of others, including but not limited to legal and compliance professionals.'"; "Both as the CEO and a sophisticated businessman, he necessarily understood that F-Squared, rather than he, personally held the keys to attorney-client privilege. At that time, as the CEO of F-Squared, Present was in the position either to waive the privilege or to obtain in his personal capacity the right to be able to waive the privilege in the future. He chose not to do so. These circumstances mitigate the fairness considerations advanced by Present. Finally, ordering disclosure, even under a protective order, necessarily divests F-Squared from control over its privileged information and exposes it to the SEC and, ultimately, at trial to a variety of others contrary to the fundamental purposes of the privilege.").

- Virtue Global Holdings Ltd. v. Rearden LLC, Case No. 15-cv-00797-JST, 2016 U.S. Dist. LEXIS 68819, at *5 (N.D. Cal. May 24, 2016) (holding that sale of a corporation's assets does not automatically transfer the privilege-protected documents; "Even if the MOVA Assets had transferred to Rearden in April 2013, however, the Court would still find that Magistrate Judge Kim did not err. The transfer of assets alone does not cause a transfer of attorney-client privilege. City of Rialto v. U.S. Dep't of Def., 492 F. Supp. 2d 1193, 1201 (C.D. Cal. 2007); VIA Techs., Inc. v. SONICBlue Claims LLC, No. C 09-2109 PJH, 2010 U.S. Dist. LEXIS 59709, 2010 WL 2486022, at *2 (N.D. Cal. June 16, 2010). Instead, the transfer of control over the entity 'result[s] in a transfer of the attorney-client privilege.'" City of Rialto, 492 F. Supp. 2d at 1201. On this point, Judge Kim discussed the lack of evidence supporting a transfer of control from Original MO2 to Rearden Mova. She considered that Rearden took no steps to inform LaSalle that he no longer had a managerial role with Original MO2 and that Rearden did not take steps to document changes in LaSalle's managerial status with Original M02. ECF No. 103 at 5.").

- Cooper v. Meritor, Inc., Civ. A. Nos. 4:16-cv-052 to -056-DMB-JMV, 2017 U.S. Dist. LEXIS 4727, at *43, *44, *45-46, *46, *47, *47-48 (N.D. Miss. Jan. 12, 2017) (analyzing the waiver impact of fifteen documents Textron created when it owned a Mississippi facility from 1989 to 1996; explaining that Textron sold assets of the company in 1999; disagreeing with Textron's assertion that the asset purchase agreement excluded the privileged environmental documents; noting that Textron left the documents at the facility without any restrictions on access, and did not object when the asset purchaser went bankrupt in 2004 and all of its assets were sold to another company out of bankruptcy; finding that Textron waived privilege protection for the fifteen documents, even though Textron claims to have forgotten that the documents were left at the facility; "In the instant case, Textron asserts a privilege over fifteen (15) documents created from 1989 to 1996 during a period of time it owned and operated a wheel cover manufacturing facility in Grenada, Mississippi. In 1999, Textron entered and subsequently consummated an asset sale agreement with Grenada Manufacturing, LLC (hereinafter sometimes 'the APA'). According to Textron, it did not transfer ownership of documents related to environmental matters, including the subject 15 documents, to Grenada Manufacturing, LLC as part of that sale. It is Textron's position that it retains ownership of all such documents and any affiliated privilege with respect thereto."; "According to an affidavit supplied by Textron, boxes of these environmental documents, together with other business records of Textron's operations prior to the 1999 sale, were left by Textron at the Grenada facility after the sale. Indeed, Textron contracted for a right to access the documents for a period of time following the sale. APA 14.1. In the court's view, Textron's claim of retained ownership of the documents, even if it were convincing, does not satisfactorily answer whether its treatment of those assets waived any privilege that might be claimed with regard to any of them." (footnote omitted); "Textron is faced with the fact that it intentionally left documents that it must acknowledge (because it is material to its claim of retained ownership of the documents in the first instance) it knew concerned environmental matters related to releases from the business prior to 1999. These documents were intentionally left unattended and unrestricted in the hands of yet another party -- this time, Ice Industries, Inc. Though Textron was given notice of the asset transfer to Ice Industries, Inc., it made no effort to retrieve the environmental documents or to even review them for privilege."; "In other words, Textron plainly waived any privilege that would have otherwise been retained if the documents had, in fact, been excluded from the purchase and asset sale."; "Textron argues that unless it realized that the documents concerning environmental matters that it freely gave possession of to others for decades did in fact contain privileged documents, that disclosure could not waive any privilege attendant to the

document(s)."; "The court is unpersuaded."; "[T]here is nothing about the 'practical consequences doctrine' that dictates a different outcome. The practical outcome of leaving -- for decades -- documents a company contends it owns in possession of another, with no provision for protection of any privileged communications therein, not to mention permitting the subsequent transfer of possession to others on additional occasions, all without any effort to retrieve them prior to the instant litigation, or to otherwise review them to remove privileged materials has the obvious practical and legal consequence of waiver of any associated privileges." (footnote omitted)).

- Newsome v. Lawson, 286 F. Supp. 3d 657, 662, 663, 664, 665 (D. Del. 2017) (applying the Teleglobe [In re Teleglobe Commc'ns Corp., 493 F.3d 345 (3d Cir. 2007)] standard, and finding that a liquidating trustee could obtain privileged documents from a lawyer that jointly represented the bankrupt company and its parent; also finding that the Eureka [Eureka Inv. Corp., N.V. v. Chi. Title Ins. Co., 743 F.2d 932 (D.C. Cir. 1984)] case did not change that result; also finding that the “breach of duty exception” allowed the lawyer for a joint client to obtain privileged communications between either of the joint client and their lawyer; “The magistrate judge relied on Teleglobe to hold that neither the adverse-litigation exception nor the breach of duty exception were proper grounds to compel Defendants' production of privileged documents from the joint representation of Mahalo USA and Mahalo Canada. . . . Other courts addressing the same factual scenario have uniformly reached a different conclusion: A joint client suing only the joint attorney may compel disclosure of privileged documents from the joint representation.” (emphasis added); “In a lawsuit between a joint client and the joint attorney, all of the courts found to have addressed the issue relied on the adverse-litigation exception to compel disclosure of the privileged communications from the joint representation.”; “[A] joint attorney may not withhold from one joint client privileged communications from the joint representation, even if the other (non-party) joint client refuses to consent to the disclosure.” (emphasis added); “Ultimately, the documents Plaintiff seeks would not be disclosed to a third party, but would remain among the joint clients and the joint attorney that participated in the joint representation. Accordingly, it is not enough that Mahalo Canada, a non-party joint client, objects to the disclosure of privileged documents from the joint representation. The court finds that the magistrate judge erred in holding that the adverse-litigation exception was not a proper legal basis for compelling disclosure of privileged documents from the joint representation.” (emphasis added); “The adverse-litigation exception does not entitle Plaintiff to unbounded discovery. A joint client is entitled to only those communications relevant to the matter of common interest that was the subject of the joint representation.” (emphasis added); “Although the parties do not dispute that there was a joint representation, they have not identified the matter of common interest that was the subject of the joint representation. It is possible that Mahalo Canada has some privileged documents which reference Mahalo USA, but which are not the subject of the joint representation. Because the parties did not identify the matter of common interest, it is difficult to determine where exactly that line would be drawn. Nevertheless, once the parties have agreed on the matter of common interest, Plaintiff is entitled to all communications that fall within the scope of the joint representation, including communications where one joint client is not present.” (emphases added))

- United States v. Adams, Case No. 0:17-CR-00064-DWF-KMM, 2018 U.S. Dist. LEXIS 41165, at *3, *5, *8-9, *10, *11, *14 (D. Minn. Mar. 12, 2018) (assessing a situation in which the government seized emails between defendant (also a lawyer) Adams and his former clients ("Apollo"); noting that many of the emails deserved privilege protection, but the government argued that the privilege belonged to Scio, a company which earlier had purchased (in the words of the asset purchase agreement) "certain of [Apollo's] property, assets, rights and privileges."; explaining that the government noted that Scio was willing to waive its privilege; further explaining that Adams argued that although defunct, Apollo "retained the authority to waive," and could therefore assert, the privilege; court applying the "practical consequence[s]" test, and thus focusing on the "practical realities of the Apollo-Scio transactions"; emphasizing that: (1) Apollo had sold Scio "all of its intellectual property"; (2) the transactional parties' contemporaneous communications "support the conclusion that [the transactions] effectively constituted the sale of a business that transferred control of the privilege as well"; and (3) there was no evidence that after the transactions "Apollo continued operating in any meaningful way"; concluding that Scio owned and could therefore waive the privilege – even though Apollo continued to exist as a corporate entity).

- Utilisave, LLC v. Fox Horan & Camerini, LLP, No. 652318/2014, 2018 NY Slip Op 33320(U), at *2, *3,*11, *8-9, *10-11, *15 (N.Y. Sup. Ct. Dec. 17, 2018) (addressing a situation in which one of Utilisave's two managing members (MHS, which was owned by Michael Steifman) had earlier successfully "pursued both direct and derivative claims against Utilisave and its then-CEO"; noting that after Utilisave declared bankruptcy, MHS and Steifman: (1) purchased Utilisave's assets from a liquidation trustee, (2) caused Utilisave to file a malpractice case against Utilisave's law firm that had lost the earlier action, and (3) sought access to communications between that law firm and Utilisave's then-CEO; explaining that the law firm argued that "Utilisave is not entitled to any privileged communications because the company was purchased by Steifman, who was adverse to Utilisave in the Prior Action"; acknowledging that "had Steifman or MHS sought privileged communications during the pendency of that [earlier] action, defendants' documents would have been prohibited from disclosure"; concluding that now that MHS and Steifman owned Utilisave, they could rely on what is called the "practical consequences" standard to assert ownership of Utilisave's attorney-client privilege and its former law firm's files; ordering Utilisave's former law firm to describe the files in its possession so some could be produced; inexplicably holding in contrast "that [Utilisave] has not advanced any argument that it is entitled to [its former law firm's] work product").

- Shareholder Representative Services LLC v. RSI Holdco, LLC, C.A. No. 2018-0517-KSJM, 2019 Del. Ch. LEXIS 196, at *3, *4-5, *10,*11-12 (Del. Ch. May 29, 2019) (addressing a situation in which the sellers negotiated a merger agreement provision: (1) recognizing continued privilege protection after the closing for their privileged transactional communications with their law firm Seyfarth Shaw; and (2) prohibiting the buyer from "us[ing] or rely[ing] on any of the Privileged Communications in any action or claim against or involving any of the parties hereto after the Closing"; noting that the buyer nevertheless sought to use them in a post-closing dispute – arguing that "[b]ecause the sellers did not excise or segregate the privileged communications from the computers and email servers transferred to the surviving company," sellers waived their privilege and "the buyer may thus use the communications in this litigation"; rejecting buyer's argument, finding that it would "undermine the guidance of Great Hill [Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP], 80 A.3d 155 (Del. Ch. 2013)) – which cautioned parties to negotiate for contractual protections"; holding that the sellers could "assert that privilege in this litigation," and that buyer was "barred from using or relying on the Emails in this litigation").

- In re Old BPSUSH Inc., Ch. 11 Case No. 16-12373 (KJC), 2019 Bankr. LEXIS 1867, at *3, *16-17, *17, *22-23 (Bankr. D. Del. June 20, 2019) (addressing a situation in which a liquidation bankruptcy trustee sought documents from the bankrupt company's audit committee's law firm; following China Medical, and ordering production of the privileged communications; disagreeing with China Medical in ordering production of the law firm's investigation-related work product; "Theseus Strategy Group LLC, as trustee (the 'Liquidation Trustee') of the Old PSG Wind Down Liquidation Trust (the 'Trust') filed a motion pursuant to Bankruptcy Code § 542 (the 'Motion') for entry of an order: (i) compelling Richards Kibbe & Orbe LLP ('RKO') and AlixPartners, LLP ('AlixPartners') to turn over certain documents, records, and information related to the investigation conducted by RKO and Alix Partners on behalf of the Debtors' former audit committee (the 'Audit Committee'); and (ii) finding that all rights, titles, and interests in any privilege or immunity applicable to the documents, records, and information (collectively, the 'Privileges') that remain in effect are controlled exclusively by the Liquidation Trustee. RKO and AlixPartners object to the relief requested in the Motion, disputing that the Privileges transferred to the Liquidation Trustee, and arguing that RKO, as independent counsel to the Audit Committee, is duty-bound to maintain the confidentiality of any privileged documents."; "I agree with the China Medical Court's reasoning that it is appropriate to extend the Supreme Court's analysis in Weintraub and recognize that the trustee appointed as the representative of a corporate debtor controls the privileges belonging to the independent committee established by the corporate debtor. Therefore, in the present case, I conclude that upon confirmation, the Plan transferred control of the former Audit Committee's Privileges to the Liquidation Trustee."; "Deciding that the Liquidation Trustee controls the Audit Committee's Privileges, however, does not fully resolve this matter. RKO asserts that it has not turned over Investigation Records that are subject to protection under the work product doctrine, not the attorney-client privilege. The China Medical Court decided that counsel could assert the work product doctrine, and the liquidator could not 'waive the protection unilaterally.'" (citation omitted); "In accordance with TradingScreen and Sage Realty, I conclude that RKO must produce the entirety of the Investigation Records to the Litigation Trustee, except for those items that are firm documents intended for internal law office review and use. Only the documents characterized as counsel's mental impressions fall within that category. The draft factual memoranda and draft legal memoranda must be turned over as part of the entire file, even if those documents were circulated only within the firm. Moreover, the communications between counsel and the individual Audit Committee members also do not fall within the internal document exception and must be turned over to the Litigation Trustee.").

- Askari v. McDermott, Will & Emery, LLP, 114 N.Y.S.3d 412, 415, 415-16, 429, 430, 432, 432-33 (N.Y. App. Div. 2019) (confirming and applying the Tekni-Plex doctrine under which the Seller in a stock sale transaction retains the transaction documents' privilege protection essentially by operation of law; "On this appeal we are asked to address a conflict between New York and Delaware law relating to which law applies, and implicating who or which entity may assert the attorney-client privilege, in the context of the merger and restructuring of businesses, the sale of membership interests, and related transactions which occurred in connection with those events."; "Upon concluding that, under Delaware law, the right of the plaintiffs, Kevin Askari and Sina Drug Corp. (hereinafter Sina), as sellers, to transactional documents contained in the file of the defendant law firm McDermott, Will & Emery, LLP (hereinafter McDermott), relating to the reorganization, merger, and sale of Sina, was transferred to the new entity/buyer, the defendant Oncomed Specialty, LLC (hereinafter Specialty), post- merger/reorganization, the Supreme Court denied the plaintiffs' motion for summary judgment on the complaint and granted the defendants' separate cross motions for summary judgment dismissing the complaint insofar as asserted against each of them. We reverse the order appealed from for the reasons set forth herein."; "Under New York law, the attorney-client privilege regarding pre-merger communications between an attorney and his or her client which are related to a business/corporate merger does not fully pass to the new or surviving company/buyer, but remains with the former shareholders of the prior company/seller (see Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d at 130). In Tekni-Plex, the Court of Appeals determined that the buyer in a corporate acquisition controlled the attorney-client privilege as to some, but not all, of the pre-merger communications (see id. at 127)."; "Thus, the Court of Appeals made a clear distinction between confidential communications regarding a company's ongoing operations and those related to its acquisition (see id. at 136). The Court noted that, during the acquisition negotiation process, the predecessor company and its shareholders were in an adversarial relationship with the successor company (see id. at 138-139). Therefore, the original Tekni-Plex continued to control the attorney-client privilege with respect to confidential communications concerning the acquisition, and was entitled to refuse to disclose such communications to the new Tekni-Plex (see id. at 138-139; Fochetta v Schlackman, 257 AD2d 546, 546, 685 N.Y.S.2d 22 ["Given the extent of plaintiff's ownership interest and managerial involvement in defendant corporations prior to the disputed stock surrender, the motion court properly determined that the attorney-client privilege was not properly invoked by defendants to deny plaintiff access to otherwise privileged pre-surrender materials essential to the proof of his claims"]; see also Orbit One Communications, Inc. v Numerex Corp., 255 FRD 98,

104, 106-107 [SD NY] ["Allowing Numerex to control Old Orbit One's privilege would lead to a fundamentally unfair result. . . . Numerex cannot both pursue the rights of the buyer and simultaneously assume the attorney-client rights of the buyer's adversary, Old Orbit One. Old Orbit One retained ownership of, and continues to control, the attorney-client privilege as to confidential communications with [the law firm which represented it throughout the acquisition negotiations] concerning the acquisition transaction" [citation omitted]]." (alteration in original); "In a situation where documents are sought, New York will apply the law of the forum where the evidence will be introduced at trial or the location of the proceeding seeking discovery of those documents (see People v Greenberg, 50 AD3d 195, 198-199, 851 N.Y.S.2d 196). Here, the privileged communications being sought by the plaintiffs in this New York replevin action were made in New York between New York-based attorneys at McDermott and Sina, a New York corporation, involving its then-majority shareholder and president, Askari, a New York resident. The sole nexus that Delaware has to this action is that Specialty is a limited liability company formed under the laws of that state. Consequently, New York law applies in this action sounding in replevin seeking the disclosure of McDermott's files (see id. at 199)."; "It would indeed be incongruous to enforce a law which effectively forecloses New York corporations merging with foreign corporations from having the ability to pursue their claims against their counsel or the newly formed, post-merger entities based on the post-merger entities' control of the documents needed by the former entities to prosecute potential claims. Here, Delaware law gives the new corporation, a putative defendant, sole access to and control of the merger-related documents by the exercise of the attorney-client privilege. This is contrary to New York public policy as enunciated in Tekni-Plex.").

- [Privilege Point, 12/11/19]

Can A Dissolved Corporation Claim Privilege Protection?

December 11, 2019

Deceased individuals' privilege protection survives their death, and bankrupt companies can also claim privilege protection under certain circumstances (although it may be owned by a trustee). But as the court in Affiniti Colorado, LLC v. Kissinger & Fellman, P.C., asked, "[d]oes the attorney-client privilege survive [a] corporation's dissolution?" Not surprisingly, the issue almost always involves documents in the possession of the former corporation's law firm. 461 P.3d 606, 609 (Colo. App. 2019).

In Affiniti Colorado, plaintiff filed a negligent misrepresentation action against defendant law firm for alleged misrepresentations in an opinion letter the firm sent on behalf of a now-dissolved corporation. The law firm "urge[d] [the court] to follow the well-settled general rule that the privilege survives the death of a natural person." Id. at 614. But the court rejected that analogy, noting that: (1) corporations' managers change over time, so there is no assurance that some future manager will not waive their privilege; (2) "corporations do not have friends or family who could be embarrassed or harmed" by post-dissolution disclosure; (3) "unlike an individual, whose estate can be sued civilly, once a corporation is fully dissolved, any suit brought against it must be filed within two years." Id. at 615. After finding that "no one with the authority to act on behalf of [the dissolved corporation] remains to invoke or waive the privilege," the court upheld the lower court's ruling that the dissolved corporation's former law firm could not successfully assert privilege protection for the now-dissolved corporation's documents in its files. Id. at 616.

Although the law often treats corporations as if they were "persons," sometimes the privilege applies in very different ways to such entities.

- Spicer v. GardaWorld Consulting (UK) Ltd., 120 N.Y.S.3d 34, 35, 36 (N.Y. App. Div. 2020) (finding a financial advisor was inside privilege protection; "Plaintiffs were the sole shareholders of Hestia B.V. (the Company) prior to selling all of their shares to defendant. Nonparty KippsDeSanto & Company (KDC) was plaintiffs' financial adviser in connection with the sale transaction."; "It is true that KDC was not retained to assist plaintiffs' counsel in providing legal advice. However, the unrebutted evidence reflects that KDC spent some portion of its time helping counsel to understand various aspects of the transaction for that purpose. As such, KDC's presence was necessary to enable attorney-client communication (see MBIA Ins. Corp. v Countrywide Home Loans, Inc., 93 AD3d 574, 574, 941 N.Y.S.2d 56 [1st Dept 2012]; Lehman Bros. Intl. [Europe] v AG Fin. Prods., Inc., 2016 NY Slip Op 30187[U], *9-15 [Sup Ct. NY County 2016]; United States v. Kovel, 296 F2d 918, 922 [2d Cir 1961]; Urban Box Off. Network, Inc. v Interfase Mgrs., L.P., 2006 WL 1004472, *3, 2006 US Dist LEXIS 20648, *11 [SD NY Apr. 17, 2006])."; "Plaintiffs also had a reasonable expectation that the confidentiality of communications between their counsel and KDC would be maintained. Plaintiffs' counsel attested that KDC promised to keep all such communications confidential. The governing Purchase and Sale Agreement also specified that all privileged documents related to the transaction would remain protected from disclosure to defendant even after closing (see Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 138-139, 674 N.E.2d 663, 651 N.Y.S.2d 954 [1996]; Askari v McDermott, Will & Emery, LLP, 179 AD3d 127, 149-150, 114 N.Y.S.3d 412 [2d Dept 2019]).").

- DLO Enterprises, Inc. v. Innovative Chemical Products Group, LLC, C.A. No. 2019-0276-MTZ, 2020 Del. Ch. LEXIS 202, at *9, *10, *11 (Del. Ch. June 1, 2020) (not released for publication) (pointing to earlier Delaware case law indicating that by statute the purchaser of a corporation's stock acquires the corporation's privileged transactional documents -- unless the seller explicitly excludes them; noting that the situation before the court instead involved an asset sale; explaining that "we must look to the Purchase Agreement, not a statute, to determine if Buyers purchased certain assets and privileges"; concluding that because the Agreement listed "this litigation [as] an Excluded Liability," "the privilege for this litigation remains with [the assets'] Sellers"; noting that asset sales involve a "baseline rule governing pre-closing privilege" that differs from a stock sale context, meaning that "the seller will retain pre-closing privilege regarding the agreement and negotiations unless the buyer clearly bargains for waiver"; emphasizing that "[h]ere, Buyers failed to explicitly secure pre-closing privilege waiver rights relating to the negotiation of the Purchase Agreement").

- In re Ahlan Industries, Inc., Ch. 7 Case No. BG 18-04650, 2020 Bankr. LEXIS 1746, at *27-28, *46-47 (Bankr. W.D. Mich. July 2, 2020) (addressing a situation in which GRE sued several corporate defendants, individual owners and managers; noting that when one defendant corporation declared bankruptcy, GRE purchased from a Chapter 7 trustee all of the corporation's assets, and that GRE claimed that it now owned 60,000 emails on the corporation's servers; further noting that the individual defendants argued that 424 of the emails were their communications with their personal lawyers, which the trustee did not own and therefore could not sell to GRE; agreeing with the individual defendants; applying the generally accepted standard for ownership of such personal emails on company servers (In re Asia Global Crossing, Ltd., 322 B.R. 247 (Bankr. S.D.N.Y. 2005)); pointing to the company's "lack of policies concerning email usage or monitoring, the password protection of the accounts, and the fact that the company had never taken any steps to invade the confidentiality of the accounts"; holding that even if the company (now under the trustee's control) could waive its privilege, the individuals could veto that waiver as the privilege's co-owners).

- Lawrence v. Rihm Family Cos., 954 N.W.2d 597, 600, 603, 604 (Minn. Ct. App. 2020) (addressing a situation in which the selling shareholders of corporation LTX sued the current shareholders of LTX—LTX is not a party; denying defendants' effort to discover pre-closing communications between plaintiffs and a lawyer who had represented both a plaintiff shareholders and LTX in the sale transaction; acknowledging that a corporation's purchaser normally owns its pre-closing privileged communications, subject to the Tekni-Plex doctrine—which recognizes that the seller maintains ownership of the transaction-related communications; "As for respondents' first argument, the district court noted that generally, when control of a corporation passes to new management, the authority to assert and waive the attorney-client privilege passes as well. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349, 105 S. Ct. 1986, 1991, 85 L. Ed. 2d 372 (1985). The district court determined that the authority to assert the attorney-client privilege passed to LTX's successor company with respect to confidential communications relating to general business communications and certain other matters. But the district court also concluded that LTX's successor company did not control the attorney-client privilege with regard to the communications concerning the acquisition. Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 674 N.E.2d 663, 666, 651 N.Y.S.2d 954 (N.Y. 1996)."; inexplicably finding that the purchasing shareholders could not access the pre-closing communications between LTX and its lawyer at KSK, because the lawyer also jointly represented the sellers shareholders, and a waiver required the consent of both the jointly represented LTX and the seller shareholders; "KSK performed legal work for LTX related to the corporate reorganization and subsequent stock sale. KSK also represented the individual seller shareholders of LTX regarding the stock purchase agreement."; "When an attorney represents two or more clients in a matter, all clients jointly hold and control the attorney-client privilege, and the privilege must be waived by each privilege-holder. The district court erred when it concluded that the company controlled the attorney-client privilege for itself and for the individual seller shareholders, including petitioners. Thus, the district court's order for disclosure was not authorized by Minnesota law. Petitioners do not have an adequate remedy if privileged communications with counsel are disclosed. We therefore grant the writ of prohibition." (emphasis added); thus not analyzing the transaction as a purchase, but rather as a waiver, which seems inappropriate)

- Appel v. Wolf, Case No. 18-cv-814-L-BGS, 2022 U.S. Dist. LEXIS 114002, at *29-30, *30 (S.D. Cal. June 27, 2022) (finding that a former employee properly refused to answer questions about privileged communications while at his former employer, because the former employee was not authorized to waive the company's privilege; "[N]one of these address whether a former corporate officer like Plaintiff could be compelled to answer questions implicating the corporation's attorney-client privilege when he lacks authority to waive the privilege on behalf of the corporation. This is not a situation where the Court is determining if a former officer could waive privilege on behalf of the corporation or if the former corporate officer can assert it 'over the wishes of current managers.' See Commodity Futures Trading Comm'n, 471 U.S. at 349 ('Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.') (emphasis added). Here, there is no dispute Plaintiff cannot waive the privilege for Millennium, and the record before the Court reflects Plaintiff is not asserting privilege over the wishes of anyone. He is simply not waiving the privilege and not answering questions implicating his former employer's privilege."; "Defendant is effectively saying that because Plaintiff is no longer an officer, he cannot assert the privilege to protect Millennium's privileged communications. However, as Plaintiff explains, if Defendant's 'position were adopted, then the attorney-client privilege owed to a corporation [could] easily be circumvented by deposing the corporation's former directors and officers in their individual capacities.' Additionally, as a practical matter Plaintiff would effectively be disclosing Millennium's privileged communications despite Plaintiff lacking the ability to waive privilege. The Court is not persuaded, based on Defendant's briefing and cases cited, that the attorney-client privilege should be so easily extinguished. Plaintiff's assertion of the privilege was proper under the circumstances." (alteration in original) (internal citation omitted))

- Rekor Sys. v. Loughlin, 19-cv-7767 (LJL), 2023 U.S. Dist. LEXIS 23182, at *5-6, *6 (S.D.N.Y. Feb. 10, 2023) (describing New York case law about ownership of the privilege after a corporate sale under the Tekni-Plex standard; “Defendants rely on New York caselaw that draws a distinction between confidential communications regarding a company’s ongoing operations and those related to its acquisition, and holds that—at least in the context of a sale of all or substantially all assets—the transfer of electronic data containing otherwise privileged communications conveys control of the attorney-client privilege with respect to communications regarding ongoing operations but not with respect to communications regarding the acquisition. See Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 674 N.E.2d 663, 669-72, 651 N.Y.S.2d 954 (N.Y. 1996); Orbit One Communications, Inc. v. Numerex Corp., 255 F.R.D. 98, 105 (S.D.N.Y. 2008). The New York Court of Appeals reasoned in Tekni-Plex that control of the privilege with respect to communications regarding ongoing operations (including the ability to assert or waive the privilege) passed to the successor corporation because it succeeded those operations but that the right to the communications regarding the merger did not pass because the successor corporation acquired no rights based on those communications. 674 N.E.2d at 670-72. The court noted that the parties to the acquisition had agreed ‘that in any subsequent dispute arising out of the transaction the interests of the buyer will be pitted against the interests of the sold corporation.’ Id. at 671-72.”; “The Court need not consider whether Tekni-Plex applies, outside the sale of assets context in which there is contract language bearing on the issue of control.”)

- GPB Stockholder Grp., LLC v. P'ship Cap. Growth Invs. III, L.P., 219 N.E.3d 1231, 1241-42 (Ill. App. Ct. 2023) (analyzing privilege ownership after an asset sale transaction; "A pure asset sale, which transfers only the ownership of property, will not transfer control of the corporation itself or the attorney-client privilege. Goodrich v. Goodrich, 158 N.H. 130, 960 A.2d 1275, 1283 (N.H. 2008); American International Specialty Lines Insurance Co. v. NWI-I, Inc., 240 F.R.D. 401, 404, 406 (N.D. Ill. 2007); see Sobol v. E.P. Dutton, Inc., 112 F.R.D. 99, 103 (S.D.N.Y. 1986). Instead, where a corporation merely sells assets to another, the privilege does not transfer to the buyer unless '(1) the asset transfer was also accompanied by a transfer of control of the business and (2) management of the acquiring corporation continues the business of the selling corporation.' MacKenzie-Childs LLC v. MacKenzie-Childs, 262 F.R.D. 241, 248 (W.D.N.Y. 2009); Parus Holdings, Inc. v. Banner & Witcoff, Ltd., 585 F. Supp. 2d 995, 1001-02 (N.D. Ill. 2008); DLO Enterprises, Inc. v. Innovative Chemical Products Group, LLC, No. 2019-0276-MTZ, 2020 Del. Ch. LEXIS 202, 2020 WL 2844497, * 4 n.23 (Del. Ch. June 1, 2020) (distinguishing the transfer of assets from changes in management and control of a corporation under Weintraub). Conversely, '[i]f the practical consequences of the transaction result in the transfer of control of the business and the continuation of the business under new management, the authority to assert or waive the attorney-client privilege will follow as well.' Soverain Software, LLC v. Gap, Inc., 340 F. Supp. 2d 760, 763 (N.D. Tex. 2004). Courts look to the practical consequences and substance of a particular transaction in making this determination. Holdings, Inc., 585 F. Supp. 2d at 1002; cf. Bond, 313 So. 3d at 198-99." (alteration in original))

C. Control Group, Upjohn and Bevill Doctrines

- [Privilege Point, 5/18/05]

Court Strictly Applies Upjohn Standard

May 18, 2005

In 1981, the United States Supreme Court articulated the requirements for applying the attorney-client privilege to communications between a company's lawyers and those below the company's "control group." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Nearly 25 years later, courts continue to apply Upjohn's standard – some with surprising strictness.

In Deel v. Bank of America, N.A., 227 F.R.D. 456 (W.D. Va. 2005), the court analyzed the privilege's applicability to the Bank's communications with various employees, including questionnaires that employees completed and sent to the Bank's lawyers. The court refused to protect the completed questionnaires, finding that the Bank had not advised the employees to keep communications confidential, and "did not clarify to the employees completing the questionnaire that it needed the information to obtain legal advice." Id. at 461. The court found the latter omission to be a "fatal flaw" to the Bank's privilege assertion. Id.

Although in most states the Upjohn decision makes the privilege available to communications with any level of corporate employee, corporations must still satisfy the Upjohn standards.

- [Privilege Point, 8/18/10]

Ninth Circuit Adopts Both the Bieter and the Bevill Doctrines in One Decision

August 18, 2010

An increasing number of courts treat as corporate employees independent contractors who are the "functional equivalent" of employees – a doctrine named for the Eighth Circuit decision in In re Bieter Co., 16 F.3d 929 (8th Cir. 1994). Courts are also increasingly adopting a multi-part test in analyzing whether a corporate employee can prove the existence of a separate attorney-client relationship with the company's lawyer – which would give that employee some control over the company's power to waive the privilege. This doctrine comes from the Third Circuit – In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120 (3d Cir. 1986).

In United States v. Graf, 610 F.3d 1148 (9th Cir. 2010), the Ninth Circuit adopted both the Bieter and Bevill doctrines. The court first found that a criminal defendant appealing a long prison term should be treated as an employee of a company for whom he claimed to have acted only as an independent contractor. After reaching that conclusion, the court then applied the five-part Bevill factors in finding that the defendant could not prove a separate attorney-client relationship with the company's lawyer. Among other things, the court noted that the defendant "understood that he was getting legal advice on behalf of the corporation," and that he "was not seeking personal legal representation." Id. at 1163.

It can be risky to put too much weight on privilege decisions arising in the criminal context, but the Ninth Circuit's unequivocal embrace of both Beiter and Bevill clarifies the law in that circuit – and continues the spread of both doctrines.

- [Privilege Point, 2/2/11]

Can the Privilege Ever Protect Communications with a Hostile Company Employee?

February 2, 2011

The attorney-client privilege can protect communications between a company's lawyer and company employees providing facts that the lawyer needs to give legal advice to the company. But what happens if the lawyer communicates with hostile employees, who later become members of a class suing the company?

In Winans v. Starbucks Corp., No. 08 Civ. 3734 (LTS) (JCF), 2010 U.S. Dist. LEXIS 134136 (S.D.N.Y. Dec. 15, 2010), Magistrate Judge Francis addressed communications between Starbucks' lawyers and Assistant Store Managers who claim that they should have shared in each store's tip pool. In opposing certification of a store manager class, Starbucks submitted declarations from several managers – and then instructed the managers not to answer any questions during their depositions about their conversations with Starbucks' lawyers. Judge Francis upheld the instruction. Noting that Starbucks' lawyers could communicate ex parte with the managers (before class certification), Judge Francis emphasized that the privilege belonged to Starbucks and not the managers. Therefore, the store managers "are forever precluded from revealing the content of their communications with counsel absent a waiver by Starbucks." Id. at *9.

A corporation's ownership of the privilege normally means that no employee can waive that privilege, even if the employee later sues the company.

- [Privilege Point, 5/22/13]

Some States Still Haven't Decided Between the "Control Group" Standard and the Upjohn Standard

May 22, 2013

Before 1981, most states applied what is called the "control group" privilege standard for corporate communications -- extending privilege protection only to communications between the company's lawyer and members of upper management who act on the lawyer's advice. In that year, the United States Supreme Court took a totally different approach. In Upjohn Co. v. United States, 449 U.S. 383 (1981), the court interpreted federal common law as extending privilege protection to communications between a company's lawyer and any level of employee, if that employee has facts the lawyer needs when advising the corporate client.

Most states have moved to the Upjohn standard. Illinois is the chief remaining proponent of the "control group" standard. Remarkably, some states have still not decided which approach to take. In Maxtena, Inc. v. Marks, the federal district court explained that "[t]he Maryland Court of Appeals has not yet delineated a precise test for determining the applicability of the attorney-client privilege 'in the corporate context.'" Civ. A. No. DKC 11-0945, 2013 U.S. Dist. LEXIS 42332, at *17 (D. Md. Mar. 26, 2013) (citation omitted). The court found it unnecessary to predict which standard Maryland's highest court would chose.

Ironically, the Upjohn case itself recognized that "[a]n uncertain privilege . . . is little better than no privilege at all." 449 U.S. at 393. Some states' continuing uncertainty about the privilege's applicability in the corporate setting highlights the wisdom of this principle.

- [Privilege Point, 1/4/17]

**Two Decisions Issued the Same Day Highlight Choice of Laws Issues:
Part I**

January 4, 2017

Every privilege analysis should start with determining the applicable law. In the corporate context, federal courts handling federal question cases and nearly every state follow the Upjohn standard. Upjohn v. United States, 449 U.S. 383 (1981). Under this standard, the privilege can protect a corporation's lawyer's communications with any corporate employee possessing information the lawyer needs. A handful of states continue to follow the pre-Upjohn "control group" standard – under which the privilege generally protects only communications with upper-level corporate management.

In Harris Management, Inc. v. Coulombe, 2016 ME 166, ¶ 15, 151 A.3d 7, 14, Maine's highest court reaffirmed Maine's reliance on the old "control group" standard – extending privilege protection only to employees (usually officers) who direct the corporation's response to its lawyers' legal advice, and other individuals with authority to make corporate decisions. Although Maine corporations feel the main brunt of this narrow approach, corporations from Upjohn states might also lose their privilege if they are sued in Maine.

In some cases, a choice of law analysis will result in application of the narrow "control group" corporate privilege standard. In other cases, courts applying other states' privilege law relieve corporations of that troublesome standard.

- [Privilege Point, 5/24/17]

Court Affirms the Comforting Bevill Backstop

May 24, 2017

Lawyers representing corporations should in nearly every circumstance provide an Upjohn warning to avoid accidentally creating attorney-client relationships with company employees. Upjohn v. United States, 449 US 383 (1981). Fortunately, lawyers who do not provide such warnings (or who cannot prove that they did so) can usually also rely on what is called the Bevill doctrine. In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1986).

In United States v. Blumberg, Crim. A. No. 14-458 (JLL), 2017 U.S. Dist. LEXIS 47298 (D.N.J. Mar. 27, 2017), defendant Blumberg claimed that the Bracewell law firm represented both his employer and him individually – meaning that he co-owned the privilege protecting his communications with Bracewell lawyers. The court noted competing affidavits about whether Bracewell lawyers gave an Upjohn warning. The court therefore applied "the five-factor Bevill analysis." Id. at *12. The Bevill doctrine requires employees seeking to claim personal privilege protection for communications with the company's lawyer to prove on a communication-by-communication basis that: (1) they sought legal advice from the lawyer; (2) if so, they "'made it clear that they were seeking legal advice in their individual rather than in their representative capacities"; (3) the company lawyer agreed to provide such individual advice regardless of possible conflicts; (4) such communications were confidential; and (5) the communications' substance "'did not concern matters within the company or the general affairs of the company.'" Id. at *7 (citation omitted). In assessing the fifth factor, the court acknowledged Blumberg's claim that he and Bracewell lawyers discussed his "'potential for criminal exposure'" – and that the lawyers said he was a "'fact witness.'" Id. at *14 (internal citation omitted). The court concluded that this one possible exchange did not allow Blumberg to assert a blanket claim of "privilege over all statements made during the Bracewell meetings." Id. at *14-15. The court ultimately held that the company rather than Blumberg owned the privilege covering his communications with the Bracewell lawyers, and thus could waive it (presumably over his objection).

Corporations' lawyers should carefully provide Upjohn warnings, but can also rely on the Bevill backstop.

- [Privilege Point, 2/10/21]

Slip and Fall Case Provides Useful Guidance for More Serious Scenarios: Part I

February 10, 2021

Under the commonly (but not universally) recognized Upjohn standard, a corporation's lawyer may engage in privileged communications with any level of corporate employee who has information the lawyer needs. But that favorable Upjohn standard is not self-executing – there is another condition lawyers must satisfy.

In Bobalik v. BJ's Restaurants, Inc., Case No. 3:19-CV-0661-RGJ-LLK, 2020 U.S. Dist. LEXIS 231289 (W.D. Ky. Dec. 9, 2020), plaintiff slipped and fell in a Louisville, Kentucky, restaurant. Not surprisingly, defendant restaurant claimed privilege and work product protection for the resulting investigation. Acknowledging that the Upjohn standard applied, the court nevertheless denied privilege protection – explaining that the restaurant "failed to demonstrate that the manager(s) who completed the investigation notes at issue were aware their statements were being elicited for the purpose of the BJ's Defendants obtaining legal advice." Id. at *12-13. The restaurant could not successfully assert privilege protection "[w]ithout showing such awareness." Id. at *13.

Presumably lawyers normally explain during such investigations why they are seeking information from their corporate client's employees (after reciting the Upjohn warning's first half – "I represent the company and I do not represent you"). But even a slip and fall case can remind lawyers not to say something sloppy like "I'm here from headquarters to interview you." Next week's Privilege Point will describe why the restaurant also lost its work product claim.

D. Communications Within Corporate Families

- Crabb v. KFC Nat'l Mgmt. Co., No. 91-5474, 1992 U.S. App. LEXIS 38268, at *7-9 (6th Cir. Jan. 6, 1992) (holding that the privilege can protect communications among affiliated corporations under "common ownership or control"; "The District Court ruled that the simple distribution of legal advice to similarly-situated decision makers at affiliated companies would not constitute a waiver of the confidentiality of the document. It is well settled that attorney-client privilege is not waived merely because the communications involved extend across corporate structures to encompass parent corporations, subsidiary corporations, and affiliated corporations. See, e.g., United States v. A T & T, 86 F.R.D. 603, 616 (D.D.C. 1979) ('The cases clearly hold that a corporate "client" includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary and affiliate corporations.'); Roberts v. Carrier Corp., 107 F.R.D. 678, 687-88 (N.D.Ind. 1985) (identical nature of legal interest test applied to communications between two wholly-owned subsidiaries of common parent); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1184-85 (D.S.C. 1974) ('Although an interest of a third-party corporation from a commercial standpoint would not establish a sufficient community of interest, the fact that the communications are among formally different corporate entities which are under common ownership or control leads this court to treat such inter-related corporate communications in the same manner as intra-corporate communications.'); see also Admiral Ins. Co. v. United States Dist. Ct. for the Dist. of Arizona, 881 F.2d 1486, 1493 n.6 (9th Cir. 1989) (recognizing privilege not waived across parent-subsidiary relationship).")

- Glidden Co. v. Jandernoa, 173 F.R.D. 459, 472-73 (W.D. Mich. 1997) (Glidden (now called Grow) sold its subsidiary (Perrigo) to the subsidiary's management; Grow then sued its old subsidiary and the subsidiary's management; the court ordered the former subsidiary to produce all of the requested documents to the former parent; the court also rejected the argument that the former subsidiary's management could assert their own privilege; "The universal rule of law, expressed in a variety of contexts, is that the parent and subsidiary share a community of interest, such that the parent (as well as the subsidiary) is the 'client' for purposes of the attorney-client privilege. See Crabb v. KFC Nat'l Man. Co., 1992 U.S. App. LEXIS 38268, 1992 WL 1321 (6th Cir. 1992) ('The cases clearly hold that a corporate "client" includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary and affiliate corporations.') (quoting United States v. AT&T, 86 F.R.D. 603, 616 (D.D.C. 1979)). Consequently, disclosure of legal advice to a parent or affiliated corporation does not work a waiver of the confidentiality of the document, because of the complete community of interest between parent and subsidiary. Id. at *2. Numerous courts have recognized that, for purposes of the attorney-client privilege, the subsidiary and the parent are joint clients, each of whom has an interest in the privileged communications. See, e.g., Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 49 (S.D.N.Y. 1989); Medcom Holding Co. v. Baxter Travenol Lab., 689 F. Supp. 841, 842 (N.D. Ill. 1988). Simply put, a sole shareholder has a right to complete disclosure about the legal affairs of its wholly owned subsidiary.").

- [Privilege Point, 6/20/01]

Do Communications Between a Corporate Parent and Subsidiary Waive the Privilege?

June 20, 2001

In nearly every situation, corporate lawyers have an incentive to honor (if not emphasize) the distinction between members of their client's corporate family—parents, subsidiaries, etc. However, does this approach mean that communications from one to the other are outside the attorney-client relationship for purposes of waiving the attorney-client privilege?

Fortunately, most courts find that communications between a parent and subsidiary are not to a "third party," and therefore will not waive the privilege. For instance, the court in Cary Oil Co. Inc. v. MG Refining & Marketing, Inc., No. 99 Civ. 1725 (VM) (DFE), 2000 U.S. Dist. LEXIS 17587, at *17 (S.D.N.Y. Dec. 6, 2000) noted that "[t]he plaintiffs cite no New York case holding that a subsidiary waives its privilege by making disclosures to its parent corporation. There is no such waiver in federal-question cases."

This general rule might not apply with equal force to subsidiaries that are less than wholly owned, so corporate lawyers must remain vigilant in protecting the privilege whenever one corporate family member communicates with another.

- **[Privilege Point, 8/13/03]**

Court Demands Proof of Corporate Affiliation to Prove Privilege

August 13, 2003

Most courts find that lawyers representing one member of a corporate family may freely share privileged communications with other corporate family members without waiving the privilege. However, establishing the lack of waiver may require showing the nature of the corporate affiliation.

In Moore v. Medeva Pharmaceuticals Inc., No. 01-311-M, 2003 U.S. Dist. LEXIS 5960 (D.N.H. Apr. 9, 2003), a lawyer representing CPI argued that she had not waived CPI's privilege by disclosing privileged communications to Evans, which she described as one of CPI's "affiliates." The court noted that the lawyer had not proven that one of the companies owned or controlled the other, or that another company owned controlling interest in both of them. Significantly, the court focused on the specific time that the lawyer disclosed the privileged communications to Evans, and said that the later merger of the two companies was "of little legal significance" in assessing waiver. Id. at *11 n.5. The court also noted that the lawyer had not established a sufficient "identity of legal interest" to apply the "common interest" doctrine. The court found that disclosing the privileged communications waived the privilege. Id. at *12.

Lawyers representing corporate affiliates must be prepared to establish the exact relationship if someone alleges that inter-corporate communications waived the attorney-client privilege.

- [Privilege Point, 9/1/04]

Court Overrules Extreme Decision Regarding Intra-Corporate Waiver

September 1, 2004

General waiver principles recognize that corporate clients and their lawyers risk waiving the privilege if they share privileged communications even within a corporation, beyond those with a "need to know." On January 8, 2003, a magistrate judge in the Southern District of New York found that a company had waived the privilege by allowing its executive vice president to attend meetings on topics for which the executive vice president had no responsibility.

Although it took over 18 months, the district judge has reversed that extreme finding. In Ashkinazi v. Sapir, No. 02 CV 0002 (RCC), 2004 U.S. Dist. LEXIS 14523, at *6 (S.D.N.Y. July 27, 2004), the district court analyzed the matter only briefly, and seemed to adopt a per se test that members of corporate management are never "third parties" for waiver purposes.

Although lawyers should be relieved by this reversal, they should nevertheless be vigilant about their clients sharing privileged communications beyond those with a "need to know" even within the same corporation.

- SCR-Tech LLC v. Evonik Energy Services LLC, 2013 NCBC 42, ¶¶ 18, 15, 26 (N.C. Super. Ct. Aug. 13, 2013) (reviewing the very sparse case law on privilege protection for communications with partially owned subsidiaries; dealing with communications to and from plaintiff SCR-Tech (1) when the company was partially owned by Ebinger; (2) when the company was then sold to, and wholly owned by, Catalytica, and (3) when the company later entered into a "common interest agreement" with Ebinger, because both faced similar litigation; applying a sort of sliding scale, considering both the percentage of ownership and any "shared legal interest"; concluding that the privilege protected communications during all three situations, because (1) SCR-Tech's shared legal interest with Ebinger meant that the court did not have to determine whether Ebinger's 37.5% ownership (which gave it control) was "too limited" to assure privilege protection by itself; (2) Catalytica's 100% ownership of, and shared legal interest with, SCR-Tech assured privilege protection; and (3) the "common interest" doctrine could protect communications between SCR-Tech and its former controlling shareholder Ebinger even in the absence of any corporate affiliation at that time.).
- Estate of Jackson v. General Electric Capital Corp. (In re Fundamental Long Term Care, Inc.), 515 B.R. 874 (Bankr. M.D. Fla. 2014) (addressing a situation in which Kirkland & Ellis represented several corporate affiliates on various matters, including a corporate transaction and Ohio litigation; noting that a state receiver took over one of Kirkland's former clients, and other affiliates in the corporate family declared bankruptcy (and thus had a trustee now calling the shots); carefully scrutinizing Kirkland & Ellis's work for the related corporations when the corporations became litigation adversaries; concluding that Kirkland had not jointly represented two of the affiliated corporations in the transaction – which meant that the trustee (standing in the shoes of the bankrupt joint client) could not obtain the other corporation's responsive but privileged documents about the transaction; holding in contrast that Kirkland had jointly represented two of the affiliated corporations in the Ohio litigation, allowing the trustee to rely on what the court called the "co-client exception" to obtain privileged documents relating to that litigation).

- [Privilege Point, 12/10/14]

Courts Affirm Privilege Protection for Intra-Corporate Communications

December 10, 2014

In most states (Illinois being the main exception), attorney-client privilege protection extends to communications between a corporation's lawyers and (1) employees with facts the lawyers need, regardless of the employee's place in the hierarchy, and (2) employees with a "need to know" the lawyers' advice about those facts. Most courts also protect ancillary communications that support the corporation's request for and receipt of legal advice.

In Moffatt v. Wazana Brothers International, the court confirmed that the privilege protects "communications relaying legal advice provided by corporate counsel among non-attorney corporate employees who share responsibility 'for the subject matter underlying the consultation.'" Civ. A. No. 14-1881, 2014 U.S. Dist. LEXIS 151326, at *4 (E.D. Pa. Oct. 24, 2014) (citation omitted). Corporations frequently rely on this principle when their adversaries challenge privilege protection for documents whose privilege log entries do not show a lawyer as either the author or a recipient. One week later, the District of Delaware similarly held that the privilege could continue to protect privileged documents "shared within the corporate family, such as those sent to or from" the corporate defendant's French parent -- "[t]o the extent that . . . such involvement was essential to and in furtherance of the communications with the attorneys involved." United States v. Veolia Env't N. Am. Operations, Inc., Civ. No. 13-mc-03-LPS, 2014 U.S. Dist. LEXIS 154717, at *22 (D. Del. Oct. 31, 2014).

Although these justifiable principles provide some comfort, company employees should be warned against intra-corporate circulation of privileged communications beyond those with a "need to know."

- Nester v. Textron, Inc., No. A-13-CA-920-LY, 2015 U.S. Dist. LEXIS 28182 (W.D. Tex. March 9, 2015) ("The question governing 10 of the 13 withheld emails is whether Texas law allows attorney client privilege or 'Co-Client/Joint Client Common Interest Privileges' to attach to communications between the in-house counsel of a parent company and managing personnel of a separate corporate entity [described as an 'indirect subsidiary of Textron, Inc.']."; "So long as Mr. Rupp [Textron's in-house counsel] was authorized to represent both RJL [the indirect but ultimately wholly owned subsidiary] and Textron [Parent], it is black letter Texas law that both RJL and Textron's 'communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients.'" (emphasis added)).

- [Privilege Point, 8/5/15]

Court Confirms that Corporations do not Waive Their Privilege by Communicating with Their Affiliates

August 5, 2015

The attorney-client privilege provides such a fragile protection that disclosure to nearly any third party waives the protection. Does that general rule apply to communications among corporate affiliates? Surprisingly few decisions have addressed this issue.

In Cohen v. Trump, Civ. No. 13-CV-2519-GPC (WVG), 2015 U.S. Dist. LEXIS 74542 (S.D. Cal. June 9, 2015), the plaintiff claimed that a Trump entity waived its privilege by including in its communication an employee of another Trump entity. The court rejected plaintiff's waiver argument — confirming that "if a corporation with a legal interest in an attorney-client communication relays it to another related corporation, the attorney-client privilege is not thereby waived." Id. at *39. Interestingly, the court primarily relied on a 41-year-old District of South Carolina case, Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1184-85 (D.S.C. 1974). The most recent case cited by the court was nearly 20 years old. One might have expected the court to rely on more recent case law.

Corporations should take comfort in this latest articulation of a principle that many lawyers think goes without saying.

- [Privilege Point, 5/18/16]

Court Issues a Surprising Common Interest Doctrine Decision

May 18, 2016

The common interest doctrine can sometimes allow separately represented clients to avoid the normal waiver implications of disclosing privileged communications to each other. However, courts take widely varying views of the doctrine's reach, and reject its applicability in about half of the reported cases — after the participants have already shared privileged communications, and therefore waived their respective privileges.

In IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal District, plaintiff claimed that defendant's in-house lawyer (who jointly represented the defendant and its "direct subsidiary") waived privilege protection by sending an email to several of defendant's employees — and one subsidiary employee. No. 16-cv-00146, 2016 U.S. Dist. LEXIS 42223, at *4 (W.D. La. Mar. 29, 2016). Defendant argued that such disclosure did not waive defendant's privilege, because the defendant shared a common interest with its own subsidiary. The court found the common interest doctrine inapplicable — because the subsidiary did not face any litigation threat. The court quoted plaintiff, which indicated that "it has no intention of ever making [the subsidiary] a party to this litigation." Id. at *5. Thus, the court held that defendant waived its privilege by disclosing the communication "to an employee of a non-party" — its own subsidiary. Id. Fortunately for defendant, the court also found the work product doctrine applicable, and held that disclosing the email to the subsidiary did not waive that separate protection.

This is a remarkable decision. The common interest doctrine should never have become an issue, because the in-house lawyer jointly represented the parent and its subsidiary. And the court's apparent insistence that every common interest participant must itself anticipate litigation could reward some obvious mischief — plaintiffs could threaten a number of possible defendants, but later disclaim any intent to sue one of them. All in all, cases like this highlight the risk of relying on the common interest doctrine.

- Naturalock Solutions, LLC v. Baxter Healthcare Corp., No. 14-cv-10113, 2016 U.S. Dist. LEXIS 66982, at *4, *6, *6 n.1, *7-8, *9, *9-10 (N.D. Ill. May 20, 2016) (analyzing a product inventor's efforts to obtain the files of K&L Gates, which were obtained by Baxter, but which also assisted the inventor in prosecuting a patent; ultimately concluding that K&L Gates jointly represented Baxter and the inventor, which meant that the inventor could obtain the law firm's files in connection with its later dispute with Baxter; "The parties have submitted numerous exhibits that they claim support their respective positions as to whether Naturalock was a client of K&L Gates." (emphasis added); "Given the extensive nature of Baxter's involvement in the patent prosecution, this Court does not find persuasive Naturalock's attempt to cast itself as K&L Gates's sole client. Thus, the question is whether Naturalock was a joint client along with Baxter." (emphasis added); "Baxter asserts that Delaware, not federal, law applies to this privilege dispute. Baxter does not, however, show that the privilege analysis would be different under Delaware and federal law. . . . In fact, Baxter itself cites federal law in support of its arguments."; "Here, based on the record before the Court, it is clear that K&L Gates provided legal advice and services to Naturalock and acted at the direction of Naturalock in addition to Baxter. This is not a situation where there is no evidence of the nature of communications between the licensor and licensee's counsel. . . . It does not matter what K&L Gates or Baxter perceived the relationship to be." (emphasis added); "Baxter focuses on the facts that Naturalock had separate counsel and that all of the parties involved referred to K&L Gates as Baxter's counsel. But those facts do not lead to the conclusion that K&L Gates's representation of Baxter was to the exclusion of Naturalock. Furthermore, Baxter does not contend that Naturalock was ever explicitly informed that K&L Gates represented only Baxter. To the contrary, the record makes clear that K&L Gates had a professional relationship with both Naturalock and Baxter, and that both Naturalock and Baxter manifested an intention to seek professional legal advice from K&L." (second emphasis added); "In sum, it appears that Naturalock and Baxter were joint clients of K&L Gates, and thus there is no basis for Baxter to assert the attorney-client privilege to deny Naturalock discovery regarding correspondence regarding the prosecution of patents for Naturalock's technology. This is true even if Naturalock is correct that Baxter, unbeknownst to Naturalock at the time, was actually acting in a manner that was adverse to Naturalock's interests and even if K&L Gates was complicit in Baxter's scheming." (emphasis added)).

- Airport Fast Park-Austin, L.P. v. John Hancock Life Ins. Co., Case No. 1:15-cv-245, 2016 U.S. Dist. LEXIS 125931, at *4, *8-9, *9-10 (S.D. Ohio Sept. 15, 2016) (holding that affiliate corporations with common ownership could communicate within privilege protection; "In the corporate context, it is well-settled that the 'attorney-client privilege is not waived merely because the communications involved extend across corporate structures to encompass parent corporations, subsidiary corporations, and affiliated corporations.' Crabb v. KFC Nat. Management Co., No. 91-5474, 1992 U.S. App. LEXIS 38268, 1992 WL 1321, at *3 (6th Cir. 1992) (citing United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 616 (D.D.C. 1979)."; "The communications AFP seeks to protect from disclosure are privileged communications AFP sent to PCA, which is an affiliated entity by virtue of the entities' common ownership and the overlap in their operations, or that the affiliates' joint counsel exchanged with PCA employees. Cf. Ohio Valley Coal Co. v. Pleasant Ridge Synfuels, LLC, 54 F. App'x 610, 614 (6th Cir. 2002) (upholding a finding that companies were affiliates where one individual served as the CEO of one company and owned and controlled another company)."; "'Chavez Properties' is the name 'loosely use[d] to describe a family of affiliated entities,' including AFP and PCA. . . . The vast majority of Chavez Properties are single-asset entities that are limited liability companies which own parking real estate assets. . . . PCA is a management company which manages the vast majority of the affiliates of Chavez Properties. . . . Manuel Chavez, Robert Chavez and Martin Chavez are the common owners of both Austin Airport Fast Park, LLC, which is the managing partner of AFP, and of PCA, the entity which manages AFP's business. . . . AFP and PCA, though separate entities, share a common attorney and common legal interests. There is nothing in the documentation before the Court or about the parties' relationship that suggests AFP waived the confidentiality of its privileged communications when outside counsel for AFP communicated with employees of PCA on the JHLIC loan transaction or when AFP copied employees of PCA on emails it sent to the parties' joint counsel. Accordingly, the same result reached in Crabb [Crabb v. KFC Nat'l Mgmt. Co., No. 91-5474, 1992 U.S. App. LEXIS 38268 (6th Cir. Jan. 6, 1992)] and Roberts [Roberts v. Carrier Corp., 107 F.R.D. 678 (N.D. Ind. 1985)] is warranted under the facts of this case." (emphases added)).

- Au New Haven, LLC v. YKK Corp., No. 15-CV-03411 (GHW) (SN), 2016 U.S. Dist. LEXIS 160602, at *19-20, *20-21, *21-22 (S.D.N.Y. Nov. 18, 2016) (holding that certain corporate affiliates must satisfy the common interest agreement to successfully assert privilege and avoid waiver for their communications with each other; "Plaintiffs argue that Document 3 should nevertheless be revealed because YKK Corporation and its wholly owned subsidiary YKK Corporation of America (YCA) do not share a common legal interest. Because Attorney John Castellano was Chief Legal Counsel of YCA, Plaintiffs contend that any communications he had with YKK Corporation and any communications incorporating his advice forwarded by employees of YKK Corporation would lose their privilege by virtue of having been disseminated to a third party. They further argue that the common interest rule does not apply because (1) only YKK Corporation, and not YCA, admitted that they were party to the License Agreement at issue in this case pursuant to plaintiffs' Requests for Admissions and (2) YCA and other YKK affiliates denied that they were jointly and severally liable for the actions of YKK Corporation. Defendants, for their part, counter that entities under common ownership sharing privileged information are always considered to be a single entity for the purpose of attorney-client privilege. Music Sales [Corp. v. Morris], 1999 U.S. Dist. LEXIS 16433, 1999 WL 974025, at *7 [(S.D.N.Y. Oct. 22, 1999)] (holding that corporations related through ownership or control need not prove common legal interest)."; "The Court does not adopt the per se standard that Defendants urge; in certain circumstances, commonly owned subsidiaries simply do not have the common purpose in litigation necessary for the invocation of the doctrine. . . . For example, in Gulf Lands Leasing v. Bombardier Capital, Inc., 215 F.R.D. 466 (S.D.N.Y. 2003), the court considered the case of two defendant subsidiaries that were wholly owned by the same corporation. Although the corporations shared a common commercial interest in the success of the litigation, they had two different agreements with the plaintiff, separate legal counsel, and showed no indicia of coordinating a legal strategy beyond occasional discussions between co-counsel. Id. at 473. On this record, the court found that communications between the two companies were not privileged. This approach, which considers the real relationship between companies and their counsel, is preferable considering the great diversity of legal and factual scenarios that corporate litigation presents." (footnote omitted); "Nevertheless, in this case, Defendants have amply proven that YKK Corporation and YCA may invoke the common interest doctrine to maintain their communications privileged." (emphases added)).

- DePuy Orthopaedics, Inc. v. Orthopaedic Hospital, Cause No. 3:12-cv-299-JVB-MGG, 2016 U.S. Dist. LEXIS 166537, at *12-13, *13 (N.D. Ind. Dec. 1, 2016) (addressing a situation in which plaintiff DePuy and defendant Hospital had worked together on patent prosecutions – but later become litigation adversaries; noting that DePuy resisted the Hospital's attempt to discover communications to and from DePuy's in-house counsel, which was based on the Hospital's contention that DePuy's in-house lawyer jointly represented her employer/client DuPuy and the Hospital; further noting that DuPuy's in-house counsel claimed that DePuy and the Hospital had only entered into a common interest agreement – noting that O'Melveny & Myers had acted as patent "prosecution counsel" on behalf of both companies; reciting facts that could have proven either a common interest agreement or a joint representation: DePuy and the Hospital shared confidential information and cooperated on a common legal strategy; DePuy's in-house counsel communicated with and gave direction to O'Melveny, etc.; ultimately concluding that DePuy's in-house counsel had jointly represented DePuy and the Hospital – rather than represented just DePuy in a common interest arrangement with the separately represented Hospital; emphasizing that "the evidence does not show that DePuy's in-house counsel . . . provided any kind of disclaimer about representation when answering the Hospital's questions with legal information or consequence regarding the patent prosecution" (emphasis added); delivering the punchline impact -- because DePuy's in-house counsel had jointly represented DePuy and the Hospital, the former joint client Hospital could discover "DePuy's internal communications related to the [patent] prosecution").

- Illinois LEO 17-05 (5/2017) (analyzing the loyalty (conflicts) and confidentiality implications of parent company's in-house lawyer's dealings with corporate subsidiaries of the lawyer's client/employer; recommending: (1) that lawyer treat subsidiaries as separate clients for loyalty/conflicts purposes, including even obtaining consents or prospective consents in the event of any "competing interests"; and (2) also treat subsidiaries as separate clients for confidentiality purposes, including even analyzing how confidential information will be shared among the corporate affiliates; "For the in-house lawyer, there is no one size fits all test for identifying the client. It may change depending on the circumstances of the representation. Is it the single corporate parent (whose interests may be considered to preempt the interests of any subsidiary, or in any case, be able to provide informed consent to any conflict waiver or disclosure of confidential information)? Or is it the legally distinct individual subsidiaries? Recognizing subsidiaries as separate clients seems to be acknowledged in the IRPC noted above, particularly IRPC 1.13. For practical purposes, treating subsidiaries as distinct clients would seem the better practice if for no other purpose than to focus the in-house lawyer's attention on identifying and addressing problematic legal and ethical issues."; "With respect to conflicts of interests, when an in-house lawyers is called upon to provide legal services to a related corporate entity that is not the lawyer's direct employer, the lawyer must be careful to recognize the potential for competing interests. . . . As with any representation, the in-house lawyer must consider and, if applicable, apply IRPC 1.7. Although impacted by client identification, the interests of intra-family corporate entities may or may not be considered aligned. If the interests are determined to conflict, an in-house lawyer can consider a number of actions to address and resolve the conflict. First and foremost is to obtain, if possible, the subsidiary's and parent's consent to the representation as permitted by IRPC 1.7(b). Counsel may also consider obtaining advance conflict waivers, limiting the scope of the representation to eliminate the potential conflict, or retaining outside counsel."; "Perhaps even thornier issues than conflicts arise with respect to confidentiality under IRPC Rule 1.6. Virginia State Bar Opinion 1838 provides that an in-house lawyer must maintain a subsidiary's confidences unless the subsidiary consents to disclosure. In most corporate contexts, maintaining this confidentiality from the corporate parent, and perhaps other subsidiaries, is likely unworkable and doesn't reflect the work of an in-house legal department. . . . Attempting to maintain confidentiality between related corporate entities, but particularly between a subsidiary and a parent, tends to disregard corporate ownership and hierarchy. . . . In these situations, as with conflicts of interest, a prudent course for the in-house lawyer may be to memorialize in writing how confidential information will be treated, obtain advance consent for disclosure, or retain outside counsel.")

- A.O.A. v. Rennert, Case No. 4:11 CV 44 CDP, 2018 U.S. Dist. LEXIS 19157, at *7, *7-8, *8 (E.D. Mo. Feb. 6, 2018) (in an opinion by Judge Perry, holding that a corporate parent and its subsidiary have an “inherent common interest” and may therefore engage in privileged communications with each other; “Presently before me are Plaintiffs’ objections to the Special Master’s legal conclusion regarding privilege of inter-corporate communications between the various entities of the Renco corporate family. Defendants have responded to Plaintiffs’ objections and the matter is fully briefed for my consideration.” (footnote omitted); “After conducting a de novo review of the Special Master’s finding, including reading the briefs submitted to the Special Master as well as to this Court, I will adopt and sustain the finding as set forth in paragraph 6 of the January 5, 2018, Report and Recommendation (ECF #766), and specifically: ‘[T]he related Defendants have shared legal services without surrendering their separate corporate identities. Defendants each hold a privilege as to legal communications amongst them that cannot be waived without the consent of each Defendant involved in the communication.’” (alteration in original); “In the circumstances of this case, the parent-subsidiary relationship between and amongst Renco and its subsidiaries gives rise to a joint/co-client relationship for the purpose of attorney-client privilege given their inherent common interest and shared counsel. Accordingly, as the Special Master found, each Defendant holds a privilege as to legal communications amongst them that cannot be waived without the consent of each Defendant involved in the communication.”)

- Grupo Petrotemex, S.A. de C.V. v. Polymetrix AG, Case No. 16-cv-02401 (SRN/HB), 2020 U.S. Dist. LEXIS 43465, at *8-9, *9, *9-10, *10, *10-11, *11 (D. Minn. Mar. 13, 2020) (inexplicably holding that although a parent corporation and its wholly owned subsidiary had a common interest, disclosing privileged communications to a third party required both of them to waive the privilege – so that the parent could not unilaterally waive privilege protection in connection with its possible sale of its wholly owned subsidiary; "The Court agrees that Polymetrix and Bühler shared a common legal interest. In or around July 2017, Bühler acquired 100% of Polymetrix's shares, and remained its sole and total owner until the sale to Sanlian on March 22, 2018. (Vögtli Decl. ¶¶ 3, 14; Müller Suppl. Decl. ¶¶ 2, 7.) GPT/DAK does not appear to contend otherwise. (See, e.g., Pls.' Suppl. Reply Mem[.] at 16, 23-25 (referring to the players as 'Polymetrix and Bühler, on the one hand, and Sanlian, on the other hand').) Thus, the sharing of the July 5, 2017, Wilming email between Polymetrix and Bühler did not destroy the privileged status of that communication or the communications upon which it was based."; "The crux of the parties' disagreement comes from what happened next. At some point, Bühler's in-house counsel directed a member of the Bühler Corporate Finance Projects team to give a copy of the July 5, 2017 Wilming email to Sanlian's attorneys at the Grandall law firm in China and the Schmid Rechtsanwälte law firm in Switzerland. (Vögtli Decl. ¶ 6.) It is undisputed that the email included the protected opinions of Polymetrix's attorneys Noah and Wilming, and that Bühler made the deliberate decision to transfer it to representatives of Sanlian, a separate corporation. GPT/DAK argue that this transfer waived any privilege attached to the email contents, since the voluntary disclosure of a communication protected by the attorney-client privilege is generally an express waiver of the privilege. United States v. Workman, 138 F.3d 1261, 1263 (8th Cir. 1998)."; "But it is a well-established component of the common interest doctrine that one party to a common enterprise cannot waive the privilege for another party. In re Grand Jury, 112 F.3d at 922; John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 555-56 (8th Cir. 1990); see also Restatement (Third) of the Law Governing Lawyers § 76, cmt. g. (2000). As a result, in cases where a member of a common interest group discloses privileged information received from another member without that member's consent, the courts have held the privilege was not waived as to the member to whom the privilege belonged. E.g., John Morrell & Co., 913 F.2d at 556; see also United States v. Gonzalez, 669 F.3d 974, 982 (9th Cir. 2012); United States v. BDO Seidman, LLP, 492 F.3d 806, 817 (7th Cir. 2007)."; "Here, all of the information before the Court indicates the decision to disclose the opinion to Sanlian was made by Bühler, for Bühler's benefit in its negotiations with Sanlian—negotiations in which Polymetrix played no part—and that Polymetrix did not even know about the disclosure, let

alone consent to it. (Müller Suppl. Decl. ¶ 4; Vögtli Decl. ¶¶ 8, 12; Wilming Decl. ¶ 4.) Significantly, GPT/DAK do not argue that Polymetrix's consent was unnecessary. On the contrary, they state: 'Polymetrix is correct that this disclosure [from Bühler to Sanlian] alone would not constitute a waiver of Polymetrix's attorney-client privilege to the extent that Polymetrix did not consent to Bühler's disclosure.' (Pls.' Suppl. Reply Mem. at 23.) Nor does GPT/DAK advance an argument that Polymetrix gave its consent to the disclosure of the email at the time it was disclosed."; "In sum, the Court finds that Polymetrix did not consent to Bühler's disclosure of the July 5, 2017 email Sanlian prior to or at the time of the disclosure, and that absent such consent, it did not waive the attorney-client privilege as to that email, its contents, or the communications and opinions of counsel upon which it was based. Polymetrix never 'voluntarily [disclosed] a communication protected by the attorney-client privilege'— Bühler did. Workman, 138 F.3d at 1263. As a result, the Court need not reach the question of whether Bühler's disclosure to Sanlian was protected by a common interest relationship between those two entities because Polymetrix did not give Bühler permission to share the document in the first place and Bühler could not waive the attorney-client privilege on Polymetrix's behalf.").

- [Privilege Point, 11/3/21]

The Privilege Always Protects Communications Among Jointly Represented Corporate Affiliates, Right?

November 3, 2021

Corporate parents' in-house lawyers' joint representations of the parent and its wholly-owned subsidiaries should cinch their communications' attorney-client privilege protection. Additional grounds for such privilege protection (in a litigation setting) could also come from the obvious "common interest" between a corporate parent and its wholly-owned subsidiaries – which by definition must comply with their parent's direction.

But not all courts agree. In Somers v. QVC, Inc., Civ. A. No. 19-cv- 04773, 2021 U.S. Dist. LEXIS 148568 (E.D. Pa. Aug. 9, 2021), the court addressed communications between QVC's in-house lawyers and employees of its sister company HSN – and communications between HSN's in-house lawyers and QVC employees. Both QVC and HSN are wholly-owned subsidiaries of the same corporate parent. The court inexplicably rejected a privilege claim, despite acknowledging that: (1) "the QVC and HSN legal teams were consolidated into one legal department" after the corporate parent acquired them; and (2) the corporate family's Shared Services Agreement confirmed that "legal communications among and between" the wholly-owned subsidiaries "are made pursuant to a joint client/attorney-client privilege." Id. at *4-5. Instead of relying on the obvious joint representation privilege protection, the court only considered (and rejected) the common interest argument – noting that "there is no clear interest for sister companies to comply with each other's contracts" or for a corporate parent to assure that "one subsidiary compl[ies] with another subsidiary's contract." Id. at *11.

Although perhaps the common interest analysis was interesting, the court should have extended privilege protection based on the corporate family's consolidated law department's joint representation of both wholly-owned subsidiaries.

- [Privilege Point, 4/5/23]

Delaware Federal and State Courts Disagree About a Key Privilege Waiver Issue

April 5, 2023

Under some arrangements, major shareholders appoint directors to companies those shareholders partially own. Does such a company waive its privilege by disclosing its privileged documents to a designating shareholder's employees (other than its designated board members)? In In re Sanchez Energy Corp., Case No. 19-34508, Jointly Administered, Ch. 11, 2022 Bankr LEXIS 3507, at *8 (Bankr. S.D. Tex. Dec. 12, 2022), a Texas federal court analyzed under Delaware law whether a company waived its privilege by disclosing privileged communications to employees of two large shareholders who were "entitled to designate two of the three members of [the company's] board."

The court first noted that a Delaware bankruptcy court dealing with waiver in the other direction "recently held that a designating shareholder may waive privilege upon sharing information with its designee." Id. at *9. That decision disagreed with a 2013 Delaware Chancery Court decision holding that a "designating stockholder is entitled to the privileged communications to which its designee directors is entitled" without waiving the company's privilege. Id. at *10.

The court applied federal common law in adopting the Delaware bankruptcy court's reasoning — "ha[ving] no reason to believe that a designating shareholder is entitled to the privileged information of its designated board member." The court thus ordered the company's designated board members to produce privileged documents that they had shared with their fellow designating shareholder's employees (who were unaffiliated with, and thus "third parties," to the company).

III. CORPORATE PRIVILEGE: EXPANSION

A. Employee-to-Employee Communications

- [Privilege Point, 1/19/11]

Courts Examine Privilege Protection for Employee-to-Employee Communications

January 19, 2011

The attorney-client privilege protects communications between clients and their lawyers. In a corporate setting, however, the privilege sometimes can protect employee-to-employee communications (not directly involving a lawyer). Two December decisions explored the contours of such privilege protection.

In Willnerd v. Sybase, Inc., Case No. 1:09-CV-500-BLW, 2010 U.S. Dist. LEXIS 135781 (D. Idaho Dec. 22, 2010), the court held that the privilege did not protect the substance of ordinary conversations between two employees, although it protected one of the employees' later e-mail to the company's lawyer recounting the conversation. Less than two weeks earlier, a California appellate court held that the privilege protected one employee's communication to another employee relaying a company lawyer's questions and advice. S. Cal. Edison Co. v. Superior Court, No. B227781, 2010 Cal. App. Unpub. LEXIS 9809 (Cal. Ct. App. Dec. 13, 2010).

Although the privilege normally does not cover employee-to-employee communications, it can protect such communications (1) preceding a request for legal advice (in which the employees jointly formulate questions for the lawyer) or (2) relaying legal advice to other employees who need it.

- [Privilege Point, 12/10/14]

Courts Affirm Privilege Protection for Intra-Corporate Communications

December 10, 2014

In most states (Illinois being the main exception), attorney-client privilege protection extends to communications between a corporation's lawyers and (1) employees with facts the lawyers need, regardless of the employee's place in the hierarchy, and (2) employees with a "need to know" the lawyers' advice about those facts. Most courts also protect ancillary communications that support the corporation's request for and receipt of legal advice.

In Moffatt v. Wazana Brothers International, the court confirmed that the privilege protects "communications relaying legal advice provided by corporate counsel among non-attorney corporate employees who share responsibility 'for the subject matter underlying the consultation.'" Civ. A. No. 14-1881, 2014 U.S. Dist. LEXIS 151326, at *4 (E.D. Pa. Oct. 24, 2014) (citation omitted). Corporations frequently rely on this principle when their adversaries challenge privilege protection for documents whose privilege log entries do not show a lawyer as either the author or a recipient. One week later, the District of Delaware similarly held that the privilege could continue to protect privileged documents "shared within the corporate family, such as those sent to or from" the corporate defendant's French parent "[t]o the extent that . . . such involvement was essential to and in furtherance of the communications with the attorneys involved." United States v. Veolia Env't N. Am. Operations, Inc., Civ. No. 13-mc-03-LPS, 2014 U.S. Dist. LEXIS 154717, at *22 (D. Del. Oct. 31, 2014).

Although these justifiable principles provide some comfort, company employees should be warned against intra-corporate circulation of privileged communications beyond those with a "need to know."

- **[Privilege Points, 8/26/15]**

The Privilege Can Protect Employee-to-Employee Communications

August 26, 2015

Because attorney-client privilege protection depends primarily on communications' content, privilege logs rarely play a dispositive role in courts' analyses. But sometimes the adversary will point to the "author" and "recipients" data in challenging a privilege claim — noting the absence of a lawyer's name.

Courts universally acknowledge that employee-to-employee communications may deserve privilege protection. In Stryker Corp. v. Ridgeway, Case Nos. 1:13-CV-1066 & 1:14-CV-889, 2015 U.S. Dist. LEXIS 93741, at *9 (W.D. Mich. July 20, 2015), the court flatly rejected defendant's argument that "in and of itself" the lack of a lawyer's involvement in plaintiff's communications made privilege unavailable. The court explained that "[i]n the corporate context, the privilege applies to communications of any corporate employee on matters within the scope of the employee's corporate duties when the employee is aware that the information is being provided to enable the corporation to obtain legal advice." Id. On the same day, another court generally rejected a corporation's privilege claim, but acknowledged that the privilege can protect communications that "evidence . . . in-house counsel's advice or otherwise reflect counsel's involvement in decisions relating to legal matters, even if the communication is between two members of . . . management." Roberts Tech. Grp., Inc. v. Curwood, Inc., Civ. A. No. 14-5677, 2015 U.S. Dist. LEXIS 95779, at *4 (E.D. Pa. July 20, 2015) (emphasis added).

Given the usually cryptic nature of privilege logs, some litigants understandably argue that the privilege cannot apply to employee-to-employee communications — but every court disagrees.

- **[Privilege Point, 6/8/16]**

Can the Privilege Protect Emails that Lawyers Do Not Send or Receive?

June 8, 2016

Because privilege logs generally require withholding litigants to identify emails' senders and recipients, the absence of a lawyer's name often triggers discovery skirmishes. Not surprisingly, the withholding litigants' adversaries often argue that communications not involving a lawyer cannot possibly be privileged.

In ChriMar Systems Inc. v. Cisco Systems Inc., the court held that the privilege and the work product doctrine protected emails that a patent inventor sent to himself — noting that the inventor and his lawyers "attest that the emails memorialize and reflect confidential communications made for the purpose of conveying legal advice." Case No. 13-cv-01300-JSW (MEJ), 2016 U.S. Dist. LEXIS 54375, at *19 (N.D. Cal. Apr. 21, 2016). About a week later, another court dealt with an email that was not sent by or received by a lawyer. In FPP, LLC v. Xaxis US, LLC, No. 14 CV 06172-LTS-AJP, 2016 U.S. Dist. LEXIS 57421 (S.D.N.Y. Apr. 29, 2016), defendant's senior vice president sent an email to several of his colleagues, and the company's outside counsel. The company's CFO responded to the email, but removed the outside counsel from the recipient list. District Judge Swain acknowledged that employee-to-employee communications can deserve privilege protection, but rejected the defendant's privilege claim for the CFO's response. The court noted that the CFO had deliberately "removed the attorney from the distribution list when she replied, and indicated in her declaration . . . that she had merely offered her comments for possible use by a business colleague in a future communication with the attorney." Id. at *5.

Although email strings that do not include lawyers can sometimes deserve privilege protection, courts usually demand evidence that the emails relayed a lawyer's advice; memorialized a lawyer's advice; or (occasionally) involved clients formulating questions to pose to their lawyer.

- FTC v. Boehringer Ingelheim Pharms., Inc., 180 F. Supp. 3d 1, 34 (D.D.C. 2016) ("The FTC's focus on the sender and recipient of these documents is also misguided. It is true that 'documents prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged since they are not communications made primarily for legal advice.' . . . But the principle is more nuanced than the FTC admits. The same protections afforded to communications between counsel and client extend to communications between corporate employees who are working together to compile facts for in-house counsel to use in rendering legal advice to the company. . . . That is precisely what happened here, and it is not surprising that this occurred given the complexity of the factual analyses Persky [Defendant's Senior Vice President, General Counsel, and Secretary] requested." (emphasis added)).

- [Privilege Point, 4/19/17]

Can the Attorney-Client Privilege Protect Corporate Executives' Notes of Their Conversations with a Lawyer?

April 19, 2017

The attorney-client privilege protects communications between lawyers and their clients, primarily motivated by the latter's need for legal advice. Some corporations' adversaries challenge privilege protection for withheld documents whose log entries do not include a lawyer author or recipient. Fortunately for corporations, courts universally protect such communications in which one corporate employee passes along a lawyer's advice to another employee who needs it.

Fewer courts deal with corporate employees' contemporaneous notes prepared during their conversations with a company lawyer. In Bailey v. Oakwood Healthcare, Inc., Case No. 15-11799, 2017 U.S. Dist. LEXIS 13667 (E.D. Mich. Feb. 1, 2017), defendant claimed privilege protection for two handwritten pages of notes a human resources employee made during his conversation with an in-house lawyer. The court initially acknowledged that for privilege purposes "[n]otes on a privileged conversation that reflect the substance of that conversation can amount to 'communications.'" Id. at *2. The court then relied on the employee's affidavit and deposition testimony in concluding that his notes reflected his request for, and the in-house lawyer's providing of, legal advice.

Thus, the privilege can protect (1) contemporaneous memorializations of privileged conversations, and (2) post-conversation communications relaying legal advice to employees who need it. In some limited circumstances, the privilege can even extend to (3) employees' communications compiling facts or composing questions that they will later present to their company's lawyer.

- Nalco Co. v. Baker Hughes Inc., Civ. A. No. 4:09-CV-1885, 2017 U.S. Dist. LEXIS 111127, at *6, *6-7, *7 (S.D. Tex. July 18, 2017) (holding that the attorney-client privilege can protect employee-to-employee communications under certain circumstances; "Communications between employees may be privileged in two circumstances. First, communications may be privileged when a corporate client shares information with non-attorney employees 'to relay information requested by attorneys.'" (emphasis added) (citation omitted); "Second, communications between non-attorney corporate employees may be privileged when they were made 'for the purpose of securing legal advice.'" (citation omitted); "When the communication involves a document, for the court to find that the attorney-client privilege applies, the court must inspect the document and find that the primary purpose of the communication was to secure legal advice."; "A party can prove that the purpose of a communication was to seek legal advice by offering evidence that the communication was relayed to an attorney." (emphasis added)).
- Nalco Co. v. Baker Hughes Inc., Civ. A. No. 4:09-CV-1885, 2017 U.S. Dist. LEXIS 111127, at *8, *8-9, *9 (S.D. Tex. July 18, 2017) (holding that the attorney-client privilege can protect employee-to-employee communications under certain circumstances; "The 7:57 a.m. email reflects that Dr. Weers told Ralph Navarrete about a specific request he made for legal advice to an attorney regarding the patent. The attorney-client privilege protects this exchange because, on its face, the email reflects that Dr. Weers communicated that he sought legal advice from a lawyer." Contrasting that protected email with an unprotected email; "In the 12:55 p.m. email, Baker seeks to redact a question from Mr. Navarrete to Dr. Weers about the effect of an expired patent on the enforceability of Baker's patent. In the email, Mr. Navarrete does not ask Dr. Weers to forward this question to counsel or state that that [sic] Mr. Navarrete intended to do so. Baker submitted Mr. Navarrete's affidavit in support of its position that the communication was privileged. Mr. Navarrete stated that he responded to Dr. Weers' email 'with a question I had for counsel concerning the scope of the 943 patent.'"; "Nothing in the email chain indicates that the question was to be proposed to counsel. . . . Even assuming Mr. Navarrete had such an unexpressed intent, Baker has not submitted evidence that the substance of this communication was in fact conveyed to an attorney." (emphases added)).

- [Privilege Point, 1/10/18]

When Can the Privilege Protect Employee-to-Employee Communications?

January 10, 2018

Because privilege logs generally list the authors and recipients of withheld communications, corporations' adversaries frequently cite such logs in challenging the corporations' privilege claims when a log shows that no lawyer sent or received a withheld document. Corporations normally win such disputes if they demonstrate that one employee who received legal advice relayed it to another employee who needed it. Occasionally corporations also successfully withhold employees' contemporaneous notes of a privileged communication.

But there is a third, albeit less frequent, scenario in which the privilege can protect intra-corporate communications not involving a lawyer. In Crabtree v. Experian Information Solutions, Inc., the court held that defendant corporation "appropriately designated as privileged the communications between its non-lawyer employees." No. 1:16-cv-10706, 2017 U.S. Dist. LEXIS 173905, at *4 (N.D. Ill. Oct. 20, 2017). The court noted that the "employees gathered information to assist counsel with rendering legal advice," and that "those facts were eventually channeled to counsel to aid in the provision of legal services." Id. at *5. In other words, company lawyers had essentially deputized such employees to gather facts the lawyers needed. Of course, wise in-house and outside lawyers memorialize such deputization.

This type of protected employee-to-employee communications represents the chronologically first of the intra-corporate lawyerless trifecta of protected scenarios, which can extend privilege protection to such communications (1) before employees go to the lawyer with facts the lawyer needs; (2) that are memorialized while employees communicate with the lawyer; and (3) after they receive legal advice from the lawyer, which they then relay to other employees who need it.

- [Privilege Point, 11/6/19]

Courts Confirm Privilege Protection's Availability For Employee-to-Employee Communications

November 6, 2019

Given privilege logs' listings of withheld documents' authors and recipients, it should come as no surprise that adversaries frequently challenge privilege protection for documents not sent by or to companies' lawyers. In fact, it is one of the few privilege challenges adversaries can mount based purely on the log. But such communications can deserve privilege protection if: (1) the company's employees were formulating a question or gathering facts for later transmission to the corporation's lawyer; (2) the employees were contemporaneously memorializing communications with the company's lawyer; or (3) the employees were relaying the company's lawyers' advice to other employees who needed it.

In Rauback v. City of Savannah, No. CV418-167, 2019 U.S. Dist. LEXIS 134025, at *9 (S.D. Ga. Aug. 8, 2019), the court protected employee-to-employee communications after confirming in an in camera review that "the emails appear to be a conversation between a representatives of a corporate client conveying relevant legal information advice from counsel." About two weeks later, in McCall v. P&G, Case No. 1:17-cv-406, 2019 U.S. Dist. LEXIS 143161, at *10 (S.D. Ohio Aug. 22, 2019), the court similarly found after its in camera review that "all [withheld documents] are covered by the attorney-client privilege, notwithstanding the fact that none lists an attorney as a sender, recipient, or copied party." The court explained that in some of the documents "P&G's employees gather information . . . at the request of P&G's attorneys," and in other documents P&G's employees "convey legal updates from P&G's attorneys, implement legal advice from P&G's attorneys and/or set up meetings with P&G's attorneys/agents about the case." Id.

Although these and similar cases offer hope for successfully asserting privilege protection for employee-to-employee communications, lawyers should train those employees to articulate those purposes on the face of such documents.

- [Privilege Point, 1/8/20]

Another Court Analyzes Privilege Protection For Employee-To-Employee Communications

January 8, 2020

As a recent Privilege Point noted, the attorney-client privilege can protect employee-to-employee communications: (1) if the employees are gathering facts or formulating questions to inform a lawyer or pose those questions to the lawyer; (2) if the employees are contemporaneously memorializing otherwise privileged communications with the lawyer; or (3) most commonly, if the employees are relaying legal advice to other employees who need it.

In most, if not all, privilege situations like this, courts read the withheld documents to determine if they fall into one of those three categories. In Dolby Laboratories Licensing Corp. v. Adobe Inc., the court upheld a magistrate judge's holding that one withheld document did not deserve privilege protection, despite defendant's argument that "the document was sent at the direction of counsel to gather information to be used to obtain legal advice." Case No. 18-cv-01553-YGR, 2019 U.S. Dist. LEXIS 166025, at *10 (N.D. Cal. Sept. 26, 2019). The judge noted that "[h]ad the document contained substantive information related to counsel's request, the evidence provided by Adobe likely would have been sufficient to establish privilege." Id. In contrast, the judge reversed the magistrate judge's denial of privilege protection for another document – which was based on the magistrate judge's observation "that the specific document at issue contained 'indicia of business purposes.'" Id. at *11. After reviewing that document in camera, the court held that "the magistrate judge did not give sufficient regard to the sworn statement offered by the sender of the email stating that it was sent 'in response to [a] request from [in-house counsel]' communicated just one day prior and 'addresse[d] information necessary for Adobe's in-house attorneys to provide legal advice.'" Id. (alterations in original).

These two examples highlight ways that corporations can increase the odds of successfully withholding employee-to-employee communications. Affidavits can sometimes carry the day, but it is always best for in-house lawyers to train their colleagues to explicitly include on the face of privileged employee-to-employee documents the basis for the privilege protection (one of the three scenarios described above).

- In re Dealer Mgmt. Sys. Antitrust Litig., MDL No. 2817; Case No. 18 C 864, 2020 U.S. Dist. LEXIS 246422, at *41-42 (N.D. Ill. Mar. 30, 2020) (in an opinion by Judge Gilbert, holding that intra-corporate communications can deserve privilege protection despite the absence of author's or recipient's identity; "The Court ordinarily tries to be as consistent as possible with its rulings in this and any other case. With respect to this particular issue, the Court understands there are instances when there may be no identifiable author/recipient information for documents that are email attachments, but the absence of that information might not be dispositive of the question whether the attorney-client privilege applies with respect to a particular document or documents. The Court, however, is not inclined to issue a blanket ruling on the instant Motion or any other motion to the effect that a document that does not have any author/recipient designation automatically is or is not privileged on that basis alone. Similarly, the Court is not inclined to say on a blanket basis that a document is or is not privileged because a party's privilege log does not identify an attorney by name but rather refers to 'in-house counsel' or 'legal department.' The Court can conceive of scenarios when a document would be privileged even if a lawyer is not identified by name and instances when the identification of the attorney could be relevant and necessary to a privilege determination.")

- [Privilege Point, 7/1/20]

Illinois Federal Court Addresses a Substantive and a Logistical Privilege Issue: Part I

July 1, 2020

A frequent privilege issue arising in federal and state courts involves communications that do not come from or go to a lawyer. Such communications may clearly deserve privilege protection, under certain limited circumstances. Most commonly, an employee receives legal advice from the company's lawyer, and then relays that advice to another employee who needs it. Less commonly, the privilege can protect an employee's contemporaneous memorialization of her communication with a company lawyer, which the employee saves. The third scenario is the most rare — employees communicating with each other before reaching out to the company's lawyer.

In RTC Industries, Inc. v. Fasteners for Retail, Inc., Case No. 17 C 3595, 2020 U.S. Dist. LEXIS 50518, at *9-10 (N.D. Ill. Mar. 24, 2020), the court protected as privileged “three redacted sentences from an email” RTC's Vice President sent to RTC's CEO – which “reflect[] the advice of attorneys and is thus privileged.” The court also protected another email from RTC's Vice President to the CEO. Acknowledging that neither “is an attorney,” the court concluded that “[e]ven so, the redacted information is protected by the attorney-client privilege, as it reflects what [RTC's Vice President] intends to discuss with an RTC attorney about obtaining intellectual property protection.” Id. at *9.

Corporations' lawyers should train all executives and other employees communicating with each other to explicitly: (1) identify advice as having come from the company's lawyer, if they relay that advice to another employee; and (2) explicitly explain that they intend to seek advice from a lawyer about an issue, if that is their intent. Next week's Privilege Point will address the same court's careful redaction process.

- Shenandoah Coatings, LLC v. Xin Dev. Mgmt. East, LLC, No. 517102/18, 2020 N.Y. Misc. LEXIS 10893, at *12-13, *15 (N.Y. Sup. Ct. Dec. 24, 2020) (holding that the privilege could protect employee-to-employee communications; “Plaintiff argues that the emails between employees, with no attorney as sender or recipient, cannot be deemed a privileged communication between attorney and client. 421 Kent contends, however, that the emails between their employees consisted of legal advice from counsel and are privileged as inter-company legal communications.”; “Recognizing that legal advice to a corporate client ‘inherently involves dispersing the advice to corporate representatives,’ the court holds that communications between employees concerning legal matters in this instance may be privileged.”)
- TIGI Linea Corp. v. Professional Prods. Grp., LLC, Lead Case 4:19-cv-00840-RWS-KPJ; 4:20-cv-087, 2020 U.S. Dist. LEXIS 244777, at *15 (E.D. Tex. Dec. 30, 2020) (holding that the attorney-client privilege could protect communications between corporate employees; “The attorney-client privilege may attach to communications between nonlegal employees where: (1) ‘the employees discuss or transmit legal advice given by counsel[’]; and (2) ‘an employee discusses her intent to seek legal advice about a particular issue.’” Id. (quoting Datel Holdings Ltd. v. Microsoft Corp., No. C-09-05535 EDL, 2011 [WL 866993], at *5 (N.D. Cal. Mar. 11, 2011)).”)

- Adkisson v. Jacobs Eng'g Grp., Inc., No. 3:13-CV-505-TAV-HBG, 2021 U.S. Dist. LEXIS 7982, at *23 (E.D. Tenn. Jan. 15, 2021) (holding that the attorney-client privilege can protect employee-to-employee communications; “Again, the Court notes that ‘[c]ommunications among non-attorneys in a corporation may be privileged if made at the direction of counsel, to gather information to aid counsel in providing legal services.’ EPAC Techs., Inc., 2015 U.S. Dist. LEXIS 198583, 2015 WL 13729725 *2 (quoting In re Rivastigmine Patent Litig., 237 F.R.D. 69, 80 (S.D.N.Y. 2006)). ‘In the corporate context the attorney-client privilege may extend to communications between employees that convey legal advice given by an attorney to the corporation.’” (alteration in original) (citation omitted))
- Tower 570 Co. v. Affiliated FM Ins. Co., No. 20-CV-0799 (JMF), 2021 U.S. Dist. LEXIS 63955, at *9 (S.D.N.Y. Apr. 1, 2021) (holding that employee-to-employee communications can deserve privilege protection if they convey legal advice; “[I]n the corporate setting, courts have held that the ‘intra-corporate distribution of legal advice received from counsel does not necessarily vitiate the privilege, even though the legal advice is relayed indirectly from counsel through corporate personnel.’” (citation omitted))

- Wier v. United Airlines, Inc., No. 19 CV 7000, 2021 U.S. Dist. LEXIS 73397, at *18-19 (N.D. Ill. Apr. 16, 2021) (holding that the attorney-client privilege protected employee-to-employee communications copying an in-house lawyer, or involving employees' gathering of facts the lawyer needed; "The Court finds that United has carried its burden and appropriately designated as privileged the communications on which in-house counsel is copied or is one of multiple recipients. These emails indicate that the non-attorney employees were seeking legal advice regarding 'suspicions of FMLA abuse,' 'approval of absences in light of suspicious documentation,' 'Wier's absences,' and 'absences in light of suspicious paperwork.' [57-1] 2-9 (entries 1-2, 4, 6-22, 25, and 27). These are 'terms of art well-known to the parties in this litigation, as they go to the heart of some of the key disputes in the litigation.' Washtenaw Cnty., 2020 U.S. Dist. LEXIS 123756, 2020 WL 3977944, at *4. The descriptions are self-evident, and bear on the core issues in the parties' dispute. United's employees collected information to assist in-house counsel Nash with rendering legal advice about Wier's suspected FMLA abuse and the legal ramifications of her conduct.")

- Mr. Dee's Inc. v. Inmar, Inc., No. 1:19cv141, 2021 U.S. Dist. LEXIS 163460, at *11-13 (M.D.N.C. Aug. 30, 2021) (in an opinion by Judge Auld, explaining privilege protection for intra-corporate communications, including protection for non-lawyers' communications; "With respect to the fourth prong of the classic test, '[a]ny disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege.' Jones, 696 F.2d at 1072. However, '[c]orporations may communicate privileged information at various levels without waiving the attorney-client privilege.' Santrade, Ltd. v. GE, 150 F.R.D. 539, 545 (E.D.N.C. 1993). In general, the privilege protects the dissemination of legal advice and the solicitation of information for purposes of obtaining legal advice. See North Carolina Elec. Membership Corp., 110 F.R.D. at 514 ('It is important for corporations not only to be able to act on advice but also to be able to communicate information held at every corporate level to counsel so that counsel can render informed advice.'). Consistent with those principles, 'privileged communications may be contained in discussions between or among non-attorney employees.' Walgreen Co., 2020 U.S. Dist. LEXIS 123756, 2020 WL 3977944, at *4. More specifically, the privilege applies 'when documents specifically convey legal advice to the limited number of people necessary for the company to act on that legal advice.' In re Zetia (Ezetimibe) Antitrust Litig., No. 2:18md2836, 2020 U.S. Dist. LEXIS 61020, 2020 WL 1593544, at *4 (E.D. Va. Feb. 6, 2020) (unpublished); accord Deel v. Bank of Am., N.A., 227 F.R.D. 456, 460 (W.D. Va. 2005) ('A corporation does not waive its privilege when non-lawyer employees send or receive communications because corporate communications which are shared with those having need to know of the communications are confidential for purposes of the attorney-client privilege.'). Similarly, 'documents subject to the privilege may be transmitted between non-attorneys to relay information requested by attorneys.' Santrade, Ltd., 150 F.R.D. at 545." (alterations in original))

- In re Allergan PLC Sec. Litig., No. 18 Civ. 12089 (CM) (GWG), 2021 U.S. Dist. LEXIS 171331, at *7-8 (S.D.N.Y. Sept. 9, 2021) (holding that employee-to-employee communications would deserve privilege protection if they conveyed legal advice to those with a need to know; “[A]ttorney-client privilege is not lost where there is ‘distribution within a corporation of legal advice received from its counsel,’ provided that disclosure is made to employees that are ‘in a position to act or rely on the legal advice contained in the communication.’ It is therefore not required that an attorney be a party to the communication that shares the legal advice from the attorney. We also see no particular need for the attorney’s name to be revealed in the communication, or for that matter the privilege log, in order for the privilege to be maintained. Of course, the assumption behind these principles is that what is being shared is legal advice to begin with, not business advice, to which no privilege would attach.” (citation omitted))

- [Privilege Point, 3/9/22]

Court Explains How Employee-to-Employee Emails Can Deserve Privilege Protection

March 9, 2022

Because privilege logs necessarily contain logistical but not content-based information about withheld documents, adversaries sometimes challenge privilege protection because no lawyer sent or received a withheld document. Every court recognizes that the privilege can protect one employee's forwarding of a lawyer's advice to another employee who needs it. And there is another less common but equally protected type of employee-to-employee communication.

In Corkrean v. Drake University, No. 4:21-cv-00336-RGE-SHL, 2022 U.S. Dist. LEXIS 10156 (S.D. Iowa Jan. 3, 2022), the court noted that "[c]ourts overwhelmingly recognize that a communication is not per se unprivileged simply because it is solely between non-attorneys." Id. at *7. Focusing on the less common type of protected employee-to-employee communications, the court explained that "the attorney-client privilege sometimes will protect communications between employees about imminent future discussions with an attorney." Id. at *9. The court then offered useful guidance for what it called the "gray area" in such communications. For instance, "[a]n email that makes a passing reference to the possibility of speaking with an attorney is less likely to be privileged than one that prepares for an already-scheduled meeting with an attorney." Id. at *9-10. And so "a long email chain that mentions nothing about an attorney until the very last message is unlikely to be privileged except as to the last message." Id. at *10.

Corporations and their lawyers should be on the lookout for all the ways the privilege can justify withholding employee-to-employee emails.

- Wagner Aeronautical, Inc. v. Dotzenroth, Case No. 21-cv-0994-L-AGS, 2022 U.S. Dist. LEXIS 158665, at *15-16 (S.D. Cal. Sept. 1, 2022) (finding that the attorney-client privilege protection covered employees' collection of facts needed by a lawyer to give legal advice; "The emails between plaintiffs and Fortress attorneys that compile information for the purpose of seeking legal advice or directly solicit or receive the legal advice are privileged in their entirety. See Upjohn, 449 U.S. at 390 ('[T]he [attorney-client] privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.'); AT&T Corp., 2003 U.S. Dist. LEXIS 8710, 2003 WL 21212614, at *3 ('Communications containing information compiled by corporate employees for the purpose of seeking legal advice and later communicated to counsel are protected by attorney-client privilege.'). This category includes PLEs 26, 60, 61, 63-66, 68, 122, 123, 127, 134-36, 145-47, and 158-60. Likewise, those emails disseminating the legal advice to 'those who can act on it' are privileged. See Upjohn, 449 U.S. at 390. So PLE 120 is privileged too." (alterations in original))
- In re Apple Inc. Sec. Litig., Case No. 4:19-cv-2033-YGR, 2022 U.S. Dist. LEXIS 172182, at *5-6 (N.D. Cal. Sept. 12, 2022) (finding Apple's affidavits insufficient to support its privilege claim; "[D]efendants argue that Judge Spero departed from 'settled law' by concluding that certain internal communications were non-privileged even though counsel for Apple submitted sworn declarations to the contrary. As Judge Spero states in the order, '[a]ttorney declarations generally are necessary to support the designating party's position in a dispute about attorney-client privilege.' (quoting Dolby Lab's Licensing Corp. v. Adobe Inc., 402 F. Supp. 3d 855, 865 (N.D. Cal. 2019)). That does not mean such affidavits are dispositive, particularly when, as Judge Spero found here, such declarations are 'vague' or otherwise inadequate. The order reveals that Judge Spero considered the declarations and found them wanting. Such factual determinations are not clearly erroneous." (internal citations omitted))

- Trush v. City of Phila., Civ. A. No. 21-3254, 2023 U.S. Dist. LEXIS 203319, at *6-7 (E.D. Pa. Nov. 14, 2023) (“[D]ocuments in which non-lawyers discuss communicating with a lawyer, without disclosing the matter for which they seek legal advice or relaying the legal advice provided by the lawyer, are not privileged. See Fed. Trade Comm’n v. Abbvie, Inc., No. 14-5151, 2015 U.S. Dist. LEXIS 166723, 2015 WL 8623076, at *8 (E.D. Pa. Dec. 14, 2015) (‘There is no privilege where one non-attorney employee states to another non-attorney employee his or her desire to speak with in-house counsel.’); see also Idenix Pharms., Inc. v. Gilead Scis., Inc., 195 F. Supp. 3d 639, 643 (D. Del. 2016) (holding that an email from one non-lawyer to another non-lawyer within the same corporation suggesting meeting a newly-hired lawyer was not privileged). In contrast, information from counsel relayed by a non-lawyer to another non-lawyer within a company may be privileged if it is shared for the purpose of obtaining or providing legal counsel or shared with an employee who needs the information to carry out their work or make effective decisions. Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609, 633 (M.D. Pa. 1997). Accordingly, the City shall produce Documents 240, 250, 251-252, 253 in whole and Documents 172-175, 198, 255, 300 with revised redactions.”)
- Platinum Supply Corp. v. Turner Constr. Co., Index No. 157835/2020, 2023 NY Slip Op 34060(U), at *3 (N.Y. Sup. Ct. Nov. 15, 2023) (“There is no dispute that the only potentially discoverable information are the notes prepared by the attorneys in connection with the interviews of certain employees for defendant. An attorney’s notes, which may include his or her impressions and thoughts about those interviews, are clearly protected under the attorney-client privilege and the work product doctrine as defendant wanted an assessment of potential wrongdoing and whether it needed to pursue legal remedies.”)

B. Former Employees

- Export-Import Bank of U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 112 (S.D.N.Y. 2005) (holding that the attorney client privilege and the work product doctrine protect the deposition preparation discussions between a company's lawyer and a former company employee; "Virtually all courts hold that communications between company counsel and former company employees are privileged if they concern information obtained during the course of employment. . . . It is true, as APP contends, that the privilege guarding such discussions will not protect pre-deposition conversations that are held to refresh a deponent's memory. . . . However, this is a very narrow exception. Pre-deposition conversations may also be work product; to the extent Ex-Im's attorneys communicated their legal opinions and theories of the case, their conversations are immune from discovery. . . . APP has had its opportunity to obtain from Ms. Mostofi the non-privileged information to which it is entitled. The benefit that might be obtained from asking Ms. Mostofi about communications with Ex-Im lawyers that neither concerned information she learned while she was an Ex-Im employee nor was work product is outweighed by the burden a new deposition would impose on Ex-Im.")
- • Gary Friedrich Enterprises, LLC v. Marvel Enterprises, Inc., No. 08 Civ. 1533 (BSJ) (JCF), 2011 U.S. Dist. LEXIS 54154, at *11-12 (S.D.N.Y. May 20, 2011) ("In situations such as this where a former employee is represented by counsel for a defendant corporation for the purpose 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.").

- [Privilege Point, 9/24/14]

Are Now-Adverse Former Corporate Executives Entitled to See Their Own Files?

September 24, 2014

Courts vehemently disagree about now-adverse former corporate executives' right to see privileged documents that were in their possession when they worked at the company. A 1987 Delaware decision provided such access. Kirby v. Kirby, Civ. A. No. 8604, 1987 Del. Ch. LEXIS 463 (Del. Ch. July 29, 1987) (not released for publication). In 2005, the Montana Supreme Court even condemned the opposite approach as "perverse." Inter-Fluve v. Mont. Eighteenth Judicial Dist. Court, 112 P.3d 258, 264 (Mont. 2005).

In Las Vegas Sands Corp. v. Eighth Judicial District Court, 331 P.3d 905 (Nev. 2014), the Nevada Supreme Court took what Montana called the "perverse" view — but which seems much more logical. A company's CEO took 40 gigabytes of documents with him when he left. After examining both sides of the issue, the court concluded that "the modern trend in caselaw" denies access to now-adverse former employees. Id. at 913. The court explained that allowing former executives "to access and use privileged information after he or she becomes adverse to the corporation" is inconsistent with the privilege's purpose. Id. In an undoubtedly unintended swipe at the Montana analysis, the court concluded that providing such access "would have a perverse chilling effect on candid communications between corporate managers and counsel." Id.

Although the trend favors corporations' right to deny former employees access to their privileged communications, the debate probably will continue.

- [Privilege Point, 12/31/14]

Court Applies the Peralta Standard for Company Lawyers' Communications with Former Employees

December 31, 2014

Although the attorney-client privilege generally protects company lawyers' communications with former company employees, most courts follow the nuanced approach of Peralta v. Cendant Corp., 190 F.R.D. 38 (D. Conn. 1999). Under that standard, the privilege can protect communications relating to the former employee's time at the company, but not since then.

In Winthrop Resources Corp. v. CommScope, Inc., Civ. A. No. 5:11-CV-172, 2014 U.S. Dist. LEXIS 158413 (W.D.N.C. Nov. 7, 2014), the court addressed plaintiff's effort to compel deposition answers from defendant's former vice president and CIO Kap Kim. Applying the Peralta standard, the court upheld the magistrate judge's ruling that Kim must answer the following questions (among others): (1) "whether [defendant's] attorney Jeff Mayer had told, or if Kim had asked, Mayer's 'personal view on whether [plaintiff] Winthrop or [defendant] CommScope is correct in their interpretation of the lease language in the case,'" Id. at *12 (internal citation omitted); (2) "whether Kim had asked any lawyer to determine whether CommScope's or Winthrop's interpretation of the lease was correct," Id.; and (3) "the substance of conversations that occurred during a deposition break" — which the court held were "questions that directly relate[d] to deposition preparation" and thus "are squarely covered by the holding in Peralta." Id. at *10-11. Defendant also claimed work product protection for those communications, but the court held that the defendant waived that argument by not presenting it to the magistrate judge.

Company lawyers dealing with former employees should remember the Peralta standard's limitations. They should also weigh both work product and privilege protection possibilities, considering that in the former employee context, the work product doctrine may provide more promising protection than the attorney-client privilege.

- [Privilege Point, 12/7/16]

Court Nixes Privilege Protection for Former Employee Interviews – Is This a Big Deal?: Part I

December 7, 2016

In a 4-3 vote, the Washington Supreme Court held that an institution's lawyers' communications with former employees did not deserve privilege protection. Newman v. Highland Sch. Dist., 381 P.3d 1188 (Wash. 2016). This decision places Washington in a distinct minority position – but is it a big deal?

The Newman majority emphasized the predictability of a per se rule that "the privilege does not broadly shield counsel's postemployment communications with former employees." Id. at 1190. A strong dissent relied on the Supreme Court's seminal decision in Upjohn Co. v. United States, 449 U.S. 383 (1981). As the dissent correctly explained, Upjohn rejected the earlier "control group" standard for corporate privilege protection – which looked at the employee's place in the corporate hierarchy. Instead, Upjohn focused on the employees' factual knowledge that the corporation's lawyer needs before advising his corporate client. Upjohn did not explicitly extend privilege protection to former employees with such knowledge, but the Newman dissent noted that those Upjohn employee interviews held to be within privilege protection included seven former employees.

Nearly every court since Upjohn has adopted that decision's focus on employees' knowledge rather than their place in the corporate hierarchy — and extended privilege protection to former employees. See, e.g., Indergit v. Rite Aid Corp., No. 08 Civ. 9361 (JPO)(HBP), 2016 U.S. Dist. 150565, at *11 (S.D.N.Y. Oct. 31, 2016) (holding that a Rite Aid lawyer's conversation with former employees "concerning their conduct and duties while employed by Rite Aid would also be within the attorney-client privilege"). Newman has sparked many articles sounding the alarm about this erosion of corporate privilege protection.

- [Privilege Point, 12/14/16]

Court Nixes Privilege Protection for Former Employee Interviews – Is This a Big Deal?: Part II

December 14, 2016

Last week's Privilege Point described the Washington Supreme Court's 4-3 rejection of privilege protection for communications with former corporate employees. Newman v. Highland Sch. Dist., 381 P.3d 1188 (Wash. 2016). Although the decision seems to ignore the widely accepted Upjohn analysis, is it a big deal?

The answer is no. First, no court assessing privilege protection has ever treated former employees as if they were current employees. The majority approach to former employee privilege protection is often called the Peralta standard. Peralta v. Cendant, 190 F.R.D. 38 (D. Conn. 1999). Under that standard, the privilege only extends to communications about the former employee's tenure at the company – it never protects discussions about what happened after the employee left, or the typical type of testimony-preparation give and take that a company lawyer might have with a current employee. So the only privileged communications under the Peralta standard involve mundane open-ended questions about historical facts. Second, corporate lawyers hoping to cinch privilege protection might jointly represent former employees – although that might create conflicts problems. If available, such an arrangement would also preclude an adverse lawyer's ex parte communications with the former employees. For some reason, the Newman trial court prohibited such joint representations. Third, if a joint representation would not work, the company might hire separate lawyers for the former employees – in which case a common interest agreement might assure privilege protection.

At most, the Newman approach makes privilege protection unavailable for communications most lawyers would not mind disclosing – questioning former employees about what they remembered from their time at the company. And joint representations or common interest agreements might provide alternative ways to protect such communications. Next week's Privilege Point explains another possible way to protect such communications (which Newman did not even address) – as well as another risk to privilege that no commentator seems to have mentioned.

- [Privilege Point, 12/21/16]

Court Nixes Privilege Protection for Former Employee Interviews – Is This a Big Deal?: Part III

December 21, 2016

The last two Privilege Points (Part I and Part II) described the Washington Supreme Court's 5-4 rejection of privilege protection for communications with former corporate employees (Newman v. Highland School Dist., 381 P.3d 1188 (Wash. 2016)), and three reasons why the decision should not frighten corporations' lawyers.

Newman alarmists often miss the fourth and perhaps most important reason why the decision should not cause panic. In the normal context for such communications (when the company is in or anticipates litigation), the work product doctrine usually can provide an entirely separate protection in most courts. That protection should cover lawyers' and former employees' notes of their communication, and even their intangible oral conversations. Although fact work product protection can be overcome, that seems unlikely if the former employee is available for the adversary to interview or depose. And focused questions from the corporation's lawyer might even deserve absolute opinion work product protection. Newman did not address that independently sufficient protection. A 2014 Privilege Point described a federal case in which litigants also inexplicably failed to timely claim work product protection in this context. Winthrop Res. Corp. v. CommScope, Inc., Civ. A. No. 5:11-CV-172, 2014 U.S. Dist. LEXIS 158413 (W.D.N.C. Nov. 7, 2014). All in all, careful lawyers should be able to work around Newman's adverse impact.

Ironically, Newman's extension of privilege only to current employees might prove a greater threat in a totally different direction. Most courts extend privilege protection to non-employees who are the "functional equivalent" of employees. In this age of outsourcing, the "functional equivalent" doctrine can be critically important. Newman's "bright line" privilege approach could threaten this protection.

- In re Premera Blue Cross Customer Data Security Breach Litig., 296 F. Supp. 3d 1230, 1239 (D. Or. 2017) (“The corporate attorney-client privilege, however, does not extend to former employees.”)
- Maxus Energy Corp. v. YPF, S.A. (In re Maxus Energy Corp.), Nos. 16-11501 & 18-50489, 2021 Bankr. LEXIS 534, at *19 (Bankr. D. Del. Mar. 8, 2021) (finding that some deposition preparation communications with a corporate client’s former employee deserved privilege protection; “To be clear, the Trust owns and maintains the debtors’ privilege including any privileged communications and documents Mr. Segovia received while employed by the debtors. This is consistent with the case law that states that two types of information remain privileged after a pre-deposition preparation session of a former employee of a corporation: (a) privileged information that the former employee received during his or her employment; and (b) communications designed to allow the employer’s counsel to ascertain facts relevant to the lawsuit that the former employee witnessed while employed.” (footnote omitted))

- Corcoran v. HCA-HealthONE LLC, Civ. A. No. 21-cv-0237-NRN, 2022 U.S. Dist. LEXIS 91486, at *6, *9, *9-10, *10-11, *11 (D. Colo. May 20, 2022) (adopting the Peralta approach to communications with a former employee, but rejecting Peralta's work product analysis – finding that disclosure of work product to a former employee waived that protection because the former employee could disclose it to third parties; “One case where the facts closely mirror those presented by the instant Parties is Peralta v. Cendant Corp., 190 F.R.D. 38 (D. Conn. 1999).”; “This approach seems reasonable and consistent with the objectives of preserving the corporate entity's privilege, while recognizing that the adversary has a right to know if the witnesses' testimony has been influenced in any way.”; “For these reasons, I accept Ms. Corcoran's arguments from her brief and adopt the Peralta opinion with respect to issues of attorney-client privilege only. With respect to attorney-client privilege, the Peralta decision should guide any future deposition questions and answers to and from former Rose employees.” (internal citation omitted); “The Peralta decision goes on and reaches certain conclusions about the work product doctrine and how a lawyer can have a discussion about legal theories and opinions with a former employee and such discussion might be protected as work product. See Peralta, 190 F.R.D. at 42 (suggesting that the work product doctrine would prevent deposition questions about legal theories or opinions that the corporate lawyer may have discussed with the former employee). I disagree with the Peralta opinion on this point. The authority it cites, C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2024, does not support the position stated. A review of the most recent edition of the Wright and Miller treatise indicates that this section is referring to whether showing a work product document to a third party waives completely the work product privilege. Obviously, the fact that work product might have been shown by a lawyer to a third party does not mean that it can then be obtained directly from the lawyer. Thus, the showing of the document to a third party does not waive the work product protection. See C. Wright, A. Miller and R. Marcus, Federal Practice and Procedure § 2024 at 531-32 (2010).”; “But a third party has no duty maintain such post-employment communications of trial strategy as confidential. If a lawyer is dumb enough to tell her trial strategy to a former employee of the client, and the former employee has no ongoing duty of confidentiality with respect to information learned post-employment, then opposing counsel is free to inquire about it and the former employee can answer questions in deposition without infringing on the attorney work product doctrine. Thus, the Court does not adopt Peralta's discussion of the work product doctrine.”)

- Warner v. Talos ERT, LLC, Case No. 2:18-CV-01435 LEAD, 2022 U.S. Dist. LEXIS 168760 (W.D. La. Sept. 19, 2022) (finding that the attorney-client privilege protected a company's lawyer's communications with a former employee), aff'd, 2022 U.S. Dist. LEXIS 235295 (W.D. La. Sept. 30, 2020)

- [Privilege Point, 6/28/23]

Northern District of Texas Protects Communications With Former Employees

June 28, 2023

Lawyers representing corporations or other entities during investigations routinely interview former employees. Those intangible interviews and any resulting documentation presumably deserve work product protection if the entity reasonably anticipates litigation at the time. But what about the absolute attorney-client privilege?

In McGowan v. Southern Methodist University, Civ. A. No. 3:18-CV-141-N, 2023 U.S. Dist. LEXIS 63907 (N.D. Tex. Apr. 11, 2023), the court adopted the majority view – relying on the widely cited Peralta standard (from Peralta v. Cendant, 190 F.R.D. 38 (D. Conn. 1999)). The court held that an SMU lawyer’s communications with former University employees deserved privilege protection to the extent they focused on the time that the former employees worked there. The court also explained that if SMU’s lawyer also represented the former employees, the privilege could protect deposition preparation-related communications; “information provided to the employee to prepare for the deposition”; “references to other witnesses’ testimony”; and “instructions given by defense counsel about the employee’s testimony.” Id. at *8-9. But the court held that SMU could not assert those privilege protections, because its lawyer only represented the witnesses “as former employee[s] but not individually.” Id. at *9 (alteration in original). The court inexplicitly ordered those produced — without considering what should have been obvious work product protection.

Corporations and their lawyers should familiarize themselves with both the privilege and work product implications of such common types of interviews, and be prepared to assert either or both.

C. Functional Equivalent Doctrine

- [Privilege Point, 2/1/12]

Southern District of New York Applies the "Functional Equivalent" Doctrine

February 1, 2012

Under what is called the "functional equivalent" doctrine, the attorney-client privilege can protect communications to and from a non-employee considered to be the "functional equivalent" of an employee. This doctrine represents an enormously important expansion of the attorney-client privilege for companies which have reduced their employee head count, and rely on independent contractor/temporary workers.

In *Steinfeld v. IMS Health Inc.*, No. 10 Civ. 3301 (CS)(PED), 2011 U.S. Dist. LEXIS 142288, at *1 (S.D.N.Y. Dec. 9, 2011), Magistrate Judge Davison found that an "independent equity compensation consultant" did not meet the "functional equivalent" standard. The court examined six factors: (1) whether the company relied on the independent contractor "because its business is sporadic"; (2) whether the independent contractor appeared on behalf of the company, corresponded with third parties as a representative of the company, or was ever viewed by others as a company employee; (3) whether the independent contractor was "physically present" at the company, such as maintaining an office there, or spending "a substantial amount of his time" there; (4) whether the company "lacked the internal resources necessary for an [actual] employee to perform" the services; (5) whether the independent contractor "exercises any measure of independent decision-making authority" within the company; (6) whether the independent contractor "has ever sought out legal advice from [the company's] attorneys as part of his work with the [company]." *Id.* at *9-11. The court found that the company fell short in trying to establish several of these factors.

While corporations should welcome the "functional equivalent" doctrine's expansion of the privilege, they should also fear the sometimes disastrous effects of failing to satisfy the doctrine's standards: (1) communications with an independent contractor generally do not deserve privilege protection; (2) the presence of an independent contractor during otherwise privileged communications usually aborts the privilege; and (3) sharing preexisting privileged communications with an independent contractor usually waives the privilege.

- [Privilege Point, 10/2/13]

Northern District of Illinois Questions the "Functional Equivalent" Doctrine

October 2, 2013

One of the notable recent privilege trends involves most courts' adoption of what is called the "functional equivalent" doctrine – which extends privilege protection to nonemployees who are the functional equivalent of corporate employees. The vast majority of courts recognize the functional equivalent doctrine, which greatly benefits corporations relying on temporary workers or outsourcing corporate functions such as tech support or even human resources support.

However, a few courts take a narrower approach. In BSP Software, LLC v. Motio, Inc., No. 12 C 2100, 2013 U.S. Dist. LEXIS 95511, at *2 (N.D. Ill. July 9, 2013), the court addressed a functional equivalent argument by a company which did not have a formal board of directors, but which asserted privilege protection for communications to and from its "advisory board." The court rejected the company's privilege assertion, finding that the company waived its privilege protection by communicating with its advisory board. Ironically, the court expressed as its first worry the possibility that the functional equivalent doctrine would "increase the level of uncertainty" about the privilege's applicability. Id. at *7.

Although rejecting the functional equivalent doctrine might avoid legal uncertainty, it creates enormous factual uncertainty. Anyone communicating with or in the presence of even a long-term temp could unknowingly abort or waive privilege protection.

- [Privilege Point, 2/11/15]

A Southern District of New York Decision Adopts Narrow Views of Privilege Protection for Independent Contractors and Lawyer-Retained Consultants: Part I

February 11, 2015

Not all recent Southern District of New York decisions have favored privilege protection in the corporate setting. In Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH, No. 14-cv-585, 2014 U.S. Dist. LEXIS 175552 (S.D.N.Y. Dec. 19, 2014), the court dealt with two issues that frequently arise in the corporate context: (1) the "functional equivalent" doctrine, and (2) privilege protection for communications with outside consultants on whom lawyers rely in giving legal advice.

The "functional equivalent" doctrine treats as corporate employees for privilege purposes non-employees who are the "functional equivalent" of full-time employees. In this era of outsourcing, one can easily imagine the disruption corporations would face if the privilege did not protect communications with, or in the presence of, temporary secretaries or long-time outsourced contractors who report every day to the company just as employees do. Since first articulated by the Eighth Circuit in In re Bieter, 16 F.3d 929, 933-34 (8th Cir. 1994), the "functional equivalent" doctrine has spread throughout the country, and only a few courts have questioned it. However, the Church & Dwight decision noted that the Second Circuit has not adopted the doctrine, and "[b]ecause the Second Circuit has recognized very limited exceptions to privilege waiver, the Court has doubts as to whether it would endorse such an approach." 2014 U.S. Dist. LEXIS 175552, at *6.

Although the court justifiably concluded that the outside marketing consultant at issue would not have satisfied the generally accepted "functional equivalent" doctrine standard, its negative comments should worry those seeking privilege protection in the corporate setting.

- **[Privilege Point, 4/29/15]**

Court Offers Good Privilege News for Draft Form 10-K Filings

April 29, 2015

Courts disagree about the attorney-client privilege protection's applicability to draft documents whose final version will be publicly disclosed. Public companies naturally worry about this issue's impact on their draft securities filings.

In Smith v. Unilife Corp., Civ. A. No. 13-5101, 2015 U.S. Dist. LEXIS 18755 (E.D. Pa. Feb. 13, 2015), a whistleblower plaintiff alleged that Unilife's 2011 Form 10-K report contained false and misleading statements. He sought discovery of Unilife's draft 10-Ks and company lawyers' communications to and from nonlawyer consultants "concerning the [drafts'] contents, style and 'wordsmithing.'" Id. at *5. The court first found that the consultants were the "functional equivalent" of employees — refreshingly acknowledging that "[a] trial judge is not in a good position to second-guess a corporate decision to rely on an independent consultant or an employee to accomplish a specific task." Id. at *7-8. The court then held that the draft 10-Ks deserved privilege protection — citing an earlier decision protecting 10-Ks that contained "legal advice and communications between a law firm and its client . . . even though the final version of the Form 10-K was publicly filed, because the drafts contained information not included in the final version." Id. at *9-10 (citing In re U.S. Healthcare, Inc. Sec. Litig., Master File No. 88-0559, 1989 U.S. Dist. LEXIS 1043, at *12 (E.D. Pa. Feb. 8, 1989)).

Although many decisions seem hostile to corporations' privilege claims, some courts' analyses provide good news.

- **[Privilege Point, 3/23/16]**

How Far Does the "Functional Equivalent" Standard Extend?

March 23, 2016

Many previous Privilege Points have addressed the corporate-friendly "functional equivalent" doctrine, under which non-employees who essentially act as employees are inside privilege protection. An equal number of Privilege Points have explained that disclosure even to friendly client consultant/agents normally waives privilege protection (although not work product protection). One might think that these two types of non-employees would be easy to distinguish, but some courts blur the line.

In Fosbre v. Las Vegas Sands Corp., Case No. 2:10-cv-00765-APG-GWF c/w Case No. 2:10-cv-01210-APG-GWF, 2016 U.S. Dist. LEXIS 5422 (D. Nev. Jan. 14, 2016), the court addressed Sands' privilege claims for its communications with Goldman Sachs employees who helped it deal with the 2007-2008 financial crisis. After describing Goldman Sachs' relationship with Sands as "that of a financial advisor in developing its complex financial strategy," the court surprisingly found that "Goldman Sachs' personnel performing these duties were the functional equivalent of [Sands] employees." Id. at *19. The court required Sands to supplement its privilege log and demonstrate that the individual Goldman Sachs employees (among other things) "understood the communications were for purposes of obtaining legal advice and were intended to be confidential." Id. at *45.

Most courts would not go this far — instead finding that disclosing of privileged communications to Goldman Sachs employees waived privilege protection. But corporations and their lawyers should consider claiming that friendly third parties such as financial advisors are inside privilege protection under an expansive "functional equivalent" doctrine.

- CAC Atlantic LLC v. Hartford Fire Ins. Co., No. 16 Civ. 5454 (GHW) (JCF), 2017 U.S. Dist. LEXIS 11010 (S.D.N.Y. Jan. 19, 2017) (in an opinion by Magistrate Judge Francis, inexplicably citing Kovel in the context of a client rather than a lawyer agent; "The documents now at issue are all communications to or from Minogue ['a building consultant retained by Hartford prior to its disclaimer of coverage']", and since Minogue is not 'the client,' they are not privileged on their face. Nevertheless, there are two theories that might bring these communications within the privilege. First, an attorney may rely on a non-lawyer to facilitate communications with the client, including persons with expertise such as accountants used to convey technical information. See United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961); Osorio, 75 N.Y.2d at 84, 550 N.Y.5.2d at 615. Here, however, Hartford has not demonstrated that Minogue was engaged simply to 'translate' information for purposes of providing legal advice."; "Second, even though Minogue is not itself a party, its communications with counsel and the defendant might be privileged if it were the functional equivalent of an employee of Hartford."; "Hartford has not established that Minogue served such an integral role in light of these factors that it must be treated as if it were an employee for purposes of the privilege." (emphases added)).

- FTC v. Innovative Designs, Inc., Civ. A. No. 16-1669, 2017 U.S. Dist. LEXIS 162222, at *11-12, *12-13, *14-15 (W.D. Pa. Sept. 28, 2017) (a lab tester consultant was the functional equivalent of a corporate employee; "Determining functional equivalence entails a broad, practical analysis of a consultant's relationship with a corporation. . . . Accordingly, the Court should look to whether the consultant acted for the corporation, had a role similar to that of an employee, and/or was an integral member of a team assigned to handle an issue related to litigation. . . . The Court must also consider whether the consultant possessed information needed by corporate attorneys in order to render legal advice."; "In his May 22, 2017, Declaration, Riccelli explains that Defendant hired Manni during the FTC's initial investigation in order to aid in preparation of a defense against any future claims by the FTC. . . . He acknowledges that Manni, and his company BRC Laboratories, had been previously engaged by Defendant to conduct the R-value testing of Insultex. . . . However, the new engagement was different; Manni was to consult with Defendant's non-testifying experts and attorneys to prepare responses to FTC inquiries, and assist with R-value testing of Insultex and with modifications to a machine used for R-value testing. . . . Manni was, thus, considered to be part of a 'defense team.' . . . This characterization of Manni's involvement with Defendant was reiterated in the Declaration by Loew, also dated May 22, 2017. . . . Loew noted that Manni was part of a defense team, with which he worked, and that communications between Manni and Defendant were understood to be confidential. . . . Manni was included in the email chain at issue with the expectation of confidentiality. . . . Finally, the Court observes that Defendant disclosed to the FTC that Manni was being utilized as a consulting expert in a January 19, 2015, letter." (emphasis added); "Although no formal consulting agreement existed, and Manni had been involved with Defendant well before litigation was foreseeable, the record supports a finding that Manni was an integral member of a team assembled to address the FTC's investigation and subsequent lawsuit. Indeed, his inclusion in all the email chains at issue in the instant Motion corroborates the Declarations to the extent that Manni worked as part of a team, participated in conference calls, and consulted for the purpose of conducting additional testing and responding to FTC inquiries. Additionally, having conducted much of the original R-value testing for Insultex at his lab, Manni would clearly have information valuable to Defendant's attorneys in preparing to respond to, and/or defend against, the FTC. Consequently, the Court finds that Defendant has demonstrated that Manni was the functional equivalent of an employee." (emphases added)).

- Homeward Residential, Inc. v. Sand Canyon Corp., Nos. 12-CV-5067 & -7319 (JFK) (JLC), 2017 U.S. Dist. LEXIS 171685, at *41, *41-42 (S.D.N.Y. Oct. 17, 2017) (holding that a client consultant was not the functional equivalent of an employee; "To determine whether a third party can be considered the 'functional equivalent' of an employee, courts look to (1) whether the third party had 'primary responsibility for a key corporate job,' (2) 'whether there was a continuous and close working relationship between the [third party] and the company's principals on matters critical to the company's position in litigation,' and (3) 'whether the [third party] is likely to possess information possessed by no one else at the company.'" (emphasis added) (alterations in original) (citation omitted); "None of these factors weighs in favor of Altisource employees being characterized as the functional equivalent of Ocwen employees. Altisource [which provides data management and reporting services to Ocwen] was not given primary responsibility for a key corporate job. Altisource is an independent company that provides services and technology to multiple clients. Its role in storing and managing data for Ocwen did not integrate it into Ocwen's 'corporate structure.' . . . Homeward has not alleged that any of the communications between Ocwen and Altisource relate to Ocwen or Homeward's position in these cases. Even if Altisource had information possessed by no one at Ocwen, such a fact alone cannot transform the relationship such that Altisource's employees are the 'functional equivalent' of Ocwen's employees. Businesses routinely rely on other companies to carry out important functions and services, including but not limited to shipping, accounting, customer service, and, as here, data storage and management. If this relationship satisfied the functional equivalent standard, the exception could well swallow the rule." (emphasis added))

- [Privilege Point, 3/21/18]

Courts Wrestle with Privilege Protection for Client Consultants: Part I

March 21, 2018

The attorney-client privilege protects confidential communications between clients and their lawyers. Corporate client consultants may also deserve this protection if they act as the "functional equivalent" of corporate employees. Otherwise, most but not all courts take a very narrow view of privilege protection for communications to or from such consultants.

In Durling v. Papa John's International, Inc., No. 16 Civ. 3592 (CS) (JCM), 2018 U.S. Dist. LEXIS 11584 (S.D.N.Y. Jan. 24, 2018), Papa John's relied on a third-party consultant to analyze how it should reimburse its delivery drivers. Class action plaintiffs claiming minimum wage violations sought communications between Papa John's and the consultant. The court first rejected Papa John's "functional equivalent" argument – noting that the consultant's employees were "not so fully integrated into the [Papa John's] hierarchy that its employees were de facto employees of [Papa John's]." Id. at *15. The court also found that the consultant was outside privilege protection, because its "role was not as a translator or interpreter of client communications," and that Papa John's retained the consultant "not to improve the comprehension of the communications between attorney and client, but rather to obtain information that [Papa John's] did not already have." Id. at *14. One day later, another court in Narayanan v. Southern Global Holdings Inc., similarly found that a corporation's "consulting and accounting firm" failed the "functional equivalent" standard and likewise fell outside privilege protection -- because the consultant's involvement was not "nearly indispensable or serve[d] some specialized purpose in facilitating the attorney-client communications." 285 F. Supp. 3d 604, 614 (W.D.N.Y. 2018) (alteration in original) (citation omitted). Instead, "the proof suggests that [the consultant's] role in attorney-client communications was merely useful and convenient." Id.

Most courts take this narrow approach. But next week's Privilege Point will discuss a case going the other way.

- [Privilege Point, 1/2/19]

State Courts Address Outsiders' Privilege Impact: Part I

January 2, 2019

Most client agents/consultants stand outside privilege protection. This means that: (1) communications with them do not deserve privilege protection; (2) their presence during otherwise privileged communications aborts that protection; and (3) disclosing pre-existing privileged communications to them waives that privilege. In the corporate setting, clients have other options for seeking privilege protection in such scenarios, but many of those fail.

In Technetics Group Daytona, Inc. v. N2 Biomedical, LLC, N2 and its lawyer retained a technology consultant "because of his expertise in relevant fields." 2018 NCBC 115, ¶ 4 (N.C. Super. Ct. Nov. 8, 2018). In a later patent dispute, N2 claimed privilege protection for communications with that consultant. The court rejected the privilege claim, holding that the technology consultant: (1) was not the "functional equivalent" of an N2 employee (because he had no "continuous and close working relationship with the company," and he "does not maintain an office at N2 or spend a substantial amount of his time working for N2"); (2) was not within the narrow privilege protection for client agents/consultants who are "nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications" or "function more or less as a 'translator or interpreter' between the client and the lawyer" – but instead was "retained for the value of his own advice"; (3) could not claim that he had a "common interest" with N2, because he "help[ed] develop a solution to a technological problem" rather than cooperate "for purposes [of] indemnification or coordination in anticipated litigation." Id. ¶¶ 18-20, ¶¶ 23-24, ¶ 30 (citations omitted).

Corporate executives sometimes erroneously assume that confidentiality agreements with such outside agent/consultants assure privilege protection or avoid waiver. They do not. Next week's Privilege Point discusses the same issue in a family setting.

- [Privilege Point, 3/27/19]

How Can Companies Successfully Assert the "Functional Equivalent" Doctrine?

March 27, 2019

Starting in 1994, most courts have recognized an enormously important privilege doctrine – treating as if they were full-time corporate employees independent contractors who are the "functional equivalent" of such employees. As companies' outsourcing has dramatically increased since then, this "functional equivalent" doctrine has become a key weapon in corporations' privilege arsenal. What must companies prove to successfully rely on this doctrine?

In In re Sampedro, the court held that third-party consulting firm G3M's employees were the "functional equivalent" of respondent Codere's employees. Case No. 3:18 MC 47 (JBA), 2019 U.S. Dist. LEXIS 4973, at *12 (D. Conn. Jan. 10, 2019). The court relied on affidavits establishing that one G3M employee became Codere's CEO, and that "other G3M employees served as the 'primary liaison with external counsel'" on key matters. Id. at *12-13 (internal citation omitted). As the court put it, "[t]his evidence shows that G3M employees were integrated into the corporate structure of Codere rendering them de facto employees of the company." Id. at *13. A couple weeks later, in Dialysis Clinic, Inc. v. Medley, 567 S.W.3d 314, 325 (Tenn. 2019), the Tennessee Supreme Court similarly held that plaintiff's outside property management company's employees satisfied the "functional equivalent" standard. The court explained that: (1) plaintiff "hired XMi as its agent because of XMi's experience in property management, which [plaintiff] did not have in-house"; (2) "XMi had primary responsibility for the day-to-day management of [plaintiff's] properties"; (3) XMi employees established a "close working relationship" with plaintiff; and (4) XMi "was the entity that interacted directly with the tenants." Id. at 324.

Courts analyzing this often privilege-dispositive "functional equivalent" doctrine also examine whether the independent contractors: exercised decision-making authority for the company; possessed information no one at the company had; interacted with third-parties on the company's behalf; maintained an office or other substantial physical presence at the company; or obtained legal advice from the company's lawyers.

- Pipeline Productions, Inc. v. Madison Cos., Case No. 15-4890-KHV, 2019 U.S. Dist. LEXIS 71601, at *7-8 (D. Kan. Apr. 29, 2019) (holding that outside consultant was the "functional equivalent" of a company employee; "Madison has met its burden to prove that Pipeline authorized Ms. Land to consult with attorneys to secure legal advice for the corporation. Madison submitted a detailed factual record that establishes Ms. Land was an authorized representative for purposes of seeking and receiving the legal advice at issue. Mr. Gordon's affidavit explains that he brought Ms. Land on board in the winter of 2014-2015 as his 'right hand person' to oversee negotiating certain proposed business transactions, including the dealings with Pipeline that are the subject of this litigation. According to Mr. Gordon, Ms. Land took the lead on certain due diligence aspects of the transaction, including those involving real estate and alcohol permits. He authorized and asked Ms. Land to communicate with counsel and other Madison representatives in order to obtain information needed or requested by Madison's attorneys, he authorized Ms. Land to act in this capacity as Madison's representative, and he relied upon her to do so. When Pipeline withdrew from the proposed transaction, Ms. Land interfaced with Madison's counsel regarding litigation between the parties. Ms. Land's affidavit confirms the salient facts and provides further details. She elaborates that she worked as a project manager on the companies' corporate transactions, including working with Madison's in-house and outside counsel. This included working with counsel on various aspects of the Thunder transaction. After litigation ensued between Madison and Pipeline, Ms. Land spoke to the Pipeline principals to attempt to resolve the dispute and communicated with counsel about the pending lawsuits. Based on this record, there is no principled basis to find that Ms. Land was not acting as an authorized representative in seeking legal advice for Pipeline, regardless of whether she was an independent consultant.").

- [Privilege Point, 8/7/19]

The Southern District of New York Defines The Privilege Standard For Communications With Three Types of Consultants

August 7, 2019

Clients and their lawyers often work with consultants. If such consultants are found to be outside privilege protection: (1) communications with them do not deserve privilege protection; (2) their participation in otherwise privileged communications aborts that protection; and (3) disclosing pre-existing privileged communications to them waives that protection. So corporations and their lawyers must know the privilege standard for each consultant.

In Universal Standard Inc. v. Target Corp., 331 F.R.D. 80 (S.D.N.Y. 2019), Judge Gorenstein dealt with the three most common types of consultants. First, client consultants are within privilege if they are "deemed essential to allow communication between the attorney and the client, such as an interpreter or accountant." Id. at 87. Second, some consultants are the "'functional equivalent' of a corporate employee." Id. Third, some consultants assist lawyers in providing legal advice to their clients. The court ultimately concluded that plaintiff's public relations consultant did not fall within any of those protected categories, concluding that: (1) "BrandLink did not serve to improve counsel's understanding of [plaintiff's] request for legal advice" (id. at 88); (2) BrandLink did not have "any independent authority to decide to issue a press release," and did not "work[] exclusively" for plaintiff, but instead "provides services for over a dozen other brands" (id. at 90); (3) "[t]here is no evidence that the purpose of the communications with BrandLink was to assist counsel in engaging in a legal task as opposed to allowing [plaintiff] to make a decision about the nature of publicity that should be sought." Id. at 92.

This Southern District of New York opinion provides a helpful checklist of what corporations must prove in many courts if they seek protection for communications with, in the presence of, or later shared with, outside consultants.

- In re Signet Jewelers Ltd. Sec. Litig., 332 F.R.D. 131, 133, 136, 137 (S.D.N.Y. 2019) (finding that two public relations firms were outside privilege protection because they were not essential for the communications between a lawyer and the client and because they were not assisting the lawyer by legal advice; "In this lawsuit, which was commenced in August 2016, Lead Plaintiff, the Public Employees' Retirement System of Mississippi ("Plaintiff"), alleges that Defendants Signet Jewelers Limited ('Signet') and certain of its senior executives (collectively, the 'Defendants') committed securities fraud by misrepresenting (1) the health of Signet's credit portfolio, and (2) Signet's alleged 'pervasive' culture of sexual harassment. (Fifth Amended Complaint, ECF No. 111, ¶¶ 1-25.) In late-2015/early-2016, The Capitol Forum ('CF') 'published a series of articles accusing Signet of fraudulently stating its financials to conceal the quality of its in-house consumer lending program.' (Defs.' 8/22/19 Ltr., ECF No. 183, at 2.) In response to this event, Signet's outside counsel retained two PR firms, Joele Frank ('JF') and Ogilvy & Mathers ('Ogilvy'). (Pl.'s Letter-Motion, ECF No. 181, at 1; Defs.' 8/22/10 Ltr. at 2.); "Defendants advocate for the Court to apply Judge Kaplan's decision in In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321 (S.D.N.Y. 2003), to find that the privilege applies to communications between Signet and its PR firms. The Court finds that Judge Kaplan's decision is not applicable to the facts here. The PR firms here were not called upon to perform a specific litigation task that the attorneys needed to accomplish in order to advance their litigation goals. Rather, the PR firms were involved in public relations activities aimed at burnishing Signet's image."; "Tab 7 does not present a situation where 'the presence of a third party is needed to allow the client to communicate information to an attorney, such as where a translator is used or where an accountant supplies specialized knowledge to allow an attorney to understand the client's situation.' See Universal Standard Inc., 331 F.R.D. at 87. Nor does it present a situation where the PR firm employees included in the communications were the 'the functional equivalent' of a Signet employee. See id. Thus, the document should be reproduced in full.").

- Hudock v. LG Electronics U.S.A., Inc., Case No. 0:16-cv-1220-JRT-KMM, 2019 U.S. Dist. LEXIS 190611, at *11-12, *12, *12-13 (D. Minn. Nov. 4, 2019) (holding that employees of a consultant who provided human resources advice only to LG satisfied the “functional equivalent” standard; “Several HSAA employees work ‘fulltime in LG’s offices at assigned work stations among LG employees and maintain LG email addresses.’ [Id. ¶ 3.] LG hires some HSAA personnel to work on year-long retainers, and it enters contracts with others ‘on a project by project basis.’ [Id.] These employees work side-by-side with LG employees in ‘integrated teams.’ [Id. ¶ 6; see also Fernandez Decl. ¶¶ 5-6.]” (alterations in original); “LG’s attorneys also discuss legal advice with HSAA employees. [Giagrande Decl. ¶¶ 11.] HSAA ‘seeks and receives legal advice from the legal departments of LG and its parent company with respect to advertising and marketing issues.’ [Id. ¶ 10.] HSAA personnel approach LG’s legal department for answers to legal questions concerning advertising or marketing LG’s products, not HSAA’s counsel. [Id.] HSAA’s personnel could not ‘craft advertisements that complied with the law and with legal advice specific to pending or threatened litigation against LG,’ unless it received advice from LG. [Id.]” (alterations in original); These facts are sufficient to demonstrate that HSAA’s employees carrying out marketing and advertising tasks for LG satisfy the ‘functional equivalent’ test and are de facto LG employees for purposes of applying the attorney-client privilege. See Bieter, 16 F.3d at 938. HSAA personnel represent LG’s interests in the marketing arena and often do so in an exclusive capacity. This reality describes the Channel Marketing Team that works with retailers selling LG products, the very marketing and advertising relationship that is placed at issue in this litigation. Under these circumstances, ‘[t]here is no principled basis to distinguish [the HSAA employees’] role from that of [LG] employee[s]. . . .’ Bieter, 16 F.3d at 938. Application of the attorney-client privilege to HSAA employees under these circumstances is consistent with the purpose of the privilege—encouraging pursuit of legal advice free from concern that the request will be revealed, and the inclusion of these de facto employees on communications does not vitiate that privilege. See id. at 937-38 (discussing ‘the very purpose of the privilege’). For this reason, the Court finds that HSAA’s relationship to LG is of the sort that justifies application of the privilege, so long as the employees satisfied the need-to-know test.” (alterations in original)).

- [Privilege Point, 1/22/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part II**

January 22, 2020

Last week's Privilege Point described two favorable analyses from a Southern District of New York decision (Judge Gorenstein) assessing defendant Barnes & Noble's privilege assertions covering its investigation and later firing of its CEO for sexual harassment. Parneros v. Barnes & Noble, Inc., 382 F.R.D. 482 (S.D.N.Y. 2019).

Third, the court addressed fired CEO Parneros's argument that the investigation-related documents "are not privileged because they were created for business purposes, rather than for legal purposes" – noting that the Barnes & Noble policy "requires that all complaints of alleged sexual harassment be investigated." Id. at 495. The court rejected Parneros's argument, holding that "[t]he mere fact that there was a business benefit obtained from conducting the investigation does not detract from the circumstances here indicating that the predominant purpose of the investigation was to gather facts for the General Counsel so he could give legal advice to the corporation." Id. This is a very favorable standard, perhaps based in part on the high-level nature of the investigation and outside counsel Paul Weiss's involvement. Fourth, the court addressed fired CEO Parneros's complaint that neither he nor his Executive Assistant were given Upjohn warnings before they were interviewed by the company's General Counsel and the Senior VP of Corporate Communications and Public Affairs – thus aborting any privilege protection for the interviewers' notes of that interview. The court rejected Parneros's argument, noting that "courts have found the attorney-client privilege to shield notes of interviews undertaken as part of an internal investigation without discussing whether an Upjohn warning was first given." Id. at 496. Interestingly, the court did not address the privilege's applicability to the interview itself.

The next two Privilege Points will describe other favorable language from this significant case.

- Vent[ure] Commc'ns. Coop., Inc. v. James Valley Coop. Tel. Co., No. 3:20-CV-03011-RAL, 2021 U.S. Dist. LEXIS 134932, at *10, *10-11, *11 (D.S.D. July 20, 2021) (holding that the third party consultants were the “functional equivalent” of corporate employees and thus within the privilege; “JSI's relationship with Venture is the kind that justifies application of the privilege. JSI was intimately involved, on Venture's behalf, ‘in the transaction that [wa]s the subject of legal services’ and ‘possess[ed] the very sort of information [] the privilege envisions’ Venture's counsel should have to render informed legal advice on how to proceed.” (alterations in original); “James Valley and Northern Valley contend that ‘JSI is not the functional equivalent of a Venture employee’ because ‘JSI exercised neither management control over Venture nor was it “involved on a daily basis” with running Venture.’ Their contention though goes against the Supreme Court's rejection of the ‘control group’ test and the Court's recognition that non-managerial employees may be considered part of the corporate client for purposes of the privilege. And the contention is that odds with the Eighth Circuit's principal holding that the privilege extends to ‘non-employees who possess a significant relationship to the client and the client's involvement in the transaction that is the subject of legal services,’ and who therefore ‘have the relevant information needed by corporate counsel’ to advise the client.” (footnotes omitted); “Settled Eighth Circuit precedent controls here and requires the denial of James Valley and Northern Valley's production request. The attorney-client privilege applies to communications made among JSI, Venture, and Venture's counsel and the production of the same. On this record, JSI was the functional equivalent of Venture's employee. Those communications fell within the scope JSI's duties and were made at Venture's behest and to seek legal advice for Venture.”)

- In re Allergan PLC Sec. Litig., No. 18 Civ. 12089 (CM) (GWG), 2021 U.S. Dist. LEXIS 171331, at *24-25, *26 (S.D.N.Y. Sept. 9, 2021) (rejecting a company’s argument that consultants were the “functional equivalent” of corporate employees; “These general pronouncements fail to establish that all or even some of the third parties at issue were the functional equivalent of an Allergan employee. Providing ‘extensive support’ and ‘assistance’ to Allergan hardly shows that the companies or advisors operated as the functional equivalent of an Allergan employee. There is no evidence that each of these companies and advisors operated as independent decision makers, served as Allergan’s representatives to third parties, or maintained offices at Allergan. The claim that in-house counsel for Allergan was involved in communications with its medical and scientific advisors, see Reynolds Decl. ¶ 44, and that the ‘distributors and affiliates often received instructions and legal advice directly from Allergan’s in-house counsel,’ id. ¶ 39, is not enough to deem these companies functional equivalents of an Allergan employee. Nor is it of any importance that Allergan used the expertise of third parties to ‘manag[e] its legal risks.’ Id. ¶ 7; Def. Opp. at 18. As noted, corporations commonly engage in conduct that involves legal risks. A corporation’s discussion of such matters with a consultant does not result in the consultant being magically converted into the functional equivalent of an employee of the corporation.” (alteration in original); “We therefore find defendants waived attorney-client privilege for communications with third party distributors, affiliates, and medical and scientific advisors. These communications must therefore be produced.”)

- Spectrum Dynamics Med. Ltd. v. Gen. Elec. Co., No. 18-CV-11386 (VSB) (KHP), 2021 U.S. Dist. LEXIS 172201, at *9 (S.D.N.Y. Sept. 9, 2021) (“[T]he functional equivalent doctrine[] has been adopted and applied by other Circuits but has never been recognized by the Second Circuit.”)
- Sandoz Inc. v. Lannett Co., 570 F. Supp. 3d 258, 270, 270-71 (E.D. Pa. 2021) (in analyzing the common interest doctrine, holding that to deserve common interest protection a communication must involve both participants’ lawyers; “I therefore conclude that Lannett’s expansive interpretation is inconsistent with Pennsylvania precedent. I decline to follow TD Bank and hold instead that an attorney must be involved for the common interest privilege exception to attach.”; “There is less clarity as to whether attorneys for both parties must be involved in the exchange. Cogent arguments can be advanced on either side of the issue. In the absence of clear guidance from Pennsylvania appellate courts, I default to the overarching principle emanating from the Supreme Court, that exceptions to disclosure are to be construed narrowly. Accordingly, where both parties were not represented by counsel in an exchange of information, I find the privilege waived.”)

- Klein v. Meta Platforms, Inc., Case No. 20-cv-08570-JD (VKD), 2022 U.S. Dist. LEXIS 44047, at *26, *26-27, *21-22 (N.D. Cal. Mar. 11, 2022) (holding that Meta’s long-time outside marketing agency’s partner Rebecca Hahn met the “functional equivalent” standard in the specific situation (but not for all purposes); pointing to her “employee-like duties and responsibilities for Meta for over many years,” including access to Meta’s confidential systems and facilities, and representation of Meta “at major communications events and in interactions with the press”; concluding that Ms. Hahn deserved the protection because “she could be expected” to have pertinent information that Meta’s lawyers needed – “even if she did not actually do those things” in the specific situation; notably discounting several other factors that might have doomed the argument in other courts: (1) she was “one of many public relations professionals included in [the pertinent] communications”; (2) according to plaintiff, Ms. Hahn performed work “during the same period for other high-profile clients” (so she was not assigned only to Meta); and (3) “she worked on site at Meta several times per month” (apparently instead of being continuously assigned there))

- City of Fort Collins v. Open Int'l, LLC, Civ. A. No. 21-cv-02063-CNS-MEH, 2022 U.S. Dist. LEXIS 154564, at *12, *15-16, *20 (D. Colo. Aug. 16, 2022) (holding that the “functional equivalent” doctrine protected communications between City officials and consultant Vanir to assist as project manager for a billing system; “[T]he Court notes that some of the documents over which the City appears to assert the work-product privilege were created before—according to the City's counsel in a declaration made under penalty of perjury—the City began anticipating litigation.”; “[T]he Colorado Supreme Court has articulated a four-part test to determine whether a government entity's independent contractor may be deemed the equivalent of an employee for purposes of the attorney-client privilege, which the Court finds analogous here. See All. Const. Sols., Inc. v. Dep't of Corr., 54 P.3d 861, 862-63 (Colo. 2002). In those circumstances, the court looks to whether (1) the agent has a significant relationship both to the government entity and to the transaction that is the subject of the government's need for legal services; (2) the communication was made for the purpose of seeking or providing legal assistance; (3) the subject matter of the communication was within the scope of the duties provided to the entity by the agent; and (4) the communication was treated as confidential and only disseminated to those with a specific need to know its contents. Id. The party asserting the attorney-client privilege as to non-employees ‘must make a detailed factual showing that the non-employee is the functional equivalent of an employee and that the information sought from the non-employee would be subject to the attorney-client privilege if [it] were an employee of the party.’ Horton, 204 F.R.D. at 672.” (alteration in original) (footnote omitted); “And finally, to the extent that Open argues that the City's privilege assertion must fail ‘because the City did not (and cannot) establish that Vanir was engaged to work with the City's attorneys and to assist them in providing legal advice related to this litigation,’ ECF 54 at 8, Open is mistaken. There is no requirement that in order for the attorney-client privilege to apply to communications with a third-party consultant, the third-party must have been retained for purposes of ‘assist[ing]’ attorneys in providing legal advice related to this litigation.” (alteration in original))

- Bellridge Capital, LP v. EVmo, Inc., Civ. A. No. 21 Civ. 7091 (PGG) (SLC), 2022 U.S. Dist. LEXIS 220039, at *14 (S.D.N.Y. Dec. 6, 2022) (in an opinion by Judge Cave, finding that the founder and former CEO of a company who later resumed his CEO role satisfied the “functional equivalent” standard between his stints as CEO; “The Court finds that EVmo has met its burden, at this stage of the action, of showing that, in May 2019 when the Warrant Amendment was entered, El-Batrawi was the functional equivalent of an employee who possessed primary responsibility for the Warrant Amendment and thus had unique information critical to the issues in this action such that the attorney-client privilege protects his communications with Withers.”)

- [Privilege Point, 9/27/23]

S.D.N.Y. Takes a Demanding View of the “Functional Equivalent” Doctrine

September 27, 2023

Under the common law “functional equivalent” doctrine, corporations sometimes may claim privilege protection for communications to or from a non-employee who is the “functional equivalent” of an employee. This common sense privilege expansion can be extremely helpful for corporations reducing employee head count and outsourcing some important functions.

But some courts take a very restrictive view. In SEC v. Rayat, No. 21-cv-4777 (LJL), 2023 U.S. Dist. LEXIS 118257, at *9-13 (S.D.N.Y. July 10, 2023), Judge Liman noted that the Second Circuit has not adopted the doctrine, and that “[m]ost [SDNY] decisions . . . reject the assertion of privilege based on the functional employee exception.” The court predictably rejected the doctrine’s applicability to the “strategic advisor” to a defendant accused of a “pump-and-dump” scheme. Id. at *2, *4. The court found “no evidence” that the advisor engaged in “necessary tasks that he alone accomplished,” or that the advisor had “primary responsibility for a ‘key corporate job.’” Id. at *19-20 (citation omitted). For the coup de grâce, the court quoted the advisor’s concession that he “did not have management authority under the express terms of his agreement,” and pointed to the company’s Form 10-K’s statement that “[n]one of the consultants are required to expend all of their time and efforts on our behalf and may engage in other activities.” Id. at *21 (alteration in original).

Depending on the court, corporations may have a very difficult time applying the often helpful “functional equivalent” doctrine to protect communications with their non-employee consultants.

IV. CORPORATE PRIVILEGE: RISKS

A. Widespread Intra-Corporate Circulation

- United States v. Chevron Corp., No. C 94-1885 SBA, 1996 U.S. Dist. LEXIS 8646, at *6 (N.D. Cal. May 29, 1996) ("The attorney-client privilege does not attach, however, to documents which were prepared for simultaneous review by both legal and non-legal personnel within the corporation.").

- [Privilege Point, 1/2/13]

Another Court Follows the Troubling Vioxx Approach

January 2, 2013

Previous Privilege Points have noted many courts' increasing insistence that a corporate litigant withholding privileged documents prove that every recipient of each document had a "need to know" the document's substance. Some courts take an even narrower view of the privilege in the corporate setting, usually relying on a 2007 decision in the multidistrict litigation against Merck. In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789 (E.D. La. 2007).

In United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center, the court cited Vioxx and an earlier Middle District of Florida decision in holding that "when a communication is simultaneously emailed to a lawyer and a non-lawyer, the corporation 'cannot claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes.'" Case No. 6:09-cv-1002-Orl-31TBS, 2012 U.S. Dist. LEXIS 158944, at *11-12 (M.D. Fla. Nov. 6, 2012) (citation omitted). Later in the opinion, the court seemed to back off a bit, noting that the simultaneous transmission of an email to a non-lawyer "weighs against a privilege finding." Id. at *23 n.5. However, throughout the opinion the court took a restrictive view of the privilege in the corporate setting. Distinguishing legal advice from "compliance advice," the court rejected a corporate litigant's argument that the privilege protected compliance department employees' communications because "the compliance department operates under the supervision and oversight of [the] legal department." Id. at *23 (internal citation omitted). The court's response to that position was blunt: "Halifax's organizational structure is of no consequence." Id.

Although there may be essentially no way for most corporations' privilege to survive the nearly per se Vioxx approach, all corporations should try to restrict the internal distribution of emails to those with a "need to know."

- [Privilege Point, 6/12/13]

District of Nevada Rejects the Narrow Vioxx Rule

June 12, 2013

In a troubling approach, some courts hold that almost by definition the privilege cannot protect intra-corporate communications directed to both a lawyer and a nonlawyer, because they are not primarily legal in nature. In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789 (E.D. La. 2007). For instance, late last year the Middle District of Florida bluntly held that "when a communication is simultaneously emailed to a lawyer and a non-lawyer, the corporation 'cannot claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes.'" United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr., Case No. 6:09-cv-1002-Orl-31TBS, 2012 U.S. Dist. LEXIS 158944, at *11-12 (M.D. Fla. Nov. 2, 2012) (citation omitted).

Fortunately for corporations, other courts take a less severe position. In Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 630 (D. Nev. 2013), the court acknowledged that "some courts have held that a company cannot claim the 'primary purpose' of a communication was to solicit legal advice when it is sent to both the lawyers and non-lawyers for simultaneous review." The court explained that it "will not make a per se ruling in this regard" – but instead "will review each communication at issue" to decide "whether the 'primary purpose' was to solicit legal advice." Id.

It is refreshing to see that courts continue to push back against the Vioxx approach, which seems contrary to corporations' laudable desire for internal transparency.

- [Privilege Point, 11/6/13]

Can the Privilege Protect Intra-Corporate Communications Sent Simultaneously to a Lawyer and a Non-Lawyer?

November 6, 2013

Some courts inexplicably hold that "when a communication is simultaneously emailed to a lawyer and a non-lawyer," the privilege cannot apply because the communication by definition is not primarily legal. United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr., Case No. 6:09-cv-1002-Orl-31TBS, 2012 U.S. Dist. LEXIS 158944, at *11-12 (M.D. Fla. Nov. 6, 2012). This narrow approach seems out of step with common practice.

Not all courts take such a restrictive approach. In Surfcast, Inc. v. Microsoft Corp., Microsoft sought plaintiff's internal communications, arguing that "the fact that [an] e-mail was directed to others in addition to [a lawyer] renders it unprivileged." No. 2:12-cv-333-JAW, 2013 U.S. Dist. LEXIS 111417, at *7 (D. Me. Aug. 7, 2013). The court disagreed, holding that "asking for legal advice in a covering e-mail when only one of the individuals to whom it was sent is an attorney demonstrates that [the sender] expected [the lawyer] to act as an attorney at the time." Id. at *6.

Although corporations should welcome this type of analysis, the court also noted that (1) the lawyer was a direct recipient of the email rather than a copy recipient, and (2) the email "requested legal advice." Id. at *5. Corporations and their lawyers should train employees to take such steps.

- Hedden v. Kean Univ., 82 A.3d 238, 246 (N.J. Super. Ct. App. Div. 2013) (analyzing a situation in which a university coach disclosed a privileged draft letter to the NCAA during an investigation; "Contrary to the dissent's view, the fact that another University employee may have been copied on the email does not defeat its confidential nature because as a fellow employee with an interest in the matter, he shared Sharp's [Coach] interest in protecting the University from liability." (emphasis added)).
- Williams v. Duke Energy Corp., Civ. A. 1:08-cv-00046, 2014 U.S. Dist. LEXIS 109835, at *8 (S.D. Ohio Aug. 8, 2014) ("Documents prepared and emailed for review by both legal and nonlegal employees are often held to be not privileged because the communications were not made for the primary purpose of seeking legal advice.").

- [Privilege Point, 12/24/14]

It Can be Nearly Impossible to Satisfy Some Courts' Privilege Protection Standards: Part II

December 24, 2014

Last week's Privilege Point described a federal court's unforgiving approach to a company's effort to retrieve one purportedly privileged document out of 30,000 produced.

One week later, another court took a similarly narrow view of a defendant's privilege claim in Kleen Products LLC v. International Paper, Case No. 10 C 5711, 2014 U.S. Dist. LEXIS 163987 (N.D. Ill. Nov. 12, 2014). Among other things, the court applied the following principles to communications to and from co-defendant RockTenn's General Counsel (who also served as that company's Chief Administrative Officer and Senior Vice President and Secretary): (1) "[w]here a document is prepared for simultaneous review by legal and non-legal personnel and legal and business advice is requested, it is not primarily legal in nature and is therefore not privileged," id. at *12 (quoting a 2013 Northern District of Illinois decision); (2) "although [the General Counsel] is copied on three out of the four emails contained within [one email] chain, he offered no legal advice in response," id. at *14; (3) "[i]t is improper to infer as a blanket matter that any email asking for 'comments' that copies in-house counsel along with several other high level managers automatically is a request for 'legal review.'" Id. at *18-19.

Companies' lawyers should train their clients' employees to articulate the basis for privilege in the body of their communications to and from the lawyers. The lawyers should also familiarize themselves with the privilege standards applied by the court in which they find themselves litigating.

- In re Bard IVC Filters Prods. Liability Litig., MDL No. 15-2641 PHX DGC, 2016 U.S. Dist. LEXIS 97043 (D. Ariz. July 25, 2016) (holding that the attorney-client privilege could protect intra-corporate communications in which the sender sought feedback from both lawyers and non-lawyers in the same communications; "This category involves '[e]ntries describing a communication to non-lawyers and attorneys seeking simultaneous review and comment.' Doc. 1476-3 at 3. Three of the five examples do not require the Court's attention. Plaintiffs have withdrawn their challenge to Log 3, Control 809, Bard has produced Log 6, Control 251, and the Court determined above that Log 2, Control 816 is privileged."; " The redacted portions of Log 3, Control 2099 are privileged. The redacted portions appear in an email to Gina Dunsmuir, one of Bard's lawyers, and others, and seek comments on draft talking points to Bard's sales force. Communications with sales force, as noted above, can have significant legal implications, as illustrated by Plaintiffs' claim in this case that Bard's sales force made misrepresentations concerning its products. Because the communication solicits input from a lawyer on these issues, it falls within A.R.S. § 12-2234(B)." (emphasis added); "The Court denies Plaintiffs' motion to compel production of Category 6 documents.").

- Nucap Industries Inc. v. Robert Bosch LLC, No 15 CV 2207, 2017 U.S. Dist. LEXIS 135288, at *7 (N.D. Ill. Aug. 23, 2017) (finding the privilege inapplicable to a company employee's communication simultaneously seeking both legal and non-legal advice; "Although corporations often seek legal advice with respect to business decisions, the inclusion of counsel does not transform all business discussions into privileged attorney-client communications. See RBS Citizens, 291 F.R.D. at 217 (citing Upjohn Co. v. United States, 449 U.S. 383, 393, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). 'Where a document is prepared for simultaneous review by legal and non-legal personnel and legal and business advice is requested, it is not primarily legal in nature and is therefore not privileged.' Id. (internal quotations and citations omitted).").

- In re Abilify (Aripiprazole) Prods. Liab. Litig., Case No. 3:16-md-2734, 2017 U.S. Dist. LEXIS 213493, at *21, *21-22, *22-23 (N.D. Fla. Dec. 29, 2017) ("There are a number of emails where attorneys are one of a number of recipients merely copied on the communications. As to these emails Plaintiffs argue that the document should not be protected by the attorney-client privilege because the widespread distribution evidences the communication was not prepared primarily to seek legal advice. Plaintiffs suggest these types of emails widely distributed to a number of recipients constitute communications that serve both business and legal purposes and therefore are not privileged." (emphasis added); "Defendants point out that the focus of the inquiry is not on whether the attorney is a direct or copied recipient of an email but rather upon whether the email was made for the purpose of securing legal advice or legal services, or conveying legal advice. The number of lawyers or non-lawyers to whom a communication is disseminated is not dispositive of whether the attorney-client privilege applies. In re Vioxx, 510 F. Supp. 2d 789, 799 (E.D. La. 2007). In corporate environments involving drug manufacturers -- who frequently are involved in product liability litigation and adversarial challenges by regulatory authorities -- in-house counsel are involved in coordinating the company's legal position, responding to issues from outside counsel and advising the company on legal strategies and actions that should or should not be taken with regard to both business and legal issues. The involvement of attorneys with business teams consisting of non-legal personnel is the norm in many corporations. The key question as to whether emails distributed among a business team are subject to the attorney-client privilege is dependent upon whether the attorney is providing legal advice even though the attorney may be a copyee of an email that also contains business advice."; "By way of example, drug manufacturers as part of their business deal with regulatory authorities concerning labeling issues for their drug products. Although labeling issues may involve a number of business issues, none of which would be protected by the attorney-client privilege, the request to an attorney and the attorney's advice concerning the legal ramifications of a decision regarding the label of a drug -- particularly where the drug manufacturer faces threatened or ongoing litigation -- would be subject to the attorney-client privilege. The bottom line is that simply because emails involve multiple recipients or even because some emails circulated among a business team may contain business advice, does not mean that legal advice requested and provided to the corporate decision makers is not privileged. It depends. In conducting the *in camera* inspection of the documents the Court has utilized these principles in determining whether an email is subject to the attorney-client privilege." (emphases added)).

- Medina v. Buther, No. 15-CV-1955 (LAP), 2018 U.S. Dist. LEXIS 149277, at *8 (S.D.N.Y. Aug. 22, 2018) (finding the privilege inapplicable to a company employee's communication simultaneously seeking both legal and non-legal advice; "Where, as here, 'non-legal personnel are asked to provide a response to a matter raised in a document, it cannot be said that the "primary" purpose of the document is to seek legal advice. This is because the response by non-legal personnel by definition cannot be "legal" and thus the purpose of the request cannot be primarily legal in nature.'" (citation omitted)).
- Smith v. Bd. of Education, No. 17 C 7034, 2019 U.S. Dist. LEXIS 102326, at *8 (N.D. Ill. June 19, 2019) (finding the privilege inapplicable to a company employee's communication simultaneously seeking both legal and non-legal advice; "Finally, a number of the e-mails in question were prepared by non-attorneys and sent to other non-attorneys and Ms. Ernesti for simultaneous review or were addressed to other non-attorneys with a copy to Ms. Ernesti. As such, it cannot be said that the primary purpose of these e-mails was to secure legal advice. See, e.g., U.S. v. Cohn, 303 F.Supp.2d 672, 684-85 (D.Md. 2003); Neuder, 194 F.R.D. at 295; Pacamor Bearings, Inc. v. Minebea Co., Ltd., 918 F.Supp. 491, 511 (D.N.H. 1996). Documents sent from one corporate officer to another are not privileged merely because a copy is also sent to counsel. BDO USA, 876 F.3d at 696.").

- Chabot v. Walgreens Boots Alliance, Inc., Civ. A. No. 1:18-CV-2118, 2020 U.S. Dist. LEXIS 107547, at *12 (M. D. Pa. June 11, 2020) (finding the privilege inapplicable to a company employee's communication simultaneously seeking both legal and non-legal advice; "Citing cases from California as well as New York, the court in In re Vioxx noted that when communications are simultaneously sent for review to both lawyers and non-lawyers, business and legal purposes are both being served so the document cannot be said to have a primary purpose of legal advice or assistance. In re Vioxx, 501 F. Supp. 2d at 805. These communications would not be privileged. In re Vioxx, 501 F. Supp. 2d at 805. The court prudently observes that corporations can easily send requests for legal advice—including attachments of email threads if need be—to only the attorneys, and it would be clear that the communications would be primarily legal.").

- [Privilege Point, 11/18/20]

Dartmouth Strikes Out on Privilege Claim for Email Threads

November 18, 2020

Courts analyzing privilege assertions for email threads often look for some indicia of that protection on the face of those emails.

In Anderson v. Trustees of Dartmouth College, Case No. 19-cv-109-SM, 2020 U.S. LEXIS 153785 (D.N.H. Aug. 25, 2020), an expelled student sued Dartmouth for applying a faulty disciplinary process. Dartmouth withheld approximately 5,000 pages of documents, many of which were email threads. The court rejected most of Dartmouth's privilege claims. One group of withheld documents constituted emails between non-lawyer Dartmouth employees. Although one email "discusses the relevant New Hampshire statute, . . . that fact does not render the email subject to an attorney-client privilege. And, while in-house counsel . . . is copied on the email, neither [of the Dartmouth employees] requests legal advice, nor does [Dartmouth's in-house lawyer] offer any." Id. at *6. Another batch of withheld emails "invite[d] feedback or comment on potential draft email responses to the plaintiff" – but "[t]hose requests were not made specifically to counsel, [and] instead generally requested responses from all email recipients." Id. at *7-8. The court also rejected Dartmouth's argument that its employees sent Dartmouth's lawyer documents seeking legal advice – bluntly holding that "[o]f course, merely saying so does not make the documents privileged." Id. at *9. The court also noted that "Dartmouth fail[ed] to provide any sort of affidavit or declaration from an individual with personal knowledge of that practice, or any other evidence that might establish that practice." Id. at *9 n.2.

Lawyers should educate their clients about the importance of including on the face of their emails indicia of those emails' privileged nature (normally, that the clients seek the lawyers' legal advice). And of course lawyers must support privilege claims with whatever necessary affidavits the pertinent court would expect.

- [Privilege Point, 5/17/23]

Can Now-Adverse Former Corporate Directors Access Their Old Corporate Files?

May 17, 2023

One glaring disagreement among state courts involves former corporate directors' right to access documents they possessed when they served as directors. Common sense might lead one to think that directors enjoyed access when they were loyally serving a corporation, but should be denied access if they become adverse to that corporation.

In Hyde Park Venture Partners Fund III, L.P. v. FairXchange, LLC, 292 A.3d 178 (Del. Ch. 2023), the Delaware Court of Chancery strenuously defended Delaware's longstanding contrary view. After noting that "[s]ince 1987, Delaware law has treated the corporation and the members of its board of directors as joint clients for purposes of privileged material created during a director's tenure," the court found that "the corporation cannot invoke the privilege against the investor [which had appointed a director who "monitor[ed] corporate performance," and who as "a human has only one brain"] for materials created during the director's" tenure. Id. at 184. The court then described "[t]hree recognized methods . . . by which a corporation can alter these default rules": (1) by contract, "through a confidentiality agreement"; (2) by forming a board committee "that excludes the director"; or (3) by the corporation "put[ting] the director on notice of [the] fact" that "a sufficient adversity of interests has arisen." Id.

The Delaware Chancery Court acknowledged that federal court decisions and the prestigious Restatement (Third) of the Law Governing Lawyers (Am. L. Inst. 2000) take a different view — which the court candidly conceded was "the majority rule." Id. at 205 & n.8. This discovery-related distinction rests on the difference between Delaware's and most other states' fundamental disagreement about the nature of a corporate client's identity — whether directors are a corporation's lawyer's joint client or merely agents of the corporate entity client.

- [Privilege Point, 7/26/23]

Corporations May Risk Waiving Privilege Protection When Communicating With Their Own Board Members

July 26, 2023

It seems obvious that corporations do not waive privilege protection by disclosing privileged communications to their own board members. But what about outside board members receiving such communications where they work or live?

In O'Neill v. City of Springfield, Civ. No. 30036-MGM, 2023 U.S. Dist. LEXIS 82572 (D. Mass. May 11, 2023), family members sued the City after their sister died in custody. Although the City and the police union shared a common interest in resisting plaintiff's claims, the court understandably held that their common interest agreement did not apply to negotiating the terms of a disciplinary memorandum criticizing police conduct — so the City and the union were adversaries in that context. The police union's president used his City email address when communicating with the union's lawyer — which the court found had waived the union's privilege and required those communications' production.

The court distinguished the case from the decision in United States ex rel. Wollman v. Massachusetts General Hospital, Inc., 475 F. Supp. 3d 45 (D. Mass. 2020), in which Mass. General's board chair received privileged emails at her employer Simmons College email address. That decision declined to find a waiver, pointing to the communications' privilege label, lack of any evidence that "the report had been inappropriately disseminated at Simmons," and Mass. General's quick request that Simmons respond to a subpoena seeking such documents by including those communications on its privilege log. O'Neill, 2023 U.S. Dist. LEXIS 82572, at *21. The police union's president and lawyer had not taken such protective steps.

Corporations would be wise to avoid communicating electronically to their outside directors using those directors' employers' email addresses. They should also consider similar protective actions even when mailing privileged board material to their outside directors' employers or residential personal addresses.

B. Need to Know Standard

- ePlus, Inc. v. Lawson Software, Inc., 280 F.R.D. 247, 252-53, 253 & n.2 (E.D. Va. 2012) ("290 entries concern communications to ten or more non attorneys. Lawson does not deny this, but claims that it was required to widely disseminate information because of the injunction, which applied to a broad group of people. Communications within a corporation are only protected if the party claiming privilege can demonstrate that the persons to whom the communications were made had the 'need to know' the information communicated." (citation omitted); "Nor has Lawson established that the individuals in each of these entries are protected by the decision in Upjohn v. United States, 449 U.S. 383, 389 . . . (1981)."; "Here, Lawson has not argued that the individuals listed in any of the 290 entries had a need to know as defined by Deel [Deel v. Bank of Am., N.A., 227 F.R.D. 456 (W.D. Va. 2005)] or that they should enjoy the protection provided by Upjohn. It has not even established that the listed individuals are employees or that they needed to know the information communicated. Nor has Lawson asserted that the communications were made at the direction of supervisors. Quite simply, Lawson has not satisfied its burden to establish that a privilege applies. Thus, it has waived the privilege with respect to these entries."; "This is true also of the 39 entries in which Lawson identifies the recipient as an unidentified distribution list. Whether the persons on those lists have a 'need to know' the information communicated and whether those persons are employees who knew they were being communicated with by Lawson's counsel in its capacity as legal counsel is unclear. Lawson has waived its privilege with respect to these entries." (emphases added)).
- Int'l Cards Co., Ltd. v. MasterCard Int'l Inc., No. 13-CV-02576 (LGS) (SN), 2014 U.S. Dist. LEXIS 125370, at *5 (S.D.N.Y. Aug. 27, 2014) ("A corporate entity's attorney-client privilege can also be waived by disclosure of the communication to employees of the corporation who are not in a position to act or rely on the legal advice contained in the communication." (emphasis added)).

- Norton v. Town of Islip, No. CV 04-3079 (PKC) (SIL), 2015 U.S. Dist. LEXIS 125114, at *11, *11-12, *14 (E.D.N.Y. Sept. 18, 2015) (finding that a town did not assert privilege for documents to which town employees without a "need to know" and members of the public had access; holding that the Town had the duty to show that no one actually accessed the documents, and had fallen short of that burden; "One of the underlying issues here pertains to changes made to the certificate of occupancy ('C/O') for the property. Norton argues that the privilege was waived because the Memos were made accessible to Town employees who did not need to know the privileged contents regarding those changes, i.e., the autoworker in the Verschoth [Verschoth v. Time Warner, Inc., No. 00CIV1339, 2001 U.S. Dist. LEXIS 3174 (S.D.N.Y. Mar. 22, 2001)] example. Defendants argue without elaboration that 'Building Department or other property-related officials' have a need to know and thus may view privileged communications between the Town Attorney's Office and the Building Department without waiving the privilege, i.e., the engineer in the Verschoth example."; "Applying the standards above, Defendants have failed to carry their burden of establishing that the privileges have not been waived. All of the Memos were contained in the Building Department file and were apparently accessible by all Town employees within that department. . . . [I]f non-Building Division Town personnel wish to review a document, unspecified 'Building Division staff retrieve the document and provide a copy'. Defendants have presented no reason, however, why all or even most Building Department personnel have a need to know confidential legal communications in order to perform their jobs. As Defendants have failed to carry their burden, the Court finds that they have waived attorney-client privilege as to the Memos."; "The Memos were found in the paper files and Defendants have provided no evidence to counter the plain suggestion that the Memos resided in the paper files for some indeterminate time period for anyone in the public to see, if they asked for the file. Further and conspicuously absent from Defendants' submissions is any argument, let alone supporting evidence such as log books, that the paper files at issue were never checked out by a member of the public. Absent this type of evidence, Defendants have failed to meet their burden of establishing a lack of public access and the Court concludes that they have waived both work product and attorney-client privileges." (emphases added)).

- [Privilege Point, 2/3/16]

What is the "Need to Know" Standard?

February 3, 2016

Under the majority Upjohn approach, the attorney-client privilege can protect lawyers' communications with any level of corporate client employee -- if the lawyers need the employees' factual information before giving their corporate clients legal advice. Upjohn Co. v. United States, 449 U.S. 383 (1981).

Upjohn focuses on clients' communications of facts to lawyers, not lawyers' communications of legal advice to clients. The latter communications implicate the "need to know" standard. The Upjohn standard expands corporations' privilege protection, while the "need to know" standard constricts it.

In EEOC v. Texas Roadhouse, Inc., the court articulated the unfortunate but widely accepted principle that privileged intra-corporate "[c]ommunications retain their privileged status if relayed to other employees or officers of the corporation who need to know the information. When the communications are repeated to employees who do not need the information to carry out their work or make decisions, the privilege is lost." Civ. A. No. 11-cv-11732-DJC, 2015 U.S. Dist. LEXIS 161929, at *5-6 (D. Mass. Dec. 2, 2015).

At first blush, this "need to know" standard seems inconsistent with Upjohn. An example might explain the difference. A company's lawyer can have an Upjohn-protected interview with a company's employee who happened to see a visitor fall in the lobby. But that employee does not "need to know" the lawyer's legal advice about the company's possible liability or defenses. The "need to know" standard does not make much sense -- it can force a corporation to provide a litigation adversary purely internal privileged communications simply because a few extra employees (bound by their own confidentiality duty) happened to also receive those communications.

- Thomas v. Kellogg Co., Case No. C13-5136-RBL, 2016 U.S. Dist. LEXIS 66881, at *5 (W.D. Wash. May 20, 2016) ("Documents disseminated beyond those with a 'need to know' for legal advice purposes are not privileged.").
- Romero v. Allstate Ins. Co., Cons. No. 01-3894, 2016 U.S. Dist. LEXIS 153142, at *229-30 (E.D. Pa. Nov. 4, 2016) (rejecting as "conjecture" plaintiffs' argument that internal Allstate documents did not deserve privilege protection because they may have been disclosed to employees who did not need them; "Plaintiffs also argue that documents for which the source is listed only as 'Allstate' may have lost their privileged status on the ground that Allstate may have disclosed them to employees who did not need to access them. . . . Here, the authors and recipients of the documents in question are known and provide ample basis for determining the applicability of privilege. Allstate has explained that the custodians of the documents are not known because no record of them was made when the documents initially were produced in 2000-2002. Plaintiffs' assertion that the documents may have been circulated widely enough to waive the privilege is nothing more than conjecture. In light of the scope of these consolidated cases and the passage of time since the initial production, this speculative possibility does not justify a waiver of the privilege." (emphasis added)).
- In re Riddell Concussion Reduction Litig., Civ. No. 13-7585 (JBS/JS), 2016 U.S. Dist. LEXIS 168457, at *12-13 (D.N.J. Dec. 5, 2016) ("Many of the challenged documents involve communications between and amongst Riddell's employees that do not involve an attorney. The Court agrees with Riddell that simply sharing documents amongst corporate employees does not necessarily vitiate a privilege. These communications remain privileged if they assist the attorney to formulate and render legal advice. . . . However, the privilege is waived if the document is shared beyond persons with a 'need to know.'" (citation omitted) (emphasis added)).

- [Privilege Point, 4/12/17]

Illogical and Frightening "Need to Know" Doctrine

April 12, 2017

Corporations face two possible impediments when claiming privilege protection for purely internal communications. First, some courts see widespread intra-corporate circulation as tending to show that the communications primarily dealt with business rather than legal matters. This approach makes some sense, although a few courts take it to an unjustifiable extreme – applying a per se rule that the privilege cannot protect communications an employee sends both to a lawyer and to a non-lawyer requesting their input.

Second, the more frightening doctrine involves the "need to know" standard. In Peerless Indemnity Insurance Co. v. Sushi Avenue, Inc., the court rejected plaintiff's privilege claim for several internal documents – because it had not established with evidence that the documents "were not disseminated beyond those persons who needed to know their contents." Civ. No. 15-4112 ADM/LIB, 2017 U.S. Dist. LEXIS 22436, at *10 (D. Minn. Feb. 15, 2017).

Many courts follow this troubling waiver approach – which can force corporations to turn over to litigation adversaries purely internal communications simply because they were shared with a few employees who did not need them. Because this doctrine focuses mostly on lawyers' communication to their corporate clients' employees, we have the primary responsibility to limit internal circulation and re-circulation of our advice.

- Margulis v. Hertz Corp., Civ. A. No. 14-1209 (JMV), 2017 U.S. Dist. LEXIS 28311, at *31-32 (D.N.J. Feb. 28, 2017) (not for publication) (holding that a corporate family was not "one" client, but that a United States law firm jointly represented a U.S. company and an overseas affiliate; "This document is not privileged."; "First, the document includes as a carbon copy a Xerox employee, Ms. Weston. Ms. Weston is not an attorney or client in any way relating to Hertz, nor has Defendant established that she is an 'agent' for purposes of expanding the attorney-client privilege."; "Second, the document itself is a training document that is not 'legal' but part of the Hertz 'business.' Thus, any attorney included in the email is acting in a business capacity, not in the capacity of an attorney providing legal advice. Thus, there is no privilege that applies."; "Third, apart from Ms. Weston, there are numerous recipients of the email (direct and cc'd) that Defendant has not established are necessary intermediaries for Hertz's counsel to provide legal advice. Only those employees that 'need to know' are permitted to be included in privileged communications and Defendant has failed to establish that each and every recipient involved 'needed to know' attorney-client privileged communications." (emphasis added)).

- In re Syngenta AG MIR 162 Corn Litig., MDL No. 2591, Case No. 14-md-2591-JWL, 2017 U.S. Dist. LEXIS 44192, at *208 (D. Kan. Mar. 24, 2017) (in an opinion by Special Master, finding that a former Monsanto lawyer and business person did not resist discovery after being designated by defendant as a testifying expert; "[W]ith very few exceptions, Monsanto's privilege log lists the recipients of the various documents as simply 'Monsanto Company,' without delineating the individual recipients (or their corresponding professional titles or job positions). By this description, Monsanto has chosen to leave the undersigned in the dark as to whether the documents were shared only with key Monsanto managers needing legal advice, or whether they also were shared widely with lower-level employees. In other words, the undersigned have no way of determining whether the multitudes of persons who were sent particular documents were attorneys or business persons, and with respect to the latter category, whether they had a need to know the contents of those documents." (emphasis added)).

- Valassis Communications, Inc. v. News Corp., No. 17-cv-7378 (PKC), 2018 U.S. Dist. LEXIS 160234, at *8-9 (S.D.N.Y. Sept. 19, 2018) (“Courts in this district focus on whether the legal advice was disclosed ‘to employees of the corporation who are not in a position to act or rely on the legal advice.’ . . . If the legal advice is disclosed in this fashion, the attorney-client privilege is waived.”)
- SecurityPoint Holdings, Inc. v. United States, No. 11-268C, 2019 U.S. Claims LEXIS 341, at *7 (Fed. Cl. Apr. 16, 2019) (not for publication) (applying the “need to know” standard; “Disclosure of privileged information to persons within a corporation that do not have a need for that information is a waiver of the attorney-client privilege. See Scott v. Chipotle Mexican Grill, Inc., 94 F. Supp. 3rd 585, 598 (S.D.N.Y. 2015).”).
- Chabot v. Walgreens Boots Alliance, Inc., Civ. A. No. 1:18-CV-2118, 2020 U.S. Dist. LEXIS 107547, at *23 (M. D. Pa. June 11, 2020) (applying the “need to know” standard; “Additionally, if the communication or document is sent to anyone who does not need the information to carry out their work or make effective decisions on the part of the company, then the privilege is lost.”).

- [Privilege Point, 7/21/21]

How Do Courts Assess the "Need to Know" Standard?

July 21, 2021

Most if not all courts recite the tenet that corporations can lose their privilege protection for privileged documents circulated within the corporation to employees beyond those with a "need to know." One might think that this approach makes little sense, because it can force corporations to disclose purely internal communications to litigation adversaries just because the documents were shared with others in the corporation who did not need them to do their job (but presumably would be required to keep them confidential). Fortunately for corporations, most courts mention this counter-intuitive "need to know" standard in their introductory explanation of corporate privilege, without actually stripping away privilege based on that standard. But some courts do.

In Novafund Advisors, LLC v. Capitala Group, LLC, Civ. No. 3:18-cv-01023, 2021 U.S. Dist. LEXIS 98560, at *14 (D. Conn. May 25, 2021), the court repeated the commonly-recited approach that "the involved non-lawyer employees must have a 'need to know' the privileged information in order for it to remain protected." The court then concluded that "defendants' log entries do not demonstrate that the involved non-lawyers were persons with a 'need to know' the legal advice being discussed, and accordingly the Court will direct them to submit a sample for in-camera review." Id.

One might justifiably wonder how an in-camera review would shed much light on the "need to know" standard. Some courts wisely take what seems like the common sense view. They presume that corporate employees would not share privileged communications with random colleagues who did not need them. And perhaps those courts also implicitly recognize the unfairness of granting a corporation's litigation adversary access to purely internal documents shared with another corporate employee who had a built-in duty to keep them confidential.

- In re Allergan PLC Sec. Litig., No. 18 Civ. 12089 (CM) (GWG), 2021 U.S. Dist. LEXIS 171331, at *7-8 (S.D.N.Y. Sept. 9, 2021) (holding that employee-to-employee communications would deserve privilege protection if they conveyed legal advice to those with a need to know; “[A]ttorney-client privilege is not lost where there is ‘distribution within a corporation of legal advice received from its counsel,’ provided that disclosure is made to employees that are ‘in a position to act or rely on the legal advice contained in the communication.’ It is therefore not required that an attorney be a party to the communication that shares the legal advice from the attorney. We also see no particular need for the attorney’s name to be revealed in the communication, or for that matter the privilege log, in order for the privilege to be maintained. Of course, the assumption behind these principles is that what is being shared is legal advice to begin with, not business advice, to which no privilege would attach.” (citation omitted))

- In re Google RTB Consumer Priv. Litig., Case No. 21-cv-02155-YGR (VKD), 2023 U.S. Dist. LEXIS 19940, at *18-19, *22-23 (N.D. Cal. Feb. 6, 2023) (finding that Google had not established privilege protection for internally distributed documents, because it had not proven that those receiving the documents had a “need to know”; “The Ninth Circuit has not addressed the circumstances under which a corporation may fail to meet the confidentiality requirement for asserting privilege because an otherwise privileged communication is distributed to too many employees. However, other courts that have addressed this issue, including district courts within the Ninth Circuit, consider whether the employees to whom the privileged communication was distributed had a ‘need to know’ the information.” (footnote omitted); “This explanation is conclusory and unsupported. While Google is correct that sharing a communication with a large number of employees is not necessarily fatal to a privilege claim, that observation is not a sufficient response to plaintiffs’ challenge to the merits of the claim. Google does not distinguish between the different parts of the email exchange or the different employees involved, and it provides no supporting declaration or other evidence showing that any of these employees had a need to know the purportedly privileged portions of the exchange. In the case of Entry #1262, the Court cannot infer the necessary information from an in camera review of the document itself. As Google has failed to meet its burden to show that otherwise privileged communications in Entry #1262 were made and maintained in confidence, Google may not withhold Entry #1262 from production. It must be produced.”)

C. Access Issues

- [Privilege Point, 9/11/13]

A Southern District of New York Judge Mentions the Danger of Granting Widespread "Access" to Privileged Communications in a Corporate Setting

September 11, 2013

Corporations face several risks to their privilege protection if employees widely circulate privileged communications, even within the corporation. As noted in earlier Privilege Points, most courts require corporations to prove that every recipient of such a privileged communication has a "need to know." And, in a troublesome doctrine highlighted in the Vioxx MDL litigation, some courts point to widespread intra-corporate distribution as demonstrating such communications' primarily business rather than legal nature.

In Chen-Oster v. Goldman, Sachs & Co., 293 F.R.D. 547 (S.D.N.Y. 2013), Judge James Francis held that an employment database prepared by defendant Goldman Sachs generally deserved privilege protection because Goldman Sachs' lawyers used the database to give legal advice. However, he also acknowledged that plaintiffs were entitled "to test whether managers have access" to portions of the database – describing such access as "a fact that could militate in favor of finding that these fields are maintained for business purposes and would not be privileged." Id. at 555.

Such managers presumably have a "need to know" legal advice about employment issues. Thus, it is worrisome that a court would consider such managers' "access to" (not just use of) such a database to support the opposing party's argument that the database served primarily a business rather than a legal purpose.

- **[Privilege Point, 3/11/15]**

Court Concludes That Access to Privileged Document by Employees Without a "Need to Know" Does Not Destroy Privilege Protection

March 11, 2015

Many courts hold that corporations might waive their privilege protection through purely internal circulation of privileged communications — beyond those employees with a "need to know." This does not make much sense, because it hands over to corporations' external adversaries internal corporate communications disclosed only to employees with a fiduciary, contractual, or other duty to keep them confidential.

Although a few courts have extended this troublesome approach to situations in which other employees merely had access to privileged communications, other courts have drawn the line. In Garvey v. Hulu, LLC, Case No. 11-cv-03764-LB, 2015 U.S. Dist. LEXIS 7042, at *7 (N.D. Cal. Jan. 21, 2015), the court rejected plaintiffs' argument "that confidentiality was destroyed by the fact that [privileged communications are] generally accessible to Hulu employees beyond those immediately participating" in the pertinent legal issue. The court noted that the privileged communications were "not public" and that "[o]nly Hulu employees may access" them. Id. at *10. The court ultimately concluded that "[c]onfidentiality is not destroyed by the possibility of other Hulu employees, not directly participating in the [issue], could have accessed" the privileged documents — quoting an earlier Central District of Illinois decision explaining that "[m]aterial need not be 'kept under lock and key to remain confidential' for purposes of the attorney-client privilege" (quoting United States v. Dish Network, L.L.C., 283 F.R.D. 420, 425 (C.D. Ill. 2012)). Id. at *10-11.

It is refreshing to see some courts' common-sense approach, but corporations should still take reasonable steps to limit privileged communications' internal circulation to employees with a "need to know" in order to perform their duties.

- Norton v. Town of Islip, No. CV 04-3079 (PKC) (SIL), 2017 U.S. Dist. LEXIS 33977, at *19-20 (E.D.N.Y. March 9, 2017) (holding that categorical privilege logs are sometimes acceptable, but not in the circumstances before the court; "Defendants are directed to promulgate a revised privilege log, which, considering the recent waiver, must include all individuals who had access to the documents and when that access was provided. . . . [T]he Court directs Defendants to identify where each of the documents were [sic] kept and who had access to that location. For the sake of clarity, the revised privilege log must outline for each document and handwritten note: (1) the date of creation; (2) the identity of each person who created and received the document, including those copied on it, and the title of each individual; (3) a more elaborate description, without revealing the substance of the communications, as to the basis of the privilege(s); (4) the subject matter of the document; (5) the privilege(s) being asserted; (6) where the document was kept; and (7) each person who has been given access to each of the document's locations and the date that access was provided." (emphases added)).

- **[Privilege Point, 7/5/17]**

Can the Privilege Protect Communications in a Public Place?

July 5, 2017

If clients and their lawyers engage in otherwise privileged communications in the presence of third parties, the privilege rarely if ever protects the communications. But what if the communications occur in a public place where third parties might have overheard them? Does a litigant challenging privilege protection have to demonstrate that a third party actually did overhear the communications?

In MacFarlane v. Fivespice LLC, No. 3:16-cv-01721-HZ, 2017 U.S. Dist. LEXIS 68184 (D. Or. May 4, 2017), employment discrimination plaintiff MacFarlane challenged defendant Café's privilege claim for communications between its lawyer and its former chief chef – which occurred at the Café. It is unclear how plaintiff knew about the conversation, but she argued that the conversation "occurred in a setting where it could have been heard by the public and is not therefore privileged." Id. at *12. The court upheld the Café's privilege claim, pointing to another participant's testimony: that "it occurred in the morning during off-peak hours"; that "no Café employees or customers sat near them at any point during the meeting"; that "the conversation participants did not raise their voices"; and that "the conversation, in his perception, was out of earshot." Id. at *13. The court concluded that "this was a sufficiently confidential setting for maintaining the attorney-client privilege." Id.

Such a scenario would be more complicated if the plaintiff had found someone who heard part but not all of the otherwise privileged communications, or could show that the Café was packed with people – but was unable to track down anyone who could testify that he or she actually overheard the conversation. Some authorities find the privilege inapplicable if communications occurred where they could have easily been overheard, while other authorities require evidence that someone actually overheard the communications (presumably requiring some witness to step forward).

- [Privilege Point, 9/19/18]

Court Assesses Implications of Privileged Communications' Inclusion in Employees' Personnel Files

September 19, 2018

Attorney-client privilege protection normally evaporates when the client abandons its confidentiality expectation. Under this basic principle, does placing privileged communications in an employee's personnel file forfeit privilege protection?

In Martin v. Copeland, a terminated employee argued that her former employer "waived any possible claim to attorney-client privilege when [it] placed the attorney communications into Plaintiff's personnel file." Cause No. 2:16-CV-59-JVB-JEM, 2018 U.S. Dist. LEXIS 111756, at *4 (N.D. Ind. July 5, 2018). The court rejected plaintiff's argument, noting that "[i]t is uncontested that Plaintiff never received a copy of the omitted communications; thus, no waiver of the attorney-client privilege occurred." Id. The obvious implication is that plaintiff's review of the file might have destroyed the company's privilege.

It is unclear whether plaintiff could have (but did not) access her personnel file while employed. If so, defendant's argument would be more difficult. But most courts would still allow companies to withhold privileged documents that employees never saw.

- [Privilege Point, 11/21/18]

Court Demands That Defendant Identify Those With Access to Privileged Documents

November 21, 2018

In 2015, the court handling a malicious prosecution case against the Town of Islip held that the Town had waived privilege protection for documents that "were apparently accessible by all Town employees, " even those without a need to know, and that might also have been accessed by members of the public "in days past." Norton v. Town of Islip, No. CV 04-3079 (PKC) (SIL), 2015 U.S. Dist. LEXIS 125114, at *11, *14 (E.D.N.Y. Sept. 18, 2015).

The parties' privilege fights have continued, and plaintiff recently challenged the Town's declaration that "[t]here is no reason to believe' that the privileged documents were accessed by anyone other than those individuals and offices to whom they were addressed." Norton v. Town of Islip, CV 04-3079 (PKC) (SIL), 2018 U.S. Dist. LEXIS 177811, at *24 (E.D.N.Y. Oct. 16, 2018). The court again addressed the access issue. After explaining that it was "unable to credit the Town Defendants' conclusion about access of the subject documents," the court ordered the Town to provide "affidavits from an individual or individuals with knowledge setting forth where each document was kept, including all individuals who had access to the documents and when that access was provided." Id. at *25, *28. And the court then doubled down, emphasizing that "[f]or the sake of clarity, the Court is directing the Town Defendants to explain who had access, not just who actually accessed the documents at issue and what was done to maintain confidentiality." Id. at *28.

It is difficult to imagine any institutional client (governmental or corporate) being able to comply with such a remarkable requirement.

- [Privilege Point, 3/20/19]

Can Business Persons' Access to Work Product Doom a Work Product Claim?

March 20, 2019

The work product doctrine can protect documents primarily motivated by litigation or anticipated litigation, rather than prepared in the ordinary course of business or motivated by some other non-litigation purpose. But actions occurring after the documents' creation sometimes can reflect back on that key motivational element.

In Annese v. U.S. Xpress, Inc., No. CIV-17-655-C, 2019 U.S. Dist. LEXIS 6343 (W.D. Okla. Jan. 14, 2019), the court analyzed defendant's work product claim for documents it created while investigating a tractor-trailer accident. The court acknowledged that defendant anticipated litigation, because plaintiff's lawyer threatened litigation the day after the accident. But the court denied defendant's work product claim --emphasizing that the defendant's Director of Safety "has access to this information for non-litigation purposes." Id. at *5. The court concluded that "the portion of the claims file available [to defendant's Director of Safety] is discoverable to Plaintiff because it is generated in the ordinary course of business and not directly in anticipation of litigation." Id. at *6.

Many if not most courts would take a different approach, properly analyzing documents' creation rather than their post-creation availability to others. But maintaining the litigation focus of appropriately created work product enhances the chance for successfully claiming that protection.

- [Privilege Point, 3/4/20]

Can Former But Now-Adverse Corporate Employees Access Privileged Communications From Their Tenure At The Company?

March 4, 2020

When former employees turn on their former employer, they sometimes seek access (through discovery) of privileged communications that were in their possession when they worked at the company. At first blush, that might seem like a no-brainer – the documents they seek might have been sitting on their desk. On the other hand, they could access those documents at that earlier time because they were then loyal employees – not adversaries.

In McRae v. Tautachrome, Inc., Case No. 17-1260-EFM-GEB, 2019 U.S. Dist. LEXIS 205151 (D. Kan. Nov. 26, 2019), McRae sued his former employer for allegedly refusing to pay him as it had promised. He sought privileged documents that he "himself either authored or was included in the original communications." Id. at *6. The court noted that a 1999 District of Connecticut case "found any privileged information obtained by the non-party former employee during her employment remained privileged." Id. at *9. But the court agreed instead with a 1992 District of Colorado case (which adopted the Delaware approach) – holding that a former officer was not "precluded by the attorney-client privilege or work product doctrine from inspecting documents generated during [his] tenure." Id. at *8 (alteration in original) (citation omitted). The court understandably cautioned McRae that although he "is entitled to review the documents, this does not mean the communications may be disclosed – it only means McRae is able to receive them." Id. at *11.

Although most states generally follow the same generic privilege principles, they take dramatically different approaches in some areas.

- [Privilege Point, 3/2/22]

Can a Single Member of a Multimember Board Waive an Institution's Privilege?

March 2, 2022

Lawyers sometimes represent institutions governed by multimember boards. Those members frequently receive privileged communications from the institution's lawyers. Under the majority rule, an institution's upper and even middle-level management trusted to handle privileged communications can waive the institution's privilege if they are acting in its interest. Is the same true of an individual board member?

In Breuder v. Board of Trustees, No. 15 CV 9323, 2021 U.S. Dist. LEXIS 244867 (N.D. Ill. Dec. 23, 2021), a college's former president suing for wrongful termination argued that a member of the college's board of trustees waived the college's privilege by disclosing a privileged communication to an outsider. The court rejected plaintiff's argument, agreeing with the college that the individual "did not have the authority to unilaterally waive the Board's privilege without the approval of the full Board" – so her disclosure did not waive the college's privilege. Id. at *14. All or nearly all courts follow this majority rule, which recognizes that a board controls the institution's privilege collectively, and must act collectively to waive it.

But one might wonder how this story plays out – because the outsider already has the privileged communication. Presumably a court's non-waiver finding in this scenario precludes use of the privileged communication during depositions and denial of its admissibility at trial. And because the unauthorized disclosure has occurred in a non-judicial setting, there generally is no subject matter waiver risk.

D. Employees' Personal Privileged Communications on Employers' Servers

- [Privilege Point, 7/6/05]

Can Company Executives Use a Company-Owned E-mail System for Privileged Communications with their Private Lawyers?

July 6, 2005

In addition to sending and receiving jokes and other personal communications, some company executives use their employer's e-mail system to communicate with their personal lawyers. If the company and the executives become adversaries, can the executives ever claim privilege protection for such e-mails?

In In re Asia Global Crossing, Ltd., 322 B.R. 247 (Bankr. S.D.N.Y. 2005), Asia Global Crossing's bankruptcy trustee sought discovery of e-mail message traffic between several company executives and their personal lawyers, claiming that all company employees had been warned that the e-mail system belonged to the company. The court found that the company had **not** clearly enough warned executives that they could not use the e-mail system for personal communications. The court noted that "at log on, some business computers, including those used by this Court's personnel, warn users about personal use and the employers' right to monitor." Id. at 261 (emphasis added). The court found that the company executives could withhold from the trustee the e-mail communications with their personal lawyers.

Not every court would be so generous, but this decision highlights the risk that companies run by not using warnings about their e-mail systems that courts themselves use.

- Peerenboom v. Marvel Entertainment, LLC, 50 N.Y.S.3d 49, 50 (N.Y. App. Div. 2017) (holding that Marvel's CEO could not claim privilege protection but could claim work product protection for emails sent and received from his personal lawyer in a personal defamation case not involving Marvel or its parent Disney, for which he used his Marvel's server; "Application of the four factors set forth in In re Asia Global Crossing, Ltd. (322 BR 247, 257 [Bankr SD NY 2005]), which we endorse (see also e.g. Scott v Beth Israel Med. Ctr. Inc., 17 Misc 3d 934, 941, 847 N.Y.S.2d 436 [Sup Ct, NY County 2007]), indicates that Perlmutter lacked any reasonable expectation of privacy in his personal use of the email system of Marvel, his employer, and correspondingly lacked the reasonable assurance of confidentiality that is an essential element of the attorney-client privilege (see Matter of Priest v Hennessy, 51 NY2d 62, 69, 409 N.E.2d 983, 431 N.Y.S.2d 511 [1980]). Among other factors, while Marvel's email policies during the relevant time periods permitted 'receiving e-mail from a family member, friend, or other non-business purpose entity . . . as a courtesy,' the company nonetheless asserted that it 'owned' all emails on its system, and that the emails were 'subject to all Company rules, policies, and conduct statements.' Marvel 'reserve[d] the right to audit networks and systems on a periodic basis to ensure [employees'] compliance' with its email policies. It also 'reserve[d] the right to access, review, copy and delete any messages or content,' and 'to disclose such messages to any party (inside or outside the Company).' Given, among other factors, Perlmutter's status as Marvel's Chair, he was, if not actually aware of Marvel's email policy, constructively on notice of its contents." (alterations in original) (emphases added); "Given the lack of evidence that Marvel viewed any of Perlmutter's personal emails, and the lack of evidence of any other actual disclosure to a third party, Perlmutter's use of Marvel's email for personal purposes does not, standing alone, constitute a waiver of attorney work product protections." (emphasis added)).

- [Privilege Point, 7/18/18]

Court Protects an Employee's Personal Privileged Communications Using the Company's Email Account

July 18, 2018

Starting 10-15 years ago, many courts addressed corporate employees' privilege claims for communications with their personal lawyers (usually employment lawyers) using their employers' email infrastructure. Most states (other than New Jersey), eventually settled on the standard articulated in In re Asia Global Crossing, Ltd., 322 B.R. 247, 256-61 (Bankr. S.D.N.Y. 2005) to reject such privilege claims – as long as the company widely circulated a personnel policy explicitly warning that such communications could be monitored, and did not deserve confidentiality or privilege protection.

The cases dwindled after that, and the matter seemed largely settled. But in Kreuze v. VCA Animal Hospitals, Inc., Civ. A. No. PJM-17-1169, 2018 U.S. Dist. LEXIS 66667 (D. Md. Apr. 20, 2018), the court protected such emails as privileged. Among other things, the court noted that: (1) the defendant's personnel policy "does not affirmatively ban personal use by its employees" but instead only warns them to keep such use "to a minimum" (*id.* at *3); (2) defendant "did not actively monitor Plaintiff's email account during or after her employment," but instead merely reserved the right to do so (*id.* at *4); (3) "Defendants do not claim that they took affirmative steps to inform employees of the policies in place, besides providing a copy of VCA's Policy" – although noting that plaintiff acknowledged the personnel policy (*id.* at *7); and (4) plaintiff's "acknowledgment was signed in 2009, close to five years prior to the sending of the emails." *Id.* at *8.

A corporation facing such a demanding application of the Asia Global standard will have a difficult time winning a privilege fight with a current or former employee. Corporations and their lawyers should monitor the case law for a possible resurgence of such pro-employee decisions.

- Cho v. Depaul University, Case No. 18 C 8012, 2020 U.S. Dist. LEXIS 86299, at *4-5 (N.D. Ill. May 17, 2020) (finding that the privilege still protected employees' communications using the employer's server; "Consideration of these factors leads to a conclusion that Cho did not waive the privilege. First, DePaul does not preclude use of university e-mail accounts for personal matters. To the contrary, its policies state that 'Limited personal use of Computing Resources by students, staff, and faculty is permissible if it does not violate this Policy or other University policies, or otherwise interfere with the legitimate education and business purposes of DePaul,' none of which is the case here. Second, DePaul's policies state that it 'does not routinely monitor individual usage of its Computing Resources,' though it reserves the right to do so. And notices that appear upon log-in state that any access or monitoring would take place only in accordance with applicable laws and legitimate business purposes. This would lead a reasonable employee in Cho's position to believe that her e-mails would not be monitored. Third, DePaul did have access to the e-mail account, but 'only in accordance with applicable laws, for legitimate business purposes,' including system monitoring and maintenance, complying with legal requirements, and administering university policies—none of which would suggest to a reasonable user in Cho's position that her e-mails to her personal legal counsel would be monitored. Finally, although DePaul put Cho on notice of its policies, as just discussed those policies did not indicate that her e-mail would be reviewed or monitored; the contrary is true.").

- [Privilege Point, 9/30/20]

Lawyers' Failure to Consider Work Product Protection Prejudices Their Clients: Part I

September 30, 2020

The attorney-client privilege and the work product doctrine differ dramatically in their age, source, scope, strength and fragility. Lawyers must always consider both. But because clients, lawyers, and even courts usually use the word "privilege" to describe both of those totally different protections, some lawyers forget the work product doctrine's possible applicability.

In Stavale v. Stavale, 957 N.W.2d 387, 389, 390, 396, 396 n.8 (Mich. Ct. App. 2020), a wife seeking divorce "issued subpoenas to [her husband's] employer requesting emails that [her husband] had sent to his personal attorney through his employer-provided email address." The court applied what it correctly described as the "seminal case in the federal system" addressing privilege protection for such communications: "In re Asia Global Crossing, Ltd. (322 BR 247 Bankr. SD NY, 2005)."; The court concluded that the company's email policy "unambiguously provided that [the husband] had no expectation of privacy when using his employer-provided e-mail," but remanded to the trial court to "give particular focus to whether and to what extent defendant was notified or otherwise made aware of the policy." Id. at *18-19. The court then noted in a footnote that the defendant husband "briefly asserts, as an alternative issue at the end of his reply brief on appeal, that even to the extent the e-mails at issue are not protected by the attorney-client privilege, they are work-product that should be excluded on that ground."; The court "declin[ed] to address defendant's reliance on the work-product doctrine" -- because he had not raised it in his initial pleading or in his supporting brief. Id.

The work product doctrine almost certainly would have protected emails between the husband and his personal divorce lawyer. And because the robust work product protection normally survives disclosure to friendly third parties (which do not increase the risk of the work product falling into an adversary's hands), work product protection might well survive the Asia Global standard. Next week's Privilege Point describes a case in which one of America's largest corporations made the same mistake.

- In re Ahlan Industries, Inc., Ch. 7 Case No. BG 18-04650, 2020 Bankr. LEXIS 1746, at *27-28, *46-47 (Bankr. W.D. Mich. July 2, 2020) (addressing a situation in which GRE sued several corporate defendants, individual owners and managers; noting that when one defendant corporation declared bankruptcy, GRE purchased from a Chapter 7 trustee all of the corporation's assets, and that GRE claimed that it now owned 60,000 emails on the corporation's servers; further noting that the individual defendants argued that 424 of the emails were their communications with their personal lawyers, which the trustee did not own and therefore could not sell to GRE; agreeing with the individual defendants; applying the generally accepted standard for ownership of such personal emails on company servers (In re Asia Global Crossing, Ltd., 322 B.R. 247 (Bankr. S.D.N.Y. 2005)); pointing to the company's "lack of policies concerning email usage or monitoring, the password protection of the accounts, and the fact that the company had never taken any steps to invade the confidentiality of the accounts"; holding that even if the company (now under the trustee's control) could waive its privilege, the individuals could veto that waiver as the privilege's co-owners).

- [Privilege Point, 10/14/20]

Federal Court Wrestles With Privilege Ownership After a Complicated Corporate Transaction

October 14, 2020

Several previous Privilege Points have summarized often-complicated judicial holdings on who owns privilege protection after corporate stock or asset transactions. It should come as no surprise that the privilege ownership issue can arise in many possible settings.

In In re Ahlan Industries, Inc., Ch. 7 Case No. BG 18-04650, 2020 Bankr. LEXIS 1746 (Bankr. W.D. Mich. July 2, 2020), GRE sued several corporate defendants, individual owners and managers. When one defendant corporation declared bankruptcy, GRE purchased from a Chapter 7 trustee all of the corporation's assets. GRE claimed that it now owned 60,000 emails on the corporation's servers. The individual defendants argued that 424 of the emails were their communications with their personal lawyers, which the trustee did not own and therefore could not sell to GRE. Somewhat surprisingly, the court agreed with the individual defendants, applying the generally accepted standard for ownership of such personal emails on company servers (In re Asia Global Crossing, Ltd., 322 B.R. 247 (Bankr. S.D.N.Y. 2005)). The court pointed to the company's "lack of policies concerning email usage or monitoring, the password protection of the accounts, and the fact that the company had never taken any steps to invade the confidentiality of the accounts." Ahlan, 2020 Bankr. LEXIS 1746 at *27-28. The court also held that even if the company (now under the trustee's control) could waive its privilege, the individuals could veto that waiver as the privilege's co-owners. Id. at *46-47.

The court's Asia Global analysis was remarkably employee-friendly, but its analysis and holding highlight the difficulty of assessing privilege ownership following such a complicated corporate asset transaction.

- Theroux v. Resnicow, No. 154642/2017, 2020 N.Y. Slip Op 51489(U) (N.Y. Sup. Ct. Dec. 16, 2020) (addressing a dispute between condo owners – one of whom presumably is Jennifer Aniston’s ex-husband actor Justin Theroux; applying the Asia Global standard in light of defendant lawyer’s use of his law firm’s server for his personal dispute with Theroux; denying Theroux’s attempt to discover the emails after finding that the law firm’s personnel policy only applied to non-partners).

- In re WeWork Litig., Consol., Civ. A. No. 2020-0258-AGB, 2020 Del. Ch. LEXIS 368, at *3, *10, *11-12, *12 n.41, *13 (Del. Ch. Dec. 22, 2020) (applying the Asia Global standard to emails on Sprint's servers, which had been sent and received by employees of SoftBank—which owned 85% (but not all) of Sprint at the time; explaining that plaintiff Adam Neumann sued Softbank for breaching its agreement to buy \$3 billion of stock in WeWork, which Neumann had founded; noting that the employees had executive roles in both SoftBank and in Sprint (which was not a party to the Neumann - Softbank dispute; noting that the employees could have used non-Sprint email accounts; “During the period in question, Combes and Sternberg both had access to email accounts other than their Sprint email accounts that they could use for SBG[-]related matters. Specifically, Combes had use of a WeWork-related Gmail account, which identified him as ‘Michel WeWork,’ and Sternberg had use of a ‘softbank.com’ email account.” (emphasis added); noting that the employees were aware of privilege risks; “The record suggests SBG also was aware of the risks to maintaining privilege when commingling the resources of separate corporate entities, including email accounts. On November 4, 2019, Robert Townsend, SBG's Chief Legal Officer, wrote to various SoftBank employees ‘[w]e also need to think through how we maximize protection of privilege [sic] which I assume will require a separate Common Interest and Confidentiality Agreement between the corporate entities.’ Wilson, Claire's Staff Operations Director, highlighted the same concern with respect to WeWork ‘email monitoring,’ writing in an email to Claire the same day that “[w]e flag any hot items and forward as needed but are attempting to mitigate any potential legal privilege issues which could arise from pending litigations by limiting what content we forward to SoftBank email accounts.” (alterations in original) (emphasis added) (footnote omitted); finding that the employees had no expectation of confidentiality; “As to the first point, the fact that Combes and Sternberg are parties to agreements obligating them to keep SBG's information confidential does not mean that they had a reasonable expectation of privacy in using their Sprint email accounts for non-Sprint matters. To that end, SBG points to no language in any agreement where Sprint, which is in possession of the Documents, authorized Combes or Sternberg to use Sprint's email accounts for non-Sprint or SBG-related purposes.” (emphasis added); distinguishing a scenario involving wholly-owned subsidiaries; “The authorities on which SBG relies all appear to involve a scenario not present here, i.e., communications shared between a parent corporation and its wholly-owned subsidiary. See Corp. Prop. Assocs. 14 Inc. v. CHR Hldg. Corp., 2009 WL 8726822 (Del. Ch. Sept. 30, 2009) (Strine, V.C.) (TRANSCRIPT) (denying motion to compel where ‘a solvent subsidiary -- whose equity at that time was wholly owned by a parent’ shared information with the parent because ‘the mere fact that the

communications involved both a parent and sub is not, in my view, a basis for finding a waiver of privilege') (emphasis added); In re Teleglobe Commc'ns Corp., 493 F.3d 345, 370 (3d Cir. 2007), as amended (Oct. 12, 2007) ('Within the wholly owned corporate family, it superficially makes sense to hold, as BCE urges, that the family is really one client for purposes of the privilege and that the privilege is held exclusively by the parent because all fiduciary duties flow to the parent.' (emphasis added)); Mennen v. Wilmington Tr. Co., 2013 Del. Ch. LEXIS 238, 2013 WL 5288900, at *11 (Del. Ch. Sept. 18, 2013) (Master's Report) (stating generally that '[parent]'s participation in the communications does not destroy the privilege,' before deciding that parent's participation did not 'serve as a basis to conclude that [parent] was a "joint client" with [subsidiary]').' (alterations in original) (emphasis added); ordering the emails' production to Neumann; "Combes and Sternberg both had alternative emails accounts at their disposal for conducting SBG business. Despite these arrangements, they both failed to ensure the confidentiality of SBG's privileged information on numerous occasions—64 times for Combes and 25 times for Sternberg. Given these circumstances and the lack of any legal authority supporting SBG's position, the court declines to deviate from the Asia Global framework simply because the party seeking to overcome the privilege is not the corporation whose email system was used for non-work related purposes." (emphasis added))

- In re Lightning Techs., Inc., 627 B.R. 349, 351 (Bankr. E.D. Mich. 2021) (quoting the Asia Global standard in concluding that a bankruptcy trustee is entitled to corporate communications; “At all relevant times, the Debtor's policy was, and the E-Mail Policy clearly stated, that the Debtor's Office 365 e-mail system is ‘subject to monitoring’ and ‘subject at all times to monitoring’ by the Debtor, and that the Debtor ‘may from time to time monitor, log . . . employee Internet activity’ and ‘may examine all individual connections and communications.’ The E-Mail Policy also stated that ‘[a]ll emails are archived on the [Debtor's] server in accordance with [the Debtor's] records retention policy, and all emails are subject to review by the [Debtor].” (alterations in original); “Based on the foregoing findings, the Court concludes as follows: None of the Respondents could have had, at any time, an objectively reasonable expectation that any e-mail that they sent or received through the Debtor's Office 365 e-mail system, including any e-mails that were for personal use, were or would remain private or confidential. See Peerenboom v. Marvel Ent., LLC, 148 A.D.3d 531, 50 N.Y.S.3d 49 (2017); and the following cases cited in In re Asia Global Crossing, Ltd., 322 B.R. 247, 257-58 (Bankr. S.D.N.Y. 2005) (United States v. Simons; Muick v. Glenayre Elec.; Thygeson v. U.S. Bancorp.; Kelleher v. City of Reading; and Garrity v. John Hancock Mutual Life Ins. Co.).”)

- [Privilege Point, 12/22/21]

S.D.N.Y. Deals With Spouses and Law Firm Emails: Part I

December 22, 2021

Most states have adopted some variation of what is called the "spousal privilege" or "marital privilege." Those usually appear in statutes or rules, and dramatically vary from state to state. For obvious reasons, spouses' communications and presence also implicate normal privilege and work product doctrine principles.

In Shih v. Petal Card, Inc., 565 F. Supp. 3d 557 (S.D.N.Y. 2021) (Moses, J.), the defendant sought communications between plaintiff and her lawyer husband. In analyzing the attorney-client privilege, the court first explained that under New York law disclosing a preexisting privileged communication to a spouse did not waive that protection. But the court then warned that "[t]he analysis is somewhat more complicated when . . . the spouse is present for the communication between client and her attorney." Id. at 573. That analysis turned on whether "the spouse is an agent of the client." Id. (citation omitted). The court ultimately concluded that the plaintiff established that her husband met that standard – which requires "a fairly minimal showing" that "the client reposed trust and confidence in her spouse and expected the communication to remain confidential notwithstanding his presence." Id.

Many lawyers might think that this analysis is a gimmie – but the S.D.N.Y.'s careful evaluation proves otherwise. Although the court noted that "New York courts frequently reach similar results where the third party is the client's adult child or other close family member" (id. at 573 n.9), other courts treat those other family relationships with far more skepticism than in the spousal context. Next week's Privilege Point will address protection for the plaintiff's lawyer husband's use of his law firm's server – which could have had disastrous results.

- **[Privilege Point, 12/29/21]**

S.D.N.Y. Deals With Spouses and Law Firm Emails: Part II

December 29, 2021

Last week's Privilege Point summarized a Southern District of New York decision finding that the plaintiff's lawyer husband was inside privilege protection. Shih v. Petal Card, Inc., 565 F. Supp. 3d 557 (S.D.N.Y. 2021) (Moses, J.).

The court then addressed the privilege implications of plaintiff's husband's use of the Buckley Sandler law firm email system (where he was a summer clerk at the time). The court bluntly held that "the spousal privilege does not protect the emails sent to and from [plaintiff's lawyer husband] in the summer of 2017 over his buckleysandler.com email account." Id. at 575. The court applied the widely accepted standard articulated in In re Asia Global Crossing, Ltd., 322 B.R.D. 247 (Bankr. S.D.N.Y. 2005) — agreeing with defendants that "the use of an employer's email account negated any reasonable expectation of confidentiality and thus vitiated the privilege." Id. Fortunately for the plaintiff and her lawyer husband, the court held that the more robust work product protection survived — because his use of his law firm's email system had not "substantially increase[d] the opportunity for potential adversaries to obtain the information" (quoting another court's articulation of the work product waiver standard). Id. at 576 (alteration in original) (citation omitted).

Lawyers using their law firms' email systems should keep in mind the privilege waiver risks, even when communicating with their spouses.

- Popat v. Levy, No. 15-CV-1052W(Sr), 2022 U.S. Dist. LEXIS 108449, at *4, *5-7 (W.D.N.Y. June 17, 2022) (without citing the Asia Global standard, finding that a doctor could claim privilege for communications to a lawyer even though the doctor used his employer's email system; "Plaintiff argues that emails between counsel for SUNY Buffalo/UB Medical School and Dr. Levy are not protected by the attorney-client privilege because they were addressed to Dr. Levy's UBNS email and UBNS policy unambiguously states that employees have no expectation of privacy or confidentiality in their email communications."; "Plaintiff replies that SUNY cannot establish that the disputed emails with Dr. Levy were confidential because UBNS reserved the right to monitor and inspect emails to and from UBNS email accounts. Plaintiff also replies that SUNY has failed to establish that the emails were exchanged so that the SUNY defendants could obtain legal advice." (internal citation omitted); "Thus, SUNY Buffalo controls the privilege over communications between it's [sic] counsel and it's [sic] Chair of Neurosurgery at defendant UB Medical School irrespective of the fact that Dr. Levy has retained counsel to represent him as an individual defendant and as Chair of N[eu]rosurgery for defendant UBNS. The fact that such communications occurred through an email account which defendant UBNS was authorized to monitor and inspect does not undermine the confidentiality of such communications given the relationship between SUNY Buffalo and UBNS. See Dkt. #1, ¶ 11 (alleging that SUNY Buffalo controls and operates both defendant UB Medical School and defendant UBNS). SUNY Buffalo's privilege log represents that the emails at issue were communications between SUNY Buffalo counsel and SUNY Buffalo employees relating to plaintiff's complaint and charge of discrimination; the fact that one email also copied Dr. Levy's individual attorney does not alter this analysis.")

- **[Privilege Point, 11/16/22]**

Musk-Twitter Feud Privilege Fallout: Part I

November 16, 2022

Not surprisingly, the Musk-Twitter fast-track Delaware case generated privilege issues. One predictably recognized Musk's unique role in his varied revolutionary enterprises.

In Twitter, Inc. v. Musk, Civ. A. No. 2022-0613-KSJM, 2022 Del. Ch. LEXIS 227 (Del. Ch. Sept. 13, 2022), Twitter sought Musk's Twitter-related emails he sent and received on his SpaceX and Tesla email systems. Twitter relied on the commonly applied standard articulated in In re Asia Global Crossing, Ltd., 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005). In essence, under Asia Global an employee using his or her employer's email system forfeits privilege protection if the corporate employer: warns employees that they have no expectation of privacy; "maintain[s] a policy banning personal or other objectionable use"; and monitors employees' emails. Id. at *12 (citation omitted). SpaceX and Tesla met that standard, but affidavits reflected what the court described as "Musk-specific rules." Id. at *15-16. The court acknowledged that "[o]ne can debate whether this corporate reality makes for good 'corporate hygiene,'" but concluded that "the evidence rings true" that no one would access Musk's emails without his approval. Id. at *16-17.

The average person presumably should not rely on this case. Next week's Privilege Point describes another Musk-Twitter feud privilege issue that comes closer to the real world.

- Sickels v. McDonough, Case No. 4:21-CV-00963-JAR, 2023 U.S. Dist. LEXIS 201554, at *4-5, *5 (E.D. Mo. Nov. 9, 2023) (although not citing the Asia Global standard, holding that an employee of the Department of Veteran Affairs could not claim privilege for communications with her employee discrimination plaintiff's lawyer because she was warned about the lack of confidentiality expectation when using a government email system; "Defendant also provided evidence that it requires employees to acknowledge that their activity is not private through a security warning banner every time they login and access their account on a VA computer system. (ECF Nos. 38-3, 38-5). It provides annual training about these policies. (ECF No. 38-5). Sickels has undergone this training since she began her employment with the VA in 2012. (ECF No. 38-6 at p. 6). And Sickels was warned in April 2018 not to use Defendant's instant messaging system for anything that she wanted to keep private. (ECF No. 38-7). This evidence shows that Sickels had no expectation of privacy on her email account and server. The disputed communications are therefore not protected by the attorney-client privilege."; implying that the work product doctrine might protect communications, but noting that "neither Sickels nor her counsel have attempted to claim work product privilege or show that the documents attached to the emails were prepared in anticipation of litigation")

- Fine v Bowl Am., Inc., Civ. No. SAG-21-1967, 2023 U.S. Dist. LEXIS 218558, at *10, *11 (D. Md. Dec. 7, 2023) (in an opinion by Judge Copperthite, explaining that the privilege could protect communications sent to a husband via his wife's email address; "Plaintiffs first allege they are entitled to emails that were sent from counsel to Allan Sher via his wife's email address, since she is not a party. Defendants argue that the use of a third party's email does not destroy the privilege simply because it is addressed to Ms. Sher. ECF No. 114 at 12. The Court agrees."; "In this case, Defendants provide sufficient support that the communications between counsel and Mr. Sher were made in confidence for the purpose of obtaining legal advice. The fact that his wife provided technical support for Mr. Sher to receive those communications does not destroy the most venerable privilege between counsel and client. The Motion to Compel is DENIED as to these communications.")

E. Drafts

- Burton v. R.J. Reynolds Tobacco Co., 170 F.R.D. 481, 485), motion aff'd in part, denied in part, 177 F.R.D. 491 (D. Kan. 1997) ("When documents are prepared for dissemination to third parties, neither the document itself, nor preliminary drafts, are entitled to immunity. Documents which the client does not reasonably believe will remain confidential are not protected." (emphasis added)).
- SEC v. Schroeder, No. C07-03798 JW (HRL), 2009 WL 1125579, at *7, *9, *8, *10, *12 (N.D. Cal. Apr. 27, 2009) (addressing Skadden's representation of a Special Committee in investigating KLA-Tencor Corp.'s options backdating; explaining that the SEC had sued one of KLA's executives, who in turn sought several categories of Skadden's communications and documents; ordering production of Skadden's final interview memoranda that had been given to the SEC, but not its raw material that had never been disclosed outside the law firm; pointing to Skadden affidavits that the raw material represented opinion work product; "[E]ach of the individual Skadden attorneys who participated in the interviews has submitted a declaration attesting that they did not merely record verbatim (or substantially verbatim) the witnesses' statements. Rather, they used their knowledge about the facts and theories of the case to identify and filter which facts and comments by the witnesses were important to the investigation."; explaining that Skadden had only provided an oral report to KLA's outside auditors and that disclosure to the auditor did not waive work product protection -- noting that "disclosures to outside auditors do not have the 'tangible adversarial relationship' requisite for waiver" (emphasis added); "Schroeder seeks the production of documents and communications between the Special Committee and KLA's outside auditors. The only auditor that has been identified here is PwC. Reportedly, PwC has been KLA's auditor since at least 1994 and was KLA's auditor with respect to the restatement of the options in question. (Miller Decl., ¶¶ 23-24). Skadden says that, in connection with that restatement, PwC requested information about the Special Committee's investigation. On October 18, 2006, Skadden made an oral presentation to PwC, including a PowerPoint presentation. No documents were provided to PwC at that time. (Id. ¶ 25). According to Skadden, at PwC's request, Skadden attorneys also later discussed information learned from certain witness interviews, using the Final Interview Memoranda to refresh their recollection. The Final Memoranda were not provided to PwC. (Id.[.]) Skadden's opposition brief states that Skadden and the Special Committee disclosed certain documents to PwC to assist in the audit of KLA and the restatement of the company's historical financial statements. (Skadden Opp. at 18). On the record presented, it is not clear precisely

what those documents are, save the PowerPoint presentation that was made. (See Miller Decl. ¶¶ 23-26).” (emphases added); contrasting the KLA scenario with the Royal Ahold case; “Schroeder’s other cited cases do not support the broad waiver he seeks here. In Royal Ahold N.V. Securities Litig., 230 F.R.D. 433 (D. Md. 2005), a securities class action, the defendant company disclosed the details of its internal investigation in a public SEC filing and produced investigative reports (which quoted from witness interview memoranda) to the lead plaintiffs, but nonetheless withheld the majority of the underlying interview memoranda. The court found that because the company publicly disclosed details of its internal investigation ‘in order to improve its position with investors, financial institutions, and the regulatory agencies, it also implicitly has waived its right to assert work product privilege as to the underlying memoranda supporting its disclosures.’ Id. at 437. Here, by contrast, Schroeder already has the interview memoranda underlying the Special Committee’s disclosure to the SEC.”; rejecting the executive’s effort to obtain communications between Skadden and its forensic accounting investigation consultant; “Communications between Skadden and its consultant, LECG, need not be produced. The withheld communications reportedly contain ‘documents related to methods for document review and retention, discussions regarding how to locate and interpret metadata, a collection of documents that LECG deemed important related to a particular witness, and emails discussing special projects that LECG completed during the investigation.’ (Miller Decl. ¶ 34). It is not apparent that any of those communications were disclosed beyond Skadden and LECG. Further, it appears that these communications comprise opinion work product, and Schroeder has not demonstrated a substantial need for any facts that might be contained in them. Schroeder’s motion as to these documents is denied.” (emphases added); ordering Skadden to produce the factual portion of documents provided to KLA and its law firm Morgan Lewis, but not Skadden’s drafts or other documents “that contain or reflect” opinion work product; “With respect to the communications between and among Skadden/the Special Committee and KLA/Morgan Lewis, it is not clear exactly what this universe of documents includes. However, the withheld communications reportedly comprise ‘documents reflecting numerous requests for information from the Company and discussions of what Skadden did during the investigation.’ (Miller Decl. ¶ 35). This court finds that any factual information contained in these documents should be produced. However, drafts and other documents that contain or reflect an attorney’s mental impressions (if any) need not be produced (or, if feasible, such information may be redacted). See Roberts, 254 F.R.D. at 383 (ordering production of attorney notes reflecting communications with the company’s board of directors, with opinion work product redacted).” (emphases added); “As for the KLA

opinion grant binders, on the record presented, it appears that the option summaries and legal memoranda comprise facts that are inextricably intertwined with opinion work product.")

- In re Pappas, Case No. 08-10949, 2009 Bankr. LEXIS 1394, at *1-2, *4 (Bankr. D. Del. June 3, 2009) ("I have determined that drafts of documents prepared for eventual release to third parties - such as loan documents, acceleration notices, and guarantee demands - are not protected by the attorney work product doctrine or the attorney-client privilege." (emphasis added)).

- **[Privilege Point, 6/26/13]**

Does the Privilege Protect a Lawyer's Draft Document?

June 26, 2013

Most courts recognize the abstract principle that lawyers' communications to their clients deserve privilege protection only if the communication contains or otherwise reflects client confidences. For example, the privilege normally does not protect a lawyer's verbatim transmittal to a client of what the lawyer learned from some government official or other third party.

How does this basic principle apply to draft documents a lawyer prepares? Most courts protect such draft documents, explaining, for example, that "[d]rafting legal documents is a core activity of lawyers, and obtaining information and feedback from clients is a necessary part of the process." Diversey U.S. Holdings, Inc. v. Sara Lee Corp., No. 91 C 6234, 1994 U.S. Dist. LEXIS 2554, at *4 (N.D. Ill. Mar. 3, 1994). However, some courts take a narrower approach. In Earthworks v. United States Dep't of Interior, the court held that "the lawyer's draft, transmitted to [clients], does not yield any confidential communication from them." Civ. A. No. 09-1972 (HHK/JMF), 2013 U.S. Dist. LEXIS 49873, at *5 (D.D.C. Apr. 2, 2013). Fortunately, the court acknowledged that this approach would apply "particularly . . . in a governmental situation," in which "the lawyer may be the chief draftsman of the particular document which she then sends to her co-workers for their views and thoughts." Id.

Most lawyers would be surprised to hear that the privilege does not protect all draft documents they prepare for their client's review. While most courts do apply the privilege that broadly, lawyers should remember that the privilege exists primarily to protect what their clients tell them.

- **[Privilege Point, 4/29/15]**

Court Offers Good Privilege News for Draft Form 10-K Filings

April 29, 2015

Courts disagree about the attorney-client privilege protection's applicability to draft documents whose final version will be publicly disclosed. Public companies naturally worry about this issue's impact on their draft securities filings.

In Smith v. Unilife Corp., Civ. A. No. 13-5101, 2015 U.S. Dist. LEXIS 18755 (E.D. Pa. Feb. 13, 2015), a whistleblower plaintiff alleged that Unilife's 2011 Form 10-K report contained false and misleading statements. He sought discovery of Unilife's draft 10-Ks and company lawyers' communications to and from non-lawyer consultants "concerning the [drafts'] contents, style and 'wordsmithing.'" Id. at *5. The court first found that the consultants were the "functional equivalent" of employees — refreshingly acknowledging that "[a] trial judge is not in a good position to second-guess a corporate decision to rely on an independent consultant or an employee to accomplish a specific task." Id. at *7-8. The court then held that the draft 10-Ks deserved privilege protection — citing an earlier decision protecting 10-Ks that contained "legal advice and communications between a law firm and its client . . . even though the final version of the Form 10-K was publicly filed, because the drafts contained information not included in the final version." Id. at *9-10 (citing In re U.S. Healthcare, Inc. Sec. Litig., Master File No. 88-0559, 1989 U.S. Dist. LEXIS 1043, at *12 (E.D. Pa. Feb. 8, 1989)).

Although many decisions seem hostile to corporations' privilege claims, some courts' analyses provide good news.

- FTC v. Reckitt Benckiser Pharms., Inc., Misc. No. 3:14mc5, 2015 U.S. Dist. LEXIS 29203, at *16-17, *17-18 (E.D. Va. Mar. 10, 2015) (finding that the privilege did not protect drafts prepared with a lawyers assistance if the final version of the document was intended to be disclosed; "In conclusion, in the Fourth Circuit, the attorney-client privilege with respect to confidential communications does not apply to published documents and the underlying details and data if, at the time the communication was made, the client intended that the document was to be made public. Therefore, 'when the attorney has been authorized to perform services that demonstrate the client's intent to have his communications published . . . the client lose[s] the right to assert the privilege as to the subject matter of those communications.' United States v. (Under Seal), 748 F.2d [871,] 876 [(4th Cir. 1984)]."; "It is important to note, however, that the intended publication of a communication does not eviscerate the privilege for all of the material produced for, or in connection with, publication. Rather 'if any of the non-privileged documents contain client communications not directly related to the published data, those communications, if otherwise privileged, must be removed by the reviewing court before the document may be produced.' United States v. (Under Seal), 749 F.2d at 875, n.7. In other words, although some documents may not be privileged in their entirety, other documents, such as attorney's notes, communications between the attorney and client containing relevant data, and other documents which might contain 'details underlying the data' might well be privileged. That determination would require an individualized inspection of the documents to ensure that only non-privileged content is disclosed." (emphasis added)).

- Barba v. Shire US, Inc., Case No. 13-21158-CIV-LENARD/GOODMAN, 2015 U.S. Dist. LEXIS 65859, at *11, *11-12 (S.D. Fla. May 20, 2015) (rejecting the Eastern District of Virginia's approach to draft documents expressed in FTC v. Reckitt Benckiser Pharms., Inc., No. 3:14mc5, Dkt. Nos. 42-43 (E.D. Va. Mar. 10, 2015); "Plaintiffs argue that the attached 'Citizens Petition' document is not privileged under the 'draft document' rule, which they say was applied in a similar case, FTC v. Reckitt Benckiser Pharms., Inc., No. 3:14mc5, Dkt. Nos. 42-43 (E.D. Va. Mar. 10, 2015). The Undersigned's review of that case however does not find support for Plaintiffs' position. In that case, a court in the Eastern District of Virginia stated the Fourth Circuit's view that 'the attorney-client privilege with respect to confidential communications does not apply to published documents and the underlying details and data if, at the time the communication was made, the client intended that the document was to be made public.' Id. at p. 15."; "While Plaintiffs may be entitled to the draft of a document that was ready to publish, it is clear from the email exchange that this document is attached to a document which was still under consideration and in the drafting process. The specific email that the document is attached to is from a non-attorney and addressed directly to two attorneys (one in-house counsel and one outside counsel) while copying two more (in-house counsel). Further, the communication in that email calls the attached document the 'latest version' and notes that the parties involved in the email will talk about the contents of the document at a later date. From the Undersigned's perspective, this is a clear indication that the document is not ready to publish and therefore is not subject to the 'draft document rule,' as Plaintiffs argue (if the Undersigned agreed that the rule was even applicable in this Circuit). Accordingly, CIT021317-324 should remain protected by privilege." (emphasis added)).

- Johnson v. Ford Motor Co., Case Nos. 3:13-cv-06529, -14207, & -20976, 2015 U.S. Dist. LEXIS 119886, at *155-56 (S.D. W. Va. Sept. 3, 2015) (holding that the attorney-client privilege protected communications in which a corporate employee sought an in-house lawyer's advice about how to respond to public inquiries; "Mr. Engle's [design analysis engineer for defendant] purpose in communicating with Mr. Logel [defendant's in-house lawyer] was to obtain legal advice about the wording of an investigation report Mr. Engle intended to supply to the Chicago Transit Authority. . . . Mr. Engle did not provide data to Mr. Logel for the purpose of drafting the investigation report; instead, he submitted the completed report to Mr. Logel to review with an eye toward 'possible legal and/or litigation ramifications of the statements made in [the] draft report and as to the general wording of the document, including whether any information should be omitted or included to comply with legal requirements or principles.' . . . In other words, Mr. Engle's communication with Mr. Logel was not a request for assistance in generating a public report; rather, it was a request to insure that the wording of a report that detailed a completed investigation did not expose the corporation to liability, or negatively affect its position in potential litigation. Being retained to provide legal guidance on how to reduce a client's risk of liability is different than being retained for the specific purpose of preparing a report intended for public dissemination. Certainly, Mr. Engle had reason to obtain legal advice on the wording of the report given his concern that the underlying incidents would lead to litigation. . . . Contrary to Plaintiffs' contention, there is nothing about this request for advice that suggests Mr. Engle's intention to have any of his communications with Mr. Logel published. . . . Accordingly, the Court finds that the e-mail exchange between Mr. Engle and Mr. Logel, and the draft showing the edits of Mr. Logel." (emphases added)).
- EEOC v. Tex. Roadhouse, Inc., Civ. A. No. 11-cv-11732-DJC, 2015 U.S. Dist. LEXIS 161929, at *10 (D. Mass. Dec. 2, 2015) ("This is an email concerning changes that counsel was making to a document. The document has already been provided to the EEOC in discovery. The email and the document attached to the email, as it was undergoing review and was being edited by counsel, are privileged." (emphasis added)).

- Medline Indus., Inc. v. C.R. Bard, Inc., No. 14 CV 3618, 2016 U.S. Dist. LEXIS 9767, at *8-9, *11-12, *12 (N.D. Ill. Jan. 26, 2016) (holding that the privilege protected an employee inventor's draft affidavit even though the final version was filed; also holding that a non-employee's draft affidavit was not protected by the privilege despite that person's claim that the lawyer also represented him; "In Spalding [In re Spalding Sports Worldwide, Inc.], 203 F.3d 800 (Fed. Cir. 2000)], the Federal Circuit found that 'invention records' -- documents including information such as the names of inventors, descriptions of the invention, closest prior art, and dates of publication -- constitute privileged communications as long as they are provided to an attorney for purposes of securing legal services or assisting in a legal proceeding."; "[P]rivilege analysis in the context of patent suits no longer turns on whether a document is technical in nature or whether it was submitted, in its final form, to the USPTO. . . . Rather, privilege depends on whether 'the overall tenor of the document indicates that it is a request for legal advice or services.'" (citation omitted); "Based on the descriptions in Medline's privilege log and this court's in camera review, the court finds that drafts of the Tomes declarations are privileged. Medline asserts that Tomes, an inventor of record and a Medline employee at the time the documents were created, worked closely with Burrus [lawyer] to write the drafts for ultimate submission to the USPTO. . . . And the draft documents appear to reflect 'communications involved in the strategizing process' during which the attorney 'attempts to shape the [patent] application for presentation to the patent office.' . . . In crafting the final declarations, Burrus and Tomes likely had to make judgment calls, both technical and legal, to persuade the USPTO to issue the patent." (emphases added)).

- SCF Waxler Marine LLC v. M/V ARIS T, Civ. A. Nos. 16-902, -959, -1022, -1060, -1134, & -1614, SECTION "A"(1), 2017 U.S. Dist. LEXIS 90256, at *25 (E.D. La. June 13, 2017) (holding that the attorney-client privilege protected preliminary drafts of an incident report, even though the final version was intended to be made public; "[T]he Court finds that the ultimate disclosure of the final draft of the NOBRA Pilot Incident Report does not result in a waiver of the privilege. . . . [T]he Court finds that the drafts and notes were never intended to be made public. They were conveyed in confidence in the course of obtaining and giving legal advice. While Leone and his counsel were obviously working towards a document that would be made public, they did not intend that their drafts and analysis would be subject to disclosure. . . . [T]he argument raised by Genesis [third party] here would result in disclosure of every draft of a pleading, brief, or affidavit that is exchanged between counsel and client merely because such drafts concern facts and the final draft is made public. At oral argument, counsel for Genesis seemed willing to live with this extraordinary result, but the Court finds that such a holding goes too far." (emphases added)).
- In re Syngenta AG MIR 162 Corn Litig., MDL No. 2591, Case No. 14-md-2591-JWL, 2017 U.S. Dist. LEXIS 92606, at *286 (D. Kan. June 13, 2017) ("Drafts of documents to be submitted to third parties, although prepared by counsel, are not generally privileged. Submission of the document to the third party removes any cloak of privilege." On the other hand, drafts of memoranda prepared for a client are protected." (emphasis added)).

- **[Privilege Point, 8/30/17]**

The Trouble with Drafts: Part I

August 30, 2017

Because attorney-client privilege protection depends on confidentiality, the privilege evaporates once clients determine to disclose privileged communications – even before the disclosure occurs. For example, the final version of a client-approved pleading loses its privilege protection even before the lawyer files it. Some courts inexplicably misapply this basic principle to strip privilege protection from preliminary privileged drafts reflecting clients' and lawyers' input.

In In re Syngenta AG MIR 162 Corn Litigation, MDL No. 2591, Case No. 14-md-2591-JWL, 2017 U.S. Dist. LEXIS 92606 (D. Kan. June 13, 2017), the court provided an otherwise very helpful list of non-privileged information and communications. After correctly explaining that "drafts of memoranda prepared for a client are protected," the court also indicated that "[d]rafts of documents to be submitted to third parties, although prepared by counsel, are not generally privileged. Submission of the document to the third party removes any cloak of privilege." *Id.* at *286 (alteration in original; citation omitted). The court quoted another District of Kansas case, which was even more blunt. Burton v. R.J. Reynolds Tobacco Co., 170 F.R.D. 481, 485 (D. Kan. 1997) ("When documents are prepared for dissemination to third parties, neither the document itself, nor preliminary drafts, are entitled to immunity." (emphasis added)). Another court even held that "handwritten communications between [a corporate client's employees] and its attorneys" on draft offering documents did not deserve privilege protection, because the client intended to publicly disseminate the final version. In re Micropro Sec. Litig., No. C-85-7428-ECF (JSB), 1988 U.S. Dist. LEXIS 19375, at *7 (N.D. Cal. Feb. 26, 1988).

This approach does not make much sense. For instance, judges themselves prepare draft opinions, but their disclosure of an opinion's final version does not strip away confidentiality from their in-progress drafts. Next week's Privilege Point will discuss a decision decided the same day as Syngenta – but which took what seems to be the proper approach.

- **[Privilege Point, 9/6/17]**

The Trouble with Drafts: Part II

September 6, 2017

Last week's Privilege Point discussed a decision holding that the privilege did not protect in-progress drafts of documents whose final version will be disclosed to third parties. In re Syngenta AG MIR 162 Corn Litig., MDL No. 2591, Case No. 14-md-2591-JWL, 2017 U.S. Dist. LEXIS 92606 (D. Kan. June 13, 2017).

On the same day, the Eastern District of Louisiana dealt with this issue. In SCF Waxler Marine LLC v. ARIS T, Civ. A. Nos. 16-902, -959, -1022, -1134, & -1614 SECTION: "A"(1), 2017 U.S. Dist. LEXIS 90256 (E.D. La. June 13, 2017), the court rejected a party's effort to discover preliminary drafts of an incident report whose final version was ultimately made public. The court noted that the client and his lawyer "did not intend that their drafts and analysis would be subject to disclosure." Id. at *25. The court then emphasized an obvious point some courts seemingly overlook – "the argument raised by [the party seeking discovery] here would result in disclosure of every draft of a pleading, brief, or affidavit that is exchanged between counsel and client merely because such drafts concern facts and the final draft is made public." Id.

The SCF Waxler Marine court's refreshingly logical approach should carry the day in every court. But to be safe, clients and their lawyers should carefully document (1) both of their roles in drafting documents for ultimate disclosure; (2) the lawyer's legal input as reflecting legal advice, rather than business, stylistic, or grammatical advice; and (3) their intent to maintain their drafting process's confidentiality until they agree on a final version to be disclosed.

- In re Niaspan Antitrust Litig., Master File No. 13-MD-2460, 2017 U.S. Dist. LEXIS 135753, at *8 (E.D. Pa. Aug. 24, 2017) ("Entries 427, 581, 635, 2145, 2155, and 612 were properly withheld under the attorney-client privilege because those communications clearly convey legal advice. Entry 427 is a portion of a draft legal agreement on which Kos general counsel Koven made handwritten comments and edits. 'Preliminary drafts of contracts are generally protected by attorney client privilege, since '[they] may reflect not only client confidences, but also legal advice and opinions of attorneys, all of which is protected by the attorney client privilege.'". . . The Court concludes that entry 427 is precisely such a document, and is protected by the attorney-client privilege." (emphasis added) (alteration in original) (citations omitted))

- [Privilege Point, 8/29/18]

The Attorney-Client Privilege Does Not Protect All Lawyer Changes to Draft Documents

August 29, 2018

Some courts erroneously fail to extend privilege protection to draft documents prepared by or revised by a lawyer before their final disclosure beyond the attorney-client relationship. Even courts that properly acknowledge the availability of privilege protection for such documents must examine the revisions' primary purpose.

In Entrata, Inc. v. Yardi Systems, Inc., the court rejected defendant's privilege claim for "a draft letter showing edits made by ... Yardi's Vice President and General Counsel." Case No. 2:15-cv-00102-CW-PMW, 2018 U.S. Dist. LEXIS 104171, at *9 (D. Utah June 20, 2018). The court: (1) correctly noted that "[t]he mere fact that [defendant's General Counsel] was involved with [the draft letter] does not automatically render it subject to attorney-client privilege protection"; (2) erroneously stated that "documents prepared to be sent to third parties, like [the letter], even when prepared by counsel, are generally not attorney-client privileged"; (3) correctly rejected privilege protection after "conclud[ing] that the types of edits made by [defendant's General Counsel] constitute nothing more than simple editorial changes, which do not qualify for attorney-client privilege protection." Id.

Some lawyers mistakenly assume that the privilege protects all of their changes to clients' draft documents. However, every withheld change in such draft documents must meet the "primary purpose" test to deserve privilege protection. Typographical and stylistic revisions generally do not deserve privilege protection.

- [Privilege Point, 11/14/18]

How Do Clients Successfully Assert Privilege Protection for Draft Documents They Send to Lawyers for Review?

November 14, 2018

Understandably, clients can rarely if ever claim privilege protection for preexisting documents they send to their lawyers. But clients also send their lawyers in-progress documents about which they want lawyers' advice, and sometimes assistance in drafting. How do courts tell them apart?

In Valassis Communications, Inc. v. News Corp., No. 17-cv-7378 (PKC), 2018 U.S. Dist. LEXIS 160234 (S.D.N.Y. Sept. 19, 2018), Judge Castel acknowledged these two basic principles. The court then explained that "[p]reexisting business documents that are sent to a lawyer are fundamentally different from drafts because their business purpose (or content) cannot be affected by any after-the-fact advice received from the lawyer." Id. at *4-5. The court also recognized that clients might ask for abstract legal advice, but "[t]o save time and to place the inquiry in a concrete setting, the business person could instead send a draft of the material" about which the clients seek advice. Id. at *5 (footnote omitted). Those documents can deserve privilege protection -- "[a]ssuming the transmittal of those drafts were confidential and implicitly or explicitly sought the lawyer's advice." Id. The court also explained how it would differentiate between unprotected preexisting documents and protected draft documents: "[t]he Court's in camera review ensures that, as to any document as to which the privilege is upheld, there was a bona fide request for legal advice and not a subterfuge to evade discovery obligations." Id. at *8. The court then addressed possible privilege protection for each withheld document one by one.

Given this well-settled law and judicial approach, lawyers should educate their clients who send them draft documents to describe them as drafts, and to explicitly ask for legal advice if that is what they seek – so courts' "in camera" review will reach the right result.

- [Privilege Point, 12/26/18]

Court Needs More Information to Assess Draft Documents' Privilege Protection

December 26, 2018

The attorney-client privilege can protect lawyers' input into draft documents created by the lawyer or by the client – which of course evaporates when the client approves the finished document for disclosure outside the relationship. Not surprisingly, courts examine such lawyers' revisions to assess whether those lawyers were providing legal input rather than business, grammatical, stylistic suggestions, etc.

In Shenwick v. Twitter, Inc., the court noted that defendants withheld "several drafts of documents with comments provided with the redlined version." Case No. 16-cv-05314-JST (SK), 2018 U.S. Dist. LEXIS 185714, at *7 (N.D. Cal. Oct. 30, 2018). But because the court could not "determine the identity of the author of comments [in] these draft documents," it ordered defendants "to provide the Court with the identity of the individuals who provided the comments and link them to the comments in the draft documents submitted to the Court." Id.

The lesson from such decisions is self-evident. Lawyers should always memorialize their role in any drafting process, and stand ready to identify their suggested changes – including the nature of their legally-driven revisions.

- [Privilege Point, 1/29/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part III**

January 29, 2020

The last two Privilege Points described four favorable analyses from a Southern District of New York decision (Judge Gorenstein) assessing defendant Barnes & Noble's privilege assertions covering its investigation and later firing of its CEO for sexual harassment. Parneros v. Barnes & Noble, Inc., 332 F.R.D. 482 (S.D.N.Y. 2019).

Fifth, the court addressed fired CEO Parneros's argument that Barnes & Noble waived its privilege by eliciting at his deposition extensive testimony about a meeting at which Parneros "apologized for his conduct" to the company's Senior VP, and another meeting attended by Barnes & Noble's Founder and Chairman. Id. at 489. The court rejected Parneros's argument – noting that the company had not asserted privilege for either one of the meetings, but rather "taken the position that certain notes taken at the apology meeting as part of the investigation overseen by [General Counsel] Feuer are privileged." Id. at 496. This meant that the deposition testimony about those non-privileged meetings did not waive any privilege. But the privilege still protected the "notes taken by an attorney or his designee at a non-privileged meeting . . . as long as the notes were taken for the purpose of allowing counsel to give legal advice." Id. As with other interview notes prepared by General Counsel Feuer, the court did not address work product protection – which would seem to be a more appropriate protection. Sixth, the court addressed fired CEO Parneros's argument that the privilege did not protect drafts of press releases that were sent to General Counsel Feuer and/or outside counsel at Paul, Weiss. The court rejected Parneros's argument, pointing to Feuer's declaration that the company's Senior VP of Corporate Communications of Public Affairs and VP of Investor Relations sent draft press releases to him and to Paul Weiss "for his 'review and legal advice' and were sent to 'outside counsel concerning the wording of the announcement for their review and legal advice.'" Id. at 498.

The next Privilege Point will describe other favorable language from this significant case.

- Berkley Custom Ins. Managers v. York Risk Services Group, Inc., No. 18-cv-9297 (IJL), 2020 U.S. Dist. LEXIS 165618, at *13, *13-14, *14 (S.D.N.Y. Sept. 10, 2020) (holding that privilege protected preliminary drafts of a document, but not the final version); "Finally, as to a select subset of documents, York argues that draft communications to third parties intended publication are not within the privilege. See Dkt No. 40 at 5."; "In this Circuit, however, the fact that 'documents appear to be drafts of communications the final version of which might eventually be sent to other persons, and as distributed would not be privileged,' provides 'no basis . . . for inferring that [the privilege holder] did not intend that the drafts—which reflect its confidential requests for legal advice and were not distributed—to be confidential.' In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 731 F.2d 1032, 1038 (2d Cir. 1984); see In re General Motors LLC Ignition Switch Litig., 80 F. Supp.3d 521, 528 (S.D.N.Y. 2015) (same); Favors v Cuomo, 285 F.R.D. 187, 198 (E.D.N.Y. 2008) ('[I]n this Circuit, the publication of a non-confidential attorney-client communication does not create an inference that related communications or earlier drafts were similarly not intended to be confidential.') (citing In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d at 1037)." (alterations in original); "It is undisputed that each of the draft letters is attached to an email in which Berkley requests that Wade Clark provide legal advice concerning claims and positions advanced in the underlying litigation. In response, Wade Clark prepared draft letters discussing Berkley's legal position. The circumstances reflect that the documents were not intended for publication. Accordingly, the motion to compel with respect to those documents on the grounds that they are drafts is denied.").

- Coventry Capital US LLC v. EEA Life Settlements Inc., Civ. A. No. 17 Civ. 7417 (VM) (SLC), 2021 U.S. Dist. LEXIS 181137, at *8-9 (S.D.N.Y. Sept. 22, 2021) (finding that the attorney-client privilege protected a draft document prepared by a corporate executive with the input of its general counsel; “The Court finds that each of the drafts of the Manager Recommendations (and their cover emails) are protected by the attorney-client privilege because they constitute communications for the purpose of seeking or providing legal advice. Each document reflects communications between Mr. Piscaer [Corporate Executive] and Mr. Harrop [General Counsel] concerning legal review of the contents of the respective draft of the Manager Recommendations. It is undisputed that the withheld drafts were not shared with third parties, and EEA Inc.'s production of versions of the Manager Recommendations, which did not contain such a request for or provision of legal advice, did not act as a waiver of the privilege.”)

F. Garner Doctrine

- Weil v. Investment/Indicators, Research & Mgmt., Inc., 647 F.2d 18, 23 (9th Cir. 1981) ("Without passing on the merits of Garner, we find it inapposite to the case before us. Weil is not currently a shareholder of the Fund, and her action is not a derivative suit. The Garner plaintiffs sought damages from other defendants in behalf of the corporation, whereas Weil seeks to recover damages from the corporation for herself and the members of her proposed class. Garner's holding and policy rationale simply do not apply here.").
- Ryskamp v. Looney, Civ. A. No. 10-cv-00842-WJM-KLM, 2011 U.S. Dist. LEXIS 98644 (D. Colo. Sept. 1, 2011) (finding that the Garner doctrine did not apply because a small number of shareholders had filed a lawsuit and could not establish good cause).
- Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW, 95 A.3d 1264, 1278 (Del. 2014) (applying the Garner doctrine (Garner v. Wolfenbarger, 430 F.2d 1093 (5th Cir. 1970)) in a Delaware § 220 action, in which union shareholders sought privileged documents about Wal-Mart's alleged Mexican corruption investigation; "[T]he Garner doctrine fiduciary exception to the attorney-client privilege is narrow, exacting, and intended to be very difficult to satisfy. It achieves a proper balance between legitimate competing interests."; "We hold that the Garner doctrine should be applied in plenary stockholder/corporation proceedings. We also hold that the Garner doctrine is applicable in a Section 220 action. However, in a Section 220 proceeding, the necessary and essential inquiry must precede any privilege inquiry because the necessary and essential inquiry is dispositive of the threshold question -- the scope of document production to which the plaintiff is entitled under Section 220." (footnote omitted)).

- NAMA Holdings, LLC v. Greenberg Traurig LLP, 18 N.Y.S.3d 1, 7, 7-8, 8, 9, 9-10, 10, 10-11 (N.Y. App. Div. 2015) (applying the fiduciary exception; holding that an investor which owned seventy percent of an LLC did not automatically deserve access to the LLC's privileged documents, and remanding for an in camera review; "In the corporate context, where a shareholder (or, as here, an investor in a company) brings suit against corporate management for breach of fiduciary duty or similar wrongdoing, courts have carved out a 'fiduciary exception' to the privilege that otherwise attaches to communications between management and corporate counsel. This Court has not previously defined the parameters of the exception, so we take the opportunity to do so here."; "The fiduciary exception has its origins in English trust law, which long ago recognized that the fiduciary nature of the relationship between a trustee and a beneficiary of a trust provides an exception to the privilege with respect to communications between the trustee and the trust's attorney The theory is that when a trustee seeks legal advice in executing his or her fiduciary duties, he or she is acting ultimately on behalf of the beneficiaries of the trust and, accordingly, cannot cloak his or her actions from them, the attorney's 'real clients.'" (citation omitted); "In 1970, the U.S. Court of Appeals for the Fifth Circuit extended the fiduciary exception to the corporate environment in Garner v Wolfinbarger (430 F.2d 1093 [5th Cir. 1970], cert denied 401 U.S. 974, 91 S. Ct. 1191, 28 L. Ed. 2d 323 [1971])"; "Despite its critics, the fiduciary exception has been widely accepted throughout most of the United States in trustee-beneficiary and corporation-shareholder cases" (footnote omitted); "Several New York courts have also recognized the fiduciary exception -- both in corporation-shareholder and trustee-beneficiary cases -- and we are not aware of any that have rejected it outright"; "In extending the fiduciary exception to the corporate sphere, the Garner court set forth a non-exhaustive list of factors that should be considered to determine whether a party has shown good cause for applying the exception in a given case."; "The Garner test remains viable, and it strikes the appropriate balance between respect for the privilege and the need for disclosure; therefore, we adopt it here."; "Here, the motion court determined that NAMA demonstrated good cause to apply the fiduciary exception to the withheld communications without considering the factors set forth in either Garner or Hoopes [Hoopes v. Carota, 531 N.Y.S.2d 407 (N.Y. App. Div. 1988)]. . . . For example, we do not know whether the approximately 3,000 communications on the Privilege Log pertain to past or prospective actions, whether the information sought is available from other sources, or whether any of the communications concern advice regarding the instant litigation."; "Thus, although defendants do not take issue with the motion court's finding of good cause -- they focus on the determination that there never was an adversarial relationship between

NAMA and Alliance -- we conclude that the case must be remanded for the court to conduct a comprehensive good-cause analysis."; "While some factors in the Garner test are relevant to a determination of adversity, Garner did not create a categorical adversity limitation. Thus, adversity is not a threshold inquiry but a component of the broader good-cause inquiry. Moreover, of the Garner factors that pertain to adversity, some will indicate whether the parties are generally adverse, while others will require a review of the communications in dispute; the relevant factors may weigh against finding good cause to apply the fiduciary exception with respect to those communications that reveal adversity. Accordingly, a court may find that the party seeking disclosure has shown good cause to be given access to some communications but not others."; "That NAMA is a 70% majority investor in Alliance and is suing the managers derivatively suggests that it is not, in this action, generally adverse to Alliance. However, while the derivative nature of a shareholder's claim tends to support a finding of good cause, it is not dispositive.").

- [Privilege Point, 11/10/21]

What Is the Garner Doctrine, and Why Is It Dangerous?

November 10, 2021

Under what is called the "fiduciary exception," a fiduciary's beneficiary sometimes may access otherwise privileged communications between the fiduciary and its lawyer – based on the law's artificial identification of the beneficiary as the fiduciary's lawyer's true "client." A branch of this fiduciary exception entitled the Garner doctrine occasionally allows shareholders to rely on this "fiduciary exception" to access otherwise privileged communications between: (1) corporate management whom the shareholders elect; and (2) the corporation's lawyers who advise that management. Significantly, in 2014, the Delaware Supreme Court acknowledged and applied the Garner doctrine in ordering Wal-Mart to produce investigation-related privileged communications to several Wal-Mart shareholders (labor unions). Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW, 95 A.3d 1264 (Del. 2014).

In Drachman v. BioDelivery Sciences International, Inc., C.A. No. 2019-0728-LWW, 2021 Del. Ch. LEXIS 184 (Del. Ch. Aug. 25, 2021), the court acknowledged the Garner doctrine's viability in Delaware, but found it inapplicable for now in the scenario the court addressed. The court noted that "the plaintiffs are attempting to employ Garner to short-circuit the discovery process," and that "it would be inequitable to invade that privilege at the outset of discovery before the plaintiffs have exhausted other avenues." Id. at *14-15.

Although defendants in this case dodged the Garner bullet, corporations and their lawyers should remember the risk that sometimes their corporate client's shareholders may be deemed to be those lawyers' real "clients," and (as the Drachman court put it) "invade the corporation's privilege." Id. at *8-9.

V. SOURCES OF PROOF

A. Client-to-Lawyer Communications

- Travelers of N.J. v. Weisman, Dkt. No. A-4085-10T4, 2012 N.J. Super. Unpub. LEXIS 567, at *29 (N.J. Super. Ct. App. Div. Mar. 15, 2012) ("From our sampling of the file, it appears that MBUSA's [defendant] in-house attorneys rarely responded to these e-mails, if at all.").
- In re Plasma Derivative Protein Therapies Antitrust Litig., Nos. 09 C 7666 & 11 C 1468, 2012 U.S. Dist. LEXIS 159368, at *10-11 (N.D. Ill. Nov. 7, 2012) ("Baxter [defendant] has argued that the document is privileged, and to support its claim it has offered a declaration from Ms. Ladone [Baxter V.P.] explaining that the attachment, written by her, was 'a draft set of key messages for an upcoming investor conference.' . . . Ms. Ladone states that she wrote the document 'in response to an earlier communication by Ms. Lichtenstein [Baxter's General Counsel at the time] requesting a legal review of Baxter's communications for the upcoming investor conference.' . . . She further states that she wrote the email and the attachment 'for the purpose of seeking legal advice from and discussing legal issues with senior in-house counsel about the messages we could convey to investors at the upcoming conference.' . . . But this purpose is not apparent from the face of the document or the email. On its face the document appears to be drafted and circulated for primarily a business purpose - namely, to get all the potential players on the same page as to how to respond to inquiries at the upcoming investor conference. There is nothing in the body of the email or the document - other than the inclusion of lawyers on the distribution list - to suggest that Ms. Ladone was soliciting legal advice. Ms. Ladone's self-serving declaration, drafted more than five years after the fact, is not enough to trigger a privilege that clearly did not exist when the document was created." (emphases added)).

- Spread Enters., Inc. v. First Data Merch. Servs. Corp., No. CV 11 4743 (ADS) (ETB), 2013 U.S. Dist. LEXIS 22307, at *6-7, *7-8 (E.D.N.Y. Feb. 19, 2013) ("Nor is there any response from Cohen [in-house lawyer] at issue that could be construed as providing legal advice. In fact, Cohen's only response throughout the entire series of emails came almost one month after MacNaughton [executive for defendant] sent his original email and merely suggests that the parties involved 'recap the initial issue' and where First Data was in its response to it. . . . Again, however, nothing about this email appears to be of a legal nature."; ignoring the in-house lawyer's declaration; "Cohen asserts in his declaration that he was 'acting in his capacity as an attorney in the virtual discussion, as well as any other discussions (whether virtual, by telephone or in person) in which [he] participated' with respect to the MacNaughton email." (internal citation omitted) (emphases added)).

- Earthworks v. U.S. Dept. of the Interior, Civ. A. No. 09-1972 (HHK/JMF), 2013 U.S. Dist. LEXIS 49873, at *4-5, *5-6 (D.D.C. Apr. 2, 2013) (holding that a lawyer's draft of contemporaneous documents did not deserve privilege protection; "Whether or not a document styled a draft in a privilege log is privileged can be a multifaceted and fact-bound determination. The transmittal of a communication from a client to a lawyer with an express request for guidance presents the easy case: 'Here is the draft employment agreement I am going to ask my boss to sign. Let me know if it protects my legal rights.' In other circumstances, the absence of an explicit request for advice may not doom the claim of privilege, if the confidential nature of the communication can be discerned from what the lawyer has said or done. For example, a red lined edited draft of the agreement from the lawyer to the client may, in a certain context, itself permit the inference that the client sent the draft to the lawyer expecting the lawyer to provide confidential guidance as to contents of the documents. The process of the exchange may itself bespeak an intention by the client that her transmittal of the draft be a confidential request for guidance." (emphasis added); "On the other hand, and this is particularly true in a governmental situation, the lawyer may be the chief draftsman of a particular document which she then sends to her co-workers for their views and thoughts. While their responses may qualify as communications to a lawyer intended to be confidential, the lawyer's draft, transmitted to them, does not yield any confidential communication from them. In other words, from the lawyer's draft, we learn only that she wrote a draft and transmitted it to her clients. Thus, while there are circumstances where even a draft might yield a secret, client communication (e.g. the draft of a will that provides for an illegitimate child), the transmittal of drafts in this case does not. That the DOI lawyers and other employees were in the process of drafting new rules and regulations in response to an order in this case is hardly a secret. The privilege log itself indicates that such drafting was taking place." (emphasis added)).

- Hedden v. Kean Univ., 82 A.3d 238, 245 (N.J. Super. Ct. App. Div. 2013) (analyzing a situation in which a university coach disclosed a privileged draft letter to the NCAA during an investigation; "[W]e agree with the motion judge that as an employee of the University and acting within the scope of her employment, Sharp's [Coach] purpose in sending the e-mail to Tripodi [University lawyer] was to solicit his legal advice as University general counsel and, thus, an attorney-client relationship was formed. It is undisputed that in the e-mail Sharp asks Tripodi to review a draft of a fundraising letter and there would be no plausible reason for the request other than to solicit legal advice from counsel since Tripodi had no other involvement in University fundraising activities. . . . Tripodi well understood the nature of the inquiry because he reviewed the letter and later 'conveyed [his] legal opinion regarding the letter.'" (emphasis added)).

- [Privilege Point, 1/8/14]

Court Takes a Very Narrow View of Legal Advice in a Corporate Setting

January 8, 2014

Attorney-client privilege protection depends on content, and the key issue normally involves distinguishing between primarily legal and primarily business advice. Courts disagree about where to draw that line.

In Koumoulis v. Independent Financial Marketing Group, Inc., 295 F.R.D. 28 (E.D.N.Y. 2013), the court examined communications between a Duane Morris lawyer and her corporate client's human resources employees. The court rejected privilege claims for most of the lawyer's communications. For instance, the court noted that the Duane Morris lawyer "sometimes told Human Resources employees exactly what questions to ask during interviews and what statements to make during meetings," and that "her advice would advance business goals, such as improving business relationships." Id. at 45. The court also noted that Duane Morris' "advice rarely involved 'the interpretation and application of legal principles to guide future conduct or to assess past conduct,' and rarely explicitly considered future litigation." Id. (citation omitted).

Not all courts would take this narrow view, but the decision provides a good lesson. Wise lawyers train their clients to explicitly explain in the four corners of their communications that they are seeking legal advice, that they are worried about litigation, etc. However, it is also important for lawyers to explicitly explain in their responses that they are providing legal advice (by mentioning legal principles, citing statutes or case law, etc.) and to mention litigation if the client reasonably anticipates it.

- Wells Fargo & Co. v. United States, Case No. 09-CV-2764 (PJS/TNL), 2014 U.S. Dist. LEXIS 81430, at *8-9 (D. Minn. June 16, 2014) (concluding that a client employee's draft of a memorandum to a lawyer was not an implicit request for legal advice; "Even if Wells Fargo could show that all 21 of the documents were circulated to its in-house attorneys, the Court could not find that the documents were privileged, because Wells Fargo has failed to establish that the documents were circulated for the purpose of obtaining legal advice or services. Wells Fargo argues that the Court can infer that drafts of the memorandum sent to in-house counsel were implicit requests for legal advice or services regarding the memorandum. . . . But Wells Fargo offers no evidence to support these rather vague and abstract assertions By contrast, the government offers concrete evidence that Wells Fargo's in-house attorneys were involved in non-legal aspects of implementing the STARS transaction. . . . Under these circumstances, it is as likely that these attorneys were being asked to ensure the factual accuracy of the drafts as it is that these attorneys were being asked to provide legal advice." (emphasis added)).
- Hamdan v. Ind. Univ. Health N., LLC, No. 1:13-cv-00195-WTL-MJD, 2014 U.S. Dist. LEXIS 86097, at *9-10 (S.D. Ind. June 24, 2014) (emphasizing the four corners of documents prepared during an investigation of a discrimination claim; "The redacted emails are HR focused and document at-the-moment analysis of the Plaintiff's situation authored by Hospital employees such as the chief medical officer, chief nursing officer, and representatives from the department in which Plaintiff worked. None of the redacted emails are sent directly to an attorney (attorneys are included via CC), nor are any of the redacted emails addressed to an attorney in the text of the messages. There is no request for legal advice in any of the redacted emails, nor is there any indication in any of the emails that the author initiated or created the message for the purpose of seeking advice from the attorneys. In fact, the only explicit mention of the attorneys by an author of a redacted email occurs when the chief medical officer indicates that the attorneys were copied so that one of them might attend a previously scheduled meeting." (emphasis added)).

- **[Privilege Point, 7/23/14]**

District of Columbia Circuit Court Dramatically Expands Privilege Protection for Internal Corporate Investigations: Part III

July 23, 2014

Last week's Privilege Point described the District of Columbia Circuit Court of Appeals' articulation of a privilege standard very favorable to companies conducting internal investigations. In In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014), the appeals court also found the privilege applicable despite involvement of non-lawyers in conducting interviews, and those interviewers' failure to give interviewed employees the classic Upjohn warnings or confidentiality agreements mentioning legal advice.

Commentators applauding the D.C. Circuit's decision generally overlook an equally significant issue -- what the court did not say. The lower court's rejection of Kellogg Brown & Root's (KBR) privilege claim also rested on the absence of any request for or offering of legal advice in the investigation's email message traffic, and on the investigation report's failure to request legal advice or identify "possible legal issues for further review." United States ex rel. Barko v. Halliburton Co., 4 F. Supp. 3d 162, 166 (D.D.C. 2014). The appeals court upheld KBR's privilege claim despite these factors -- thus implicitly rejecting many courts' increasingly common exclusive focus on withheld documents' four corners in rejecting privilege claims. See, e.g., A&R Body Specialty & Collision Works, Inc. v. Progressive Cas. Ins. Co., Civ. No. 3:07CV929 (WWE), 2014 U.S. Dist. LEXIS 20859, at *8 n.1 (D. Conn. Feb. 19, 2014) (denying a privilege claim because "[t]here is no legal advice requested, explicitly or implicitly, in the cover letter"); Owens v. Stifel, Nicolaus & Co., Civ. A. No. 7:12-CV-144 (HL), 2013 U.S. Dist. LEXIS 171913, at *6 (M.D. Ga. Dec. 6, 2013) (denying a privilege claim because emails to and from an in-house lawyer "do not explicitly seek or contain legal advice"); Lolonga-Gedeon v. Child & Family Servs., No. 08-CV-00300A(F), 2012 U.S. Dist. LEXIS 67843, at *12-13 (W.D.N.Y. May 15, 2012) ("Nor is there any request within the text of the communication for legal advice or services and, as such, the communication is not protected by the attorney-client privilege.").

In addition to articulating a company-friendly legal standard for judging corporate investigations' motivations when assessing privilege protection, the D.C. Circuit Court of Appeals looked beyond the investigation-generated documents' four corners. The court also examined the documents' context -- ultimately concluding that "there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice." In re Kellogg Brown & Root, 756 F.3d at 760.

- [Privilege Point, 8/13/14]

**Most Courts Focus on the Four Corners of Withheld Documents,
Despite Barko: Part I**

August 13, 2014

The widely publicized Barko decision (In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014)) has encouraged corporations hoping to extend privilege protection to their internal corporate investigations. As explained in a previous Privilege Point, perhaps the most important aspect of Barko was the D.C. Circuit's willingness to examine the context of withheld communications — rather than focusing just on the documents' four corners.

However, many courts essentially limit their review to the withheld documents themselves in analyzing both privilege and work product claims. In Tecnomatic, S.P.A. v. Remy, Inc., the court examined withheld documents in camera, ultimately concluding that the attorney-client privilege protection applied — because "the communications withheld explicitly request, render, arrange for, or act in furtherance of rendering legal assistance." No. 1:11-cv-00991-SEB-MJD, 2014 U.S. Dist. LEXIS 75220, at *7 (S.D. Ind. June 3, 2014). Unfortunately, courts' assessment of withheld documents usually results in bad news. One week later, the Northern District of Illinois rejected a corporation's privilege claim for several emails, using phrases such as "[t]his email is not privileged as it does not ask for legal advice"; "the email does not seek legal advice and is not privileged"; and "[n]either the email nor the attached bill reveals any confidential communications or involves a request for legal advice." Lee v. Chi. Youth Ctrs., 342 F.R.D. 242, 252-53 (N.D. Ill. 2014). In an even more worrisome conclusion, the court rejected privilege claims for two emails a company employee sent the company's outside lawyer (1) asking for the lawyer's advice about "'the preferred language' for finance committee minutes, and (2) inviting the lawyer 'to make whatever changes she desires to [a] 'Reorganization Plan.'" Id. The court held that the first email merely sought the outside lawyer's "editorial changes," and that the second email "does not seek legal advice and is not privileged." Id. at 252.

Despite the promise of Barko, most courts examining a privilege claim focus almost exclusively on withheld documents' four corners. Clients seeking legal advice should therefore explicitly ask for it in the body of their communications. And lawyers providing legal advice should explain that they are doing so — especially if their legal advice takes the form of suggested language changes in client-prepared draft documents.

- [Privilege Point, 12/17/14]

It Can be Nearly Impossible to Satisfy Some Courts' Privilege Protection Standards: Part I

December 17, 2014

Although federal courts generally articulate the same basic attorney-client privilege principles, they can demonstrate enormous variation when applying those principles. In some situations, it might be nearly impossible for companies to successfully assert privilege protection.

In United States ex rel. Schaengold v. Memorial Health, Inc., No. 4:11-cv-58, 2014 U.S. Dist. LEXIS 156595 (S.D. Ga. Nov. 5, 2014), defendants sought to retrieve one document (out of 30,000 documents produced) that they claimed to have inadvertently produced to the government. They described the document as a draft sent to the company's lawyer, portions of which the client deleted at the lawyer's request before disclosing the final version to third parties. The court found that the document did not deserve privilege protection, because the lawyer's supporting affidavit "fails to show who exactly sent the Draft Document, whether the primary purpose of the communication was for legal advice, or whether the communication was indeed confidential." Id. at *9. Turning to the inadvertent production issue, the court found defendants' "naked assertion of a privilege review" inadequate — because defendants did not describe "when [the] review occurred, how much time [Prior Counsel] took to review the documents, what ['certain'] documents were reviewed, and other basic details of the review process." Id. at *17 (citation omitted; alterations in original).

The next Privilege Point will describe another federal court's similar decision issued seven days later.

- **[Privilege Point, 12/24/14]**

It Can be Nearly Impossible to Satisfy Some Courts' Privilege Protection Standards: Part II

December 24, 2014

Last week's Privilege Point described a federal court's unforgiving approach to a company's effort to retrieve one purportedly privileged document out of 30,000 produced.

One week later, another court took a similarly narrow view of a defendant's privilege claim in Kleen Products LLC v. International Paper, Case No. 10 C 5711, 2014 U.S. Dist. LEXIS 163987 (N.D. Ill. Nov. 12, 2014). Among other things, the court applied the following principles to communications to and from co-defendant RockTenn's General Counsel (who also served as that company's Chief Administrative Officer and Senior Vice President and Secretary): (1) "[w]here a document is prepared for simultaneous review by legal and non-legal personnel and legal and business advice is requested, it is not primarily legal in nature and is therefore not privileged," Id. at *12 (quoting a 2013 Northern District of Illinois decision); (2) "although [the General Counsel] is copied on three out of the four emails contained within [one email] chain, he offered no legal advice in response," Id. at *14; (3) "[i]t is improper to infer as a blanket matter that any email asking for 'comments' that copies in-house counsel along with several other high level managers automatically is a request for 'legal review.'" Id. at *18-19.

Companies' lawyers should train their clients' employees to articulate the basis for privilege in the body of their communications to and from the lawyers. The lawyers should also familiarize themselves with the privilege standards applied by the court in which they find themselves litigating.

- Bernstein v. Mafcote, Inc., 43 F. Supp. 3d 109, 116-17 (D. Conn. 2014) ("First, the emails are not to or from an attorney. Second, the emails do not divulge the substance of any legal advice, or a substantive request for legal advice." (emphasis added)).
- Barba v. Shire US, Inc., Case No. 13-21158-CIV-LENARD/GOODMAN, 2015 U.S. Dist. LEXIS 65859, at *9 (S.D. Fla. May 20, 2015) ("In this string of emails, Shire asserts that a non-attorney employee solicits and receives legal advice from the Shire legal team. However, review of the document reveals no such advice was solicited, nor was any given. In fact, no attorneys are even carbon copied in the email chain for four out of the six emails. And in the emails in which counsel are copied, no communication is directed at them with regard to legal advice or concerns. Accordingly, Shire's assertion of privilege over large swaths of this email chain should be overruled." (emphasis added)).
- Roberts Tech. Grp., Inc. v. Curwood, Inc., Civ. A. No. 14-5677, 2015 U.S. Dist. LEXIS 95779, at *5 (E.D. Pa. July 20, 2015) ("[W]e cannot preclude production of internal communications between employees relating to collection activities and discussions with Plaintiff's business persons simply because counsel claims they relate to some unidentified legal advice not evident on the documents." (emphasis added)).
- Shipyard Assocs., L.P. v. City of Hoboken, Civ. A. No. 14-1145 (CCC), 2015 U.S. Dist. LEXIS 100927, at *23 (D.N.J. Aug. 3, 2015) ("[T]he Court has reviewed the samples submitted, and has upheld the privilege only when facially apparent from a review of the document." (emphasis added)).
- FTC v. AbbVie, Inc., Civ. A. No. 14-5151, 2015 U.S. Dist. LEXIS 166723, at *38-39 (E.D. Pa. Dec. 14, 2015) ("These emails do not fall within the ambit of the attorney-client privilege. The only attorney recipient of these emails, in-house counsel Walt Linscott, is merely copied on the email thread and does not contribute to the discussion." (emphasis added)).

- [Privilege Point, 2/24/16]

How Do Courts Apply the "Primary Purpose" Privilege Standard?: Part I

February 24, 2016

In nearly every court, the attorney-client privilege protects intra-corporate communications only if their "primary purpose" was the corporation's need for legal advice. How do courts apply this standard? One might think that companies' lawyers can simply file affidavits confirming under oath that clients' communications to them sought legal advice, and that their communication to clients contained or reflected their legal advice.

In *FTC v. AbbVie, Inc.*, Civ. A. No. 14-5151, 2015 U.S. Dist. LEXIS 166723 (E.D. Pa. Dec. 14, 2015), the court dealt with three documents corporate employees sent to an in-house lawyer. The court rejected privilege protection for all the documents. For one, it explained that "[a]lthough [an in-house lawyer] claimed by sworn declaration that the email was a request for legal advice, AbbVie has not provided any supporting information that would allow the court to reach the same conclusion." *Id.* at *26. For the other two documents, the court similarly explained that "[b]y declaration, [the in-house lawyer] has claimed that the redacted portion contains a request for legal advice addressed to the legal department. We disagree." *Id.* at *31. In addition to the court's troubling conclusion that the in-house lawyer filed a false affidavit, the court's holding highlights the importance of corporate employees explicitly articulating their communications' legal purpose. Later affidavits failed to make up for the absence of such contemporaneous privilege indicia.

Lawyers should not only train their clients on this issue, they should themselves remember this lesson when communicating to their clients. Next week's Privilege Point will address the same court's rejection of an outside lawyer's privilege claim for his report to a client.

- In re Lidoderm Antitrust Litig., Case No. 14-md-02521-WHO, 2016 U.S. Dist. LEXIS 28969, at *57-59 (N.D. Cal. Mar. 7, 2016) (holding that documents about how a company could prevent generic pharmaceutical companies from entering a market were not subject to attorney-client privilege protection; "In general, it appears that defendants have taken an overly expansive view of which documents are privileged simply because Ms. Manogue and other attorneys (either at PWR, whose role is discussed more in-depth below, or at Teikoku) drafted them or were copied on them. Some of the documents submitted for in camera review are devoid of legal advice, but concern business matters. For example, Exhibit 3 . . . is a chain of emails attaching a draft of the Citizen Petition amendment. The emails concern the purpose of a Citizen Petition and the timing for filing, which read in context are business matters not legal advice or communications seeking legal advice. Exhibits 5, 6 & 7 consist of a cover email and identical 'Citizen Petition Timeline' slides. There is no legal advice contained or sought in the email or slides, and the slides themselves appear to be based on publicly available information, plus what may be an internal plan or suggestion on timing for an additional Citizen Petition amendment. These documents are devoid of legal advice. While they may have been prepared for a discussion between Endo, Teikoku, and PWR as to the timing of a Citizen Petition amendment or whether to file a new Citizen Petition, that does not make the contents of the emails and identical slides protectable as attorney-client information. Exhibit 8 . . . is a cover email from Caroline Manogue to board members and others at Endo attaching the response from the FDA denying the Citizen Petition. That email was forwarded by Endo's former CFO Levin to additional people at Endo seeking input on various business matters, and an email response to Levin from one of the subsequent recipients about expected financial reporting in response to the FDA's action. These documents are concerned with the business implications of the FDA's actions. Other than the first sentence at the top of the email chain (regarding a conversation with Manogue), there is no legal advice provided or sought. Other than that one sentence, this communication is not protected by the attorney-client privilege." (emphases added) (footnotes omitted)).
- Margulis v. Hertz Corp., Civ. A. No. 14-1209 (JMV), 2017 U.S. Dist. LEXIS 28311, at *30 (D.N.J. Feb. 28, 2017) (not for publication) (holding that a corporate family was not "one" client, but that a United States law firm jointly represented a U.S. company and an overseas affiliate; "This document is not privileged."; "It does not expressly refer to any attorney's legal advice, nor is it sent to or from an attorney." (emphasis added)).

- La. Municipal Police Emps. Ret. Sys. v. Green Mountain Coffee Roasters, Inc., Case No. 2:11-cv-289, 2017 U.S. Dist. LEXIS 165151, at *6-7 (D. Vt. Apr. 7, 2017) (holding that a client's communications updating a lawyer on developments can amount to an implicit request for legal advice if the need arises for such advice; "Courts have held that requests for legal advice need not be express, and may include updates about ongoing business developments so long as there is an expectation that the attorney will respond if the matter raises important legal issues. . . . Also included in this category of protection are draft documents sent to in-house counsel for legal review. See, e.g., Valente v. Lincoln Nat. Corp., 2010 U.S. Dist. LEXIS 90983, 2010 WL 3522495, at *4 (D. Conn. Sept. 2, 2010) (finding draft of document privileged where it 'was sent to counsel with an implicit request to provide feedback and comments about the draft')." (emphasis added)).
- Nucap Indus. Inc. v. Robert Bosch LLC, No. 15 CV 2207, 2017 U.S. Dist. LEXIS 135288, at *8-9 (N.D. Ill. Aug. 23, 2017) ("[I]n several instances throughout the document sampling, Nucap redacted emails between non-attorneys in which the sender mentions that he plans to seek, or has sought, legal input. . . . But the emails were not sent to attorneys and do not themselves reflect any legal advice. . . . Indeed, it appears Nucap recognized that these redactions were inappropriate because it removed some of them in its amended submissions, but still left other instances of those same redactions in place elsewhere in the document sampling." (emphasis added)).

- In re Niaspan Antitrust Litig., Master File No. 13-MD-2460, 2017 U.S. Dist. LEXIS 135753, at *6-8 (E.D. Pa. Aug. 24, 2017) ("AbbVie privilege log entries 434, 595, 596, 624, and 4398 were properly withheld under the attorney-client privilege because those entries consist of communications in which attorneys request or are provided with information for the purpose of providing legal advice. Entry number 434 is an email chain between Kos's outside counsel, Kos's in-house counsel, and Kos executives, in which the lawyers request input and specific information from the executives to assist them in drafting a declaration to attach to a legal filing. Entry number 595 consists of a string of emails: first, Kos's outside counsel sent a draft settlement agreement to Kos's then-general counsel Andrew Koven; second, Koven forwarded the draft to three Kos executives and requested their input; and finally, the three executives responded with their comments. Similarly, entry number 596 consists of an email from Kos's Chief Financial Officer Chris Kiritsy to Koven providing comments on a draft settlement agreement. Entry number 624 is an email string between Kos's Vice President for Marketing Aaron Berg, Kos's outside counsel, and Kos's general counsel, in which Berg provided detailed statistics and information regarding the potential of marketing Niaspan to women's health professionals. Koven asserted that the information was shared so that outside counsel, White & Case, could provide legal advice with respect to a co-promotion agreement relating to that marketing that was part of the ongoing settlement negotiations. . . . And entry number 4398 is an email chain between Kos's outside counsel and Kiritsy, in which outside counsel requests information from Kiritsy to assist in writing a declaration to attach to a motion. The Court concludes that these emails, in which Kos executives gave 'information to the lawyer to enable him to give sound and informed advice,' . . . would 'not have been made absent the privilege,' . . . The communications were properly withheld under the attorney-client privilege." (emphases added)).

- SodexoMAGIC, LLC v. Drexel Univ., 291 F. Supp. 3d 681, 685, 685-86, 686 (E.D. Pa. 2018) (in a 2/23/18 opinion, analyzing privilege in the context of an in-house lawyer; "In order to guide the parties' privilege determinations, below is a set of hypothetical email scenarios: 1. President of Food Service Corporation A sends email to General Counsel, 'What are the requirements of a binding contract for food service contract with College X?'; "2. General Counsel emails the President -- with a list of the requirements for such a contract."; "3. President to Corporation A's VP, who as part of her job is engaged in negotiations with College X, 'Our General Counsel has advised me that in order to form a binding contract with College X, we need to agree on requirements 1, 2, and 3.'"; "Emails 1, 2, and 3 above are all privileged communications that can be appropriately withheld from production."; "4. VP to Corporation A's Sales Manager: 'President has instructed us to proceed to negotiate a contract for food services with College X. Get to this ASAP.' 5. Sales Manager to VP: 'I've just met with Manager of College X and we have a handshake deal. How much detail do we need in the written contract?' 6. VP to President: 'Sales Manager reached a great deal for us. Let's keep the written contract simple and direct to close the deal ASAP.' 7. President to General Counsel: 'Draft this contract as quickly as possible. Draft a contract including 1, 2, 3 and also 4, 5 and 6.' 8. General Counsel to in-house Paralegal: 'The President wants a contract with 1 through 6. Please take language from our prior contract with College Z to get the process started.' 9. VP to Paralegal: 'I heard you are working on our contract with College X. Please write these exact words into provision 6: 'It is hereby agreed that the amount is \$400.' 10. General Counsel to VP: 'Here is my proposed contract attached to this e-mail. Show this to College X, but tell them it is non-negotiable.' 11. VP to College X: 'Here is our proposed contract. Our General Counsel says since we are giving you such a good deal, we must insist on these terms as written. Please send it back with your signature.' 12. Emails by non-lawyers within each party, and between Corporation A and College X, following execution of the contract, disputing its interpretation, and at times indicating they rely on their counsel's advice.' 13. As a result of a dispute on contract interpretation between the parties, VP discusses this with President and then contacts General Counsel about her interpretation of the contract and GC responds. VP forwards this email to College X.""; "Emails 4, 5, and 6 are not privileged communications. No legal advice is requested or provided. Email 7, on the other hand, is privileged. The President asks for legal services from the General Counsel. Similarly, Email 8 is privileged. The General Counsel is communicating with a Paralegal to 'get the process started' of drafting a contract (i.e., providing legal services). Email 9 is not privileged. The Paralegal is working as a scrivener, making changes that the VP requests but not providing legal advice. Email 10 is a

privileged communication between the General Counsel and the VP in furtherance of legal services. However, the attachment to this email is not privileged. Email 11 is not privileged because the communication is no longer confidential. Email 12 is not privileged even if the representatives rely on their in-house counsel's prior privileged advice, unless the counsel's interpretation is repeated in essentially verbatim language in the email. In this event, only the content of the communication with counsel is privileged and may be redacted. The rest of the document must be produced. Email 13 would be privileged only as to the communication with counsel and while confidential within Corporation A. Once sent to College X, it loses its privileged status."; "Sodexo document #5: This is not privileged. There is no lawyer on the chain, and Sodexo has not met its burden of showing that Thomas Stanton, the lawyer whom Sodexo claims provided legal advice during this communication, in fact provided such legal advice. Moreover, the communication itself does not appear to have as its primary purpose the provision of legal advice. In fact, the chain at no point demonstrates any legal services being rendered or requested. Thus, privilege cannot shield this document from production." (emphasis added)).

- Towner v. Cty. of Tioga, Civ. A. No. 3:15-CV-0963 (GLS/DEP), 2018 U.S. Dist. LEXIS 30901, at *15 (N.D.N.Y. Feb. 26, 2018) (holding that the privilege did not protect documents that did not relate to legal advice; "Although the email is between a client and her counsel, the communication is limited solely to a factual matter; no legal advice is mentioned, much less shared or otherwise conveyed between the parties. After a careful review of this email, the court finds that it is not shielded from disclosure by the attorney-client privilege, and must therefore be produced to plaintiff." (emphasis added)).

- [Privilege Point, 9/13/17]

Remember the Nitty-Gritty of Privilege Analyses: Part I

September 13, 2017

Although attorney-client privilege claims often involve thorny legal issues, at some point a human being (usually a judge) may have to read the withheld documents and make privilege calls. In fact, judges must read withheld documents if they cannot make some global rulings based on privilege logs. Unfortunately, withheld documents now consist primarily of emails (1) whose increasing volume understandably tempts judges to primarily look for explicit privileged content on the face of the emails, and (2) whose cryptic nature make that task very difficult.

In United States v. Owensboro Dermatology Associates, P.S.C., the judge "completed a thorough in camera review" of withheld emails, and found that "each document predominantly involves legal advice." Civ. A. No. 4:16-mc-00003- to -00005-JHM, 2017 U.S. Dist. LEXIS 105099, at *16-17 (W.D. Ky. July 7, 2017). Several days later, the judge in Nalco Co. v. Baker Hughes Inc., Civ. A. No. 4:09-CV-1885, 2017 U.S. Dist. LEXIS 111127, at *8 (S.D. Tex. July 18, 2017), similarly upheld a privilege claim for an email between two employees, in which one referred to "a specific request he made for legal advice to an attorney."

Lawyers should remind their clients to (1) be careful what they write, because even a successful privilege assertion often will involve the judge reading the withheld document, (2) discipline themselves to state on the face of their emails when they are seeking legal advice (not just add a "privilege" header). Next week's Privilege Point will address a case in which in camera review dealt with a more subtle issue.

- [Privilege Point, 9/20/17]

Remember the Nitty-Gritty of Privilege Analyses: Part II

September 20, 2017

Last week's Privilege Point described two cases in which courts read withheld emails in making privilege calls. Most judges understandably consider "privilege" headers irrelevant, and instead look for privileged content on the face of the emails.

In camera reviews can also help judges analyze other privilege issues. In Martinez v. Kleinfeld Bridal Corp., the court assessed "plaintiff's contention that notes [reflecting employee meetings] are not privileged because defense counsel [from Littler Mendelson] functioned as an investigator and provided business (rather than legal) advice." No. 16-CV-348 (RA) (JLC), 2017 U.S. Dist. LEXIS 103261, at *4 (S.D.N.Y. June 30, 2017). After reviewing the notes in camera, the court rejected plaintiff's argument -- noting that the notes "refer to the party carrying out the investigation with the pronoun 'we,' and refer to defense counsel as 'the labor attorneys' or 'the attorneys.'" Id. at *5 (internal citation omitted).

Corporate lawyers should train their clients (and constantly remind themselves) that any emails or other documents for which they could legitimately claim privilege protection should on their face contain language that will assure success in a later privilege fight. This usually consists of explicit requests for legal advice and explicit legal advice back --but can involve more subtle attention to wording. This is one area of the law in which lawyers and their clients essentially create their own exhibits.

- [Privilege Point, 12/6/17]

How Do Courts Decide If Employees CC'ing a Lawyer are Implicitly Seeking Legal Advice?

December 6, 2017

Electronic communications exacerbate judges' already difficult task of determining if employees copying lawyers on their communications with fellow employees are implicitly seeking legal advice – and thus deserve privilege protection. The increasing volume of emails understandably tempts judges to look only at the face of emails for employees' explicit requests for legal advice. And given the accelerating tempo of employees' electronic communications, those communications are increasingly cryptic.

In Greater New York Taxi Ass'n v. City of New York, No. 13 Civ. 3089 (VSB) (JCF), 2017 U.S. Dist. LEXIS 146655 (S.D.N.Y. Sept. 11, 2017), Magistrate Judge Francis articulated a common-sense approach. He noted that courts hold "that communications constitute implicit requests for legal advice where an attorney is copied on the communications and the communications implicate specific legal issues." Id. at *3-4. He found that some emails defendant had redacted "fit into that framework" – because defendant's commissioners copied their general counsel when they communicated "about how to craft a new set of legal rules after a court invalidated their initial set of rules." Id. at *34-35. In contrast, Judge Francis rejected defendant's privilege claim for another email on which a commissioner had copied a lawyer – because "there is no indication that it solicits legal advice or implicates a specific legal issue." Id. at *36.

Wise lawyers train their corporate clients' executives and employees to explicitly seek legal advice when they want it, but Judge Francis's wise approach gives hope for privilege claims even in the absence of such explicit requests.

- **[Privilege Point, 10/31/18]**

Court Criticizes Corporation's Sneaky "Tactic" to Avoid Discovery

October 31, 2018

Corporations claiming attorney-client privilege protection for their emails must prove that the emails were primarily motivated by their need for legal advice. Simply adding lawyers' names as direct or copy recipients does not assure protection. Lawyers must and clients should understand this – but some clients cannot avoid the temptation to withhold documents based on such steps.

In Entrata, Inc. v. Yardi Systems, Inc., the court noted that several emails "appear to be marked as privileged for no other reason than the fact that [lawyers] are recipients of the mail or are 'CCed' on the email." Case No. 2:15-cv-00102, 2018 U.S. Dist. LEXIS 149239, at *10 (D. Utah Aug. 30, 2018). The court rejected the privilege assertions for one email, because "nowhere in the email does anyone seek any legal advice." Id. The court also noted that "there was evidence that '[defendant] copied in-house-counsel [sic] on non-privileged communications as a tactic to avoid having emails discovered.'" Id. (internal citation omitted).

Lawyers should remind their clients: (1) to include requests for legal advice in the body of their emails seeking such advice; (2) that merely including lawyers as direct or copy recipients does not automatically assure privilege protection; and (3) that discussing or (especially) writing about adding lawyers "as a tactic to avoid having the emails discovered" may forfeit privilege protection even for legitimately protected documents, or worse.

- [Privilege Point, 7/31/19]

Courts Assessing Privilege Protection Continue To Look For Clients' Explicit Requests For Legal Advice

July 31, 2019

The attorney-client privilege protects clients' communication of facts to their lawyers and requests for legal advice about those facts. Not surprisingly, busy courts dealing with the mounting volume of withheld documents often requiring in camera review frequently look for explicit requests for legal advice on the face of such withheld documents.

In Curtis v. Progressive Northern Insurance Co., Case No. CIV-17-1076-PRW, 2019 U.S. Dist. LEXIS 73461 (W.D. Okla. May 1, 2019), the court reviewed in camera several documents defendant had withheld as privileged. Although acknowledging that defendant Progressive's in-house lawyer received copies of several emails, the court rejected defendant's privilege claim – noting that "[n]either email evinces a request for legal advice." Id. at *7. The court reached a similar conclusion about other emails, noting that the emails "again do not seek legal advice or strategy" and that "the decisions mentioned in the emails reflect those made by non-legal Progressive employees and do not reference any legal advice or strategy provided." Id. at *10.

This understandable but frequently frustrating judicial approach should prompt corporations' lawyers to remind their clients to explicitly ask for legal advice on the face of communications to the corporations' lawyers when that is their goal.

- [Privilege Point, 11/20/19]

Can Adversaries Ask Corporate Witnesses About Their "State of Mind" When They Sought Legal Advice?

November 20, 2019

The attorney-client privilege protects communications, not facts, past actions or future intended actions. But it can be difficult to draw the line between such non-protected facts or acts and protected motivations, thought processes, etc.

In Horwitt v. Sarroff, No. 3:17-cv-1902 (VAB), 2019 U.S. Dist. LEXIS 148910, at *18 (D. Conn. Aug. 30, 2019), the court bluntly (and properly) held that plaintiff's lawyer deposing defendant could not inquire whether the defendant had asked his lawyer "particular things." Although not quite as clearly, the court also held that the privilege protected defendant's "'state of mind' when asking their counsel to do something." Id.

Although it may be too crude a guideline when subtleties arise, it can be helpful to consider that the privilege generally cannot preclude "who, what, when, where" deposition questions – but generally precludes "why" questions.

- [Privilege Point, 8/19/20]

Nevada Supreme Court Hits the Jackpot on Two Privilege Principles

August 19, 2020

The attorney-client privilege protects communications between clients and their lawyers, not historical facts. Some courts misunderstand the real-world application of this basic principle, but other courts get it right.

In Canarelli v. Eighth Judicial District Court, 464 P.3d 114 (Nev. 2020), the court analyzed two aspects of the privilege. First, the court held that the attorney-client privilege can protect clients' notes even if the client did not physically deliver those notes to her lawyer – as long as the notes reflect what the client and the lawyer later discussed. Additionally, “we emphasize that the party asserting the privilege does not have to prove that the client spoke each and every word written in his or her notes to counsel verbatim.” Id. at 120-21. Second, and perhaps more importantly, the court held that the lower court had “clearly abused its discretion to the extent it found that the factual information contained in the [withheld] documents was not subject to the attorney-client privilege.” Id. at 121. Acknowledging that the “documents contain factual information,” the court properly held that “facts communicated in order to obtain legal advice do not fall outside the privilege’s protections.” Id.

Historical facts do not deserve privilege protection. But the adversary must discover those facts the old-fashioned way -- through other discovery, rather than by intruding into communications between clients and their lawyers.

- Chabot v. Walgreens Boots Alliance, Inc., Civ. A. No. 1:18-CV-2118, 2020 U.S. Dist. LEXIS 107547, at *28 (M. D. Pa. June 11, 2020) (analyzing the content of documents in determining that the privilege did not apply; "Review of the redacted material does not bear out a reflection of legal assistance or advice. (Doc. 100-1, at 29; Doc. 115-1, at 7). There is no mention of legal implications and there is no mention of attorney advice. (Doc. 100-1, at 29). All of the information appears to flow from Vainisi himself. (Doc. 100-1, at 29). He makes no mention of Skadden. (Doc. 100-1, at 29). Legal principles are plainly not mentioned, nor implicated, in the redacted Exhibit 14 material. See RICE § 7:10. The court in In re Vioxx spoke to emails such as this when it said, 'Merely because a legal issue can be identified that relates to on-going communications does not justify shielding them from discovery.' In re Vioxx, 501 F. Supp. 2d at 798. The redacted material must have been sent primarily for the purpose of communicating legal advice. In re Vioxx, 501 F. Supp. 2d at 798. Upon review, Defendants fail to carry their burden of persuasion and this exhibit should not be privileged.").

- **[Privilege Point, 11/18/20]**

Dartmouth Strikes Out on Privilege Claim for Email Threads

November 18, 2020

Courts analyzing privilege assertions for email threads often look for some indicia of that protection on the face of those emails.

In Anderson v. Trustees of Dartmouth College, Case No. 19-cv-109-SM, 2020 U.S. LEXIS 153785 (D.N.H. Aug. 25, 2020), an expelled student sued Dartmouth for applying a faulty disciplinary process. Dartmouth withheld approximately 5,000 pages of documents, many of which were email threads. The court rejected most of Dartmouth's privilege claims. One group of withheld documents constituted emails between non-lawyer Dartmouth employees. Although one email "discusses the relevant New Hampshire statute, . . . that fact does not render the email subject to an attorney-client privilege. And, while in-house counsel . . . is copied on the email, neither [of the Dartmouth employees] requests legal advice, nor does [Dartmouth's in-house lawyer] offer any." Id. at *6. Another batch of withheld emails "invite[d] feedback or comment on potential draft email responses to the plaintiff" – but "[t]hose requests were not made specifically to counsel, [and] instead generally requested responses from all email recipients." Id. at *7-8. The court also rejected Dartmouth's argument that its employees sent Dartmouth's lawyer documents seeking legal advice – bluntly holding that "[o]f course, merely saying so does not make the documents privileged." Id. at *9. The court also noted that "Dartmouth fail[ed] to provide any sort of affidavit or declaration from an individual with personal knowledge of that practice, or any other evidence that might establish that practice." Id. at *9 n.2.

Lawyers should educate their clients about the importance of including on the face of their emails indicia of those emails' privileged nature (normally, that the clients seek the lawyers' legal advice). And of course lawyers must support privilege claims with whatever necessary affidavits the pertinent court would expect.

- Shenandoah Coatings, LLC v. Xin Dev. Mgmt. East, LLC, No. 517102/18, 2020 N.Y. Misc. LEXIS 10893, at *5 (N.Y. Sup. Ct. Dec. 24, 2020) (holding that merely copying a lawyer does not assure privilege protection; “Emails where the attorney is merely a CC recipient ostensibly could not relate to primarily legal matters or constitute the transmission of legal advice and that the receipt of otherwise privileged documents by third parties outside of the attorney and the client constitutes a waiver of the privilege.”)
- Adhikari v. KBR, Inc., Case No. 4:16-CV-2478, 2020 U.S. Dist. LEXIS 244198, at *6 (S.D. Tex. Dec. 29, 2020) (after reviewing withheld documents in camera, holding that some documents deserved privilege protection because they sought legal advice; “The Court’s determines [sic] that the email is protected under the attorney-client privilege. It is an email from an employee to counsel and other employees with responsibility for the issues raised, seeking advice on how to respond to a media inquiry. While there is no doubt there is a mixed purpose to the email, it clearly raises legal issues and seeks legal advice. The email along with the supporting affidavit satisfy KBR’s burden of proof to maintain the privilege.”)
- Belcastro v. United Airlines, Inc., Case No. 17 C 1682, 2021 U.S. Dist. LEXIS 4751, at *9-10 (N.D. Ill. Jan. 11, 2021) (holding that the attorney-client privilege protected emails on which a client copied a lawyer; noting that the lawyer responded with legal advice; “As to entries 35 and 46, Defendants argue that these entries are privileged because they discuss legal advice rendered in connection with drafting a separation letter to give to Plaintiff. Defendants explain that non-privileged emails concerning the letter and drafts of the letter were produced, but these two emails on which attorney Frederick are copied are communications made in order to seek Frederick’s legal advice, which it seems she provided immediately following the challenged emails, or at least in the same chain on the same day. Because attorney Frederick is copied on those emails and they are part of the broader chain in which legal advice was solicited and provided, Defendants have met their burden to show that entries 35 and 46 are protected by attorney-client privilege.” (citations omitted))

- [Privilege Point, 3/24/21]

Copying a Lawyer on an Email Does Not Assure Privilege Protection, but That Lawyer Can Increase the Odds

March 24, 2021

Lawyers should remind their clients that copying a lawyer on an email does not automatically render the email privileged. But the story doesn't end there.

In Dejewski v. National Beverage Corp., the court recited the familiar lesson that "[a]n email is not deemed to be privileged if an in-house attorney: (1) is a mere recipient of that email." Case No. 19-cv-14532-ES-ESK, 2021 U.S. Dist. LEXIS 6083, at *2 (D.N.J. Jan. 12, 2021). The court then explained the obvious rationale – otherwise an employee could "simply copy[] an attorney on all company-generated emails to protect them from discovery." Id. But the court had included a significant second condition to this rejection of privilege protection: "if an in-house attorney . . . (2) did not actively participate in providing legal advice as part of that email." Id. Just a day before, the court in Belcastro v. United Airlines, Inc., implicitly applied this approach in protecting emails on which a United Airline employee copied an in-house lawyer – noting that the lawyer was copied "in order to seek [her] legal advice, which it seems she provided immediately following the challenged emails, or at least in the same chain on the same day." Case No. 17 C 1682, 2021 U.S. Dist. LEXIS 4751, at *9 (N.D. Ill. Jan. 11, 2021) (emphasis added). Thus, the privilege applied "because [United's in-house lawyer] is copied on those emails and they are part of a broader chain in which legal advice was solicited and provided." Id. (emphasis added).

In other words, lawyers who respond with a privileged return email can increase the odds of the protection covering their dialogue. They may not be able to respond to every email on which they are copied – but responding to emails that catch their attention as potentially troublesome can increase the chances of successfully asserting privilege protection.

- Wier v. United Airlines, Inc., No. 19 CV 7000, 2021 U.S. Dist. LEXIS 73397, at *18 (N.D. Ill. Apr. 16, 2021) (“It is true that ‘[m]erely communicating with a lawyer or copying a lawyer on an otherwise non-privileged communication, will not transform the non-privileged communication or attachment into a privileged one.’” (alteration in original) (citation omitted))

- [Privilege Point, 12/1/21]

Eighth Circuit and S.D.N.Y. Opinions Highlight Common-Sense Strategy to Maximize Privilege Protection

December 1, 2021

While lawyers should familiarize themselves with the sometimes counter-intuitive and nuanced privilege law, they should never lose sight of the nitty-gritty of courts' application of that law. The attorney-client privilege protects communications primarily motivated by a client's request for legal advice and a lawyer's responsive provision of legal advice. It doesn't take a genius to figure out what courts look for.

In Jacobson Warehouse Co. v. Schnuck Markets, Inc., 13 F.4th 659 (8th Cir. 2021), the court rejected privilege protection for a company's Accounts Payable Manager emails to (among others) the company's in-house lawyers. The court noted that: (1) "in voicing her concerns, [the Manager] was not explicitly or implicitly seeking legal advice on correct interpretation of [an agreement]"; and (2) "the emails [did not] reflect the legal advice of counsel." Id. at 677. Two days later, in In re Allergan PLC Securities Litigation, No. 18 Civ. 12089 (CM) (GWG), 2021 U.S. Dist. LEXIS 171331 (S.D.N.Y. Sept. 9, 2021), the Southern District of New York (Judge Gorenstein) similarly rejected privilege protection for intracorporate communications to in-house lawyers. The court noted that "[i]n none [of the documents] is there a direct request to an attorney that makes clear that legal advice (as opposed to business advice) is being sought." Id. at *13. The court also found that the communications did not amount to an implicit request for legal advice because "an attorney is just one of numerous persons who are sent an e-mail asking for views as to a particular document or course of action." Id. The court characterized the communications as "consistent with a group of corporate employees seeking to solve a corporate problem and keeping an in-house attorney apprised of the conversation." Id.

It is not difficult to imagine that the Eighth Circuit and the Southern District of New York would have reached a different result if the intracorporate communications had accurately contained explicit requests for legal advice, generating an in-house lawyer's explicit legal advice in response. Corporate executives and their in-house lawyer colleagues obviously cannot "game the system," but they should always document any legitimately privileged request for legal advice and responsive legal advice.

- Coventry Capital US LLC v. EEA Life Settlements Inc., Civ. A. No. 17 Civ. 7417 (VM) (SLC), 2021 U.S. Dist. LEXIS 181137, at *12 (S.D.N.Y. Sept. 22, 2021) (holding that the privilege did not protect an email to a company's general counsel because it did not seek legal advice; "In ECF No. 283-26, the Court finds that although Mr. Harrop is copied on the email dated 4/20/17 at 9:17 am, that email does not contain a request for or provision of legal advice, and is therefore not privileged and should be un-redacted. See Tower 570 Co. LP, 2021 U.S. Dist. LEXIS 63955, 2021 WL 1222438, at *6 (directing the production of communications on which lawyer was copied but was not 'done for the purpose of obtaining or providing legal advice').")

- Wagner Aeronautical, Inc. v. Dotzenroth, Case No. 21-cv-0994-L-AGS, 2022 U.S. Dist. LEXIS 158665, at *7-8 (S.D. Cal. Sept. 1, 2022) (finding that the attorney-client privilege protected a document that was not sent; “Defendants also challenge the privilege claims on two unsent documents drafted by Tarpley and saved to his hard drive. Both documents reflect legal advice. The first document, PLE 45, is ‘comparable to notes a client would make to prepare for a meeting with [his] lawyer.’ See ChevronTexaco Corp., 241 F. Supp. 2d at 1077. Tarpley spoke with his lawyer about the legal issue. (See PLE 16 (reflecting Tarpley’s communications with his lawyer on the same issue).) He then drafted a document reflecting that advice (PLE 45), which he sent to his lawyer for further advice. (See PLE 111 (email to attorney attaching a copy of PLE 45).) And then his lawyer returned advice on the issue in a Word document, which Tarpley saved to his hard drive. (PLE 110.) The second document, PLE 110, directly ‘memorializes and reflects legal advice’ rendered by his attorney. See ChriMar, 2016 U.S. Dist. LEXIS 53706, 2016 WL 1595785, at *3. Accordingly, both are privileged.” (alteration in original) (internal citation omitted))
- In re Apple Inc. Sec. Litig., Case No. 4:19-cv-2033-YGR, 2022 U.S. Dist. LEXIS 172182, at *4-5 (N.D. Cal. Sept. 12, 2022) (finding that the privilege can protect an implicit request for legal advice; “Defendants first argue that Judge Spero applied the wrong legal standard by requiring documents to have an explicit reference to a legal issue. This argument is without merit. Judge Spero explicitly states in the order that implied requests are sufficient to support attorney-client privilege. Judge Spero did not find Entry 288 non-privileged just because it ‘does not reference any specific legal concerns,’ as defendants misleadingly state in their motion, he also found that it ‘was not primarily aimed at seeking legal advice and therefore is not privileged.’” (internal citations omitted))

B. Lawyer-to-Client Communications

- Travelers of N.J. v. Weisman, Dkt. No. A-4085-10T4, 2012 N.J. Super. Unpub. LEXIS 567, at *29 (N.J. Super. Ct. App. Div. Mar. 15, 2012) ("From our sampling of the file, it appears that MBUSA's [defendant] in-house attorneys rarely responded to these e-mails, if at all.").
- Spread Enters., Inc. v. First Data Merch. Servs. Corp., No. CV 11 4743 (ADS) (ETB), 2013 U.S. Dist. LEXIS 22307, at *6-7, *7-8 (E.D.N.Y. Feb. 19, 2013) ("Nor is there any response from Cohen [in-house lawyer] at issue that could be construed as providing legal advice. In fact, Cohen's only response throughout the entire series of emails came almost one month after MacNaughton [executive for defendant] sent his original email and merely suggests that the parties involved 'recap the initial issue' and where First Data was in its response to it. . . . Again, however, nothing about this email appears to be of a legal nature."; ignoring the in-house lawyer's declaration; "Cohen asserts in his declaration that he was 'acting in his capacity as an attorney in the virtual discussion, as well as any other discussions (whether virtual, by telephone or in person) in which [he] participated' with respect to the MacNaughton email." (internal citation omitted) (emphases added)).

- [Privilege Point, 1/8/14]

Court Takes a Very Narrow View of Legal Advice in a Corporate Setting

January 8, 2014

Attorney-client privilege protection depends on content, and the key issue normally involves distinguishing between primarily legal and primarily business advice. Courts disagree about where to draw that line.

In Koumoulis v. Independent Financial Marketing Group, Inc., 295 F.R.D. 28 (E.D.N.Y. 2013), the court examined communications between a Duane Morris lawyer and her corporate client's human resources employees. The court rejected privilege claims for most of the lawyer's communications. For instance, the court noted that the Duane Morris lawyer "sometimes told Human Resources employees exactly what questions to ask during interviews and what statements to make during meetings," and that "her advice would advance business goals, such as improving business relationships." Id. at 45. The court also noted that Duane Morris' "advice rarely involved 'the interpretation and application of legal principles to guide future conduct or to assess past conduct,' and rarely explicitly considered future litigation." Id. (citation omitted).

Not all courts would take this narrow view, but the decision provides a good lesson. Wise lawyers train their clients to explicitly explain in the four corners of their communications that they are seeking legal advice, that they are worried about litigation, etc. However, it is also important for lawyers to explicitly explain in their responses that they are providing legal advice (by mentioning legal principles, citing statutes or case law, etc.) and to mention litigation if the client reasonably anticipates it.

- Koumoulis v. Indep. Fin. Mktg. Grp., Inc., 29 F. Supp. 3d 142, 147-48 (E.D.N.Y. 2014) (not for publication) (upholding a Magistrate Judge's opinion that neither the attorney-client privilege nor the work product doctrine protected communications between a Duane Morris lawyer and a corporate client's human resource executive; finding the attorney-client privilege inapplicable because the advice was primarily business-related and not legal; "This document contains an e-mail from Defendants' outside counsel, Ann Bradley, Esq. [Duane Morris lawyer], setting forth more than a full page of detailed, multi-part instructions on how to deal with Mr. Komoulis's personnel issues, including a recommendation that Defendants call Mr. Komoulis 'to express concern and disappointment, identify the fundamental problem and find out who he trusts to advise him,' and goes so far as to prescribe detailed instructions to be given to Plaintiff on how he should conduct himself with Defendants' customers. . . . This advice plainly is not legal advice, but rather human resources advice on personnel management and customer relations." (emphasis added)).

- **[Privilege Point, 12/24/14]**

It Can be Nearly Impossible to Satisfy Some Courts' Privilege Protection Standards: Part II

December 24, 2014

Last week's Privilege Point described a federal court's unforgiving approach to a company's effort to retrieve one purportedly privileged document out of 30,000 produced.

One week later, another court took a similarly narrow view of a defendant's privilege claim in Kleen Products LLC v. International Paper, Case No. 10 C 5711, 2014 U.S. Dist. LEXIS 163987 (N.D. Ill. Nov. 12, 2014). Among other things, the court applied the following principles to communications to and from co-defendant RockTenn's General Counsel (who also served as that company's Chief Administrative Officer and Senior Vice President and Secretary): (1) "[w]here a document is prepared for simultaneous review by legal and non-legal personnel and legal and business advice is requested, it is not primarily legal in nature and is therefore not privileged," Id. at *12 (quoting a 2013 Northern District of Illinois decision); (2) "although [the General Counsel] is copied on three out of the four emails contained within [one email] chain, he offered no legal advice in response," Id. at *14; (3) "[i]t is improper to infer as a blanket matter that any email asking for 'comments' that copies in-house counsel along with several other high level managers automatically is a request for 'legal review.'" Id. at *18-19.

Companies' lawyers should train their clients' employees to articulate the basis for privilege in the body of their communications to and from the lawyers. The lawyers should also familiarize themselves with the privilege standards applied by the court in which they find themselves litigating.

- Epic Sys. Corp. v. Tata Consultancy Servs. Ltd., No. 14-cv-748-wmc, 2015 U.S. Dist. LEXIS 166438, at *13 (W.D. Wis. Dec. 10, 2015) (analyzing privilege and work product issues in connection with internal corporate investigations conducted by Loeb & Loeb; finding the privilege inapplicable and concluding that the plaintiff could overcome any possible work product protection; finding that the privilege did not apply because (among other things) "the report contains no legal advice." (emphasis added)).
- FTC v. AbbVie, Inc., Civ. A. No. 14-5151, 2015 U.S. Dist. LEXIS 166723, at *38-39 (E.D. Pa. Dec. 14, 2015) ("These emails do not fall within the ambit of the attorney-client privilege. The only attorney recipient of these emails, in-house counsel Walt Linscott, is merely copied on the email thread and does not contribute to the discussion." (emphasis added)).
- Royal Park Investments SA/NV v. Deutsche Bank National Trust Company, 14-CV-04394 (AJN) (BCM), 2016 U.S. Dist. LEXIS 66741 (S.D.N.Y. May 20, 2016) (after an in camera review, concluding that board minutes were not all privileged; giving plaintiff one week to establish privilege protection; "It is not apparent from the face of the board minutes at issue that these elements can be met. RPI argues that the redacted portions of the minutes 'reflect information and advice that RPI's management learned from its U.S.-based legal counsel,' including Robbins Geller itself. . . . Nothing in the text of the minutes, however, confirms this assertion. The speakers at the board meetings do not attribute either the facts or the opinions they articulate to litigation counsel. Nor can the Court simply conclude, in the absence of admissible evidence, that all of those facts and all of those opinions must have come from counsel, in confidence, in response to RPI's request for legal advice. To the contrary: At least some of the statements that RPI seeks to redact reveal that they are based on sources other than counsel." (emphasis added)).

- [Privilege Point, 10/11/17]

Courts Look for Lawyers' Responses to Clients' Requests for Legal Advice

October 11, 2017

The privilege can protect clients' requests for legal advice, and lawyers' responses. But employees simply cc'ing a lawyer on an email to another employee cannot guarantee privilege protection – because the email might be (1) a protected implicit request for legal advice; (2) an unprotected but good faith effort to keep the lawyer "in the loop"; or (3) an improper attempt to gin up a privilege claim.

In Carr v. Federal Bureau of Prisons, No. 2:14-cv-00001-WTL-MJD, 2017 U.S. Dist. LEXIS 106489 (S.D. Ind. July 10, 2017), the court acknowledged that some employee-to-employee emails deserved privilege protection -- because they conveyed legal advice to those who needed it. But the court rejected privilege protection for one email which cc'd a lawyer. Among other things, the court noted that "[a]t no point did [the lawyer who was cc'd] actually respond to the inquiries with legal advice." Id. at *11.

Other courts focus on the same thing – looking for a dialogue in which clients ask for legal advice and lawyers provide it. Lawyers may find themselves far too busy to respond to every email, but they should remember that their silence could doom a privilege claim. Such lawyers should consider responding to any emails that could be misinterpreted or damaging if a court short circuits its privilege review and rejects a valid privilege claim simply because there has been no dialogue.

- Mun. Auth. of Westmoreland Cty. v. CNX Gas Co., Civ. A. No. 2:16-CV-422, 2017 U.S. Dist. LEXIS 209659, at *7-8 (W.D. Pa. Dec. 21, 2017) ("Several of the documents are clearly not privileged. . . . The third is a communication between CONSOL employees in which one or more attorney is listed as a recipient, but no attorney is contributing to the exchange, much less providing legal advice." (emphasis added)).
- Towner v. Cnty. of Tioga, Civ. A. No. 3:15-CV-0963 (GLS/DEP), 2018 U.S. Dist. LEXIS 30901, at *15 (N.D.N.Y. Feb. 26, 2018) (holding that the privilege did not protect documents that did not relate to legal advice; "Although the email is between a client and her counsel, the communication is limited solely to a factual matter; no legal advice is mentioned, much less shared or otherwise conveyed between the parties. After a careful review of this email, the court finds that it is not shielded from disclosure by the attorney-client privilege, and must therefore be produced to plaintiff.")

- [Privilege Point, 12/26/18]

Court Needs More Information to Assess Draft Documents' Privilege Protection

December 26, 2018

The attorney-client privilege can protect lawyers' input into draft documents created by the lawyer or by the client – which of course evaporates when the client approves the finished document for disclosure outside the relationship. Not surprisingly, courts examine such lawyers' revisions to assess whether those lawyers were providing legal input rather than business, grammatical, stylistic suggestions, etc.

In Shenwick v. Twitter, Inc., the court noted that defendants withheld "several drafts of documents with comments provided with the redlined version." Case No. 16-cv-05314-JST (SK), 2018 U.S. Dist. LEXIS 185714, at *7 (N.D. Cal. Oct. 30, 2018). But because the court could not "determine the identity of the author of comments [in] these draft documents," it ordered defendants "to provide the Court with the identity of the individuals who provided the comments and link them to the comments in the draft documents submitted to the Court." Id.

The lesson from such decisions is self-evident. Lawyers should always memorialize their role in any drafting process, and stand ready to identify their suggested changes – including the nature of their legally-driven revisions.

- **[Privilege Point, 11/18/20]**

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November 18, 2020

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In Anderson v. Trustees of Dartmouth College, Case No. 19-cv-109-SM, 2020 U.S. LEXIS 153785 (D.N.H. Aug. 25, 2020), an expelled student sued Dartmouth for applying a faulty disciplinary process. Dartmouth withheld approximately 5,000 pages of documents, many of which were email threads. The court rejected most of Dartmouth's privilege claims. One group of withheld documents constituted emails between non-lawyer Dartmouth employees. Although one email "discusses the relevant New Hampshire statute, . . . that fact does not render the email subject to an attorney-client privilege. And, while in-house counsel . . . is copied on the email, neither [of the Dartmouth employees] requests legal advice, nor does [Dartmouth's in-house lawyer] offer any." Id. at *6. Another batch of withheld emails "invite[d] feedback or comment on potential draft email responses to the plaintiff" – but "[t]hose requests were not made specifically to counsel, [and] instead generally requested responses from all email recipients." Id. at *7-8. The court also rejected Dartmouth's argument that its employees sent Dartmouth's lawyer documents seeking legal advice – bluntly holding that "[o]f course, merely saying so does not make the documents privileged." Id. at *9. The court also noted that "Dartmouth fail[ed] to provide any sort of affidavit or declaration from an individual with personal knowledge of that practice, or any other evidence that might establish that practice." Id. at *9 n.2.

Lawyers should educate their clients about the importance of including on the face of their emails indicia of those emails' privileged nature (normally, that the clients seek the lawyers' legal advice). And of course lawyers must support privilege claims with whatever necessary affidavits the pertinent court would expect.

- Adhikari v. KBR, Inc., Case No. 4:16-CV-2478, 2020 U.S. Dist. LEXIS 244198, at *7-8 (S.D. Tex. Dec. 29, 2020) (after reviewing withheld documents in camera; finding that the privilege did not protect some documents; “Finally, regarding Documents 10168 & 10169, Heinrich testified that Karolyn Stuver, KBR’s Communications Director, requested his legal advice on addressing a media inquiry and Jill Pettibone, KBR’s Vice President of Operational Excellence, discusses and follows up on the request for legal advice. The Court finds that this document is not privileged. Although Ms. Stuver asks for help responding to the media inquiry with input from legal or subcontracts, Ms. Pettibone responds, directing her to Sharon Steele, Procurement Director, for the response. On the face of the document, no legal advice is given. The affidavit is insufficient to cure this deficiency. These two documents must be produced. Minix, 2019 [WL 2524918], at *4 (no presumption communications with counsel are privileged, must involve obtaining or providing legal advice).” (internal citation omitted))
- Belcastro v. United Airlines, Inc., Case No. 17 C 1682, 2021 U.S. Dist. LEXIS 4751, at *9-10 (N.D. Ill. Jan. 11, 2021) (holding that the attorney-client privilege protected emails on which a client copied a lawyer; noting that the lawyer responded with legal advice; “As to entries 35 and 46, Defendants argue that these entries are privileged because they discuss legal advice rendered in connection with drafting a separation letter to give to Plaintiff. Defendants explain that non-privileged emails concerning the letter and drafts of the letter were produced, but these two emails on which attorney Frederick are copied are communications made in order to seek Frederick’s legal advice, which it seems she provided immediately following the challenged emails, or at least in the same chain on the same day. Because attorney Frederick is copied on those emails and they are part of the broader chain in which legal advice was solicited and provided, Defendants have met their burden to show that entries 35 and 46 are protected by attorney-client privilege.” (citations omitted))

- Coventry Capital US LLC v. EEA Life Settlements Inc., Civ. A. No. 17 Civ. 7417 (VM) (SLC), 2021 U.S. Dist. LEXIS 181137, at *12 (S.D.N.Y. Sept. 22, 2021) (holding that the privilege did not protect an email to a company's general counsel because it did not seek legal advice; "In ECF No. 283-26, the Court finds that although Mr. Harrop is copied on the email dated 4/20/17 at 9:17 am, that email does not contain a request for or provision of legal advice, and is therefore not privileged and should be un-redacted. See Tower 570 Co. LP, 2021 U.S. Dist. LEXIS 63955, 2021 WL 1222438, at *6 (directing the production of communications on which lawyer was copied but was not 'done for the purpose of obtaining or providing legal advice').")
- Freeman v. Ocwen Loan Servicing, LLC, No. 1:18-cv-03844-TWP-DLP, 2022 U.S. Dist. LEXIS 120616, at *6-7, *7-8 (S.D. Ind. July 8, 2022) (analyzing withheld documents in camera to determine privilege protection; noting the absence of privileged content on the face of some documents; "[T]he Court finds that approximately half of the documents reviewed in camera are protected by the attorney-client privilege. The other half of the comments log contains updates on the status of the mortgage loan, or request case status updates from legal or outside counsel. As noted in the case law, routine status updates about the status of the Plaintiff's mortgage loan or, the attorney fee amount are not protected by the attorney-client privilege, even if an attorney is involved in the communication. That information, which was undoubtedly created in the ordinary course of business and for the use of many legal and non-legal personnel, is not privileged. The Court was unable to identify any legal advice or strategy within these documents; rather, it appears that these comments are merely tracking the milestones for Plaintiff's mortgage loan, which constitutes business advice or status updates related to scheduling and business needs."; "For several of the entries, however, the Court finds that even though the comment is providing or seeking a status update, the intent of that update was for the purpose of requesting legal advice or memorializing advice from counsel regarding how Ocwen should proceed with the bankruptcy proceedings and the underlying litigation.")

VI. OUTSIDERS

A. Client Agents/Consultants

- [Privilege Point, 5/22/02]

Effect of a Spouse's Presence During an Attorney-Client Communication

May 22, 2002

The presence of a client's agent during a communication between the client and the lawyer generally eliminates the required "confidentiality" that underlies the attorney-client privilege, and therefore means that the privilege will not protect the communication (unless the client's presence was necessary for the transmission of the information). This issue becomes more complicated when the client's agent who attends the communication is the client's spouse.

A recent Colorado state court case discussed the judicial debate about a spouse's presence during an attorney-client communication. In In re: Wesp, 33 P.3d 191 (Colo. 2001), the Court noted that the interplay between the attorney-client privilege and the spousal privilege caused some courts to find that a spouse's presence prevented the privilege from arising, while other courts took the opposite approach. The Colorado Court concluded that a wife's presence during communications between a husband and his lawyer precluded the privilege from protecting the communication.

Lawyers who meet their clients in the presence of the client's spouse should consider the risk of such a joint meeting.

- United States v. Stewart, 287 F. Supp. 2d 461, 463, 464, 468, 469 (S.D.N.Y. 2003) (analyzing the following situation: "On June 23, 2002, Stewart composed an e-mail that contained her account of the facts relating to her sale of ImClone stock. She sent this e-mail to Andrew J. Nussbaum, an attorney at Wachtell, Lipton, Rosen & Katz, who was at the time one of the lawyers representing Stewart in her dealings with the government. The following day, Stewart accessed the e-mail from her own e-mail account and, without making any alterations to it, forwarded a copy to her daughter, Alexis Stewart." (emphases added); concluding that the e-mail deserved privilege protection, but that Stewart waived that protection; "Stewart's June 23 e-mail to Nussbaum was clearly protected by her attorney-client privilege Defendant's arguments regarding Stewart's intent and the sanctity of the family notwithstanding, the law in this Circuit is clear: apart from a few recognized exceptions, disclosure to third parties of attorney-client privileged materials results in a waiver of that privilege. No exception is applicable in this case." (emphasis added); also finding that the e-mail deserved work product protection; "[A]lthough the e-mail to Stewart's daughter does not realistically risk revealing the thought processes of Stewart's attorneys, I conclude that it is protectable as preparation for litigation. The Government does not claim that it has substantial need for the statements in the e-mail. I must therefore determine whether Stewart waived the protection by forwarding the e-mail to her daughter."; finding that Stewart did not waive the work product protection; "By forwarding the e-mail to a family member, Stewart did not substantially increase the risk that the Government would gain access to materials prepared in anticipation of litigation. Martha Stewart stated in her affidavit that 'Alexis is the closest person in the world to me. She is a valued confidante and counselor to me. In sharing the e-mail with her, I knew that she would keep its content strictly confidential.' . . . Alexis Stewart stated that while she did not recall receiving the June 24 e-mail, she 'never would have disclosed its contents.' . . . The disclosure affected neither side's interests in this litigation: it did not evince an intent on Stewart's part to relinquish work product immunity for the document, and it did not prejudice the Government by offering Stewart some litigation-based advantage. Accordingly, I hold that Stewart did not waive work product protection over the June 23 and 24 e-mails." (emphasis added)).

- [Privilege Point, 10/27/10]

Judges Disagree About the Waiver Impact of Plaintiffs' Disclosure of Privileged Communications to Their Son

October 27, 2010

Most courts find that the only client agents or consultants within the attorney-client privilege are those necessary for the transmission of information between the client and the lawyer. However, courts sometimes disagree about whether a client agent's involvement meets the "necessary" standard.

In July, well-respected Southern District of New York Magistrate Judge James Francis held that two individual plaintiffs waived their privilege by disclosing protected communications to their financial adviser, their accountant, and their own son. See Green v. Beer, No. 06 Civ. 4156 (KMW) (JCF), 2010 U.S. Dist. LEXIS 65974 (S.D.N.Y. July 2, 2010). Nearly two months later, in Green v. Beer, No. 06 Civ. 4156 (KMW) (JCF), 2010 U.S. Dist. LEXIS 87484 (S.D.N.Y. Aug. 24, 2010), Judge Kimba Wood agreed with Judge Francis's conclusion about the first two client agents – but disagreed about the son. Judge Wood pointed to the son's explanation that he was assisting his parents in sending and receiving e-mails – ultimately concluding that "the technical assistance provided by their son, in his capacity as their agent, should not constitute a waiver of the attorney-client privilege." Id. at *13-14. Judge Wood also noted the public policy involved, explaining that clients without technical expertise "should not be prevented from enjoying the advantages of email correspondence for fear that the necessary assistance of a third party – here, the Green Plaintiff's son – in sending or receiving such correspondence will lead to the forfeiture of the attorney-client privilege." Id. at *14.

Although it is comforting to know that parents might not waive their privilege by having a child help with their e-mail, clients and lawyers should remember that Judge Wood agreed with Judge Francis's conclusion about the financial adviser and the accountant.

- Pastura v. CVS Caremark, Case No. 1:11-cv-400, 2012 U.S. Dist. LEXIS 72179, at *2, *3 (S.D. Ohio May 23, 2012) (analyzing the following scenario; "It is undisputed that plaintiff met with Randolph H. Freking, Esq., for an initial consultation regarding the instant lawsuit. Plaintiff's sister was present during the entirety of this consultation. During plaintiff's deposition, counsel for defendant asked plaintiff questions regarding the substance of his conversation with Mr. Freking. Plaintiff's counsel objected, asserting that the conversation was protected by the attorney-client privilege and instructed plaintiff not to respond. Defendant asserts that plaintiff waived the privilege by having his sister present during the conversation and, consequently, defendant is entitled to discover the substance of the conversation."; "Here, plaintiff's communication with Mr. Freking at the initial consultation is not protected by the attorney-client privilege because the communication was not 'made in confidence' by virtue of the presence of plaintiff's sister during the conference."; inexplicably not dealing with the possible work product protection. (emphases added)).
- Caruso v. Grace, No. 11 Civ. 2353 (SAS) (KNF), 2012 U.S. Dist. LEXIS 89176, at *17 (S.D.N.Y. June 27, 2012) (holding that the presence of Nancy Grace's talent agency representative during otherwise privileged discussions between Nancy Grace and her lawyer meant that the privilege did not protect those communications; applying New York law in a diversity case without a choice of laws analysis; finding that the talent agency employee was not a necessary client agent, was not the functional equivalent of an employee, and was not assisting the lawyer in providing legal advice; "Moreover, even if Grace's contention, that she and her attorney 'relied on [Perry's] counsel to guide them through the various particularities inherent to [syndication] deals,' was corroborated, which is not the case, it would not establish that Perry's 'counsel' enabled Shire to understand aspects of Grace's communications that he could not otherwise understand in rendering his legal advice." (emphases added)).

- Jackson v. Deen, Case No. CV412-139, 2013 U.S. Dist. LEXIS 65814, at *43, *43-44, *44, *45, *46, *47, *48 (S.D. Ga. May 8, 2013) (in an employment discrimination case against celebrity Paula Deen and her brother "Bubba" Hiers, ultimately concluding that Deen's three outside consultants were outside the attorney-client privilege protection; "[T]he defendants rely on Paula Deen's affidavit. . . . She attests that Barry Weiner is her 'agent and business adviser.' . . . Lucie Salhany is 'a business consultant for' Paula Deen Enterprises, LLC (PDE)), . . . and she works 'with designated PDE personnel on staffing and salary issues, and the improvement of hiring practices,' plus marketing and public relations functions. . . . She is 'an integral person in a group dealing with issues that are completely intertwined with PDE's litigation and legal strategies.' . . . And Jeff Rose is affiliated with 'The Rose Group,' which is a 'brands relation agency.' . . . That group provides 'marketing and public relations services for PDE.' . . . Rose thus is an integral part of the Weiner-Salhany-Rose cluster that gathers 'to discuss litigation and legal strategies.' . . . Rose, then, 'must hear the advice of legal counsel regarding these matters.'"; "Those three contractors, Deen concludes, 'are indistinguishable from my employees because each, in their individual capacity, acts for me and my business entities and possesses the information needed by attorneys in rendering legal advice.'"; "Plaintiff insists that the documents Gerard copied to them are discoverable because Deen's affidavit at most speaks of her general reliance on them, while they themselves have not provided affidavits showing they possess sufficient, specific knowledge of this case to place them within that protection zone."; "It is true that there is no per se rule restricting a corporation's assertion of its attorney-client based privilege to employees, as it is common to seek legal assistance from third parties who are neither employees nor lawyers."; "Those third parties, however, must be nearly indispensable to that effort."; "Significant here is what the defendants do not say. They do not supply: (a) any affidavit from any of the agents showing what specific role they have played with respect to this case; and (b) what communications in fact were sent to them and for what purpose. There is a difference, for example, between helping to formulate and factually support a legal strategy versus damage control-based, publicity management -- a patently commercial endeavor."; "Deen's affidavit, meanwhile, speaks only in general terms. Nothing approaching the 'nearly indispensable role' is described."; "Waiver thus has occurred, so defendants must disclose all of Gerard's communications regarding Jackson's complaints, where these individuals were in the loop." (emphases added)).

- [Privilege Point, 7/17/13]

Federal and State Courts Analyze the Privilege Impact of Third Parties: Client Agents

July 17, 2013

One of the greatest threats to the attorney-client privilege's creation and preservation involves the role of agents assisting clients or their lawyers. If such agents fall outside privilege protection, the client's or lawyer's communications with the agent will not be protected; the agent's presence during otherwise privileged communications will abort the privilege; and disclosure of preexisting privileged communications to the agent will waive the privilege.

Courts frequently assess the privilege implications of a client agent's involvement in otherwise privileged communications. Some courts take a broad view of client agents who are considered inside privilege protection. In Adler v. Greenfield, 2013 IL App (1st) 121066, an Illinois state court held that JP Morgan was within privilege protection when it acted as an elderly woman's agent. The court explained that "JP Morgan acted as Muriel's agent in communicating with [her lawyer] about Muriel's estate plan." Id. ¶ 54. Interestingly, the court also held that "under agency principles, the death of the principle terminates the authority of the agent" – meaning that the privilege protection evaporated upon the client's death. Id. Most courts take a much more restrictive view of client agents who are within privilege protection. In Jackson v. Deen, Case No. CV412-139, 2013 U.S. Dist. LEXIS 65814, at *42 (S.D. Ga. May 8, 2013), the court held that Paula Deen had waived her privilege protection by "includ[ing] in the communications loop" three of her assistants. Deen argued that these various business consultants and public relations advisors "are indistinguishable from my employees." Id. at *43 (internal citation omitted). The court rejected Deen's argument, holding that the privilege only covers third parties who are "nearly indispensable" in facilitating attorney-client communications. Id. at *46 (citation omitted). The court pointedly criticized Deen's affidavit, which "speaks only in general terms" – noting that "[n]othing approaching the 'nearly indispensable role' is described." Id. at *47 (citation omitted).

The narrow majority rule on privilege protection for client agents represents perhaps the most counterintuitive aspect of privilege law. Lawyers should warn their clients not to include such third parties in privileged communications or share privileged communications with them. Next week's Privilege Point will discuss lawyer agents.

- Love v. Permanente Med. Grp., No. C-12-05679 DMR, 2014 U.S. Dist. LEXIS 22243, at *9-10 (N.D. Cal. Feb. 19, 2014) (finding that one outsider's presence at a meeting destroyed the privilege protection (although using the waiver terminology); "Nonetheless, the court finds that Defendants waived their assertion of attorney-client privilege over the redacted information when the information provided by Resnick was disclosed at the CPC meeting to individuals other than the CPC members. Namely, the disclosure of the information to Dawn Belardinelli, whom Defendants admit was present at the meeting to discuss matters unrelated to the advice provided by Resnick, constituted a waiver of the attorney-client privilege. Defendants have not shown that Belardinelli is connected to Plaintiff, the relevant departments and committees, or the events underlying this litigation, or that the advice provided by Resnick concerned matters within the scope of Belardinelli's duties. Nor have Defendants demonstrated that Belardinelli had any common legal interest with the members of the CPC such as to support an assertion of the common interest privilege. There is no indication in the minutes of the meeting that Belardinelli was not present at the meeting when the redacted information was transmitted to the meeting attendees. As such, Defendants waived any assertion of attorney-client privilege by disclosing the information to a third party without a common legal interest." (emphases added)).

- Hostetler v. Dillard, Civ. A. No. 3:13-cv-351-DCB-MTP, 2014 U.S. Dist. LEXIS 167374, at *5, *7 (S.D. Miss. Dec. 3, 2014) (holding that the presence of a potential business partner destroyed privilege protection, because his presence did not further any communications between a lawyer and a client; "At the heart of this discovery dispute is a May 11, 2011, meeting between Dillard, his wife, Byron Seward, Garrard, and Trotter. Garrard and Trotter were acting as attorneys for the Dillard Defendants. They did not represent Seward, whom Dillard wished to conduct business with regarding Dillard's property. During this meeting, the attendees discussed the Dillard Defendants' options for leasing, or otherwise utilizing, their property."; "The Dillard Defendants, however, have failed to present any proof or make any argument demonstrating that the disclosures made to Seward were made in furtherance of the rendition of professional legal services to the Dillard Defendants. Having failed to provide any proof or argument on this point, the Dillard Defendants have not met their burden of proving that the above-listed documents are privileged." (emphases added)).
- Salser v. Dyncorp Int'l, Inc., No 12-10960, 2014 U.S. Dist. LEXIS 172056, at *11 (E.D. Mich. Dec. 12, 2014) (finding a non-party therapist cannot create protected work product; "Ashley's [Decedent's wife] disclosure of information to her therapist about her attorney and about her case constitutes a waiver of the attorney-client privilege." (emphasis added)).

- [Privilege Point, 2/18/15]

A Southern District of New York Decision Adopts Narrow Views of Privilege Protection for Independent Contractors and Lawyer-Retained Consultants: Part II

February 18, 2015

Last week's Privilege Point described the Southern District of New York's prediction that the Second Circuit might reject the widely-accepted "functional equivalent" doctrine. Church & Dwight Co. Inc. v. SPD Swiss Precision Diagnostics, GmbH, No. 14-cv-585, 2014 U.S. Dist. LEXIS 175552 (S.D.N.Y. Dec. 19, 2014). The court also assessed whether the defendant waived its privilege protection by sharing protected communications with an outside marketing consultant — ultimately rejecting defendant's argument that "in light of the complex regulatory scheme to which [its product] was subject, it was essential" to share such privileged communications with the consultant. Id. at *2.

The court noted that agents or consultants considered inside privilege protection were generally translators or similar consultants "necessary to improve comprehension of the communication between attorney and client." Id. at *4. That standard arose in the context of client agents, but many courts inexplicably apply the same approach to lawyer agents. Here, the court found a waiver, because the defendant "makes no showing as to how the outside marketing firm improved counsel's comprehension of [the client's] communications to counsel, or vice versa." Id. at *4-5. Later in the opinion, the court similarly held that lawyers sharing privileged communications with their agents or consultants must show that the agent or consultant "enabled counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice." Id. at *6.

Other courts apply the same narrow standard. Three weeks before the Church & Dwight opinion, another court explained that an accountant would have been inside privilege protection as a lawyer's agent only if the accountant was "included in the conversation at the behest of Plaintiff's attorney in order to help decipher the relationship." Yoder v. Long (In re Long), Case No. 09-23473, Adv. No. 09-6172, 2014 Bankr. LEXIS 4879, at *50 (Bankr. D. Kan. Dec. 1, 2014). Applying the same translator/interpreter standard to client agents and lawyer agents can make it very difficult for lawyers to protect their communications with consultants upon whom they legitimately rely when giving their clients legal advice.

- **[Privilege Point, 7/15/15]**

Courts Assess Whether Client and Lawyer Agents are Inside or Outside Privilege Protection: Part I

July 15, 2015

Lawyers and most clients understand that disclosing privileged communications to adversaries waives that delicate protection. But clients lose privilege protection far more frequently when they or their lawyers disclose privileged communications to friendly third parties — such as agents or consultants working with the clients or with the lawyers.

In Malbco Holdings, LLC v. Patel, No. 6:14-cv-00947-PK, 2015 U.S. Dist. LEXIS 62501 (D. Ore. May 13, 2015), plaintiff argued that defendants forfeited their privilege protection by including their adult children in otherwise privileged communications with their lawyer. The court found that the children were inside the privilege, noting that Oregon's statutory privilege allowed "the inclusion of a client's family members on privileged communication regarding matters of joint concern." Id. at *6. The court then considered whether (1) defendants' "[accountant] was assisting [defendants' lawyer] in the rendition of his legal services," and thus inside the privilege, or (2) defendants' lawyer "was enlisted to advise [the accountant] in her work preparing gift tax returns" for the defendant, which would have placed the accountant outside the defendants' privilege. Id. at *8. The court ordered an in camera review of the withheld communications so it could determine the privilege's applicability.

Clients and their lawyers involving any third parties in their communications should consider the waiver risks, and assure that the communications would support a valid privilege claim if courts review them in camera. Next week's Privilege Point will address another example.

- [Privilege Point, 9/16/15]

Courts Continue to Catalogue Client and Lawyer Agents Outside Privilege Protection

September 16, 2015

Under the majority view, the only client agents/consultants inside privilege protection are those essential for the client-lawyer communications. Although courts take a more varied view of lawyer agents/consultants, many courts hold that the only lawyer agents within privilege protection are those essentially translating or interpreting data so the lawyer can understand it.

In Cardinal Aluminum Co. v. Continental Casualty Co., Case No. 3:14-CV-857-TBR-LLK, 2015 U.S. Dist. LEXIS 95361 (W.D. Ky. July 22, 2015), the court held that plaintiff's insurance broker was outside privilege protection — despite the plaintiff's CFO's affidavit that the plaintiff relied on the broker to submit an insurance claim, negotiate with the insurance company, and advise the plaintiff about the claims process. Among other things, the court noted that "Plaintiff did not argue that its broker acted to effectuate legal representation for Plaintiff." Id. at *8. About three weeks earlier, another court addressed a company's claim that the privilege covered communications between its lawyers and environmental engineering firm AGC. NL Indus., Inc. v. ACF Indus. LLC, No. 10CV89W, 2015 U.S. Dist. LEXIS 86677 (W.D.N.Y. July 2, 2015). Although acknowledging plaintiff's argument that AGC's "actions were done at the direction of counsel," the court found that AGC was outside privilege protection — noting that "[p]laintiff has not shown that AGC acted like an interpreter or translator of client communications." Id. at *12.

One of the most dangerous client misperceptions is that the privilege can protect their communications with their agents/consultants. And one of the most dangerous lawyer misperceptions is that lawyers can automatically assume that their agents/consultants are within privilege protection.

- [Privilege Point, 12/2/15]

Decision Highlights a Key Difference Between Attorney-Client Privilege and Work Product Doctrine Protection

December 2, 2015

The attorney-client privilege provides absolute but fragile protection. In contrast, work product doctrine protection can be overcome — but offers more robust safety than the privilege. This distinction affects the impact of third parties' participation, and disclosure of protected communications or documents to third parties.

In Wichansky v. Zowine, No. CV-13-01208-PHX-DGC, 2015 U.S. Dist. LEXIS 132711 (D. Ariz. Sept. 29, 2015), the court dealt with plaintiff's communications with his lawyer — in the plaintiff's father-in-law's presence. The court found that the father-in-law's participation rendered the privilege unavailable — holding that the father-in-law "was not necessary to Plaintiff's communications with his counsel and [therefore] does not fall within the privilege." Id. at *6. In addressing the work product doctrine, the court applied the universal rule that "unlike the more sensitive attorney-client privilege, waiver of work product protection does not occur simply because a document is shared with a third person." Id. at *10. Because the father-in-law's "interests are aligned with Plaintiff's," disclosing work product to the father-in-law did not waive that separate protection. Id. at *11. In fact, the court concluded that the plaintiff's father-in-law could himself prepare protected work product under Fed. R. Civ. P. Rule 26(b)(3)(A) — which can cover documents prepared in anticipation of litigation "for" a party (such as the plaintiff). Id. at *7.

The attorney-client privilege and the work product doctrine apply in dramatically different ways in the context of friendly third parties — who are generally outside privilege protection but inside work product protection, and who, even themselves, can create protected work product. Corporate lawyers should remember these rules when considering their corporate clients' friendly third parties such as accountants, consultants, or other agents.

- Walter v. Drake, Case No. 2:14-cv-1704, 2015 U.S. Dist. LEXIS 164179, at *6-7, *7 (S.D. Ohio Dec. 8, 2015) ("If Mr. Culley, even though he was legal counsel, involved the public relations firms not as part of his effort to provide legal advice to the [Ohio State] University, but as part of an effort to craft announcements which would be more palatable to the media or the public, he was not using the consultants in order to help him as a lawyer, but to help the University as a public institution anticipating a public relations campaign. Under that scenario, sharing otherwise privileged documents with the consultant is a waiver of the attorney-client privilege, a communications directly with the consultant are not privileged at all."; "On the current state of the record, it would be difficult for the Court to conclude that all of these communications were protected by the attorney-client privilege or that providing the public relations firms with otherwise privileged documents was not a waiver." (emphases added)).
- Johnson v. Zurich Am. Ins. Co., Case No. 14-cv-1095-MJR-SCW, 2016 U.S. Dist. LEXIS 10754, at *3-4 (S.D. Ill. Jan. 28, 2016) (holding that an insurance broker was inside the privilege protection; "The dispositive question was whether the broker, Hylant[, was] an agent of Triple Crown [defendant] -- and specifically Triple Crown's counsel -- for the purpose of providing legal advice." The Court agreed with Plaintiff's counsel that policies in question were ultimately purchased by Triple Crown drivers, who were the insured. Thus there could be no argument that the privilege attached due to an insured/insurer arrangement. Nevertheless the Court concluded that Hylant was Triple Crown's agent, and agent for Triple Crown's counsel Burns. . . . The Court determined that Hylant was acting at the behest of Triple Crown for the purpose of providing advice on the conversion from a worker's compensation to an occ/acc model. As Triple Crown's broker[,] Hylant provided advice to Triple Crown but ultimate decision making was in the hands of Triple Crown. Additionally, while not dispositive of the issue, evidence that Hylant was paid a retainer as an agent for Triple Crown, supports the conclusion that there was an agency relationship." (emphases added)).

- In re Queen's Univ., 820 F.3d 1287, 1295 (Fed. Cir. 2016) (holding that the attorney-client privilege covered nonlawyer patent agents' communications relating to patent prosecution, but not relating to infringement opinions or communications about the sale or purchase of a patent; "It is true . . . that courts have consistently refused to recognize as privileged communications with other non-attorney client advocates, such as accountants." (emphasis added)).

- [Privilege Point, 11/23/16]

Plaintiff's Live-In Boyfriend was Outside Privilege Protection, but Inside Work Product Protection: Part I

November 23, 2016

Nearly every court finds that the only client agents/consultants inside privilege protection are those necessary for the communications between the client and her lawyer. But the work product doctrine casts a wider protective net.

In Harrington v. Bergen County, A. No. 2:14-cv-05764-SRC-CLW, 2016 U.S. Dist. LEXIS 124727 (D.N.J. Sept. 13, 2016), a civil rights plaintiff suing her former employer claimed that her live-in boyfriend was inside privilege protection – so that his presence during her communications with her lawyer did not destroy the privilege. The court acknowledged that plaintiff had been involuntarily committed to a mental hospital at the pertinent time, and that her boyfriend "has provided meaningful assistance" to her. Id. at *11. But the court was "not convinced that disclosure to [her boyfriend] was necessary or essential for Plaintiff to obtain informed legal advice." Id. The court noted that the "Plaintiff offers no medical or other expert opinion" about her inability to communicate with her lawyer without her boyfriend present. Id. at *11-12. The court stripped away privilege protection from communications in her boyfriend's presence, or later shared with her boyfriend.

Most clients (both individual and corporate) do not appreciate the miniscule range for their agents/consultants to be within privilege protection. Next week's Privilege Point will address the court's work product analysis.

- [Privilege Point, 11/30/16]

Plaintiff's Live-In Boyfriend was Outside Privilege Protection, but Inside Work Product Protection: Part II

November 30, 2016

Last week's Privilege Point described a court's acknowledgment that a mentally ill plaintiff's live-in boyfriend had provided "meaningful assistance" to the plaintiff in dealing with her lawyer, but was not "necessary or essential" for the plaintiff to obtain her lawyer's advice. Harrington v. Bergen Cty., A. No. 2:14-cv-05764-SRC-CLW, 2016 U.S. Dist. LEXIS 124727, at *11 (D.N.J. Sept. 13, 2016). This meant that communications in her boyfriend's presence were not privileged, and that any privileged communication later shared with her boyfriend lost privilege protection.

The court then turned to the work product analysis – and dealt with two related issues. First, the court correctly held that any work product that was "transmitted to or shared with" the boyfriend did not lose that separate protection. Id. at *15. As the court explained, "there is no indication of disclosure to adversaries," so work product protection remained. Id. Second, the court incorrectly held that "the work product doctrine does not protect documents, emails, or other items created by" the boyfriend – because "Plaintiff contends that [her boyfriend] served as her agent or representative, as opposed to" her lawyer's agent. Id. at *13, *15. It is impossible to square this conclusion with the work product rule itself – which on its face protects documents (motivated by litigation) created "by or for another party or its representative." Id. at *7 (quoting Fed. R. Civ. P. 26(b)(3)(A)). The boyfriend's documents should have deserved work product protection either because (1) the documents were prepared "for" the plaintiff, or (2) "by" her "representative."

Lawyers and their clients should keep in mind the dramatic differences between the attorney-client privilege and the work product doctrine. In this case, the court correctly applied one privilege principle (under the majority approach) and one work product principle — but incorrectly applied another work product principle (which varied from the rule language itself). Perhaps the plaintiff can take solace in the words of Meatloaf's song: "Now don't be sad, cause two out of three ain't bad."

- [Privilege Point, 2/15/17]

What Client Agents Deserve Privilege Protection?

February 15, 2017

Nearly every court considers client agents outside privilege protection unless those agents are necessary for facilitating privileged communications between clients and their lawyers. Some courts occasionally take a broader view – but without starting a trend.

In In re Riddell Concussion Reduction Litigation, the court assessed privilege protection for defendant's communications with "a public relations firm that consults with clients on communication strategies." Civ. No. 13-7585 (JBS/JS), 2016 U.S. Dist. LEXIS 168457, at *21 (D.N.J. Dec. 5, 2016). Most courts find such agents outside privilege protection, but the Riddell court held that "it is unquestionably the case that communications between and amongst Riddell and [the PR agency] for the purpose of securing legal advice are privileged." Id. at *14-15. A few weeks later, Valenzuela v. Union Pacific Railroad held that a company's "right-of-way agent" deserved privilege protection under both Arizona and California law. No. CV-15-01092-PHX-DGC, 2016 U.S. Dist. LEXIS 176640, at *20 (D. Ariz. Dec. 21, 2016). But between those two decisions, a New York court applied the majority rule – holding that the plaintiff's brother (who was also funding the plaintiff's litigation) was outside privilege protection, because the plaintiff "cannot show that [his brother/litigation funder] served to facilitate attorney-client communications or representation," or acted as an agent "whose services are necessary for the provision or receipt of legal services." Kagan v. Minkowitz, No. 500940/2016, 2016 N.Y. Misc. LEXIS 4577, at *6-7 (N.Y. Sup. Ct. Dec. 9, 2016).

Many corporate executives mistakenly believe that they can share privileged communications with corporate agent/consultants without waiving the privilege. A handful of cases now and then provides a tempting sign that courts are becoming more forgiving, but the majority continues to find nearly all such agent/consultants outside privilege protection.

- CAC Atlantic LLC v. Hartford Fire Ins. Co., No. 16 Civ. 5454 (GHW) (JCF), 2017 U.S. Dist. LEXIS 11010 (S.D.N.Y. Jan. 19, 2017) (in an opinion by Magistrate Judge Francis, inexplicably citing Kovel in the context of a client rather than a lawyer agent; "The documents now at issue are all communications to or from Minogue ['a building consultant retained by Hartford prior to its disclaimer of coverage']", and since Minogue is not 'the client,' they are not privileged on their face. Nevertheless, there are two theories that might bring these communications within the privilege. First, an attorney may rely on a non-lawyer to facilitate communications with the client, including persons with expertise such as accountants used to convey technical information. See United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961); Osorio, 75 N.Y.2d at 84, 550 N.Y.5.2d at 615. Here, however, Hartford has not demonstrated that Minogue was engaged simply to 'translate' information for purposes of providing legal advice."; "Second, even though Minogue is not itself a party, its communications with counsel and the defendant might be privileged if it were the functional equivalent of an employee of Hartford."; "Hartford has not established that Minogue served such an integral role in light of these factors that it must be treated as if it were an employee for purposes of the privilege." (emphases added)).

- Mirra v. Mirra, Dkt. No. 1484CV03857BLS2, 2017 Mass. Super. LEXIS 54, at *2, *2-3, *3, *6 (Mass. Super. Ct. Apr. 26, 2017) (holding that brother and sister minority shareholders in a closely-held company waived their privilege protection by disclosing privileged communications to another brother, also a minority shareholder; "It is undisputed that Anthony [brother minority shareholder] never had any express attorney-client relationship with Posternak [lawyer for Anthony's brother and sister, also minority shareholders]. In 2010 Lenny, Sandra [both of whom were minority shareholders], and Anthony all met with Attorney Nicholas Nesgos of Posternak to discuss ongoing disputes with the majority shareholders in Mirra Co. (Defendants do not seek disclosure of anything said at that meeting.) Thereafter Lenny and Sandra hired Posternak to represent them. Anthony did not. He never signed an engagement letter with Posternak, never paid Posternak any money, never asked Posternak to represent him, and was never told that Posternak or Attorney Negros was representing him." (emphasis added); "Plaintiffs insist that Anthony nonetheless had an implied attorney-client relationship with Posternak. In an interesting twist, Anthony does not join in that argument and does not oppose the motion to compel production emails he received or sent."; "Plaintiffs' claim that Anthony had an implied attorney-client relationship with Posternak fails to meet the first requirement, because Plaintiffs have not convincingly demonstrated that Anthony ever sought advice or assistance from Attorney Nesgos."; "Lenny and Sandra were free to take private email communications they were having with their lawyer and share them with Anthony. In so doing, however, they waived the attorney-client privilege." (emphasis added)).

- Engurasoff v. Coca-Cola Refreshments USA, Inc., Case No. 14-md-02555-JSW (MEJ), 2017 U.S. Dist. LEXIS 67802, at *9, *9-10, *11-12 (N.D. Cal. May 3, 2017) (holding that defendant Coca-Cola's label designer was inside privilege protection; "Coca-Cola utilizes CMA Design, Turner Duckworth, and Christopher Weston to develop label designs. . . . It also utilizes Schawk and Finished Art to adapt label designs into final product labels and generate final label proofs. . . . 'Label content is subject to the approval of Coca-Cola's counsel. Accordingly, the Coca-Cola Legal Department provides input at multiple stages' of the label design and production process. . . . Coca-Cola attorneys may communicate legal advice regarding the labels to these third parties. . . . Coca-Cola attorneys also may communicate legal advice to Cornerstone [another label third-party entity] regarding licensing of music for commercials." (emphases added) (internal citation omitted); "Coca-Cola Design Director, Frederic Kahn, submitted a declaration describing Coca-Cola's use of outside agencies and the communication of legal advice to those outside agencies. . . . He also reviewed the disputed email chains, and confirmed that the redacted information constituted communications between Coca-Cola's counsel and the third party that was reasonably necessary to ensure counsel's recommendations could be reflected in the label design or proof." (emphases added); "Coca-Cola has met its burden of demonstrating the third party agencies 'needed to know' the legal advice in order to accomplish the purpose for which Coca-Cola hired them; as such, there was no waiver of the attorney client privilege based on the disclosure to these third parties." (emphasis added)).

- In re Syngenta AG MIR 162 Corn Litig., MDL No. 2591, Case No. 14-md-2591-JWL, 2017 U.S. Dist. LEXIS 92606, at *290, *292 (D. Kan. June 13, 2017) ("[T]his court has ruled that communications by third-party consultants 'working at the direction of' attorneys, may be protected by the attorney-client privilege if the communications are 'for the purpose of assisting [the] attorneys in rendering legal advice.'" (second alteration in original); "Plaintiffs argue Syngenta's privilege assertions are belied by documents showing Syngenta retained Informa to help Syngenta develop business strategy, not to provide legal advice. The court agrees. Although Nadel states in his declaration that the Informa analysis was for the purpose of formulating legal strategy, this assertion is unsupported by any documents in the record. The analysis itself contains no legal analysis. And Syngenta has submitted no documents indicating that anyone on Syngenta's legal team worked with Informa on the analysis."; "Syngenta has failed to satisfy its burden of proving the applicability of the attorney-client privilege to the Informa analysis. The fact that Syngenta's 'Market Insight' group, rather than legal group, appears to have sought and used the analysis suggests the analysis was commissioned and communicated primarily for business, rather than legal, purposes. The sentence in Sandlin's May 16, 2014 e-mail directing non-attorney employees to discuss distribution of the related documents with Nadel does not change the business nature of the documents. Even if the court were to find some legal purpose in the communication, the attorney-client privilege would not protect the document because the legal purpose would not predominate over the business purpose. Syngenta's privilege assertion over PRIV003591 is overruled, and Syngenta shall produce this document." (emphases added)).

- [Privilege Point, 10/4/17]

Does a Client Risk Privilege Protection by Bringing Her Mother to a Lawyer Meeting?

October 4, 2017

Because it is absolute and can hide important facts from easy discovery, the attorney-client privilege is hard to create, narrow, and fragile. Among other things, even friendly third parties' presence can abort privilege protection.

In Swyear v. Fare Foods Corp., Case No. 3:16-cv-01214-SMY-RJD, 2017 U.S. Dist. LEXIS 107939 (S.D. Ill. July 12, 2017), a Title VII plaintiff brought her mother to her initial lawyer consultation. The court bluntly held that "the presence of her mother during the consultation waived the attorney client privilege." Id. at *5. The court also rejected two arguments plaintiff advanced to avoid such a waiver, holding (1) that the mother was not a joint client, because "there is no evidence that [plaintiff's] mother sought legal services"; and (2) that "[plaintiff] and her mother did not share a common interest." Id.

Perhaps because plaintiff's lawyer did not raise it, the court did not address possible work product protection for plaintiff's communications with her new lawyer. Because the work product doctrine is not based on confidentiality and is much more robust than the privilege, friendly third parties' presence normally does not abort that separate protection.

- [Privilege Point, 11/1/17]

Courts Continue to Catalogue Client Consultants Outside Privilege Protection

November 1, 2017

Clients' agents/consultants are nearly always outside privilege protection. This generally means that their documents do not deserve privilege protection; their presence during otherwise privileged communications aborts that protection; and disclosing privileged communications to them waives the protection.

In JBGR LLC v. Chicago Title Insurance Co., 2017 NY Slip Op 51006(U) (N.Y. Sup. Ct. Aug. 2, 2017), the court held that the plaintiff's land-use consultant's presence at an otherwise privileged meeting destroyed the privilege. As the court explained, "while [the consultant's] advice may have been important to the legal advice given to the plaintiffs by their lawyers, it was not given to facilitate such legal advice." Id. at *2. Less than two weeks later, a federal court similarly held that the privilege did not protect a report prepared by a real estate appraiser "jointly engaged" by the client and its law firm Pierce Atwood. The court concluded that the appraiser "was not employed to assist Pierce Atwood in rendering legal advice." Portland Pipe Line Corp. v. City of S. Portland, No. 2:15-cv-00054-JAW, 2017 U.S. Dist. LEXIS 135704, at *9, *17 (D. Me. Aug. 14, 2017).

Even sophisticated corporate clients often do not understand that their agents'/consultants' involvement during privileged communications or as recipients of privileged communications usually destroys that protection. Clients sometimes erroneously think that confidentiality arrangements with such agents/consultants will avoid waiving privilege protection. That is incorrect – such agreements generally are irrelevant in analyzing privilege waiver issues.

- Homeward Residential, Inc. v. Sand Canyon Corp., Nos.12-CV-5067 & -7319 (JFK) (JLC), 2017 U.S. Dist. LEXIS 171685, at *38, *39 (S.D.N.Y. Oct. 17, 2017) (holding that a loan servicer and a certificate holder shared a sufficiently common interest for privilege purposes when the client consultant was outside privilege protection; "The agency exception prevents waiver of communications made through an agent where the agent is facilitating communications between the attorney and the client and where disclosure of the communications to the agent is necessary (not merely useful) for the client to obtain informed legal advice."; "The agency exception is not applicable here. While Ocwen and Homeward (and their counsel) presumably had good reasons for communicating with Altisource [provides data management and reporting services to Ocwen], the reasons proffered are not sufficient to satisfy the requirements of the agency exception. Homeward has not established that communication with Altisource was necessary in order to facilitate communication between Ocwen and Ocwen's counsel, or between Homeward and Homeward's counsel. . . . Altisource, a company that Ocwen worked with to handle Ocwen's data on a routine basis, does not, based on the record presented, appear to have had an indispensable role in translating, interpreting, or helping with the communications between Ocwen and counsel." (emphases added)).

- [Privilege Point, 2/7/18]

Public Relations Consultants Are Nearly Always Outside Privilege Protection

February 7, 2018

In an important data breach investigation case discussed in a previous Privilege Point, the court held that the privilege did not protect communications between Premera and its public relations firm, because "drafting press releases relating to a security breach is a business function," and "[h]aving outside counsel hire a public relations firm is insufficient to cloak that business function with the attorney-client privilege." In re Premera Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 1230, 1242 (D. Or. 2017).

A few weeks later, another court reached the same conclusion about a public relations firm hired by famed lawyer Mark Geragos, who was representing the singer Kesha in high-profile litigation. Gottwald v. Sebert, 63 N.Y.S.3d 818 (N.Y. Sup. Ct. 2017). After reviewing communications between the public relations firm and Kesha's lawyers, the court concluded that Geragos and the other lawyers disclosed privileged communications to the PR consultant "primarily for the purpose of advancing a public relations strategy – and not for the purpose of developing or furthering a legal strategy." Id. at 826. Thus, "most of the legal advice discussed with [the public relations firm] lost the protection of the attorney-client privilege." Id. The court inexplicably failed to address the availability of work product protection for some disclosed documents, which normally would survive disclosure to a friendly third party such as a public relations consultant.

Public relations firms often play a critical role in high-profile media-covered litigation. While most courts would hold that disclosing work product to such consultants would not forfeit that protection, lawyers should remember that disclosing pre-litigation purely privileged communications normally will waive that more fragile protection.

- In re Abilify (Aripiprazole) Prods. Liab. Litig., Case No. 3:16-md-2734, 2017 U.S. Dist. LEXIS 213493, at *24, *24-25 (N.D. Fla. Dec. 29, 2017) (finding that public relations consultants were inside privilege protection; "[W]hen a public relations firm has been retained to assist the corporate client and its counsel with an ongoing investigation the public relations firm stands in the same shoes as the corporate client with regard to communications between the public relations firm and counsel for the corporate client, or between the public relations firm and the corporate client 'that were made for the purpose of facilitating the rendition of legal services to the corporate client.'" (emphasis added); "The same principles apply to marketing firms (e.g. W2 Group, Twist Marketing), retained by Defendants. To the extent these firms were retained to assist Otsuka's in-house legal departments in monitoring and analyzing media coverage as part of in-house counsel's strategies and legal advice relating to threatened and ongoing litigation and actions by regulatory agencies, the consultants would stand in the shoes of an Otsuka corporate employee. The key is not whether the entity is a consultant but rather whether the function performed by the consultant related to assisting legal counsel in providing legal advice and strategy concerning the legal position of Otsuka in the media coverage concerning the litigation. In the world today -- where a drug manufacturer may face liability in the hundreds of millions of dollars in a product liability suit -- it is not only common but necessary to involve public relations and marketing consultants to assist in-house counsel and outside counsel in responding to media inquiries regarding ongoing or threatened legal actions. So long as the role of the consultant is to assist legal counsel in responding to the media the protections of the attorney-client privilege should apply the same as where a corporate employee is tasked with responding to media inquiries. The Court has utilized these principles in making its in camera review." (emphases added)).

- FiberLight, LLC v. Wash. Metro. Area Transit Auth., 288 F. Supp. 3d 133, 134, 135-36 (D.D.C. 2018) (holding that disclosure of privileged communications to a client agent/consultant who needed the information did not waive attorney-client privilege protection; "In the above-captioned case, FiberLight alleges that WMATA has breached their 2006 License Agreement. The document at issue is a report that was prepared by Kingston Cole for WMATA in 1999. (See Kingston [sic] Cole & Associates, Report and Recommendations To The Washington Area Metropolitan Area Transit Authority Regarding Strategic Development of Telecommunications Opportunities at 1 (June 1, 1999) ('Kingston Report').) It 'comprises a series of findings and recommendations regarding the current status and potential for future development of [WMATA's] fiber optic telecommunications system.' (Id. at 1.) Section IV of the document is entitled 'Problem Areas,' and WMATA has redacted the entirety of subsection A of Section IV, which is entitled 'Legal Concerns.' (Id. at 4-5.); "WMATA argues that the redacted material is protected by the attorney-client privilege. The Court agrees. The Kingston Report is designated on its face as including attorney-client information, the section containing the redacted material is entitled 'Legal Concerns,' and the Court's review confirms that it reflects the views of WMATA legal counsel regarding potential legal issues that could arise from the development and expansion of WMATA's own telecommunications system. Under F.T.C. v. GlaxoSmithKline, 294 F.3d 141, 148, 352 U.S. App. D.C. 343 (D.C. Cir. 2002), the sharing of such privileged information with a consultant who needs that information in order to complete a project for the company does not constitute a waiver of the privilege. Accordingly, the Court concludes that WMATA properly withheld Section IV.A of the Kingston Report pursuant to the attorney-client privilege." (emphasis added)).

- [Privilege Point, 3/28/18]

Courts Wrestle with Privilege Protection for Client Consultants: Part II

March 28, 2018

Last week's Privilege Point summarized two cases finding that corporate client consultants: (1) did not meet the "functional equivalent" standard; and (2) were not "nearly indispensable" for facilitating communications between the corporate client and its lawyers. Such holdings make privilege protection unavailable for communications between the corporate client (or its lawyer) and the consultant, and also normally compel the conclusion that disclosing preexisting privileged communications to such consultants waives the privilege.

However, some cases take a more favorable view. In FiberLight, LLC v. Washington Metropolitan Area Transit Authority, 288 F. Supp. 3d 133 (D.D.C. 2018), defendant hired a consultant to analyze current and potential future development of its fiber optic system. Plaintiff, alleging breach of contract, sought the consultant's report to the defendant, challenging the defendant's redaction of the section entitled "Legal Concerns." Id. at 134. In a one paragraph analysis, the court confirmed after its in camera review that the redacted portion "reflects the views of [Defendant's] legal counsel regarding potential legal issues." Id. at 136. The court then upheld the redaction, explaining that "the sharing of such privileged information with a consultant who needs that information in order to complete a project for the company does not constitute a waiver of the privilege." Id.

Although this favorable approach represents the minority view, corporations and their lawyers should check the applicable court's privilege law for such helpful precedent.

- Narayanan v. Sutherland Global Holdings Inc., 285 F. Supp. 3d 604, 612, 613 (W.D.N.Y. 2018) (in an 1/25/18 opinion, analyzing the privilege implications of a company relying on a public accounting firm (run by a former employee of the company) to investigate an acquisition of land in India; holding that the accountant consultant and its managing director were not the functional equivalent of corporate employees, and were outside privilege protection as client agents/consultants; "[T]he applicability of the agency exception depends on whether Sutherland [Company] has demonstrated that Freed Maxick's [CPA agent/consultant] involvement in attorney-client communications was 'nearly indispensable or serve[d] some specialized purpose in facilitating the attorney-client communications.'" (last alteration in original) (citation omitted); "Russo [former Sutherland senior vice president of finance and former CFO] provided Rank [Indian law firm] with the facts necessary for Rank to provide legal advice to Sutherland."; "Based on the record before the Court, I find that Sutherland's assertion of privilege as to these particular communications is unjustified."; "The reasoning of Ackert compels a similar conclusion in this case. Here, Russo provided factual information to Rank that Sutherland did not itself possess; although it may have been helpful or convenient to Rank to speak directly to Russo, the record does not prove that Rank needed Russo to interpret the information for it. Indeed, Russo testified that Rank did not provide advice about accounting matters. . . . Accordingly, I find that the communications between Russo and Rank are not privileged." (emphases added)).

- [Privilege Point, 3/21/18]

Courts Wrestle with Privilege Protection for Client Consultants: Part I

March 21, 2018

The attorney-client privilege protects confidential communications between clients and their lawyers. Corporate client consultants may also deserve this protection if they act as the "functional equivalent" of corporate employees. Otherwise, most but not all courts take a very narrow view of privilege protection for communications to or from such consultants.

In Durling v. Papa John's International, Inc., No. 16 Civ. 3592 (CS) (JCM), 2018 U.S. Dist. LEXIS 11584 (S.D.N.Y. Jan. 24, 2018), Papa John's relied on a third-party consultant to analyze how it should reimburse its delivery drivers. Class action plaintiffs claiming minimum wage violations sought communications between Papa John's and the consultant. The court first rejected Papa John's "functional equivalent" argument – noting that the consultant's employees were "not so fully integrated into the [Papa John's] hierarchy that its employees were de facto employees of [Papa John's]." Id. at *15. The court also found that the consultant was outside privilege protection, because its "role was not as a translator or interpreter of client communications," and that Papa John's retained the consultant "not to improve the comprehension of the communications between attorney and client, but rather to obtain information that [Papa John's] did not already have." Id. at *14. One day later, another court in Narayanan v. Southern Global Holdings Inc. similarly found that a corporation's "consulting and accounting firm" failed the "functional equivalent" standard and likewise fell outside privilege protection -- because the consultant's involvement was not "nearly indispensable or serve[d] some specialized purpose in facilitating the attorney-client communications." 288 F. Supp. 3d 604, 611-12 (W.D.N.Y. 2018) (citation omitted). Instead, "the proof suggests that [the consultant]'s role in attorney-client communications was merely useful and convenient." Id. at 614.

Most courts take this narrow approach. But next week's Privilege Point will discuss a case going the other way.

- Wade v. Touchdown Realty Grp., LLC, Civ. A. No. 17-10400-PBS, 2018 U.S. Dist. LEXIS 13069, at *8-9 (D. Mass. Jan. 26, 2018) (finding that a client agent/consultant was outside privilege protection, but that disclosing work product to the consultant did not waive that protection; "In the instant case, there is no evidence that Mr. Schadler [a consultant on a bathroom and bedroom renovation] was needed to help translate any communications between the Wades and their attorney, and he clearly was not hired for such a purpose. This is sufficient to defeat the claim of privilege. . . . Even more significantly, there is nothing in the emails cited above in which Mr. Schadler was called upon to provide interpretative services in connection with the communications between the Wades and their counsel. The derivative attorney/client privilege does not shield the production of these documents." (emphasis added)).

- Sidibe v. Sutter Health, Case No. 12-cv-04854-LB, 2018 U.S. Dist. LEXIS 20350, at *12, *12-13 (N.D. Cal. Feb. 7, 2018) (holding that a third party consultant was outside privilege protection; "There are certain exceptions where the privilege extends to communications involving a third party, such as certain situations in which the third party is necessary to interpret the client's statements to the attorney. See id. at 1071 (citing United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (discussing example)). But privilege does not extend to situations 'in which the [third party] is enlisted merely to give his or her own advice about the client's situation.' Id. at 1072 (emphasis modified). '[A] communication between an attorney and a third party does not become shielded by the privilege solely because the communication proves important to the attorney's ability to represent the client.' Id. (internal ellipsis omitted) (quoting United States v. Adlman, 68 F.3d 1495, 1500 (2d Cir. 1995)). Rather, '[t]he third-party communications must be interpretive and serve to translate informative information between the client and attorney' to be privileged. Cohen v. Trump, No. 13-CV-2519-GPC (WVG), 2015 U.S. Dist. LEXIS 74542, 2015 WL 3617124, at *14 (S.D. Cal. June 9, 2015) (citing cases)." (alterations in original) (emphases added); "This consultant-created document does not appear to contain or rely on any communications between Sutter and its attorneys, much less any confidential communications made for the purposes of seeking legal advice. The consultant was not interpreting or translating any information from Sutter for its attorneys. Rather, it appears that the consultant compiled its own business (not legal) analysis wholly independently of any confidential information that Sutter communicated to its attorneys for the purposes of seeking legal advice. The fact that Sutter's attorneys might have been the ones who retained the consultant and that the consultant's report was useful to the attorneys does not render the consultant's report privileged. See Cohen, 2015 U.S. Dist. LEXIS 74542, 2015 WL 3617124, at *14; Chevron Texaco, 241 F. Supp. 2d at 1071-72. The court finds that Sutter has not met its burden of establishing that this document is privileged." (emphases added)).

- **[Privilege Point, 9/26/18]**

Court Holds That an Accountant Was Inside Privilege Protection

September 26, 2018

Most courts reject privilege protection for communications to or from client agent/consultants such as accountants. And many courts reach the same conclusion about accountants that are retained by lawyers – unless the lawyers can prove that the accountants assisted them in providing legal advice.

Every now and then, a court takes a refreshingly broad view of privilege protection in those circumstances. In Chartwell Therapeutics Licensing LLC v. Citron Pharma LLC, the court held that an accountant retained by a law firm deserved privilege protection – noting that "when [the client] contacted [the law firm] to seek legal advice in connection with its dispute with [the defendant] in or around June 2015, [the law firm] had already retained [the accountant] to assist [law firm] and [client] in connection with another litigation." No. 16 CV 3181 (MKB) (CLP), 2018 U.S. Dist. LEXIS 119210, at *3 (E.D.N.Y. July 17, 2018). aff'd, 2018 U.S. Dist. LEXIS 222307 (Dec. 18, 2018). The law firm then "expanded the scope of the retainer" to assist in the new litigation. Id. After reading samples of withheld documents, the court upheld plaintiff's privilege and work product claims, explaining that "[i]n light of the complex factual and numerical issues presented by this case, it is eminently reasonable for counsel to rely extensively on the services of an accountant to assist the lawyer in rendering legal advice." Id. at *8.

The law firm's earlier retention of the accountant undoubtedly helped. But perhaps most importantly, the withheld documents apparently satisfied the court that the accountant had assisted the lawyers in giving legal advice rather than providing his or her own parallel accounting advice. Corporations and their lawyers must keep these factors in mind when seeking to maximize privilege and work product protection.

- **[Privilege Point, 1/2/19]**

State Courts Address Outsiders' Privilege Impact: Part I

January 2, 2019

Most client agents/consultants stand outside privilege protection. This means that: (1) communications with them do not deserve privilege protection; (2) their presence during otherwise privileged communications aborts that protection; and (3) disclosing pre-existing privileged communications to them waives that privilege. In the corporate setting, clients have other options for seeking privilege protection in such scenarios, but many of those fail.

In Technetics Group Daytona, Inc. v. N2 Biomedical, LLC, N2 and its lawyer retained a technology consultant "because of his expertise in relevant fields." 2018 NCBC LEXIS 115, ¶ 4 (N.C. Super. Ct. Nov. 8, 2018). In a later patent dispute, N2 claimed privilege protection for communications with that consultant. The court rejected the privilege claim, holding that the technology consultant: (1) was not the "functional equivalent" of an N2 employee (because he had no "continuous and close working relationship with the company," and he "does not maintain an office at N2 or spend a substantial amount of his time working for N2"); (2) was not within the narrow privilege protection for client agents/consultants who are "nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications" or "function more or less as a 'translator or interpreter' between the client and the lawyer" – but instead was "retained for the value of his own advice"; (3) could not claim that he had a "common interest" with N2, because he "help[ed] develop a solution to a technological problem" rather than cooperate "for purposes [of] indemnification or coordination in anticipated litigation." Id. ¶ 18, ¶¶ 23-24, ¶ 30 (citations omitted).

Corporate executives sometimes erroneously assume that confidentiality agreements with such outside agent/consultants assure privilege protection or avoid waiver. They do not. Next week's Privilege Point discusses the same issue in a family setting.

- [Privilege Point, 1/9/19]

State Courts Address Outsiders' Privilege Impact: Part II

January 9, 2019

Last week's Privilege Point described a North Carolina state court's predictable rejection of privilege protection for communications with a company's technical consultant. Does the same harsh standard apply when clients bring family members with them to lawyer meetings?

In Fox v. Alfini, plaintiff Fox ("then in her early thirties") fell ill at a chiropractor's office. 432 P.3d 596, 598 (Colo. 2018). Her parents rushed their "gravely ill" daughter to an emergency room "for what turned out to be a stroke." Id. at 598-99. Fox and her parents later met with a plaintiff's lawyer to discuss filing a malpractice action against the chiropractor. The defendant chiropractor discovered that the lawyer had recorded this initial meeting, and argued that the parents' presence aborted privilege protection. Not surprisingly, Fox claimed that her stroke caused "diminished mental capacity," and that "her parents' presence was necessary to facilitate her communications" with her lawyer. Id. at 599. The court disagreed, applying "an objective standard for determining whether a third party's presence was necessary to facilitate an attorney-client communication." Id. at 601. The Supreme Court agreed with the lower court that Fox "had not shown that her mental capacity was 'diminished such that the presence of her parents was necessary to assist in the representation.'" Id. at 602.

This counter-intuitive result demonstrates the difficulty of claiming privilege protection with or in the presence of client agent/consultants -- even family members. Next week's Privilege Point discusses fatal flaws in Fox's lawyer's argument.

- [Privilege Point, 1/16/19]

State Courts Address Outsiders' Privilege Impact: Part III

January 16, 2019

Last week's Privilege Point discussed a somewhat surprising Colorado Supreme Court decision holding that a stroke victim's parents' presence during a meeting with her lawyer aborted privilege protection. Fox v. Alfini, 432 P.3d 596 (Colo. 2018). Significantly, plaintiff's lawyer initially missed three arguments supporting protection claims -- two of which would almost surely have been winners.

After the lower court denied her privilege claim, plaintiff Fox moved for reconsideration. In seeking reconsideration, her lawyer argued "for the first time" that: (1) Fox's "parents were prospective clients" and therefore inside privilege protection; (2) Fox's "parents were her agents and shared common legal interests with her"; and (3) "the [initial consultation] recording was protected under the work-product doctrine and that defendants had not demonstrated substantial need to discover that recording." Id. at 599. The lower court rejected these additional arguments, noting that they had not been raised in earlier pleadings or at the initial hearing. The Colorado Supreme Court upheld the lower court's refusal "to consider arguments that Fox had raised for the first time in her motion for reconsideration." Id. at 600.

This unfortunate result highlights the need to assess all privilege protection grounds, and especially consider the dramatically different work product doctrine protection. In this case: (1) if the lawyer had jointly represented (or was considering jointly representing) Fox and her parents, the privilege would have protected their communications; and (2) even if not, the parents' presence presumably would not have destroyed the robust work product protection -- and they probably could even have created protected work product.

- [Privilege Point, 3/6/19]

Another Court Rejects Privilege Protection for a Corporation's Outside Consultant

March 6, 2019

Perhaps corporate executives' most common and dangerous privilege misperception is that they may safely disclose privileged communications to their outside consultants without waiving that protection. And perhaps their lawyers' greatest misperception is that the lawyers can rescue the privilege protection by claiming that the consultants were helping the lawyers provide legal advice.

In SEC v. Navellier & Associates, Inc., Civ. A. No. 17-11633-DJC, 2018 U.S. Dist. LEXIS 215003, at *2 (D. Mass. Dec. 21, 2018), defendant NAI had retained outside consultant ACA Compliance Group "to conduct a compliance review of NAI's marketing materials." NAI claimed privilege and work product protection for ACA-related communications and documents when the SEC sought them. The court rejected the privilege claim, holding that: (1) ACA could not satisfy the client consultant privilege standard, which applies only if the consultants' involvement is "nearly indispensable or serve[s] some specialized purpose in facilitating the attorney-client communications" (id. at *6), and (2) ACA could not satisfy the lawyer consultant privilege standard because it "was not serving an interpretive role and was not 'necessary, or at least highly useful' to defendants' counsel in providing legal advice to defendants." Id. at *9 (citation omitted). Significantly, contemporaneous documents showed that NAI's president communicated with ACA "without any mention of counsel." The court bluntly said that it "discounts" NAI's lawyer's affidavit stating that "ACA was retained . . . to assist [him] in providing legal advice to NAI in anticipation of possible litigation." Id. at *3-4 (alterations in original). The court also rejected NAI's work product claim, noting that "the SEC did not commence an investigation into NAI until more than two years after the end date of the time period for documents sought in the subpoena." Id. at *11.

The privilege rarely protects communications with corporate clients' outside consultants. Lawyers may claim privilege protection for communications with their consultants, but only if they can support a bona fide argument that they needed the consultant.

- Acosta v. Wilmington Trust, N.A., No. 17-CV-6325 (VSB) (KNF), 2019 U.S. Dist. LEXIS 16632, at *15-16, *17-18 (S.D.N.Y. Feb. 1, 2019) (holding that financial adviser Daroth was outside privilege protection; "Rothschild stated in his declaration that, despite the engagement letter's clear and unambiguous language that "'Daroth has been retained under this agreement as an independent contractor with no fiduciary or agency relationship to the Company or to any other party," we do frequently work as our clients' agent in transactions and did so with respect to various aspects of our engagement by HCMC.' That Daroth might have acted as HCMC's 'agent' is irrelevant to determining whether Daroth was HCMC's agent in a circumstance where the parties' agreement governs their relationship and the notion of agency is contrary to the clear and unambiguous term of the agreement that specifically negates the existence of any agency relationship between Daroth and HCMC. If Daroth acted in a capacity that is specifically negated by an express term of the parties' agreement in effect at the relevant time, as Rothschild appears to assert, it did so at its own peril because the relationship between Daroth and HCMC was governed by the written instrument agreed upon and executed by the parties, making such conduct not only perilous but also unreasonable."; "The Court finds that Daroth was not HCMC's agent at the relevant time. The evidence in the record is undisputed that Daroth was not GT's client or the client of any other counsel at the pertinent time. Thus, the Court finds that Daroth failed to establish that it had an attorney-client relationship with GT or any other counsel at any time relevant to the instant controversy. Accordingly, no attorney-client privilege applies to the 50 e-mail communications at issue. Even assuming that an attorney-client privilege applies to the e-mail communications at issue, exchanged between HCMC and its attorney, GT, the privilege was waived by including Daroth in those communications. See Schaeffler, 806 F.3d at 40.").

- Galasso v. Cobleskill Stone Products, Inc., 95 N.Y.S.3d 376, 379 (N.Y. App. Div. 2019) (holding that a business valuation and advisory firm was outside privilege protection); "Likewise, we are unpersuaded by plaintiff's contention that the valuation report was protected by attorney-client privilege. Although MPI was hired by plaintiff's counsel and the agreement between MPI and plaintiff's counsel states that its communications would be confidential, the primary purpose for which MPI was hired was to appraise plaintiff's stocks in defendant for estate tax filing purposes. In fact, the instant action was not commenced until after MPI expressed 'serious and substantial concerns' upon completion of its appraisal. Therefore, the mere fact that MPI's report now supports plaintiff's legal action does not eliminate the fact that the report was not initially done for legal purposes. In fact, during a court conference, plaintiff confirmed that the valuation report did not include any legal information, nor did it disclose plaintiff's confidences. Thus, given that the primary purpose of MPI's valuation report was for estate tax purposes and is not 'of a legal character,' Supreme Court properly held that it was not protected by the attorney-client privilege (Ambac Assur. Corp. v Countrywide Home Loans, Inc., 27 NY3d at 624; accord NYAHS Servs., Inc., Self-Ins. Trust v People Care Inc., 155 AD3d at 1209-1210; see People v Osorio, 75 NY2d at 84). We also reject plaintiff's assertion that the 'Kovel [p]rivilege' attaches to the valuation report because the purpose of the report was not to facilitate or clarify communications between plaintiff and his attorneys (see United States v Kovel, 296 F2d 918, 921-922 [2d Cir 1961]; People v Osorio, 75 NY2d at 84)." (alteration in original)).

- Canton Drop Forge, Inc. v. Travelers Cas. & Sur. Co., Case No. 5:18-cv-01253, 2019 U.S. Dist. LEXIS 41668, at *2, *5-6 (N.D. Ohio Mar. 14, 2019) (holding that an environmental consultant was outside privilege protection; "With respect to the 2012 documents, Plaintiff contends that TRC, an environmental consulting firm, prepared the documents and provided them to counsel for Plaintiff, Godfrey & Kahn, to provide legal advice in connection with the potential purchase of CDF. Doc. 21."; "Having reviewed the parties' arguments and legal authority relied upon by them and having conducted an in camera review of the 2012 documents, the Court finds that Plaintiff has not met its burden of demonstrating that the communications are entitled to protection under the attorney-client privilege. The Court notes that, as pointed out by Plaintiff, the 2012 documents bear a legend indicating that they are privileged and confidential, attorney-client work product, and prepared at the request of counsel. However, the attorney-client privilege does not apply simply because the communication is made or sent to an attorney. Baker, 2009 U.S. Dist. LEXIS 136747, * 43 (internal citation omitted). Moreover, based on the Court's in camera review of the 2012 documents, the Court is unable to conclude that the primary purpose of the 2012 communications between TRC and Plaintiff's counsel was to assist Plaintiff's counsel with rendering legal advice in connection with a potential sale of CDF, as Plaintiff contends.").

- Pearlstein v. Blackberry Ltd., No. 13-CV-07060 (CM)(KHP), 2019 U.S. Dist. LEXIS 45098, at *41-43 (S.D.N.Y. Mar. 19, 2019) (holding that a public relations consultant was outside privilege protection; "There are five documents in this category that specifically request legal review of the legal disclaimer language on the press release and/or concern legal advice regarding compliance with insider trading rules or legal action against Detwiler (Document Nos. 256, 257, 258, 263, 283). These documents are protected by the attorney-client privilege. But, to the extent BlackBerry included Curtiss in the communications, it has waived any privilege. Curtiss, a public relations consultant, was not needed to assist Zipperstein in evaluating whether Detwiler had violated securities laws or the strength of a potential lawsuit by BlackBerry against Detwiler. Nor was Curtiss needed to help Zipperstein advise the company on legal disclaimer language in the press release. It is clear from the communications this Court has reviewed that Curtiss was engaged for his expertise in preparing press releases and advising on the best way to respond to the Detwiler Report from a market perspective. This was not a situation like In re Grand Jury Subpoenas Dated March 24, 2003 where the lawyer engaged a public relations consultant after his client already was under criminal investigation and the consultant advised on how best to utilize press to achieve the legal goal of avoiding indictment. See 265 F. Supp. 2d at 323-24, 329. It is a stretch to view the purpose of BlackBerry's press release to be to predominantly for a legal purpose. The short press release containing only a general refutation of the Detwiler Report could not be expected to catalyze a regulatory investigation or to be for a legal purpose. Indeed, BlackBerry acknowledges in the press release that it needed to and would be making a formal request to regulatory agencies to commence an investigation. And, as of April 12, BlackBerry was not even in the position to provide complete information about Z10 sales and returns to the SEC to justify a request to investigate Detwiler. Other documents submitted in camera reflect a continuing investigation of facts in advance of a meeting with the SEC. For these reasons, this Court concludes that Curtiss performed nothing other than standard public relations services. Thus, BlackBerry waived privilege by including Curtiss in these communications. See Haugh, 2003 U.S. Dist. LEXIS 14586, 2003 WL 21998674, at *3; Calvin Klein Trademark Trust, 198 F.R.D. at 55.").

- Pipeline Productions, Inc. v. Madison Cos.; Case No. 15-4890-KHV, 2019 U.S. Dist. LEXIS 71601, at *12-13, *13-14 (D. Kan. Apr. 29, 2019) ("In support of Madison's privilege claim, it points to Ms. Land's affidavit, which explains that the purpose of the communications with Ms. Rondan was so that Ms. Rondan could help guide the company and its attorneys 'concerning public relations issues' that might result from a class-action complaint filed on behalf of Thunder ticket buyers. Ms. Land states that several entries involve communications 'as we sought to set up a call with counsel and Ms. Rondan so that Ms. Rondan could help guide the company and its counsel concerning public relations issues that might arise from the lawsuit.' (ECF No. 441-2 ¶ 12.) These descriptions suggest only that the predominant purpose of the communications was to obtain public relations advice from Ms. Rondan and, even further afield, as they sought to set up a call about that advice. Although Madison argues counsel was included on all communications and that the communications would not have occurred 'but for the fact that a lawsuit was filed,' these considerations are insufficient to show that Ms. Rondan provided any information to Madison's attorneys to enable them to render legal advice or to provide legal services. Furthermore, these descriptions fall short of demonstrating that legal advice predominated in these communications between Ms. Rondan and Madison's attorneys."; "Madison relies on In re Syngenta AG MIR 162 Corn Litig., 131 F. Supp. 3d 1177, 1225 (D. Kan. 2015), to argue that plaintiffs might include statements in pleadings for public relations purposes rather than for the purpose of stating a cognizable claim. But the court in Syngenta made this observation in the context of deciding a motion to dismiss, not resolving a privilege dispute. The fact that a lawyer might include statements in a pleading for public relations purposes is insufficient to establish that Ms. Rondan was involved in communications helping to formulate a response to a class action for predominantly legal purposes.").

- [Privilege Point, 8/7/19]

The Southern District of New York Defines The Privilege Standard For Communications With Three Types of Consultants

August 7, 2019

Clients and their lawyers often work with consultants. If such consultants are found to be outside privilege protection: (1) communications with them do not deserve privilege protection; (2) their participation in otherwise privileged communications aborts that protection; and (3) disclosing pre-existing privileged communications to them waives that protection. So corporations and their lawyers must know the privilege standard for each consultant.

In Universal Standard Inc. v. Target Corp., 331 F.R.D. 80 (S.D.N.Y. 2019), Judge Gorenstein dealt with the three most common types of consultants. First, client consultants are within privilege if they are "deemed essential to allow communication between the attorney and the client, such as an interpreter or accountant." Id. at 87. Second, some consultants are the "'functional equivalent' of a corporate employee." Id. Third, some consultants assist lawyers in providing legal advice to their clients. The court ultimately concluded that plaintiff's public relations consultant did not fall within any of those protected categories, concluding that: (1) "BrandLink did not serve to improve counsel's understanding of [plaintiff's] request for legal advice" (id. at 88); (2) BrandLink did not have "any independent authority to decide to issue a press release," and did not "work[] exclusively" for plaintiff, but instead "provides services for over a dozen other brands" (id. at 90); (3) "[t]here is no evidence that the purpose of the communications with BrandLink was to assist counsel in engaging in a legal task as opposed to allowing [plaintiff] to make a decision about the nature of publicity that should be sought." Id. at 92.

This Southern District of New York opinion provides a helpful checklist of what corporations must prove in many courts if they seek protection for communications with, in the presence of, or later shared with, outside consultants.

- IQVIA, Inc. v. Veeva Systems, Inc., Case No. 2:17-CV-00177_CCC-MF, 2019 U.S. Dist. LEXIS 80101, at *13 (D.N.J. May 13, 2019) (holding that Ernst & Young was outside privilege protection, because the client retained it for its own advice; “Based on the record, EY was hired by IQVIA to assess Veeva's systems and processes in order to provide its professional opinions as to the assurances made by Veeva that IQVIA data would be safe in Veeva's MDM system and would not be used by Veeva to improve its own data offerings. The Scope of Service indicates that while EY was providing services for the provision of legal advice by the IQVIA legal department, the professional conclusion regarding Veeva's assurances being sought was that of EY's not IQVIA's legal team. As such, the advice being sought from the Veeva assessment was that of EY's rather than IQVIA's in-house legal team and thus no privilege exists. See Kovel, 296 F.2d at 922.

- In re Signet Jewelers Ltd. Sec. Litig., 332 F.R.D. 131, 133, 136, 137 (S.D.N.Y. 2019) (finding that two public relations firms were outside privilege protection because they were not essential for the communications between a lawyer and the client and because they were not assisting the lawyer by legal advice; "In this lawsuit, which was commenced in August 2016, Lead Plaintiff, the Public Employees' Retirement System of Mississippi ('Plaintiff'), alleges that Defendants Signet Jewelers Limited ('Signet') and certain of its senior executives (collectively, the 'Defendants') committed securities fraud by misrepresenting (1) the health of Signet's credit portfolio, and (2) Signet's alleged 'pervasive' culture of sexual harassment. (Fifth Amended Complaint, ECF No. 111, ¶¶ 1-25.) In late-2015/early-2016, The Capitol Forum ('CF') 'published a series of articles accusing Signet of fraudulently stating its financials to conceal the quality of its in-house consumer lending program.' (Defs.' 8/22/19 Ltr., ECF No. 183, at 2.) In response to this event, Signet's outside counsel retained two PR firms, Joele Frank ('JF') and Ogilvy & Mathers ('Ogilvy'). (Pl.'s Letter-Motion, ECF No. 181, at 1; Defs.' 8/22/10 Ltr. at 2.); "Defendants advocate for the Court to apply Judge Kaplan's decision in In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321 (S.D.N.Y. 2003), to find that the privilege applies to communications between Signet and its PR firms. The Court finds that Judge Kaplan's decision is not applicable to the facts here. The PR firms here were not called upon to perform a specific litigation task that the attorneys needed to accomplish in order to advance their litigation goals. Rather, the PR firms were involved in public relations activities aimed at burnishing Signet's image."; "Tab 7 does not present a situation where 'the presence of a third party is needed to allow the client to communicate information to an attorney, such as where a translator is used or where an accountant supplies specialized knowledge to allow an attorney to understand the client's situation.' See Universal Standard Inc., 331 F.R.D. at 87. Nor does it present a situation where the PR firm employees included in the communications were the 'functional equivalent' of a Signet employee. See id. Thus, the document should be reproduced in full.").

- New York State Div. of Human Rights v. Cooper Square Realty, Inc., No. 450486/2013, 2019 NY Slip Op 32996(U), at 1, 2 (N.Y. Sup. Ct. Oct. 10, 2019) (holding that an emotional therapist was outside privilege protection, but that disclosing privileged communications to her did not trigger a subject matter waiver; "In this action, plaintiff-intervenor Geraldine Pauling seeks to recover for the emotional distress she allegedly suffered as a result of defendants' failure to accommodate her disability. The lawsuit was originally commenced by the New York State Division of Human Rights in 2013 and plaintiff-intervenor filed her own complaint seeking injunctive relief and damages for emotional distress in 2017. Throughout the pendency of this lawsuit, Ms. Pauling has been treating with a licensed therapist, Lauren Taylor."; "It is undisputed that Ms. Pauling's communications with her attorney regarding this lawsuit are privileged and thus the issue is whether Ms. Pauling's disclosure of these communications constitutes a waiver of the privilege. As a general matter, communications between counsel and client which are shared voluntarily with third-parties are generally not privileged. People v. Osorio, 75 N.Y.2d 80, 84, 549 N.E.2d 1183, 550 N.Y.S.2d 612 (1989); Robert V. Straus Prod. v. Pollard, 289 A.D.2d 130, 131, 734 N.Y.S.2d 170 (1st Dep't 2001). An exception to waiver exists for one serving as an agent of either attorney or client in certain circumstances since a client has a reasonable expectation that such communication will remain confidential. Osorio, 75 N.Y.2d at 84. Here, plaintiff does not assert that this exception to waiver is applicable and thus has failed to meet her burden of showing that the privilege has not been waived by her disclosure of attorney-client communications to her therapist. Thus, plaintiff has waived the attorney-client privilege with respect to the specific communications she disclosed to her therapist.").

- Network-1 Technologies, Inc. v. Google LLC, Nos. 14-CV-02396 & -09558 (PGG)(SN), 2019 U.S. Dist. LEXIS 211910, at *7-8 (S.D.N.Y. Dec. 9, 2019) (holding that a patent sale consultant was outside privilege protection; "This is an email exchange between Marc Lucier, Dr. Cox, and Cox's attorney Charles Macedo regarding the details of a nondisclosure agreement to be signed by Lucier, Cox, and Network-1. The document is not privileged. To the extent Macedo provides legal advice to his client, Lucier's presence on the email destroys the privilege. See Argos Holdings Inc. v. Wilmington Nat'l Ass'n, No. 18-CIV-5773 (DLC), 2019 U.S. Dist. LEXIS 53104, 2019 WL 1397150, at *3 (S.D.N.Y. Mar. 28, 2019) (presence of consultant destroys privilege where consultant is not necessary to facilitate the legal advice given). The email was not prepared in anticipation of litigation and is thus not protected work product.").

- [Privilege Point, 5/13/20]

Accountants Implicate Subtle Privilege and Work Product Issues: Part I

May 13, 2020

Accountants can help clients and clients' lawyers – in ordinary business transactions, in explaining complex issues to lawyers who are giving legal advice, and in litigation. These differing roles at different times can trigger complicated attorney-client privilege and work product doctrine analyses.

In United States v. Fisher, No. 3:19-cr76-MCR, 2020 U.S. Dist. LEXIS 34328 (N.D. Fla. Feb. 28, 2020), the court addressed the waiver implications of defendant having copied his CPA on emails he claimed were privileged. The court noted that the defendant “admits that [his corporation], not the lawyer, employed [the CPA] as an accountant.” Id. at *2. Because “[i]t is not apparent from the emails that [the CPA]’s advice was being sought for purposes of obtaining legal advice by either [defendant’s] lawyer or [defendant’s corporation], the court “agrees with the Government that any privilege has been waived by the disclosure to a third party.” Id. at *1-2.

Lawyers representing corporations should remind their clients not to include the company’s outside accountant in any privileged communications. Next week’s Privilege Point will address the more subtle work product doctrine implications of working with accountants.

- Spicer v. GardaWorld Consulting (UK) Ltd., 120 N.Y.S.3d 34, 35, 36 (N.Y. App. Div. 2020) (finding a financial advisor was inside privilege protection; "Plaintiffs were the sole shareholders of Hestia B.V. (the Company) prior to selling all of their shares to defendant. Nonparty KippsDeSanto & Company (KDC) was plaintiffs' financial adviser in connection with the sale transaction."; "It is true that KDC was not retained to assist plaintiffs' counsel in providing legal advice. However, the unrebutted evidence reflects that KDC spent some portion of its time helping counsel to understand various aspects of the transaction for that purpose. As such, KDC's presence was necessary to enable attorney-client communication (see MBIA Ins. Corp. v Countrywide Home Loans, Inc., 93 AD3d 574, 574, 941 N.Y.S.2d 56 [1st Dept 2012]; Lehman Bros. Intl. [Europe] v AG Fin. Prods., Inc., 2016 NY Slip Op 30187[U], *9-15 [Sup Ct. NY County 2016]; United States v. Kovel, 296 F2d 918, 922 [2d Cir 1961]; Urban Box Off. Network, Inc. v Interfase Mgrs., L.P., 2006 WL 1004472, *3, 2006 US Dist LEXIS 20648, *11 [SD NY Apr. 17, 2006])."; "Plaintiffs also had a reasonable expectation that the confidentiality of communications between their counsel and KDC would be maintained. Plaintiffs' counsel attested that KDC promised to keep all such communications confidential. The governing Purchase and Sale Agreement also specified that all privileged documents related to the transaction would remain protected from disclosure to defendant even after closing (see Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 138-139, 674 N.E.2d 663, 651 N.Y.S.2d 954 [1996]; Askari v McDermott, Will & Emery, LLP, 179 AD3d 127, 149-150, 114 N.Y.S.3d 412 [2d Dept 2019]).").

- [Privilege Point, 7/15/20]

Another Court Finds Public Relations Consultants Outside Privilege Protection

July 15, 2020

Companies dealing with the pandemic (and finding themselves in pandemic-triggered future litigation) may seek public relations consultants' assistance. Companies and their lawyers should remember that most courts reject privilege protection for communications with such consultants, and work product protection for documents those consultants create.

In In re Pacific Fertility Center Litigation, Case No. 18-cv-01586-JSC, 2020 U.S. Dist. LEXIS 71127 (N.D. Cal. Apr. 22, 2020), the Fertility Center retained two public relations consultants after a horrifying incident in which a tank failure destroyed thousands of eggs and embryos. Plaintiffs sought the Center's communications with its public relations consultants -- relying on an earlier California appellate decision holding that "the communications with the public relations consultant must be 'more than just useful and convenient, but rather . . . the involvement of the third party [must] be nearly indispensable or serve some specialized purpose in facilitating attorney-client communications.'" Id. at *7. The Fertility Center court concluded that "the inclusion of the public relations consultants on the communications at-issue [sic] waived the attorney-client privilege." Id. at *10. The court bluntly held that "[t]o the extent that a few of the documents may reflect the public relations firms consulting with counsel to develop a strategy regarding how to respond to media inquiries in light of the lawsuits, there is nothing about the communications which suggests the inclusion of the third party was necessary or essential" -- because "the documents do not show that counsel needed the public relations firms' assistance to accomplish the purpose for which Defendants hired the attorneys." Id. at *8-9.

The court did not address the somewhat more promising work product protection argument. Most courts do not protect public relations consultants' documents as work product -- because normally those are motivated by public relations concerns rather than litigation. But there is a sliver of good news. Most courts find that lawyers disclosing their pre-existing work product to such public relations consultants do not waive that robust protection.

- [Privilege Point, 11/4/20]

Court Applies the General Rule Finding a Privilege Waiver When Clients Disclose Privileged Communications to Public Relations Consultants

November 4, 2020

One of the most dangerous misperceptions among corporate clients is that disclosing privileged communications to such friendly outsiders as public relations consultants does not waive privilege protection as long as there is a confidentiality agreement in place. A steady stream of cases have rejected that approach, yet large corporate clients and sophisticated law firms continue to rely on that mistaken view.

In United States ex rel. Wollman v. Massachusetts General Hospital, Inc., 475 F. Supp. 3d 45 (D. Mass. 2020), Mass. General Hospital hired a former U.S. Attorney and his law firm Cooley, LLP, to investigate allegations that Mass. General fraudulently billed Medicare and Medicaid. The government sought the investigation report, and Mass. General predictably resisted. Unsurprisingly, Mass. General first claimed work product, but the court rejected that assertion: “there is no indication in the engagement letter, the Report itself, or the employee interviews that the Investigation was intended to relate to the [eventual litigation].” Id. at 60-61. The court then turned to Mass. General’s privilege claim – noting that Mass. General had disclosed the Report to public relations consultant Rasky “to assist in responding to an investigation by the [newspaper] Boston Globe Spotlight Team into the practice of overlapping surgeries.” Id. at 65-66. The court bluntly concluded that “the production of the Report to Rasky waived the attorney-client privilege.” Id. at 68. But the court found that because Mass. General and other defendants “have not sought to use the . . . Report in any fashion, much less to gain an adversarial advantage,” the waiver did not trigger a subject matter waiver. Id. at 69. The court explained that “[w]hile an argument can be made that they used the Report as a ‘sword and shield’ in their dealings with the press, the distinction between use in a judicial and nonjudicial setting is significant.” Id.

All of these conclusions follow generally accepted principles. It is remarkable that one of America’s great hospitals, a former U.S. Attorney, and a prestigious law firm would be involved in such a disclosure.

- Dodge v. Gomes, Case No. C20-5224JLR, 2020 U.S. Dist. LEXIS 219459, at *4 (W.D. Wash. Nov. 23, 2020) (holding that a school insurance association non-lawyer's involvement did not destroy privilege protection; "Third, Ms. Callaghan does not destroy the privilege. Although Ms. Callaghan is an administrative assistant and not an attorney, she 'serves as [the] communication conduit between SIAW members and [Ms. Homer]' when SIAW members need advice on legal issues. Thus, the fact that Ms. Gomes emailed her request for advice to Ms. Callaghan instead of Ms. Homer directly does not destroy the privilege." (alterations in original) (internal citation omitted))
- Shenandoah Coatings, LLC v. Xin Dev. Mgmt. East, LLC, No. 517102/18, 2020 N.Y. Misc. LEXIS 10893, at *17, *18, *19 (N.Y. Sup. Ct. Dec. 24, 2020) (holding that consultants providing construction development services were outside privilege protection; "Tawil asserts that Carlyle was retained to provide construction development services, was generally involved in all aspects of construction and construction management and as an entity with significant construction-related knowledge and knowledge related to the contractors' work on the project, Carlyle was also involved in discussions as a representative of 421 Kent in litigations and other legal issues and disputes that arose related to the project. Tawil avers that as a provider of important construction services, 421 Kent reasonably expected that any correspondences pertaining to legal matters between counsel, Carlyle and 421 Kent, or between 421 Kent and Carlyle, would be protected."; "For the so-called agency exception to apply, it must be shown that client (1) had a 'reasonable expectation of confidentiality under the circumstances' (Osorio, 75 NY2d at 84) and (2) disclosure to the third party was necessary for the client to obtain informed legal advice." (citation omitted); "While Tawil demonstrates that 421 Kent had an expectation of confidentiality from its three 'agents,' there is no statement from Tawil or from 421 Kent's litigation counsel that the agents' involvement in the communication from counsel was 'necessary' for 421 Kent to obtain informed legal advice, rather than just useful or convenient.")

- [Privilege Point, 9/1/21]

Two Moms, Two Cases and Two Different Results: Part I

September 1, 2021

Somewhat counter-intuitively, attorney client privilege protection is so fragile that even a family member often falls outside privilege protection (unless that family member was necessary to facilitate communications between the client and his or her lawyer). But work product protection is more robust, so most family members are inside that protection.

In Doe v. Wesleyan University, Civ. No. 3:19-cv-01519 (JBA), 2021 U.S. Dist. LEXIS 114871 (D. Conn. June 21, 2021), a former Wesleyan student sued the University after it expelled her for cheating. Plaintiff "communicated with her mother within twenty-four hours of the emergence of the cheating allegations," and "continued to communicate with her mother throughout the Honor Board proceedings." Id. at *5. The plaintiff claimed privilege protection for her communications, arguing that her mom was "acting as [her] agent." Id. at *3. The court acknowledged that "[a]s a legal matter, it is true that a client's communications with an agent can be protected by the privilege when the communication was necessary to facilitate or clarify communications between the client and the attorney." Id. at *7. But the court noted that "[t]he plaintiff is, and was at all times relevant to this case, an adult with communication skills sufficient to secure admission to one of America's most selective universities." Id. at *9. The court found the privilege inapplicable. And beyond that, the court bluntly warned that "[a]ny claim that [plaintiff] could not communicate effectively without her mother's assistance will be carefully scrutinized, and may lead to the imposition of sanctions." Id.

The court's unsurprising opinion is perhaps more important for what it does not discuss. The separate and more robust work product doctrine product almost certainly would have protected plaintiff's communication with her mom. But the court did not address possible work product protection. One cannot help but wonder if plaintiff's lawyer forgot to raise it. Next week's Privilege Point will describe another case decided eight days later, which also addressed protections for communications between a plaintiff and her mom.

- [Privilege Point, 9/8/21]

Two Moms, Two Cases and Two Different Results: Part II

September 8, 2021

Last week's Privilege Point described a court's curt rejection of attorney-client privilege protection for a plaintiff's communications with her mom – and noted the court's surprising failure to address an obvious work product claim. Eight days later, another court dealt with mother-daughter communications.

In Pogorzelska v. VanderCook College of Music, No. 19 C 5683, 2021 U.S. Dist. LEXIS 120958 (N.D. Ill. June 29, 2021), a college student sued her college, and a classmate she alleged had sexually assaulted her. Defendants sought to discover three text messages plaintiff's mom sent the plaintiff two years after the incident. The court understandably found that most of the texts' content deserved work product protection, which was not waived by the mother-daughter disclosure (although inexplicably finding that certain portions did not deserve work product protection because they reflected "the mother's personal view"). Id. at *11. In addressing plaintiff's attorney-client privilege claim, the court understandably found that the plaintiff's mom was not her "agent" for attorney-client privilege purposes. Id. at *7-8. The court also rejected plaintiff's common interest doctrine argument – concluding that her mom had no "legal interest in the case whatsoever," and that "[t]he mere fact that Plaintiff and her mother are family, or that Plaintiff's mother hopes her daughter prevails and is interested in the course of the litigation is insufficient" to support a common interest doctrine claim. Id. at *5-6.

As with last week's Privilege Point, this decision is also important for what it fails to address. Although denying privilege protection, the court off-handedly noted that plaintiff "stat[ed] generally that her mother 'is also represented by Plaintiff's lawyers.'" Id. at *5. Such a joint representation normally would cinch privilege protection. One cannot help but wonder if plaintiff's lawyer put all the privilege protection eggs in the losing common interest basket.

- Spectrum Dynamics Med. Ltd. v. Gen. Elec. Co., No. 18-CV-11386 (VSB) (KHP), 2021 U.S. Dist. LEXIS 172201, at *7-8 (S.D.N.Y. Sept. 9, 2021) (applying a “nearly indispensable” standard in describing the circumstances in which consultants are within privilege protection; “The essential third-party consultant exception occurs when the inclusion of a third party is ‘necessary, or at least highly useful, for the effective consultation between the client and the lawyer.’ United States v. Adlman, 68 F.3d 1495, 1499 (2d Cir. 1995); Nat’l Educ. Training Grp., Inc. v. Skillsoft Corp., 1999 U.S. Dist. LEXIS 8680, 1999 WL 378337, at *4 (S.D.N.Y. June 10, 1999) (Communications fall within the exception if the third party was ‘nearly indispensable or served some specialized purpose in facilitating the attorney-client communication.’) However, ‘a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney’s ability to represent the client.’ United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999). Rather, the privilege extends to a communication disclosed to a third party only ‘if the purpose of the third party’s participation is to improve the comprehension of the communications between attorney and client.’ Id.; accord Ravenell v. Avis Budget Grp., Inc., 2012 U.S. Dist. LEXIS 48658, 2012 WL 1150450, at *2 (E.D.N.Y. Apr. 5, 2012); Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113 (S.D.N.Y. 2005).”)

- [Privilege Point, 12/15/21]

Bad News and Good News About Communicating With Outside Auditors

December 15, 2021

One key distinction between attorney-client privilege protection and work product doctrine protection is their fragility. Disclosure to non-adverse third parties normally waives the former, but not the latter.

In Breuder v. Board of Trustees, No. 15 CV 9323, 2021 U.S. Dist. LEXIS 179680 (N.D. Ill. Sept. 21, 2021), the court addressed (among other things) a college's disclosure of protected communications to its outside auditor. After noting that the college's "Board itself concedes [that] disclosure of privileged information to an independent auditor typically results in a waiver of the attorney-client privilege," the court applied the universally-accepted principle that "this disclosure does not waive the [college's] work-product privilege unless the disclosure was made 'in a manner which substantially increases the opportunity for potential adversaries to obtain the information.'" Id. at *25-26. The court pointed to the plaintiff's failure to argue that the college's disclosure to its independent auditor, "was made in such a manner," or "object to the [college's] work product designations." Id. at *26.

This basic principle applies to other non-adverse third parties, such as public relations consultants and other third parties assisting corporations. An explicit confidentiality agreement is always best. But the robust work product protection normally survives disclosure even without that – if the disclosing owner reasonably expects that the recipient will keep it confidential.

- [Privilege Point, 12/22/21]

S.D.N.Y. Deals With Spouses and Law Firm Emails: Part I

December 22, 2021

Most states have adopted some variation of what is called the "spousal privilege" or "marital privilege." Those usually appear in statutes or rules, and dramatically vary from state to state. For obvious reasons, spouses' communications and presence also implicate normal privilege and work product doctrine principles.

In Shih v. Petal Card, Inc., 565 F. Supp. 3d 557 (S.D.N.Y. 2021) (Moses, J.), the defendant sought communications between plaintiff and her lawyer husband. In analyzing the attorney-client privilege, the court first explained that under New York law disclosing a preexisting privileged communication to a spouse did not waive that protection. But the court then warned that "[t]he analysis is somewhat more complicated when . . . the spouse is present for the communication between client and her attorney." Id. at 573. That analysis turned on whether "the spouse is an agent of the client." Id. (citation omitted). The court ultimately concluded that the plaintiff established that her husband met that standard – which requires "a fairly minimal showing" that "the client reposed trust and confidence in her spouse and expected the communication to remain confidential notwithstanding his presence." Id.

Many lawyers might think that this analysis is a gimmie – but the S.D.N.Y.'s careful evaluation proves otherwise. Although the court noted that "New York courts frequently reach similar results where the third party is the client's adult child or other close family member" (id. at 573 n.9), other courts treat those other family relationships with far more skepticism than in the spousal context. Next week's Privilege Point will address protection for the plaintiff's lawyer husband's use of his law firm's server – which could have had disastrous results.

- **[Privilege Point, 12/29/21]**

S.D.N.Y. Deals With Spouses and Law Firm Emails: Part II

December 29, 2021

Last week's Privilege Point summarized a Southern District of New York decision finding that the plaintiff's lawyer husband was inside privilege protection. Shih v. Petal Card, Inc., 565 F. Supp. 3d 557 (S.D.N.Y. 2021) (Moses, J.).

The court then addressed the privilege implications of plaintiff's husband's use of the Buckley Sandler law firm email system (where he was a summer clerk at the time). The court bluntly held that "the spousal privilege does not protect the emails sent to and from [plaintiff's lawyer husband] in the summer of 2017 over his buckleysandler.com email account." Id. at 575. The court applied the widely accepted standard articulated in In re Asia Global Crossing, Ltd., 322 B.R.D. 247 (Bankr. S.D.N.Y. 2005) — agreeing with defendants that "the use of an employer's email account negated any reasonable expectation of confidentiality and thus vitiated the privilege." Id. Fortunately for the plaintiff and her lawyer husband, the court held that the more robust work product protection survived — because his use of his law firm's email system had not "substantially increase[d] the opportunity for potential adversaries to obtain the information" (quoting another court's articulation of the work product waiver standard). Id. at 576 (alteration in original) (citation omitted).

Lawyers using their law firms' email systems should keep in mind the privilege waiver risks, even when communicating with their spouses.

- Sandoz Inc. v. Lannett Co., 570 F. Supp. 3d 258, 265-66 (E.D. Pa. 2021) (finding that a communications consultant was inside privilege protection; “Documents 297 and 357 are email chains involving Robert Jaffee, an outside third-party communications consultant. Lannett offers no explanation why Mr. Jaffee’s presence is indispensable for legal advice and provides no substantive argument as to his role or necessity. Nevertheless, it is patent from the face of these two documents that legal advice is in fact involved: Mr. Jaffee is sending his work product for attorney comment and the attorney is responding with comments related to legal strategy, which Jaffee incorporates. The consultant here is an active participant, as opposed to the passive consultant in BouSamra who merely received an email from counsel. In BouSamra, the Court noted that a situation may arise where a third party was necessary for legal advice, ‘in instances [that] unlike the present matter, involve soliciting advice or input from a public relations firm.’ 210 A.3d at 986, n.15 (emphasis in original). Although the situation here is slightly different, as it is the consultant, not the attorney, who is soliciting legal advice, the obvious active engagement between the attorney and consultant for the purpose of legal advice persuades me that these communications are protected and the privilege is not waived.” (alteration in original))
- In re GE ERISA Litig., Civ. A. No. 1:17-cv-12123-IT, 2022 U.S. Dist. LEXIS 16586, at *18-19 (D. Mass. Jan. 26, 2022) (in analyzing privilege protection, distinguishing among documents involving third party Credit Suisse, depending on the role it played in each communication; “Defendants are ordered to produce responsive documents according to the following instructions. First, for documents where the role of Credit Suisse employees was to provide factual information or business advice relevant to the sale of GEAM, e.g., data from financial models or information communicated to Credit Suisse from bidders, Credit Suisse’s presence waives attorney-client privilege because Credit Suisse employees were not called on to provide advice necessary for counsel to provide legal advice to GE, and these documents must be produced. Second, for documents in which Credit Suisse’s financial advisors provided information to counsel necessary for counsel to provide legal advice concerning the sale of GEAM, e.g., feedback on legal issues raised in drafts of documents attorneys shared with client, those communications remain privileged despite Credit Suisse’s presence. Third, for documents in which Credit Suisse employees are copied on otherwise privileged communications, but where their role is unclear, the presence of Credit Suisse employees waives privilege, and the documents must be produced.”)

- United States v. Coburn, Civ. No. 2:19-cr-00120 (KM), 2022 U.S. Dist. LEXIS 21429, at *15-16 (D.N.J. Feb. 1, 2022) (analyzing privilege and work product issues involving defendant's third party subpoena on another company (Cognizant); "The first category in dispute consists of Cognizant's draft press releases and public disclosures. I agree with Defendants that these materials were not created for the predominant purpose of obtaining legal advice, or in order to prepare for litigation. See In re Grand Jury Investigation, 599 F.2d at 1233. Instead, they fall squarely within the type of non-legal, business or public relations advice that are not privileged. See Fisher, 425 U.S. at 403; Westinghouse, 951 F.2d at 1423-24. Similarly, Cognizant's communications with public relations firms Finsbury and CLS Strategies concerning 'public disclosure, communications, potential litigation and related legal strategy' relevant to Cognizant's internal investigation, (Mot. To Compel Cognizant, Cat. A at 76-77, [sic]) are not protected by either privilege because they bear too tenuous a connection to the provision of legal advice or confidential preparations for litigation. See, e.g., Dejewski, No. 19-CV-14532-ES-ESK, 2021 WL 118929, at *1-2; Louisiana Mun. Police Emps. Ret. Sys., 253 F.R.D. at 305-06.")
- United States v. Coburn, Civ. No. 2:19-cr-00120 (KM), 2022 U.S. Dist. LEXIS 21429, at *17-18 (D.N.J. Feb. 1, 2022) (analyzing privilege and work product issues involving defendant's third party subpoena on another company (Cognizant); "A third disputed category consists of Cognizant's communications with the accounting firm E&Y concerning Cognizant's internal investigation and related updates given to the Board of Directors, DOJ, and SEC (Mot. To Compel Cognizant, Cat. A at 76), are closely related to the provision of legal advice. Indeed, the nature of the allegations against Defendants and the scope of Cognizant's internal investigation would understandably make accounting expertise vital to any law firm representing Cognizant. See United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (holding that a client's communications to an accountant employed by the client's attorney were reasonably related to the legal representation and remained privileged). As to those communications, the privilege is appropriately asserted.")

- Sweet v. City of Mesa, No. CV-17-001520-PHX-GMS, 2022 U.S. Dist. LEXIS 19848, at *7-8, *8 (D. Ariz. Feb. 3, 2022) (holding that plaintiff waived her privilege protection but not her work product protection by disclosing communications to her mother, who assisted plaintiff in her lawsuit; “Although Marcie was involved with the preparation of her daughter’s case, her involvement did not create an agency relationship for purposes of the federal law of attorney-client privilege. The emails establish that Marcie was deeply concerned about her daughter’s legal prospects, that she advised Laney to retain her current counsel, and that she held herself out on occasion as having been authorized by Laney to speak on her behalf. However, they do not establish that Marcie provided the kind of professional services she would ordinarily be paid to provide, nor that her services were necessary to assist Laney’s attorneys in providing their legal advice—facts central to the Dempsey court’s determination that the plaintiff’s parents were his agents. Therefore, even if Marcie’s involvement in her daughter’s case was substantial, it does not rise to the level of creating an agency relationship between her and Laney.” (footnotes omitted); “Having determined that Marcie is not Laney’s agent, her receipt of email communications between Laney and her attorneys expressly waives the attorney-client privilege. Sanmina, 968 F.3d at 1116. That Laney or her attorneys may not have subjectively intended to waive the privilege is immaterial. See Bittaker, 331 F.3d at 719 n.4. Consequently, the attorney-client privilege has been waived as to all emails marked with Dispute Codes 1, 2, and 3.”)

- Brauner v. Valley, 187 N.E.3d 439, 450-51 (Mass. App. Ct. 2022) (holding that disclosure to an accountant waived privilege protection; “The plaintiffs contend that communications with their accountants are privileged because the accountants were necessary agents of their attorney. It was the plaintiffs’ burden to establish that these communications fell within the narrow exception explained in Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 307, 901 N.E.2d 1185 (2009): ‘If the accountant’s presence is “necessary” for the “effective consultation” between client and attorney, the privilege attaches. . . . The “necessity” element means more than “just useful and convenient.” The involvement of the third party must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications.’ (Quotations and citations omitted.) The ‘doctrine applies only when the accountant’s role is to clarify or facilitate communications between attorney and client.’ Id. at 308. The plaintiffs made no such showing here. There were, for example, no affidavits from the plaintiffs or their attorneys stating that the accountants had been retained by the attorneys, or were present at the attorneys’ request, or that the attorneys required the accountants’ assistance for purposes of rendering legal (as opposed to accounting) advice.” (alteration in original))

- In re Lifetrade Litig., No. 17-CV-2987 (JPO)(KHP), 2022 U.S. Dist. LEXIS 152460, at *24-25, *28 (S.D.N.Y. Aug. 24, 2022) (finding that a client's broker and a spouse were inside privilege protection; "Many of the communications examined by the Court include a broker or financial advisor. The exemplars reviewed by the Court revealed that the brokers/financial advisors were necessary for the communication with the lawyers, as they were assisting the Plaintiffs with the engagement and acting as the Plaintiffs' agent. It is also clear that there was some expectation of confidentiality between the Plaintiff and the broker/financial advisor. Under these circumstances, the presence of the broker/financial advisor does not result in a waiver, whether the communications are viewed as attorney-client communications or work product. United States v. Kovel, 296 F.2d 918, 922 (2d Cir.1961); Am. Oversight, 2022 U.S. App. LEXIS 22720, [WL] at *12-14; Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113 (S.D.N.Y. 2005)." (alteration in original); "Although no exemplars included communications in which a spouse was included, the Court notes that the privilege log does contain examples of this. For similar reasons that communications in which a child participated, the presence of a spouse would not in this case result in a waiver both because of the expectation of confidentiality and because most courts in New York find a spouse to be an agent.")
- Wagner Aeronautical, Inc. v. Dotzenroth, Case No. 21-cv-0994-L-AGS, 2022 U.S. Dist. LEXIS 158665, at *14-15 (S.D. Cal. Sept. 1, 2022) (finding that a consultant was inside the privilege protection; "To start, Bill Yuen was hired as a consultant to assist Tarpley and Wagner in obtaining funding for the conversion program. Because Yuen was Tarpley's agent, Tarpley could share the legal advice he received from attorney Bevans to the extent necessary for Yuen to 'act on it' without compromising privilege. See Upjohn, 499 U.S. at 390. So the legal advice proffered by Bevans in PLE 16 remains privileged." (internal citation omitted))

- Homapour v. Harounian, 179 N.Y.S.3d 231, 231 (N.Y. Sup. Ct. 2022) (finding that the privilege survived a divorce client's communication with his lawyer in the presence of the client's "long-term employee and personal assistant"; "Following its in camera review, Supreme Court providently exercised its broad discretion in finding that notes of a meeting between defendant Mark Harounian and his divorce counsel were privileged even though they were created in the known presence of a third party – namely, nonparty Lennie Estipular, Harounian's long-term employee and personal assistant. An agency agreement, prepared by Harounian's divorce counsel, designated Estipular as Harounian's agent in connection with the divorce proceeding, specifically stating that Estipular's activities were undertaken at counsel's direction and were intended to maintain and preserve privilege." (citation omitted); "Contrary to plaintiff's assertion that Estipular could not have been Harounian's agent at the meeting between him and his counsel because she was not necessary to the transmission of legal advice, Estipular was, in fact, facilitating attorney-client communications by recording notes of the meeting, because her doing so allowed Harounian to listen rather than write. Therefore, the agency exception applies, and the privilege was not waived by Estipular's presence.")

- [Privilege Point, 5/10/23]

Client Consultants' Role Can Change Over Time, With Differing Waiver Implications

May 10, 2023

Some lawyers erroneously assume that the fragile attorney-client privilege protection normally survives disclosure (by them or by their clients) to the client's consultant/agent. That can be true in very limited circumstances, depending on that consultant/agent's role — which can change over time.

In Abrahami v. Meister Seelig & Fein LLP, No. 21-CV-10203 (JFK) (KHP), 2023 U.S. Dist. LEXIS 29664, at *12 (S.D.N.Y. Feb. 22, 2023), SDNY privilege guru Judge Parker described New York's "two-prong test to determine whether disclosure by a party to a purported client agent results in waiver of the attorney-client privilege." In addition to satisfying the obvious "reasonable expectation of confidentiality under the circumstances" standard, avoiding a waiver requires that "the involvement of the third party [was] nearly indispensable or serve[d] some specialized purpose in facilitating the attorney-client communications." Id. at *12-13 (alterations in original) (citation omitted). This is an incredibly demanding standard. In the case before her, Judge Parker addressed communications with an agent the client hired "to negotiate the transaction [for a commission] and interact with his lawyers." Id. at *2. She held that the privilege protected the agent's "initial communications with [the client's law firm] Seyfarth . . . to provide information necessary to rendering legal advice." Id. at *18. But the privilege did not protect communications with the client's agent after his "role as agent ended . . . once Seyfarth gathered the information it needed to provide legal advice." Id.

Judge Parker's temporal analysis had real world consequences — "one document reflects communications that occurred after Seyfarth had completed its initial fact investigation" and therefore was "not privileged and must be produced." Id. Lawyers must not only assess whether their client's agent is "nearly indispensable" to the lawyers' rendering of legal advice to their clients; they must also consider whether that analysis changes over time.

- Mark R. Kiesel Living Trust v. Hyde, No. CV 22-109-M-KLD, 2023 U.S. Dist. LEXIS 85700, at *18 (D. Mont. May 16, 2023) (finding that plaintiff's architect was outside privilege protection because he was not "nearly indispensable" for the plaintiff's communication with the architect client's lawyer; "Accordingly, as the party asserting the attorney-client privilege, Kiesel must show that (1) the communications involving Alexander were made for the purpose of obtaining legal advice from Kiesel's counsel and (2) Alexander's involvement was nearly indispensable or served some specialized purpose in facilitating the attorney-client communications.")

- [Privilege Point, 6/21/23]

Another Court Finds Public Relations Consultants Outside Privilege Protection

June 21, 2023

One of the greatest risks to corporate clients' privilege protection is their executives' and even their lawyers' misunderstanding about the availability of privilege protection for communications with public relations consultants. A remarkable number of cases address this scenario, and almost without exception courts reject privilege protection for communications with, or shared with, such consultants.

In Northwest Senior Housing Corp. v. Intercity Investment Properties, Inc. (In re Northwest Senior Housing Corp.), defendant unsuccessfully resisted discovery of its communications with its public relations consultant, contending that the public relations consultant "provided a need essential to [its law firm]'s legal representation." Chap. 11 Case No. 22-30659, Adv. No. 21-03040, 2023 Bankr. LEXIS 1001, at *7 (Bankr. N.D. Tex. Apr. 13, 2023). In ordering the communications produced, the court restated the question (and answered in the negative): "whether [the law firm] needed [the public relations consultant] in order to render **legal advice**." Id. Defendant predictably cited about the only case finding a public relations consultant inside privilege protection — a 2003 Southern District of New York case apparently involving Martha Stewart. In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321 (S.D.N.Y. 2003). As in nearly every case since then, the court found that opinion inapplicable.

Sophisticated corporate clients and their large law firms continue to get this wrong. There is some good news — disclosing pre-existing work product to a public relations consultant does not waive that more robust protection. But even that is tempered by more bad news — such public relations consultants rarely, if ever, can create their own work product-protected documents.

- **[Privilege Point, 7/12/23]**

Privilege Implications of Spousal Communications

July 12, 2023

Most courts hold that the incredibly fragile attorney-client privilege can be waived by disclosure even to family members (such as Martha Stewart's disclosure to her own daughter). The separate "spousal privilege" recognized in many states complicates the analysis with those family members.

In IsoNova Technologies LLC v. Rettig, the court noted that "[s]ome courts have . . . held that the presence of a spouse on an attorney-client communication destroys the attorney-client privilege unless the spouse's presence was necessary for the lawyer to effectuate the representation" (which is the standard for all client agents and normally fails). Case No. 20-CV-71-CJW-KEM, 2023 U.S. Dist. LEXIS 94454, at *11 (N.D. Iowa May 31, 2023). The court referred to Iowa's spousal privilege statute as taking the more generous contrary view. Noting that the Iowa statute protected the defendant's disclosure of privileged communication to his wife, the court explained that "[i]t does not make sense then that by including his spouse from the start, the emails lose their privileged nature." Id.

Lawyers should still warn their married clients to be very careful — states recognizing a spousal privilege may place that protection in different places (statutes, rule, etc.) and take widely varying approaches (applying just in criminal cases, etc.). The good news is that work product protection almost always survives disclosure to friendly third parties like a spouse.

- Fine v Bowl Am., Inc., Civ. No. SAG-21-1967, 2023 U.S. Dist. LEXIS 218558, at *10, *11 (D. Md. Dec. 7, 2023) (in an opinion by Judge Copperthite, explaining that the privilege could protect communications sent to a husband via his wife's email address; "Plaintiffs first allege they are entitled to emails that were sent from counsel to Allan Sher via his wife's email address, since she is not a party. Defendants argue that the use of a third party's email does not destroy the privilege simply because it is addressed to Ms. Sher. ECF No. 114 at 12. The Court agrees."; "In this case, Defendants provide sufficient support that the communications between counsel and Mr. Sher were made in confidence for the purpose of obtaining legal advice. The fact that his wife provided technical support for Mr. Sher to receive those communications does not destroy the most venerable privilege between counsel and client. The Motion to Compel is DENIED as to these communications.")

B. Lawyer Agents/Consultants

- SEC v. Schroeder, No. C07-03798 JW (HRL), 2009 WL 1125579, at *7, *9, *10, *12, * (N.D. Cal. Apr. 27, 2009) (addressing Skadden's representation of a Special Committee in investigating KLA-Tencor Corp.'s options backdating; explaining that the SEC had sued one of KLA's executives, who in turn sought several categories of Skadden's communications and documents; ordering production of Skadden's final interview memoranda that had been given to the SEC, but not its raw material that had never been disclosed outside the law firm; pointing to Skadden affidavits that the raw material represented opinion work product; "[E]ach of the individual Skadden attorneys who participated in the interviews has submitted a declaration attesting that they did not merely record verbatim (or substantially verbatim) the witnesses' statements. Rather, they used their knowledge about the facts and theories of the case to identify and filter which facts and comments by the witnesses were important to the investigation."; explaining that Skadden had only provided an oral report to KLA's outside auditors and that disclosure to the auditor did not waive work product protection -- noting that "disclosures to outside auditors do not have the 'tangible adversarial relationship' requisite for waiver" (emphasis added); "Schroeder seeks the production of documents and communications between the Special Committee and KLA's outside auditors. The only auditor that has been identified here is PwC. Reportedly, PwC has been KLA's auditor since at least 1994 and was KLA's auditor with respect to the restatement of the options in question. (Miller Decl., ¶¶ 23-24). Skadden says that, in connection with that restatement, PwC requested information about the Special Committee's investigation. On October 18, 2006, Skadden made an oral presentation to PwC, including a PowerPoint presentation. No documents were provided to PwC at that time. (Id. ¶ 25). According to Skadden, at PwC's request, Skadden attorneys also later discussed information learned from certain witness interviews, using the Final Interview Memoranda to refresh their recollection. The Final Memoranda were not provided to PwC. (Id.[] Skadden's opposition brief states that Skadden and the Special Committee disclosed certain documents to PwC to assist in the audit of KLA and the restatement of the company's historical financial statements. (Skadden Opp. at 18). On the record presented, it is not clear precisely what those documents are, save the PowerPoint presentation that was made. (See Miller Decl. ¶¶ 23-26)." (emphases added); contrasting the KLA scenario with the Royal Ahold case; "Schroeder's other cited cases do not support the broad waiver he seeks here. In Royal Ahold N.V. Securities Litig., 230 F.R.D. 433 (D. Md. 2005), a securities class action, the defendant company disclosed the details of its internal investigation in a public SEC filing and produced investigative reports (which quoted from

witness interview memoranda) to the lead plaintiffs, but nonetheless withheld the majority of the underlying interview memoranda. The court found that because the company publicly disclosed details of its internal investigation 'in order to improve its position with investors, financial institutions, and the regulatory agencies, it also implicitly has waived its right to assert work product privilege as to the underlying memoranda supporting its disclosures.' *Id.* at 437. Here, by contrast, Schroeder already has the interview memoranda underlying the Special Committee's disclosure to the SEC."; rejecting the executive's effort to obtain communications between Skadden and its forensic accounting investigation consultant; "Communications between Skadden and its consultant, LECG, need not be produced. The withheld communications reportedly contain 'documents related to methods for document review and retention, discussions regarding how to locate and interpret metadata, a collection of documents that LECG deemed important related to a particular witness, and emails discussing special projects that LECG completed during the investigation.' (Miller Decl. ¶ 34). It is not apparent that any of those communications were disclosed beyond Skadden and LECG. Further, it appears that these communications comprise opinion work product, and Schroeder has not demonstrated a substantial need for any facts that might be contained in them. Schroeder's motion as to these documents is denied." (emphases added); ordering Skadden to produce the factual portion of documents provided to KLA and its law firm Morgan Lewis, but not Skadden's drafts or other documents "that contain or reflect" opinion work product; "With respect to the communications between and among Skadden/the Special Committee and KLA/Morgan Lewis, it is not clear exactly what this universe of documents includes. However, the withheld communications reportedly comprise 'documents reflecting numerous requests for information from the Company and discussions of what Skadden did during the investigation.' (Miller Decl. ¶ 35). This court finds that any factual information contained in these documents should be produced. However, drafts and other documents that contain or reflect an attorney's mental impressions (if any) need not be produced (or, if feasible, such information may be redacted). See *Roberts*, 254 F.R.D. at 383 (ordering production of attorney notes reflecting communications with the company's board of directors, with opinion work product redacted)." (emphases added); "As for the KLA opinion grant binders, on the record presented, it appears that the option summaries and legal memoranda comprise facts that are inextricably intertwined with opinion work product.")

- Krys v. Sugrue (In re Refco Sec. Litig.), 280 F.R.D. 102, 105 (S.D.N.Y. 2011) (in an opinion by Judge Rakoff, holding that a party's consultant did not meet the Kovel standard; "[T]here is no evidence suggesting Ginsberg [client's lawyer] relied on Knight [former hedge fund manager] to translate or interpret information given to him by his clients. At oral argument, Ginsberg represented to the Court that Knight 'understood an awful lot about Ms. Farquharson's [client] professional duties and operations,' and that he 'was extremely knowledgeable about Standard & Poor's' and 'a platform and an investment mechanism that I . . . was not particularly familiar with. He also had a wealth of information from his 40 years or so in the field that I could only scratch the surface.' . . . From this and Ginsberg's Revised Declaration dated August 31, 2011 . . . , it appears Ginsberg relied on Knight's experience and specialized knowledge. What does not appear, however, is any evidence that there was information Ginsberg could not understand without Knight translating or interpreting the raw data for him. Accordingly, by sharing his client's information with a third party, Ginsberg waived attorney-client privilege for that information." (emphases added)).

- [Privilege Point, 5/23/12]

Courts Analyze Effect of Third Parties' Participation in Privileged Communications: Part II

May 23, 2012

Last week's Privilege Point dealt with the attorney-client privilege implications of third parties' participation in privileged communications, when the third party is acting on the client's behalf. Third parties assisting lawyers also occasionally participate in otherwise privileged communications. Most courts apply what is called the Kovel standard, under which the privilege protects such communications only if the third party is necessary for the lawyer to fully understand the client's communications (not merely if the third party's involvement is useful to the lawyer).

In Ravenell v. Avis Budget Group, Inc., No. 08-CV-2113 (SLT), 2012 U.S. Dist. LEXIS 48658 (E.D.N.Y. Apr. 5, 2012), the Eastern District of New York found that the privilege did not protect in-house lawyers' communications with a consultant assisting the company in a Fair Labor Standards Act audit. The court noted that the consultant had preliminarily assessed whether employees were exempt or nonexempt, an analysis "that in-house counsel had the ability to make themselves." Id. at *15. The court concluded that the consultant's work "neither 'improve[d] the comprehension of the communications between attorney and client'" nor "provided advice outside the general expertise of attorneys yet essential to the ability of defendants' lawyers to provide legal advice." Id. at *15-16 (citation omitted). Seven days later, another court reached the same conclusion about a leasing agent's participation in privileged communications – noting that "the mere fact that 'an attorney's ability to represent a client is improved, even substantially, by the assistance of [a third party]' is insufficient for the attorney-client privilege to apply." Banco do Brasil, S.A. v. 275 Wash. St. Corp., Civ. A. No. 09-11343-NMG, 2012 U.S. Dist. LEXIS 51358, at *21 (D. Mass. Apr. 12, 2012) (citation omitted). That court also found that the leasing agent was not the "functional equivalent" of a corporate employee. Id. at *20-21.

Lawyers often have as difficult a time as clients in establishing that communications with or in the presence of third parties acting on their behalf deserve privilege protection.

- [Privilege Point, 2/13/13]

Another Court Takes a Narrow View of Privilege Protection for a Lawyer's Agent/Consultant

February 13, 2013

Nearly every court finds that client agents/consultants usually stand outside the privilege protection, unless they are necessary for the transmission of privileged communications. In contrast, most courts have been more willing to extend privilege protection to a lawyer's agent/consultant assisting the lawyer in providing legal advice.

However, some courts recognize only a limited number of such lawyer agents/consultants who are within the privilege. In Columbia Data Products v. Autonomy Corp., Civ. A. No. 11-12077-NMG, 2012 U.S. Dist. LEXIS 175920 (D. Mass. Dec. 12, 2012), plaintiff's law firm Greenberg Traurig retained PriceWaterhouse Coopers ("PWC") to conduct an audit of royalty payments defendant owed Greenberg's client. Greenberg Traurig's retainer letter indicated that "PWC agreed to perform services intended to assist counsel with its provision of legal advice" to the client. Id. at *45. The court nevertheless rejected plaintiff's privilege claim for communications relating to the audit – concluding that "neither the [retainer] letter nor any other evidence set forth in the record suggested that PWC 'was necessary, or at least highly useful, in facilitating the legal advice' or that Greenberg Traurig was relying on PWC to translate or interpret information between the lawyers" and the client. Id. (citation omitted). The court later reiterated that the client had not "presented any supporting evidence or pointed to any facts showing that PWC played an interpretive role between Greenberg Traurig" and the client. Id. at *46.

Cases taking such a narrow approach to privilege protection for lawyer agents/consultants represent a very troubling view – both because they ignore explicit retainer letters in which lawyers hire agents/consultants, and because they require that the agents/consultants essentially "interpret" raw data that the lawyers would not otherwise understand.

- [Privilege Point, 7/24/13]

Federal and State Courts Analyze the Privilege Impact of Third Parties: Lawyer Agents

July 24, 2013

Last week's Privilege Point described the risk of involving client agents in privileged communications. The same danger arises when lawyers rely on agents and consultants.

As with client agents, some courts take a broad view. In Bank of New York Mellon, Index No. 651786/11, N.Y. Slip Op. 30996U (N.Y. Sup. Ct. May 6, 2013), the court held that a technology company was within the protection because it assisted the plaintiff's law firm Mayer Brown. The court quoted an earlier New York state court case, which explained that "[t]he scope of the privilege is not defined by the third parties' employment or function," but rather "depends on whether the client had an expectation of confidentiality under the circumstances." Id. at 5 (citation omitted). Just one day later, the Southern District of New York took its typically narrow view – allowing an adversary to depose plaintiff Chevron's investigative and risk management consultant Kroll. In Chevron Corp. v Donziger, the court acknowledged that some courts take a broad view of privilege protection for lawyer agents, but warned that other courts "have limited [privilege protection] to circumstances where communications with the agent are necessary to improve the comprehension of the communications between attorney and client." No. 11 Civ. 0691 (LAK) (JCF), 2013 U.S. Dist. LEXIS 65335, at *12 (S.D.N.Y. May 7, 2013).

Lawyers hoping to maintain privilege protection in this context should weigh the risks, and carefully document the rationale for involving their agents or consultants.

- [Privilege Point, 2/18/15]

A Southern District of New York Decision Adopts Narrow Views of Privilege Protection for Independent Contractors and Lawyer-Retained Consultants: Part II

February 18, 2015

Last week's Privilege Point described the Southern District of New York's prediction that the Second Circuit might reject the widely-accepted "functional equivalent" doctrine. Church & Dwight Co. Inc. v. SPD Swiss Precision Diagnostics, GmbH, No. 14-cv-585, 2014 U.S. Dist. LEXIS 175552 (S.D.N.Y. Dec. 19, 2014). The court also assessed whether the defendant waived its privilege protection by sharing protected communications with an outside marketing consultant — ultimately rejecting defendant's argument that "in light of the complex regulatory scheme to which [its product] was subject, it was essential" to share such privileged communications with the consultant. Id. at *2.

The court noted that agents or consultants considered inside privilege protection were generally translators or similar consultants "necessary to improve comprehension of the communication between attorney and client." Id. at *4. That standard arose in the context of client agents, but many courts inexplicably apply the same approach to lawyer agents. Here, the court found a waiver, because the defendant "makes no showing as to how the outside marketing firm improved counsel's comprehension of [the client's] communications to counsel, or vice versa." Id. at *4-5. Later in the opinion, the court similarly held that lawyers sharing privileged communications with their agents or consultants must show that the agent or consultant "enabled counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice." Id. at *6.

Other courts apply the same narrow standard. Three weeks before the Church & Dwight opinion, another court explained that an accountant would have been inside privilege protection as a lawyer's agent only if the accountant was "included in the conversation at the behest of Plaintiff's attorney in order to help decipher the relationship." Yoder v. Long (In re Long), Case No. 09-23473, Adv. No. 09-6172, 2014 Bankr. LEXIS 4879, at *50 (Bankr. D. Kan. Dec. 1, 2014). Applying the same translator/interpreter standard to client agents and lawyer agents can make it very difficult for lawyers to protect their communications with consultants upon whom they legitimately rely when giving their clients legal advice.

- Cohen v. Cohen, No. 09 Civ. 10230 (LAP), 2015 U.S. Dist. LEXIS 21319, at *8-9 (S.D.N.Y. Jan. 29, 2015) (in an action by a wife against her former husband for fraud in connection with assets; analyzing the wife's communications to and from a litigation funder; finding that the funder did not meet the Kovel [United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)] doctrine; "Because Ms. Napp [Funder] is neither necessary to facilitate Plaintiff's communications with counsel nor in possession of a legal claim against Defendants, her communications with Plaintiff are not privileged. With regard to her Kovel argument, Plaintiff has made no showing that Ms. Napp is 'indispensable or serve[s] some specialized purpose in facilitating the attorney client communications.' . . . Rather, her primary purpose appears initially to be making a decision as to whether her company will fund Plaintiff's legal team and thereafter reviewing and commenting on legal strategy presumably to maximize the chances of a return on her investment. These functions cannot be analogized to the interpreters or accounts of the Kovel line, who serve a specific function necessary to effectuate legal representation.").

- [Privilege Point, 4/8/15]

Court Condemns Law Firm's Privilege Claim as "Subterfuge": Part I

April 8, 2015

Some companies begin internal investigations or audits for business reasons, but later try to cloak related communications and documents with work product privilege protection. Although some companies successfully argue that a business-related investigation "morphed" into a privilege-protected investigation, most attempts fail.

In United States v. NeuroScience, Inc., No. 14-mc-003-slc, 2015 U.S. Dist. LEXIS 20572, at *5 (W.D. Wis. Feb. 10, 2015), NeuroScience retained a regulatory compliance company (CodeMap) to conduct a "full, flat-fee compliance audit" of its billing practices after its billing manager suddenly resigned. About a month later, CodeMap reported that NeuroScience had overbilled Medicare and some insurance companies. In the meantime, NeuroScience's outside Minneapolis law firm learned that the ex-billing manager had accused the company of fraudulent billing practices. About ten days later, NeuroScience and its law firm agreed that the law firm "should supervise the remainder of CodeMap's audit activities." Id. at *7. CodeMap sent a Services Proposal indicating that the law firm would now direct CodeMap's "baseline" compliance audit, and stating that related communications would deserve privilege and work product protection. Id. However, CodeMap later admitted that (1) "counsel really did not provide much internal 'direction' to CodeMap at all" (id. at *8); (2) lawyers were not present when CodeMap auditors met with NeuroScience employees; and (3) lawyers generally did not receive copies of email message traffic between CodeMap and company employees during the audit. CodeMap's chief auditor later acknowledged that "[b]y the time Counsel was involved, CodeMap already knew the work to be done and how to do it, so the legal oversight, as [he] understood it, was to maintain privilege." Id. at *9-10 (internal citation omitted).

- [Privilege Point, 4/15/15]

Court Condemns Law Firm's Privilege Claim as "Subterfuge": Part II

April 15, 2015

Last week's Privilege Point described an outside regulatory compliance consultant's work for a company which worried about its non-compliant billing practices and about possible litigation, that consultant's later agreement to work under outside lawyers' "direction," and the admitted lack of any such day-to-day direction. United States v. NeuroScience, Inc., No. 14-mc-003-slc, 2015 U.S. Dist. LEXIS 20572, at *7 (W.D. Wis. Feb. 10, 2015).

The court first rejected NeuroScience's work product claim. The court held that the company hired the compliance auditor CodeMap for business purposes, and that lawyers' later involvement "was a tactic designed solely to cloak the audit documents" with some protection. Id. at *17. The court concluded that the outside lawyers "in fact provided no direction at all," and found no evidence that "CodeMap changed the focus of its audit or conducted it any differently after it was agreed that the Services Proposal should be routed through counsel." Id. at *18. Although outside lawyers used the audit's result, the court explained that "the focus is on the circumstances of the communication at the time it was made." Id. The court also rejected NeuroScience's privilege claim. The court noted that the company hired CodeMap "without any direction from counsel," and that CodeMap "conducted and completed [its] coding review and transmitted the results" to NeuroScience before any lawyer's involvement. Id. at *24. And after the lawyers' "post-hoc retention of CodeMap," there was no evidence that "the focus of CodeMap's audits changed." Id. at *25. The court therefore concluded that "there is no question that [the outside law firm's] retention of CodeMap was a subterfuge specifically designed to cloak the audits with privilege." Id. at *26.

This and other similar cases highlight the wisdom of involving lawyers at the first hint of a problem, and assuring their intense hands-on involvement in any consultants' work the company intends to withhold as privileged or as work product.

- [Privilege Point, 5/13/15]

Southern District of New York Reiterates its Narrow View of Privilege Protection for Consultants Assisting Lawyers

May 13, 2015

Client agents/consultants normally fall outside privilege protection, unless they help facilitate communications between the client and lawyer. Recognizing this, some lawyers seek privilege protection by hiring the consultants themselves, arguing that the consultants are helping them provide legal advice.

In Scott v. Chipotle Mexican Grill, Inc., 94 F. Supp. 3d 585 (S.D.N.Y. 2015), Judge Netburn continued a long line of Southern District of New York decisions taking a very narrow view of the privilege in that context. Chipotle received advice from its outside law firm about wage and hour issues. The law firm then retained a human resources consultant, who prepared a report for the law firm about Chipotle employees' classifications. The court first rejected Chipotle's argument that the report deserved protection because it went to its law firm — concluding that "this formalism is insufficient to establish that it is a privileged communication." Id. at 592. The court then explained that Chipotle could establish privilege protection only if it proved that its outside law firm "engaged [the consultant] as its agent for a specific type of information that it could not otherwise obtain." Id. at 594. The court concluded that "[i]t strains credulity to imagine that an attorney evaluating wage and hours laws would not be able to speak with employees or interpret those laws on his own." Id. at 595. The court ultimately rejected Chipotle's privilege claim — noting that the consultant's report did not "provide any specialized knowledge that [Chipotle's outside lawyers] could not have acquired or understood on their own or directly through [their] clients." Id. at 594-95.

Lawyers should not assume that they can assure privilege protection merely by retaining a consultant to gather facts. Most courts require that consultants directly assist lawyers in giving legal advice — by gathering facts or providing other services the lawyers or the clients need, but could not undertake themselves.

- **[Privilege Point, 7/22/15]**

Courts Assess Whether Client and Lawyer Agents are Inside or Outside Privilege Protection: Part II

July 22, 2015

Last week's Privilege Point discussed a court's consideration of privilege protection for communications with client and lawyer agents. Two weeks later, another court analyzed Debevoise & Plimpton's argument that the privilege protected its communications with a public relations firm it retained. Debevoise claimed that the public relations firm assisted it in representing its client non-party Syracuse University in connection with a former coach's wife's defamation action against ESPN. Fine v. ESPN, Inc., No. 5:12-CV-0836 (LEK/DEP), 2015 U.S. Dist. LEXIS 68704 (N.D.N.Y. May 28, 2015).

The University relied on affidavits (including one from a Debevoise lawyer) in explaining that the public relations firm (1) "aided [Debevoise] attorneys in providing legal advice to the University on issues of communication and publicity"; (2) "'conferred frequently' with Debevoise"; and (3) "'prepar[ed] drafts of press releases and other materials which incorporated the lawyers' advice.'" Id. at *28-29 (internal citations and quotation marks omitted). The court rejected the privilege claim — noting that "[i]f public relations support is merely helpful, but not necessary to the provision of legal advice," the privilege does not apply. Id. at *32. The court also noted that the magistrate judge had reviewed the withheld communications in camera, and found that most of them "did not contain communications related to obtaining legal advice." Id. at *31. The court therefore held that Debevoise had lost the client's privilege by communicating with the public relations firm — even though Debevoise had retained the firm and supplied an affidavit supporting the privilege claim. The court also observed that the magistrate judge had earlier rejected the University's work product claim — finding that the University had conducted "for business purposes" its investigation into child molestation claims against the coach. Id. at *5.

Even sophisticated clients and law firms can underestimate the privilege's narrowness and fragility. If lawyers find it necessary to work with agents, their communications should reflect why and how.

- **[Privilege Point, 9/16/15]**

Courts Continue to Catalogue Client and Lawyer Agents Outside Privilege Protection

September 16, 2015

Under the majority view, the only client agents/consultants inside privilege protection are those essential for the client-lawyer communications. Although courts take a more varied view of lawyer agents/consultants, many courts hold that the only lawyer agents within privilege protection are those essentially translating or interpreting data so the lawyer can understand it.

In Cardinal Aluminum Co. v. Continental Casualty Co., Case No. 3:14-CV-857-TBR-LLK, 2015 U.S. Dist. LEXIS 95361 (W.D. Ky. July 22, 2015), the court held that plaintiff's insurance broker was outside privilege protection — despite the plaintiff's CFO's affidavit that the plaintiff relied on the broker to submit an insurance claim, negotiate with the insurance company, and advise the plaintiff about the claims process. Among other things, the court noted that "Plaintiff did not argue that its broker acted to effectuate legal representation for Plaintiff." Id. at *8. About three weeks earlier, another court addressed a company's claim that the privilege covered communications between its lawyers and environmental engineering firm AGC NL Indus., Inc. v. ACF Indus. LLC, No. 10CV89W, 2015 U.S. Dist. LEXIS 86677 (W.D.N.Y. July 2, 2015). Although acknowledging plaintiff's argument that AGC's "actions were done at the direction of counsel," the court found that AGC was outside privilege protection — noting that "[p]laintiff has not shown that AGC acted like an interpreter or translator of client communications." Id. at *12.

One of the most dangerous client misperceptions is that the privilege can protect their communications with their agents/consultants. And one of the most dangerous lawyer misperceptions is that lawyers can automatically assume that their agents/consultants are within privilege protection.

- LifeVantage v. Domingo, Case No. 2:13-CV-01037-DB-PMW, 2015 U.S. Dist. LEXIS 131731, at *5 (D. Utah Sept. 29, 2015) (finding that a public relations firm retained by a lawyer was not within privilege protection; also finding that the work product doctrine did not protect materials created by the public relations firm; "Courts have widely rejected claims of attorney-client privilege or work-product protection over communications with public relations firms." (emphasis added)).

- Lehman Bros. Int'l (Europe) v. AG Fin. Prods., Inc., No. 653284/2011, 2016 N.Y. Slip Op. 30187(U), at 11, 11-12, 12, 14, 15 (N.Y. Sup. Ct. Jan. 11, 2016) (analyzing whether various consultants hired by defendant's lawyers were inside privilege protection; ultimately finding after an in camera review that all but KPMG were inside privilege protection; assuming that the consultants' assistance was necessary to help defendant's lawyer; not analyzing work product protection after finding that the privilege protected the consultants' communications; "Osorio [People v Osorio, 549 N.E.2d 1183 (N.Y. 1989)] and Kovel [United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)] do not state, nor do the above cases, that the attorney-client privilege will attach to third-party communications only where the participation of the third-party is 'necessary' in order to facilitate the provision of legal advice. There is, however, authority to that effect."; "[E]ven assuming that the communications involving the consultants must have been necessary to facilitate Assured Guaranty's attorneys' provision to it of informed legal advice, the court finds that the record supports the Special Referee's findings that the communications involving Zolfo, ZAIS, and NEAM [non-party consultants] are protected by the attorney-client privilege, while those involving KPMG are not." (emphasis added); "The Special Referee reviewed the sample set of documents agreed to by the parties and made the following findings. With respect to the Zolfo documents, the Special Referee found that 'the sample set demonstrate[d] that Zolfo was providing assistance to Denton [Defendant's UK lawyers] in conveying legal advice to its client AGFP [Assured Guaranty]' and that 'the communications show that there was ongoing interplay between Denton, Zolfo and AGFP over the decisions that Denton had to advise AGFP about in attempting to settle or litigating the underlying dispute with LBIE [plaintiff].' . . . With respect to the ZAIS and NEAM documents, the Special Referee found that the documents in the sample set demonstrated that 'each of these consultants was providing assistance and guidance that assisted counsel's ability to advise AGFP; specifically they provided information about the valuation issues that were relevant to the settlement talks with LBIE or might ultimately be relevant if litigation ensued.' . . . Further, based on the retention letters and the documents, the Special Referee rejected LBIE's claim that ZAIS and NEAM were not acting as the agents of Assured Guaranty." (emphasis added; internal citation omitted); "The court further holds that in light of the complexity of the financial instruments and the importance to Assured Guaranty's exercise of its contractual rights of a sophisticated understanding of the market for such instruments, any requirement that the services of financial consultants be 'necessary' to the effective provision of legal advice is satisfied. The reasoning of the Kovel Court in holding that the attorney-client privilege may apply to an accountant's services to a lawyer representing a client in an accounting matter is equally applicable to the services of the financial

consultants here. Complex financial instruments 'are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence, the presence of the [financial consultants] . . . ought not destroy the privilege.'" (emphases added; citation omitted)). "Finally, the court holds that the KPMG documents are not protected by the attorney-client, work product, or trial preparation privileges. After reviewing the sample set, the Special Referee found that 'none of these [documents] actually reflects or gives any indication of legal advice' and that KPMG's advice 'was being sought and provided regarding the conduct and results of the post-termination auction process.' . . . In claiming privilege, Assured Guaranty merely asserts that KPMG was in fact assisting Denton and that a different firm ultimately conducted the auction. . . . These assertions are not sufficient to disturb the Special Referee's findings, which are supported by the record." (emphases added)).

- Certain Underwriters at Lloyd's v. AMTRAK, 162 F. Supp. 3d 145, 151, 152 (E.D.N.Y. 2016) (holding that London insurance brokers were outside privilege protection because they did not meet the Kovel standard; noting the difference between New York state and New York federal court law on the issue of client agents within privilege protection; "[C]ommunications from a client to a third-party accountant or foreign-language translator hired to assist a lawyer in providing legal advice to that client are protected under the privilege. See United States v. Kovel, 296 F.2d 918, 921-22 (2d Cir. 1961). Here, however, nothing in the record suggests that the London brokers served any analogous role. Rather, it appears that the London brokers acted as nothing more than an intermediary or clearing house for the Policies." (emphases added); "The thrust of LMI's [London Market Insurers] arguments with respect to attorney-client communications sent through the London brokers is that such a practice was 'standard' and 'necessary' given the London market's structure. . . . LMI's position is unavailing for several reasons. First, the fact that a particular method of distributing and/or retaining documents is standard in an industry does not determine whether that method of distribution comports with the law governing attorney-client privilege."; "Second, although LMI characterizes the utilization of the London brokers as a necessity . . ., there is nothing in the record to support a finding that this was the only method by which the U.S. lawyers could communicate with the relevant insurers -- save for a conclusory and ambiguous statement made in the Watson [London insurance market expert] Declaration that this method was the 'only way possible[.]'" (emphases added)).

- In re International Oil Trading Company, LLC, Case No. 15-21596-EPK, Ch. 7, 2016 Bankr. LEXIS 1856 (S.D. Fla. April 28, 2016) ("The Court believes the case law applying the broader approach to the 'agency exception' is more consistent with the purpose for the exception and thus better reasoned. The broader approach to the 'agency exception' is also in agreement with Florida law."; "In this case, Mr. Al-Saleh possesses a judgment against IOTC USA and is attempting to collect on that judgment. IOTC USA is an entity that has demonstrated an ability and willingness to resist Mr. Al-Saleh's collection efforts. In order to obtain counsel and collect the money he is owed, Mr. Al-Saleh secured outside funding from a lender. In order to determine whether to lend money to Mr. Al-Saleh, the litigation funder must assess the potential litigation, both at the outset and on an ongoing basis, using information provided by Mr. Al-Saleh and his counsel. With that information, the funder may advise Mr. Al-Saleh as to the cost of pursuing collection, the risks involved, and the best strategies to pursue in litigation. The thousands of pages of communications at issue in the Third Motion to Compel imply that the funder's involvement has significant value to Mr. Al-Saleh and is integral to his pursuit of legal advice."; "Communications with a litigation funder fall within the agency exception for the very reason that litigation funders exist -- because without litigation funders, parties owed money, or otherwise stymied by deep-pocketed judgment debtors, might have reduced or no ability to pursue their claims. Litigation funders may be essential to the provision of legal advice in such cases. . . . Mr. Al-Saleh has engaged Burford 'in furtherance of the rendition of legal services,' and the communication of otherwise privileged information to Burford did not result in waiver of the attorney-client privilege." (emphases added)).

- [Privilege Point, 6/29/16]

Are Public Relations Consultants Inside or Outside Privilege Protection?

June 29, 2016

Companies frequently turn to outside public relations consultants to assist both in normal media relations and when confronting crises. For obvious reasons, these companies must consider the privilege implications of involving such consultants.

In Guiffre v. Maxwell, defamation defendant Maxwell withheld communications involving her lawyer and her "media agent." No. 15 Civ. 7433 (RWS), 2016 U.S. Dist. LEXIS 58204 (S.D.N.Y. May 2, 2016) (internal citation omitted). U.S. District Judge Sweet found that the media agent's involvement in otherwise privileged communications between the defendant and her lawyer destroyed any privilege protection. As the court put it, the media agent's involvement "at best . . . establishes only that [the agent's] input and presence potentially added value to [the lawyer's] legal advice." Id. at *24. But defendant "has failed to positively establish that [the agent] was necessary to implementing [the lawyer's] legal advice." Id. at *23-24. The court likewise held that defendant had not proven that she "was incapable of understanding counsel's advice . . . without the intervention of a 'media agent,' or that [the agent] was translating information between [the lawyer] and Defendant in the literal or figurative sense." Id. at *24-25. Significantly, the communications found undeserving of privilege protection involved a British lawyer and (presumably) a British media agent — whom defendant hired to assist her "in connection with legal matters in England and Wales." Id. at *3.

The Southern District of New York has always taken an extremely narrow view of privilege protection for communications with client agents. Companies should remember that this hostile attitude might strip away possible privilege protection for communications outside New York, and even outside the United States. Fortunately, the more robust work product protection often protects litigation-related communications with public relations consultants.

- Doe v. Phillips Exeter Acad., Civ. No. 16-cv-396-JL, 2016 U.S. Dist. LEXIS 141877, at *5, *8-9 (D.N.H. Oct. 13, 2016) (finding that defendant Phillips Exeter Academy could not successfully claim privilege protection for a lawyer's investigation into possible sexual misconduct by a student; noting that defendant called the lawyer an "independent investigator," which meant that the lawyer was not assisting the defendant's lawyer in providing legal advice; also finding an implied waiver because the defendant relied on the investigation report in disciplining a student; also finding that defendant waived any possible privilege protection by disclosing portions of the investigation report to parents; inexplicably failing to deal with the work product doctrine; "[D]efendants explain that PEA's outside counsel commissioned Attorney McGintee's reports 'for the purpose of providing legal advice related to the school's handling of this student sexual misconduct matter.' . . . PEA's own statements concerning the purpose of Attorney McGintee's investigation, however, as well as its description of her as an 'independent investigator,' suggest otherwise."; "Finally, PEA's Dean Mischke has consistently described Attorney McGintee as an 'independent investigator' or an 'external investigator' in her communications with the Does and her statements in this court. . . . It seems difficult to reconcile such a description with the argument that Attorney McGintee -- the reports of that 'independent' or 'external' investigator -- acted as an agent of PEA's counsel made for the purposes of obtaining or providing legal advice to PEA. To the contrary, by describing Attorney McGintee as 'independent,' PEA appears to signal that Attorney McGintee was not acting as its outside counsel's agent." (emphases added)).

- Valley Forge Ins. Co. v. Hartford Iron & Metal, Inc., No. 1:14-cv-00006-RLM-SLC, 2017 U.S. Dist. LEXIS 57370, at *15-16, *17, *17-18, *19, *19-20 (N.D. Ind. April 14, 2017) (holding that environmental consultants hired by defendant's law firm were outside privilege protection; "Hartford Iron claims that all of the withheld emails are protected by the attorney-client privilege, asserting that the emails were confidential communications, between its counsel and an agent hired by counsel, to aid counsel in providing legal advice to Hartford Iron. Valley Forge disagrees, contending that the primary purpose in retaining Keramida [environmental consultant] and CH2M [environmental consultant] was not to provide legal advice, but rather, to provide environmental remediation services – that is, to design and construct a new stormwater control system." (emphasis added); "Here, although Dameron's firm initially retained Keramida and CH2M, 'retention or employment by the attorney alone is insufficient to bring the consultant within the scope of the attorney-client privilege.'"; "Keramida and CH2M – like HydroTech and August Mack before them – were hired to design, build, and install a stormwater remediation plan that would be acceptable to IDEM and the EPA. In doing so, they 'were not simply putting into usable form information obtained from the client.'" In fact, it is evident that the assistance rendered by Keramida and CH2M 'was based on factual and scientific evidence obtained through studies and observation of the physical condition of the [Hartford Iron] site, and not through client confidences.'" (alteration in original) (emphasis added) (citations omitted); "The provision of environmental consulting advice or services falls outside the attorney-client privilege, which is to be 'strictly confined within the narrowest possible limits.'" (emphasis added) (citation omitted); "It is apparent that Dameron employed language at times in a deliberate effort to bring Keramida and CH2M within the privilege. But labeling communications as 'privileged and confidential' or 'attorney-client work product' 'does not render the documents privileged when they contain no communication made or work done for the purpose of providing informed legal advice.'" (emphasis added) (internal citation omitted); "In fact, at times, Dameron's role as defense counsel appeared to morph into that of an environmental consultant, most likely due to her extensive experience performing clean ups as an environmental consulting geologist prior to practicing law. Ultimately, Dameron's initial retention of Keramida did not appear to be because she needed information translated into a useable form so that she could render legal advice; rather, Dameron quickly spotted problems with August Mack's stormwater collection system and urged Valley Forge and Hartford Iron to get a second opinion from another environmental contractor." (emphasis added) (internal citation omitted)).

- [Privilege Point, 11/1/17]

Courts Continue to Catalogue Client Consultants Outside Privilege Protection

November 1, 2017

Clients' agents/consultants are nearly always outside privilege protection. This generally means that their documents do not deserve privilege protection; their presence during otherwise privileged communications aborts that protection; and disclosing privileged communications to them waives the protection.

In JBGR LLC v. Chicago Title Insurance Co., 2017 N.Y. Slip Op 51006(U) (N.Y. Sup. Ct. Aug. 2, 2017), the court held that the plaintiff's land-use consultant's presence at an otherwise privileged meeting destroyed the privilege. As the court explained, "while [the consultant]'s advice may have been important to the legal advice given to the plaintiffs by their lawyers, it was not given to facilitate such legal advice." Id. at *2. Less than two weeks later, a federal court similarly held that the privilege did not protect a report prepared by a real estate appraiser "jointly engaged" by the client and its law firm Pierce Atwood. The court concluded that the appraiser "was not employed to assist Pierce Atwood in rendering legal advice." Portland Pipe Line Corp. v. City of S. Portland, No. 2:15-cv-00054-JAW, 2017 U.S. Dist. LEXIS 135704, at *9, *17 (D. Me. Aug. 14, 2017).

Even sophisticated corporate clients often do not understand that their agents'/consultants' involvement during privileged communications or as recipients of privileged communications usually destroys that protection. Clients sometimes erroneously think that confidentiality arrangements with such agents/consultants will avoid waiving privilege protection. That is incorrect – such agreements generally are irrelevant in analyzing privilege waiver issues.

- [Privilege Point, 11/8/17]

How Can Law Firms Help Maximize Privilege Protection for Consultants They Hire?

November 8, 2017

Last week's Privilege Point highlighted the difficulty of establishing that client agents/consultants are inside privilege protection. In contrast, lawyer's agents/consultants can deserve privilege protection – but only if they assist those lawyers in giving legal advice. But lawyers cannot automatically assure protection by retaining such agents/consultants themselves or jointly with their clients (as Pierce Atwood learned in one of the cases discussed last week).

As in so many other contexts, the underlying documents must support any assertion that lawyers' agents/consultants helped them give legal advice. In Legends Management Co. v. Affiliated Insurance Co., Civ. A. No. 2:16-CV-01608-SDW-SCM, 2017 U.S. Dist. LEXIS 134020 (D.N.J. Aug. 22, 2017), the court held that a forensic accountant retained by a law firm was inside privilege protection. The court warned that "[c]ommunications exchanged with consultants are not automatically privileged just because in-house or outside counsel is 'copied in' on correspondence." Id. at *10. Significantly, the court reviewed the withheld correspondence in camera, and agreed that "[t]he 'express purpose' of [the forensic accountant's] emails was to relay his accounting expertise and allow [the law firm] to render legal assistance." Id.

Lawyers, their clients, and their agents/consultants should remember that courts will often examine any withheld documents for proof that either client's or lawyer's agents/consultants facilitated or assisted lawyers in advising their clients.

- [Privilege Point, 1/24/18]

Putting Lawyers in Charge of Investigations Does Not Assure Privilege Protection

January 24, 2018

Corporations' investigations generally deserve (1) privilege protection only if the corporations are primarily motivated by their need for legal advice; and (2) work product protection only if they are motivated by anticipated litigation, and the company would not have created the investigation-related documents in the same form but for that anticipated litigation.

In In re Premera Blue Cross Customer Data Security Breach Litigation, 296 F. Supp. 3d 1230 (D. Or. 2017), Premera claimed privilege and work product protection for its data breach investigation. The court rejected both claims. Among many other things, the court assessed Premera's work product claim for documents created by its consultant Mandiant. Premera had hired Mandiant to review its claims data management system in October 2014. On January 29, 2015, Mandiant discovered malware on the system. Premera quickly hired an outside lawyer, and on February 21, 2015, "Premera and Mandiant entered into an amended statement of work that shifted supervision of Mandiant's [later] work to outside counsel." Id. at 1245. Premera predictably argued that Mandiant's later work was protected, because Mandiant was then working "on behalf of an attorney." Id. But the court rebuffed the argument -- bluntly explaining that the "flaw in Premera's argument . . . is that . . . [Mandiant's] scope of work did not change [from the October 2014 agreement] after outside counsel was retained." Id. As the court noted, the "only thing that appears to have changed involving Mandiant was the identity of its direct supervisor." Id.

Companies seeking to maximize privilege and work product protection for internal corporate investigations should carefully document the primary motivations, showing that the corporation did something different or special because of its need for legal advice or because of anticipated litigation. The documentation of course should start with law firms' and consultants' retainer letters – but all documents created before, during, and after investigations should help evidence the necessary motivational elements under the privilege and (if appropriate) the work product doctrine.

- Albin Family Revocable Living Trust v. Halliburton Energy Servs., Inc., Case No. CIV-16-910-M, 2018 U.S. Dist. LEXIS 5192, at *14 (W.D. Okla. Jan. 11, 2018) (finding that an Oklahoma Department of Environmental Quality proceeding did not count as "litigation" for work product protection purposes; "Having carefully reviewed the parties' submissions, the Court finds the attorney-client privilege would apply to any communications between defendant's counsel (whether in-house counsel or outside counsel) and SAIC, their environmental consultant, if the communication is made to assist counsel in giving legal advice to defendant and the confidential nature of the communication has been maintained. Defendant has submitted sufficient evidence, by way of the affidavits of its counsel attached to its response, that counsel retained SAIC to consult with and assist them in order to render advice to defendant. Whether the confidential nature of the communication has been maintained is a finding that must be made as to each specific document, which for purposes of this Order, the Court has not made." (emphases added)).

- [Privilege Point, 3/28/18]

Courts Wrestle with Privilege Protection for Client Consultants: Part II

March 28, 2018

Last week's Privilege Point summarized two cases finding that corporate client consultants: (1) did not meet the "functional equivalent" standard; and (2) were not "nearly indispensable" for facilitating communications between the corporate client and its lawyers. Such holdings make privilege protection unavailable for communications between the corporate client (or its lawyer) and the consultant, and also normally compel the conclusion that disclosing preexisting privileged communications to such consultants waives the privilege.

However, some cases take a more favorable view. In FiberLight, LLC v. Washington Metropolitan Area Transit Authority, 288 F. Supp. 3d 133 (D.D.C. 2018), defendant hired a consultant to analyze current and potential future development of its fiber optic system. Plaintiff, alleging breach of contract, sought the consultant's report to the defendant, challenging the defendant's redaction of the section entitled "Legal Concerns." Id. at 134. In a one paragraph analysis, the court confirmed after its in camera review that the redacted portion "reflects the views of [Defendant]'s legal counsel regarding potential legal issues." Id. at 136. The court then upheld the redaction, explaining that "the sharing of such privileged information with a consultant who needs that information in order to complete a project for the company does not constitute a waiver of the privilege." Id.

Although this favorable approach represents the minority view, corporations and their lawyers should check the applicable court's privilege law for such helpful precedent.

- [Privilege Point, 8/7/19]

The Southern District of New York Defines The Privilege Standard For Communications With Three Types of Consultants

August 7, 2019

Clients and their lawyers often work with consultants. If such consultants are found to be outside privilege protection: (1) communications with them do not deserve privilege protection; (2) their participation in otherwise privileged communications aborts that protection; and (3) disclosing pre-existing privileged communications to them waives that protection. So corporations and their lawyers must know the privilege standard for each consultant.

In Universal Standard Inc. v. Target Corp., 331 F.R.D. 80 (S.D.N.Y. 2019), Judge Gorenstein dealt with the three most common types of consultants. First, client consultants are within privilege if they are "deemed essential to allow communication between the attorney and the client, such as an interpreter or accountant." Id. at 87. Second, some consultants are the "'functional equivalent' of a corporate employee." Id. Third, some consultants assist lawyers in providing legal advice to their clients. The court ultimately concluded that plaintiff's public relations consultant did not fall within any of those protected categories, concluding that: (1) "BrandLink did not serve to improve counsel's understanding of [plaintiff's] request for legal advice" (id. at 88); (2) BrandLink did not have "any independent authority to decide to issue a press release," and did not "work[] exclusively" for plaintiff, but instead "provides services for over a dozen other brands" (id. at 90); (3) "[t]here is no evidence that the purpose of the communications with BrandLink was to assist counsel in engaging in a legal task as opposed to allowing [plaintiff] to make a decision about the nature of publicity that should be sought." Id. at 92.

This Southern District of New York opinion provides a helpful checklist of what corporations must prove in many courts if they seek protection for communications with, in the presence of, or later shared with, outside consultants.

- Bousamra v. Excela Health, 210 A.3d 967, 969, 985 (Pa. 2019) (holding that a public relations consultant was not within the Kovel Doctrine, and was therefor outside privilege protection; "In this appeal by allowance, we consider whether Excela Health waived the attorney work product doctrine or the attorney-client privilege by forwarding an email from outside counsel to its public relations and crisis management consultant, Jarrard, Phillips, Cate & Hancock. We conclude that the attorney work product doctrine is not waived by disclosure unless the alleged work product is disclosed to an adversary or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it. Accordingly, we remand this matter to the trial court for fact finding and application of the newly articulated work product waiver analysis. Further, we affirm the Superior Court's finding that Excela waived the attorney-client privilege"; "We find this reasoning unpersuasive. In both Kovel and Noll, the respective third parties--an accountant and an accident reconstruction expert--were privy to confidential information as a necessary means of improving the comprehension between the lawyer and client which facilitated the lawyer's ability to provide legal advice. In Kovel, the accountant's presence and opinion were necessary for the lawyer to understand the client's tax story, a prerequisite to furnishing legal advice"; "In both cases, the critical fact is that the third-party's presence was either indispensable to the lawyer giving legal advice or facilitated the lawyer's ability to give legal advice to the client. That is not the case here. Fedele sending the email in question to Cate, after it was sent to him, did not retroactively assist either outside counsel or Fedele in providing legal advice to Excela. In fact, the email did not solicit advice or input from Cate, nor did the attorney send it to Cate. Thus, this case is not akin to Kovel or Noll, where the third-party's receipt of information facilitated or improved the lawyer's ability to provide legal advice.")

- [Privilege Point, 5/13/20]

Accountants Implicate Subtle Privilege and Work Product Issues: Part I

May 13, 2020

Accountants can help clients and clients' lawyers – in ordinary business transactions, in explaining complex issues to lawyers who are giving legal advice, and in litigation. These differing roles at different times can trigger complicated attorney-client privilege and work product doctrine analyses.

In United States v. Fisher, No. 3:19-cr76-MCR, 2020 U.S. Dist. LEXIS 34328 (N.D. Fla. Feb. 28, 2020), the court addressed the waiver implications of defendant having copied his CPA on emails he claimed were privileged. The court noted that the defendant “admits that [his corporation], not the lawyer, employed [the CPA] as an accountant.” Id. at *2. Because “[i]t is not apparent from the emails that [the CPA]’s advice was being sought for purposes of obtaining legal advice by either [defendant’s] lawyer or [defendant’s corporation], the court “agrees with the Government that any privilege has been waived by the disclosure to a third party.” Id. at *1-2.

Lawyers representing corporations should remind their clients not to include the company’s outside accountant in any privileged communications. Next week’s Privilege Point will address the more subtle work product doctrine implications of working with accountants.

- Spicer v. GardaWorld Consulting (UK) Ltd., 120 N.Y.S.3d 34, 35, 36 (N.Y. App. Div. 2020) (holding that plaintiff's financial advisor was inside privilege protection; noting among other things that the transactional documents remain privileged after the transaction; "Plaintiffs were the sole shareholders of Hestia B.V. (the Company) prior to selling all of their shares to defendant. Nonparty KippsDeSanto & Company (KDC) was plaintiffs' financial adviser in connection with the sale transaction."; "It is true that KDC was not retained to assist plaintiffs' counsel in providing legal advice. However, the unrebutted evidence reflects that KDC spent some portion of its time helping counsel to understand various aspects of the transaction for that purpose. As such, KDC's presence was necessary to enable attorney-client communication (see MBIA Ins. Corp. v Countrywide Home Loans, Inc., 93 AD3d 574, 574, 941 N.Y.S.2d 56 [1st Dept. 2012]; Lehman Bros. Intl. [Europe] v AG Fin. Prods., Inc., 2016 NY Slip Op 30187[U], *9-15 [Sup Ct. NY County 2016]; United States v Kovel, 296 F2d 918, 922 [2d Cir 1961]; Urban Box Off, Network, Inc. v Interfase Mgrs., L.P., 2006 WL 1004472, *3, 2006 US Dist LEXIS 20648, *11 [SD NY Apr. 17, 2006])."; "Plaintiffs also had a reasonable expectation that the confidentiality of all communications between their counsel and KDC would be maintained. Plaintiffs' counsel attested that KDC promised to keep all such communications confidential. The governing Purchase and Sale Agreement also specified that all privileged documents related to the transaction would remain protected from disclosure to defendant even after closing (see Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 138-139, 674 N.E.2d 663, 651 N.Y.S.2d 954 [1996]; Askari v McDermott, Will & Emery, LLP, 179 AD3d 127, 149-150, 144 N.Y.S.3d 412 [2d Dept 2019])."; "Contrary to defendant's contention, the Cooperation Clause in KDC's engagement letter did not undermine the reasonableness of this expectation of confidentiality, as it only required 'reasonabl[e]' assistance to the Company (now owned by defendant), and should thus not be read to require KDC to turn over privileged documents (see Gulf Ins. Co. v Transatlantic Reins. Co., 13 AD3d 278, 279-280, 788 N.Y.S.2d 44 [1st Dept 2004]). "; "Thus plaintiffs demonstrated that KDC's presence was deemed necessary to enable the attorney-client communication and that they had a reasonable expectation that the confidentiality of communications between their counsel and KDC would be maintained – at least as a general matter. Defendant is free to challenge specific documents on plaintiffs' privilege log.").

- Lawson v. Spirit Aerosystems, Inc., Case No. 18-1100-EFM-ADM, 2020 U.S. Dist. LEXIS 57875, at *15-16 (D. Kan. Apr. 2, 2020) (holding that a vendor who tracks stock options was inside privilege protection and could create protected work product; "[T]he record reflects that the communications with Computershare were necessary to facilitate Arnold & Porter's legal work for Spirit. They are therefore privileged. . . . Computershare is one of Spirit's vendors. As such, this document is also properly withheld as work product.")

- [Privilege Point, 7/15/20]

Another Court Finds Public Relations Consultants Outside Privilege Protection

July 15, 2020

Companies dealing with the pandemic (and finding themselves in pandemic-triggered future litigation) may seek public relations consultants' assistance. Companies and their lawyers should remember that most courts reject privilege protection for communications with such consultants, and work product protection for documents those consultants create.

In In re Pacific Fertility Center Litigation, Case No. 18-cv-01586-JSC, 2020 U.S. Dist. LEXIS 71127 (N.D. Cal. Apr. 22, 2020), the Fertility Center retained two public relations consultants after a horrifying incident in which a tank failure destroyed thousands of eggs and embryos. Plaintiffs sought the Center's communications with its public relations consultants -- relying on an earlier California appellate decision holding that "the communications with the public relations consultant must be 'more than just useful and convenient, but rather . . . the involvement of the third party [must] be nearly indispensable or serve some specialized purpose in facilitating attorney-client communications.'" Id. at *7. The Fertility Center court concluded that "the inclusion of the public relations consultants on the communications at-issue [sic] waived the attorney-client privilege." Id. at *10. The court bluntly held that "[t]o the extent that a few of the documents may reflect the public relations firms consulting with counsel to develop a strategy regarding how to respond to media inquiries in light of the lawsuits, there is nothing about the communications which suggests the inclusion of the third party was necessary or essential" -- because "the documents do not show that counsel needed the public relations firms' assistance to accomplish the purpose for which Defendants hired the attorneys." Id. at *8-9.

The court did not address the somewhat more promising work product protection argument. Most courts do not protect public relations consultants' documents as work product -- because normally those are motivated by public relations concerns rather than litigation. But there is a sliver of good news. Most courts find that lawyers disclosing their pre-existing work product to such public relations consultants do not waive that robust protection.

- Renovate America, Inc. v. Lloyd's Syndicate 1458, Case No. 19-CV-1456-GPC (WVG), 2020 U.S. Dist. LEXIS 168846, at *5-6 (S.D. Cal. Sept. 15, 2020) (holding that the insurance broker Marsh was inside privilege protection because it assisted the company's in-house lawyers; "[B]ased on the declarations submitted in briefing and the Court's review of the documents lodged in camera, Marsh's inclusion in communications on behalf of Plaintiff clearly was to further Plaintiff's interests. Specifically, as Plaintiff's in-house counsel responsible for coordinating, monitoring, and evaluating ongoing litigation against Plaintiff and subsequently advising Plaintiff on the same, Ng and Weber's communications with Marsh in furtherance of those tasks with respect to insurance coverage Plaintiff had secured were in turn made in furtherance of the Plaintiff's overarching interest in funding and defending litigation brought against Plaintiff. The legal intricacies and requirements of satisfying insurance coverage were part and parcel of that overarching interest, and Marsh clearly assisted Ng and Weber in those areas on an ongoing basis. The Court's in camera review revealed Marsh's role in guiding and advising Ng as Plaintiff sought coverage for defense costs being incurred on a daily basis in the Nemore and Rowe matters among other litigation matters. Thus, Marsh's role wasn't simply to procure insurance contracts for Plaintiff but appears to have extended beyond that to advising Plaintiff's in-house counsel on litigation-related insurance claims and procedures. And many of the communications the Court has reviewed appear to have been reasonably necessary because Ng often sought information and Marsh's advice and assistance with these matters. Marsh, as an experienced insurance broker, appears to have been an important entity that helped Ng with these matters.")

- Midwest Athletics & Sports Alliance LLC v. Ricoh USA, Inc., Case No. 2:19-cv-00514-JDW, 2020 U.S. Dist. LEXIS 169770, at *9-10, *10-11 (E.D. Pa. Sept. 16, 2020) (holding that several outside consultants hired by the client's law firm were outside privilege protection because the consultants were retained to assist the client in a business transaction rather than to assist the lawyer in providing legal advice; "Communications With Ocean Tomo. MASA claims that Kramer Levin hired Ocean Tomo to help obtain funding for MASA pursuant to the PPA between MASA and Kodak. That engagement does not convert MASA into Kramer Levin's agent, however. An attorney's agent is one who helps the attorney render legal advice. See, e.g., Sunnyside Manor, Inc. v. Twp. of Wall, No. 02-cv-2902, 2005 U.S. Dist. LEXIS 36438, 2005 WL 6569572, at *2 (D.N.J. Dec. 22, 2005); Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609, 633 (M.D. Pa. 1997). Think an accountant to help the attorney understand financial records, a translator, or an engineer to help understand mechanical issues. Kramer Levin did not hire Ocean Tomo to help Kramer Levin render legal advice. It hired Ocean Tomo to help MASA in a business transaction. Ocean Tomo's role would not extend the privilege if MASA hired it directly. That analysis does not change just by having counsel sign the engagement letter with Ocean Tomo. The Court rejects MASA's assertion of privilege for Document Nos. 14-14d, 14f-14t, 15-18g, 22-24, 25-25h, 25j-25p, 26a-26f, 26k-26p, 27a-27b, 28a, 30, 30b-30r, 30t, 30w-30bb, 32-32l, 36, 38-38a, 40, and 41-50."; "Communications With iLex Analytica, Price Waterhouse, VP Tax Services, Covington & Burling, and Pansing Hogan Ernst & Bachman. MASA asserts privilege for documents disclosed to employees of these entities. It offers no explanation about what role any of them served, who hired them, or why disclosure to them preserved the privilege. It therefore has not satisfied its burden. Even if MASA had tried to make such a showing, the Court would reject it for the same reason that it rejected MASA's arguments about Ocean Tomo. Namely, it appears that these entities were helping MASA obtain funding or advising third parties that were transactionally adverse to MASA. They were not helping Kramer Levin offer legal advice or offering legal advice to MASA. The Court rejects MASA's assertion of privilege for Document Nos. 9a, 19-20e, 20i, 20k, 20m-21j, 24-24c, 25a-25b, 25f-25g, 25k, and 25l.").

- [Privilege Point, 10/13/21]

Having a Big Law Firm Hire a Public Relations Consultant Does Not Assure Privilege or Work Product Protection

October 13, 2021

Just as some clients think that copying a lawyer cinches privilege protection, even sophisticated clients relying on well-known law firms might erroneously believe that having those law firms hire a public relations consultant will assure privilege and work product protection. It doesn't.

In In re Valeant Pharmaceuticals International, Inc. Securities Litigation, defendant Valeant's counsel Covington & Burling hired a public relations firm "to assist Legal Counsel's representation of Valeant . . . in investigations conducted by the Department of Justice" and related matters. Master No. 3:15-cv-07658-MAS-LHG, 2021 U.S. Dist. LEXIS 136875, at *23 (D.N.J. July 22, 2021) (alteration in original). Covington's engagement letter with the public relations firm contained all the most helpful provisions intended to support privilege protection. But Valeant's executive who authorized Covington's retention of the public relations firm acknowledged in his deposition that the public relations firm was retained to provide "general public relations services." Id. at *53-54. A retired judge acting as a Special Master concluded that the public relations firm's "services consisted of general public relations assistance, the primary purpose of which was to present a favorable public image of Valeant, not to assist its attorneys in litigation." Id. at *61.

If asked to review the Special Master's report, a judge might reach a different conclusion. But the Special Master's report highlights the importance of following up the provisions of a carefully drafted public relations firm engagement letter with communications clearly demonstrating that the public relations firm actually helped the hiring law firm provide legal advice.

- Mauer v. Union Pac. R.R., No. 8:19CV410, 2021 U.S. Dist. LEXIS 204741, at *3 (D. Neb. Oct. 25, 2021) (recognizing that an in-house lawyer's advice about employee discipline or termination could include legal advice, rather than being exclusively business advice; "Here, Plaintiff argues that when in-house counsel advises on employee discipline, including termination, they are providing business advice and not legal advice protected by the attorney-client privilege. But not all advice offered by in-house counsel, including advice stating termination is an acceptable response to Plaintiff's arrest, is business rather than legal advice. The essence of providing legal advice is applying the facts to the law and providing an opinion to the client on how to lawfully proceed. Whether provided by in-house or outside counsel, an attorney offers legal advice when providing opinions in response to supervisory personnel questions on whether termination is legally allowed, or is appropriate upon weighing the company's legal exposure from the employee if fired, or from third parties if the employee is retained. A contrary result would certainly dissuade employers from having full and frank communications with counsel to encourage compliance with the law.")
- United States v. Coburn, Civ. No. 2:19-cr-00120 (KM), 2022 U.S. Dist. LEXIS 21429, at *17-18 (D.N.J. Feb. 1, 2022) (analyzing privilege and work product issues involving defendant's third party subpoena on another company (Cognizant); "A third disputed category consists of Cognizant's communications with the accounting firm E&Y concerning Cognizant's internal investigation and related updates given to the Board of Directors, DOJ, and SEC (Mot. To Compel Cognizant, Cat. A at 76), are closely related to the provision of legal advice. Indeed, the nature of the allegations against Defendants and the scope of Cognizant's internal investigation would understandably make accounting expertise vital to any law firm representing Cognizant. See United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (holding that a client's communications to an accountant employed by the client's attorney were reasonably related to the legal representation and remained privileged). As to those communications, the privilege is appropriately asserted.")

- **[Privilege Point, 9/6/23]**

**Federal and State Courts Issue Helpful Investigation-Related Decisions:
Part II**

September 6, 2023

Last week's Privilege Point described a federal court case holding that explicit reliance on a consultant's investigation waived fact work product protection related to the investigation — but not opinion work product protection.

About two weeks later, in University of Texas System v. Franklin Center for Government & Public Integrity, the Texas Supreme Court issued a very favorable investigation-related decision, finding that Kroll investigators were protected as a "lawyer's representative" because they acted under the direction of UT's General Counsel; Kroll's investigation into allegations of undue influence in the University's admissions process deserved privilege protection, as shown by affidavits "prepared after the fact, as are most affidavits prepared in the litigation context." 675 S.W.3d 273, 286-87 (Tex. 2023). The Court then found that the publication of Kroll's report did not waive privilege as to "all the privilege-log documents" (as the lower court had ruled), but instead only triggered a subject matter waiver requiring production of: (1) internal UT privileged emails, but only to the extent that Kroll's published report "contains quotes or very specific paraphrases of the emails"; (2) Kroll's interview notes, but only to the extent that the Kroll report "amounted to disclosure of a 'significant part' of the [interview] communication." Id. at 279, 288, 289.

Lawyers arranging for internal corporate investigations should take heart in the federal court's affirmation of continuing protection for opinion work product despite a waiver of fact work product protection. And the Texas Supreme Court's favorable investigation-related ruling may serve as a model for lawyers' investigation and later publications of the results.

- [Privilege Point, 10/11/23]

Must Litigants Identify Their Non-Testifying Experts?

October 11, 2023

Litigants relying on testifying experts can look to federal or state court rules in determining what they must disclose or may withhold. In contrast, courts take widely varying views of those issues in addressing litigants' non-testifying experts.

In Kaleta v. City of Holmes Beach, --- F. Supp. 3d ---, 2023 U.S. Dist. LEXIS 121660 (M.D. Fla. July 14, 2023), the court noted that the Eleventh Circuit had not decided whether litigants must identify their non-testifying experts. Remarkably, the court acknowledged that “[t]here appears to be a split in authority regarding whether the identities of non-testifying experts that are ‘retained or specially employed’ are protected from disclosure by Rule 26(b)(4)(D).” Id. at *9-10. The Tenth Circuit says yes, but the Ninth Circuit says no. The court ultimately found the litigant’s non-testifying experts’ identity discoverable, apparently at least in part because such “disclosure presents little risk of exposing counsel’s mental impressions, conclusions, opinions, or legal theories.” Id. at *15-16 (citation omitted).

Non-testifying experts can play a key role in litigants’ trial preparation. Those litigants’ lawyers should not assume that a local rule with which they are familiar will apply in other courts.

- Orlando v. Neal, Civ. A. No. 5:23-cv-00012, 2023 U.S. Dist. LEXIS 201688, at *17-18 (W.D. Va. Nov. 9, 2023) (in an opinion by Judge Hoppe, holding that a paralegal not working under a lawyer's directions could not engage in holding privileged communications; not addressing possible work product protection for those communications; "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.' Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). The purpose of this privilege 'is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' Id. The attorney-client privilege applies not only to confidential communications between clients and their attorneys, but also to such communications between clients and their attorneys' subordinates, including paralegals. N.L.R.B. v. Interbake Foods, LLC, 637 F.3d 492, 502 (4th Cir. 2011); Kain v. Bank of New York Mellon (In re Kain), No. 08-08404, 2011 Bankr. LEXIS 3679, 2011 WL 4625297, at *1 (Bankr. D.S.C. Sept. 30, 2011).")

- Orlando v. Neal, Civ. A. No. 5:23-cv-00012, 2023 U.S. Dist. LEXIS 201688, at *18-19 (W.D. Va. Nov. 9, 2023) (in an opinion by Judge Hoppe, holding that a paralegal not working under a lawyer's directions could not engage in privileged communications; not addressing possible work product protection for those communications; "Here, Briggman argues that the Court should quash the deposition subpoena because he is Pollack's paralegal and attorney-client privilege applies to the information Orlando seeks, making it undiscoverable. Movant's Br. 5-6; Movant's Reply 5-6. However, '[b]ecause the attorney-client privilege exists for the benefit of the client, the client holds the privilege.' United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247, 250 (4th Cir. 2005). While attorneys may assert the privilege on behalf of their clients, In re Search Warrant Issued June 13, 2019, 942 F.3d 159, 173 (4th Cir. 2019) (citing Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967); Model Rules of Pro. Conduct r. 1.6(a), (c) (Am. Bar Ass'n 1983)), the Fourth Circuit has never held that a paralegal may do the same. Moreover, the Fourth Circuit has reasoned that attorneys may—and sometimes must—assert the privilege on behalf of clients because attorneys' rules of professional conduct impose certain duties on them, including the duty of confidentiality. Id. ('lawyers are obliged to protect the attorney-client privilege to the maximum possible extent on behalf of their clients'). These rules do not apply to or bind paralegals, see generally Model Rules of Pro. Conduct (Am. Bar Ass'n 1983), and in Virginia, paralegals do not have similar duties, Becoming a Paralegal in Virginia - VA, ParalegalEDU, <https://www.paralegaledu.org/virginia/#:~:text=As%20in%20other%20state%2C%20Virginia's,responsibility%20for%20their%20professional%20conduct> ('Virginia does not regulate its paralegals.'). Indeed, paralegals may not practice law or hold themselves out to the public as qualified to do so. Rather, they act solely at the direction of an attorney who represents the client. Thus, it makes sense to impose a duty on the lawyer to assert a privilege for his client, but not extend that same duty to the paralegal who works for the lawyer."; "Here, Briggman asserts that he is Pollack's paralegal. Movant's Br. 5. In support of this assertion, Briggman offers only an invoice attached to an unauthorized filing showing that Pollack paid Briggman for 'Motion for Stay Research and Writing Draft' in this case. ECF No. 50-1, at 6. Based on this evidence alone, Briggman asserts that 'communications between [him] and [Rebecca Neal] have been in the capacity of paralegal for . . . Pollack'; thus, his 'discussions with [Bristol and Rebecca Neal] since this matter was filed [are] clearly covered by attorney-client privilege[.]'. Movant's Br. 5-6. This invoice does not satisfy Briggman's burden of proof. The invoice does not show that Briggman was necessarily Pollack's subordinate in this matter. It shows, at most, that Briggman invoiced Pollack for ghostwriting a brief in this

matter. Briggman's evidence and representations do not show that Pollack generally retained Briggman's services to communicate with the Defendants as their lawyer's paralegal or perform any other services in this case. Furthermore, Briggman has not shown that any communications between him and Defendants otherwise meet the criteria for attorney-client communications. See Jones, 696 F.2d at 1072 (noting that for a communication to be privileged it must be made in private, to an attorney, for legal services, regarding fact(s), and for a proper purpose). Therefore, Briggman has not adequately shown that attorney-client privilege protects the information Orlando seeks. I do not find, however, that the Defendants or their attorney cannot assert the attorney-client privilege, or that they have waived the privilege. Rather, I find that Briggman, as a purported paralegal, cannot assert the privilege on Defendants' behalf and that even if he could, he has not carried his burden to show that the privilege applies." (alterations in original))

- Leonard v. McMenamins Inc., Case No. C22-0094-KKE, 2023 U.S. Dist. LEXIS 217502, at *6, *6-7, *7-8, *8-9, *9, *9-10 (W.D. Wash. Dec. 6, 2023) (in an opinion by Judge Evanson, analyzing privilege and work-product protection for a consultant's data breach investigation report prepared by the firm of Stroz Friedberg, which was retained by the victim's law firm of Stoel Rives; rejecting victim's work product claim for the investigation report; concluding that the victim's report was analogous to the Clark Hill data breach investigation found not to deserve work product protection, rather than two highly publicized examples of successful work product assertions for such data breach investigations (Target and Experian); "Numerous courts have considered similar disputes over cybersecurity consultant reports in the context of data breach litigation. In evaluating whether the given report should be withheld as protected work product, courts consider factors including whether the report provides factual information to the impacted entity (and others), whether the report constitutes the only investigation and analysis of the data breach, the types of services provided by the consultant, the relationship between the consultant and the impacted entity, and importantly, whether the report would have been prepared in a substantially similar form absent the anticipation of litigation. See, e.g., In re Experian Data Breach Litig., No. SACV 15-01592AG (DFMx), 2017 U.S. Dist. LEXIS 162891, 2017 WL 4325583 (C.D. Cal. May 18, 2017); In re Target Corp. Customer Data Sec. Breach Litig., MDL No. 14-2522, 2015 U.S. Dist. LEXIS 151974, 2015 WL 6777384 (D. Minn. Oct. 23, 2015); Guo Wengui v. Clark Hill, 338 F.R.D. 7 (D.D.C. 2021)."; "McMenamins directs this Court to In re Target Corp. Customer Data Security Breach Litigation, where the court denied a motion to compel production of a cybersecurity consultant's report and related communications on work product grounds. 2015 U.S. Dist. LEXIS 151974, 2015 WL 6777384, at *2-3. However, unlike here, Target had engaged in a two-track investigation of the subject data breach. On one track, it conducted its own business investigation to learn 'how the breach happened and [how] Target could respond to it appropriately.' 2015 U.S. Dist. LEXIS 151974, [WL] at *2. Information arising from this investigation was not privileged and had been disclosed. On the second track, 'Target established its own task force and engaged a separate team from Verizon to provide counsel with the necessary input.' Id. Material generated from this second track was withheld." (alterations in original); "While McMenamins argues that the same is true here, the record demonstrates otherwise. See Dkt. No. 42 at 16 ('McMenamins conducted its own internal investigation, which it has produced information on in discovery.'). McMenamins' discovery responses contain no information about what any other allegedly non-privileged internal investigation entailed, the results of any such investigation, or McMenamins' response thereto. To the contrary, McMenamins withholds nearly all information related to the

breach and its response to it on privilege grounds. See, e.g., Dkt. No. 40 at 77-78 (For example, in response to interrogatory No. 10, asking for factual information about the data breach, McMenamins objects based on privilege and states: ‘All non-privileged information about the Data Breach is included in the December 2021 Notice of Data Breach.’). As such, while it is true that Stroz Friedberg was retained by counsel, the similarities to the Target case end there. It is well-established that mere delegation of business functions to an attorney is insufficient to shield otherwise unprotected factual investigation from discovery. See Guo Wengui, 338 F.R.D. at 13 (collecting cases); see also Allied Irish Banks v. Bank of Am., N.A., 240 F.R.D. 96, 99 (S.D.N.Y. 2007) (‘That [the plaintiff] hired a law firm to “assist” in the investigation is of no moment. . . . A party may not insulate itself from discovery by hiring an attorney to conduct an investigation that otherwise would not be accorded work product protection.’) (cleaned up).” (alterations in original); “McMenamins also relies on In re Experian Data Breach Litig., 2017 U.S. Dist. LEXIS 162891, 2017 WL 4325583. There, Experian retained Jones Day as legal counsel and Jones Day in turn hired the cybersecurity consultant to help ‘provide legal advice to Experian regarding the attack.’ 2017 U.S. Dist. LEXIS 162891, [WL] at *2. The court denied Plaintiff’s motion to compel the consultant’s report, finding the report was relevant to the defense of the litigation and not an internal investigation or remediation because the report was not provided to Experian’s internal incident response team. Id. Here, as noted above, the Stroz Friedberg report is the only internal investigation arising from the data breach at McMenamins and the report itself acknowledges Stroz Friedberg participated in many internal business discussions.” (alteration in original); “The Court finds Guo Wengui more closely resembles the facts of this case. 338 F.R.D. 7. In that case, like here, the hacked entity (a law firm) failed to demonstrate that any meaningful investigation of the data breach occurred apart from the lone consultant report at issue. The court also noted that the report was shared with leadership and IT, just like the report here. The court recognized that the consultant was hired by counsel but found ‘that approach “appears to [have been] designed to help shield material from disclosure.”’ Guo Wengui, 338 F.R.D. at 13 (quoting In re Dominion Dental Servs. USA Data Breach Litig., 429 F. Supp. 3d 190, 195 (E.D. Va. 2019)). Other courts granting motions to compel cybersecurity reports also focus on the description of services in the scope of work and the availability of factual information from other non-privileged sources. See, e.g., In re Premera Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230, 1245-46 (D. Or. 2017); Dominion Dental Servs., 429 F. Supp. 3d 190; In re Cap. One Consumer Data Sec. Breach Litig., MDL No. 1:19md2915 (AJT/JFA), 2020 U.S. Dist. LEXIS 91736, 2020 WL 2731238 (E.D. Va. May 26, 2020).”; “In light of the above persuasive authority and

the Court's in camera review of the report, the Court finds that the Stroz Friedberg report is not protected work product. In short, the report provides only factual information. Stroz Friedberg was hired to determine the timing, means, and extent of the data breach while also participating in containment and restoration processes. The report also notes that Stroz Friedberg contributed to business discussions and provided remediation and investigative services. Further, the supplemental scope of work underscores that Stroz Friedberg was assisting with restoration services, not providing legal advice. Beyond the conclusory and self-serving first sentence of the report that Stroz Friedberg was engaged to assist in providing legal advice, there is no evidence this report was in fact used to provide legal advice. Instead, the report, engagement letter, scopes of work, and all other available evidence demonstrate that Stroz Friedberg drafted this report for a business purpose, unrelated to anticipated or pending litigation. The report is not work product.")

VII. COMMON INTEREST DOCTRINE

A. Basic Nature and Contrast with Joint Representations

- Glidden Co. v. Jandernoa, 173 F.R.D. 459, 472-73 (W.D. Mich. 1997) (Glidden (now called Grow) sold its subsidiary (Perrigo) to the subsidiary's management; Grow then sued its old subsidiary and the subsidiary's management; the court ordered the former subsidiary to produce all of the requested documents to the former parent; the court also rejected the argument that the former subsidiary's management could assert their own privilege; "The universal rule of law, expressed in a variety of contexts, is that the parent and subsidiary share a community of interest, such that the parent (as well as the subsidiary) is the 'client' for purposes of the attorney-client privilege. See Crabb v. KFC Nat'l Man. Co., 1992 U.S. App. LEXIS 38268, 1992 WL 1321 (6th Cir. 1992) ('The cases clearly hold that a corporate "client" includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary and affiliate corporations.') (quoting United States v. AT&T, 86 F.R.D. 603, 616 (D.D.C. 1979)). Consequently, disclosure of legal advice to a parent or affiliated corporation does not work a waiver of the confidentiality of the document, because of the complete community of interest between parent and subsidiary. Id. at *2. Numerous courts have recognized that, for purposes of the attorney-client privilege, the subsidiary and the parent are joint clients, each of whom has an interest in the privileged communications. See, e.g., Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 49 (S.D.N.Y. 1989); Medcom Holding Co. v. Baxter Travenol Lab., 689 F. Supp. 841, 842 (N.D. Ill. 1988). Simply put, a sole shareholder has a right to complete disclosure about the legal affairs of its wholly owned subsidiary.").

- Egiazaryan v. Zalmayev, 290 F.R.D. 421, 434 (S.D.N.Y. 2013) (analyzing a situation in which a defamation plaintiff's law firm had first worked with and later represented the plaintiff's public relations firm; holding that the PR agency was not within the privilege as the client's agent, and did not have a common interest with the plaintiff client; also holding that the PR agency could not create work product for the non-party, but that disclosing work product to the PR agency did not waive that protection; "Egiazaryan argues that he and BGR [public relations agency] had a common interest in 'protecting [his] legal interests' and 'formulating a legal strategy on [his] behalf' Opp. at 13. But the doctrine does not contemplate that an agent's desire for its principal to win a lawsuit is an interest sufficient to prevent waiver of privilege inasmuch as it does not reflect a common defense or legal strategy. . . . BGR is not a party to any of Egiazaryan's various lawsuits and thus has no need to develop a common litigation strategy in defending those lawsuits. Indeed, it makes no suggestion that it had a need to do so.")

- Baker v. PPG Indus., Inc., Civ. A. No. 12-C-229 H, slip op. at 2, 3 (W. Va. Cir. Ct. Sept. 4, 2013) (finding that West Virginia would not adopt the common interest doctrine; "Only a handful of state and federal jurisdictions have affirmatively adopted the common interest doctrine. Those that have recognized it, have not applied it uniformly. 'An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.' Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)."; "The parties herein agree that, to date, the West Virginia Supreme Court of Appeals has not recognized or adopted the 'common interest doctrine,' joint defense privilege,' or any similarly monikered doctrine or privilege where the parties are represented by different legal counsel. Accordingly, a policy decision exists as to whether such a doctrine and/or privilege is to be recognized and adopted in this state. Moreover, if such were to be recognized and adopted, a hot-mess of details need to be ironed out; including, but not limited to: (1) Is an express agreement necessary or will the courts be able to presume that communications are intended to be in furtherance of a joint defense based upon the parties' actions? (2) Would the doctrine or privilege apply where litigation is not threatened or anticipated or will the 'palpable threat of litigation' at the time of the communications be required? (3) Will the doctrine or privilege be limited to where the parties have common shared legal interests rather than only a [sic] common shared economic, financial or commercial interests? (4) What would constitute 'waiver' and who could be found to have 'waived' the application of the doctrine or privilege as well as how and to what extent?")

- [Privilege Point, 3/5/14]

More Courts Reject Common Interest Doctrine's Applicability

March 5, 2014

The common interest doctrine occasionally allows separately represented clients to share privileged documents without waiving their fragile attorney-client privilege protection. However, lawyers cannot automatically assure the doctrine's applicability just by entering into a common interest agreement with another participant. Courts reject the doctrine's applicability in over half of the cases.

In Ducker v. Amin, Case No. 1:12-cv-01596-SEB-DML, 2013 U.S. Dist. LEXIS 181690 (S.D. Ind. Dec. 31, 2013), the court found that the common interest doctrine did not protect direct communications among the clients without at least one of the client's lawyers' participation in the communication. Three weeks later, in Integrated Global Concepts, Inc. v. j2 Global, Inc., Case No. 5:12-cv-03434-RMW (PSG), 2014 U.S. Dist. LEXIS 7294, at *5 (N.D. Cal. Jan. 21, 2014), the court found that two companies which had entered into a merger agreement could not rely on the common interest doctrine to resist discovery of privileged documents they had later shared – finding the doctrine inapplicable because the companies faced "no impending threat of litigation" at that time. One day later, another court found that the common interest doctrine could not apply "until litigation became a palpable reality." In re Application of Tinsel Grp., S.A., Misc. A. H-13-2836, 2014 U.S. Dist. LEXIS 7882, at *10 (S.D. Tex. Jan. 22, 2014).

These and many other similar cases did not address the common interest doctrine's applicability in the abstract. All of these participants and their lawyers thought they could avoid a waiver by entering into a common interest agreement, and later learned that the doctrine did not apply – after they had already waived their privilege by sharing protected documents.

- [Privilege Point, 5/18/16]

Court Issues a Surprising Common Interest Doctrine Decision

May 18, 2016

The common interest doctrine can sometimes allow separately represented clients to avoid the normal waiver implications of disclosing privileged communications to each other. However, courts take widely varying views of the doctrine's reach, and reject its applicability in about half of the reported cases — after the participants have already shared privileged communications, and therefore waived their respective privileges.

In IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal District, plaintiff claimed that defendant's in-house lawyer (who jointly represented the defendant and its "direct subsidiary") waived privilege protection by sending an email to several of defendant's employees — and one subsidiary employee. No. 16-cv-00146, 2016 U.S. Dist. LEXIS 42223, at *4 (W.D. La. Mar. 29, 2016). Defendant argued that such disclosure did not waive defendant's privilege, because the defendant shared a common interest with its own subsidiary. The court found the common interest doctrine inapplicable — because the subsidiary did not face any litigation threat. The court quoted plaintiff, which indicated that "it has no intention of ever making [the subsidiary] a party to this litigation." Id. at *5. Thus, the court held that defendant waived its privilege by disclosing the communication "to an employee of a non-party" — its own subsidiary. Id. Fortunately for defendant, the court also found the work product doctrine applicable, and held that disclosing the email to the subsidiary did not waive that separate protection.

This is a remarkable decision. The common interest doctrine should never have become an issue, because the in-house lawyer jointly represented the parent and its subsidiary. And the court's apparent insistence that every common interest participant must itself anticipate litigation could reward some obvious mischief — plaintiffs could threaten a number of possible defendants, but later disclaim any intent to sue one of them. All in all, cases like this highlight the risk of relying on the common interest doctrine.

- Au New Haven, LLC v. YKK Corp., No. 15-CV-03411 (GHW)(SN), 2016 U.S. Dist. LEXIS 160602, at *10, *20 (S.D.N.Y. Nov. 18, 2016) (rejecting defendants' argument that "entities under common ownership sharing privileged information are always considered to be a single entity for the purpose of attorney-client privilege" protection; instead holding that "[e]ntities that are under common ownership must still demonstrate that [the common interest doctrine] applies, such as by making a showing that a common attorney was representing both corporate entities or that they otherwise shared a common legal interest"; ultimately finding the privilege applicable).

- [Privilege Point, 1/25/17]

**An In-House Counsel Learns the Hard Way About a Key Difference
Between Common Interest Agreements and Joint Representations:
Part I**

January 25, 2017

Common interest agreements and joint representations share many characteristics. Both types of arrangements involve lawyers engaging in protected communications with multiple clients. But they are structurally distinct. In common interest agreements, separately represented clients cooperate in a common legal strategy. In a joint representation, the same lawyers represent several clients on the same matter. As long as everything rolls along smoothly, the structural difference has few privilege consequences. But adversity reveals a key privilege distinction.

In DePuy Orthopaedics, Inc. v. Orthopaedic Hospital, Cause No. 3:12-cv-299-JVB-MGG, 2016 U.S. Dist. LEXIS 166537 (N.D. Ind. Dec. 1, 2016), plaintiff DePuy and defendant Hospital had worked together on patent prosecutions – but later become litigation adversaries. DePuy resisted the Hospital's attempt to discover communications to and from DePuy's in-house counsel. The in-house counsel claimed that DePuy and the Hospital had only entered into a common interest agreement – noting that O'Melveny & Myers had acted as patent "prosecution counsel" on behalf of both companies. In contrast, the Hospital "claim[ed] that DePuy's in-house counsel jointly represented both parties." *Id.* at *4. The court recited facts that could have proven either a common interest agreement or a joint representation: DePuy and the Hospital shared confidential information and cooperated on a common legal strategy; DePuy's in-house counsel communicated with and gave direction to O'Melveny, etc. But the court ultimately concluded that DePuy's in-house counsel had jointly represented DePuy and the Hospital -- rather than represented just DePuy in a common interest arrangement with the separately represented Hospital.

Given the privilege implication similarities between a common interest agreement and a joint representation, one might wonder why DePuy's in-house counsel argued so strenuously against the latter. Next week's Privilege Point will explain the court's key reason for finding such a joint representation, and its frightening implication.

- [Privilege Point, 2/1/17]

**An In-House Counsel Learns the Hard Way About a Key Difference
Between Common Interest Agreements and Joint Representations:
Part II**

February 1, 2017

Last week's Privilege Point described an in-house counsel's vigorous argument that she had represented her employer/client in a common interest agreement with a hospital in jointly prosecuting patents -- rather than having jointly represented both her employer/client and the hospital. DePuy Orthopaedics, Inc. v. Orthopaedic Hospital, Cause No. 3:12-cv-299-JVB-MGG, 2016 U.S. Dist. LEXIS 166537 (N.D. Ind. Dec. 1, 2016).

After reciting facts that could have evidenced either a common interest agreement or a joint representation, the court explained why it agreed with the Hospital that there had been a joint representation: "[T]he evidence does not show that DePuy's in-house counsel . . . provided any kind of disclaimer about representation when answering the Hospital's questions with legal information or consequence regarding the patent prosecution." Id. at *12-13 (emphasis added). The court then gave the punchline. Because DePuy's in-house counsel had jointly represented DePuy and the Hospital, the former joint client Hospital could discover "DePuy's internal communications related to the [patent] prosecution." Id. at *13 (emphasis added). Thus, the Hospital's understandable desire to discover these internal DePuy communications had led it to "vociferously contend[] that it believed that DePuy's in-house counsel was acting on its behalf." Id. at *12.

If common interest participants later become litigation adversaries, privilege protection evaporates for any communications they have shared, but remains for each participant's internal communications with its own lawyer. In a joint representation, such later adversity normally allows any former joint client to discover all of their joint lawyer's communications on that matter with any jointly represented clients. In-house and outside counsel should remember this key distinction, and explicitly define any relationship if there might be confusion -- including providing socially awkward but legally significant disclaimers of a joint representation.

- Grupo Petrotemex, S.A. de C.V. v. Polymetrix AG, Case No. 16-cv-02401 (SRN/HB), 2020 U.S. Dist. LEXIS 43465, at *8-9, *9, *9-10, *10, *10-11, *11 (D. Minn. Mar. 13, 2020) (inexplicably holding that although a parent corporation and its wholly owned subsidiary had a common interest, disclosing privileged communications to a third party required both of them to waive the privilege – so that the parent could not unilaterally waive privilege protection in connection with its possible sale of its wholly owned subsidiary; "The Court agrees that Polymetrix and Bühler shared a common legal interest. In or around July 2017, Bühler acquired 100% of Polymetrix's shares, and remained its sole and total owner until the sale to Sanlian on March 22, 2018. (Vögtli Decl. ¶¶ 3, 14; Müller Suppl. Decl. ¶¶ 2, 7.) GPT/DAK does not appear to contend otherwise. (See, e.g., Pls.' Suppl. Reply Mem[.] at 16, 23-25 (referring to the players as 'Polymetrix and Bühler, on the one hand, and Sanlian, on the other hand').) Thus, the sharing of the July 5, 2017, Wilming email between Polymetrix and Bühler did not destroy the privileged status of that communication or the communications upon which it was based."; "The crux of the parties' disagreement comes from what happened next. At some point, Bühler's in-house counsel directed a member of the Bühler Corporate Finance Projects team to give a copy of the July 5, 2017 Wilming email to Sanlian's attorneys at the Grandall law firm in China and the Schmid Rechtsanwälte law firm in Switzerland. (Vögtli Decl. ¶ 6.) It is undisputed that the email included the protected opinions of Polymetrix's attorneys Noah and Wilming, and that Bühler made the deliberate decision to transfer it to representatives of Sanlian, a separate corporation. GPT/DAK argue that this transfer waived any privilege attached to the email contents, since the voluntary disclosure of a communication protected by the attorney-client privilege is generally an express waiver of the privilege. United States v. Workman, 138 F.3d 1261, 1263 (8th Cir. 1998)."; "But it is a well-established component of the common interest doctrine that one party to a common enterprise cannot waive the privilege for another party. In re Grand Jury, 112 F.3d at 922; John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 555-56 (8th Cir. 1990); see also Restatement (Third) of the Law Governing Lawyers § 76, cmt. g. (2000). As a result, in cases where a member of a common interest group discloses privileged information received from another member without that member's consent, the courts have held the privilege was not waived as to the member to whom the privilege belonged. E.g., John Morrell & Co., 913 F.2d at 556; see also United States v. Gonzalez, 669 F.3d 974, 982 (9th Cir. 2012); United States v. BDO Seidman, LLP, 492 F.3d 806, 817 (7th Cir. 2007)."; "Here, all of the information before the Court indicates the decision to disclose the opinion to Sanlian was made by Bühler, for Bühler's benefit in its negotiations with Sanlian—negotiations in which Polymetrix played no part—and that Polymetrix did not even know about the disclosure, let

alone consent to it. (Müller Suppl. Decl. ¶ 4; Vögtli Decl. ¶¶ 8, 12; Wilming Decl. ¶ 4.) Significantly, GPT/DAK do not argue that Polymetrix's consent was unnecessary. On the contrary, they state: 'Polymetrix is correct that this disclosure [from Bühler to Sanlian] alone would not constitute a waiver of Polymetrix's attorney-client privilege to the extent that Polymetrix did not consent to Bühler's disclosure.' (Pls.' Suppl. Reply Mem. at 23.) Nor does GPT/DAK advance an argument that Polymetrix gave its consent to the disclosure of the email at the time it was disclosed."; "In sum, the Court finds that Polymetrix did not consent to Bühler's disclosure of the July 5, 2017 email Sanlian prior to or at the time of the disclosure, and that absent such consent, it did not waive the attorney-client privilege as to that email, its contents, or the communications and opinions of counsel upon which it was based. Polymetrix never 'voluntarily [disclosed] a communication protected by the attorney-client privilege'— Bühler did. Workman, 138 F.3d at 1263. As a result, the Court need not reach the question of whether Bühler's disclosure to Sanlian was protected by a common interest relationship between those two entities because Polymetrix did not give Bühler permission to share the document in the first place and Bühler could not waive the attorney-client privilege on Polymetrix's behalf.").

- Adkisson v. Jacobs Eng'g Grp., Inc., No. 3:13-CV-505-TAV-HBG, 2021 U.S. Dist. LEXIS 7982, at *34, *36 (E.D. Tenn. Jan. 15, 2021) (holding that the common interest doctrine can protect communications among private litigants and a quasi-governmental entity; “Plaintiffs assert that Defendant does not have a common interest with TVA because TVA ‘a quasi-governmental entity, is not a party in this litigation,’ and ‘it remains unclear whether TVA has agreed to indemnity [Defendant], or has refused to do so.’” (alteration in original) (internal citation omitted); “Here, after in camera review, the Court finds that Defendant has met its burden to establish the necessary elements for the common interest exception to apply with respect to the communications at issue with TVA.”)
- Blackmon v. Bracken Constr. Co., 338 F.R.D. 91, 93-94 (M.D. La. 2021) (explaining the prerequisites for a common interest agreement’s efficacy; “To establish the common interest or joint-defense privilege, the proponent must generally show that documents or communications ‘were exchanged among attorneys with identical litigation perspectives to coordinate legal strategies, or to advance a joint defense effort or strategy that has been decided upon and undertaken by the parties and their respective counsel.’” (citation omitted))

- [Privilege Point, 7/6/22]

Northern District of California Court Repeats Commonly Articulated Incorrect but Harmless Statement About Common Interest Doctrine

July 6, 2022

The common interest doctrine can sometimes protect communications between separately represented clients that would otherwise trigger a waiver – if those clients share an identical (or nearly identical, in some courts) legal interest. Nearly every court applies the doctrine only if the clients are in or reasonably anticipate litigation. And even then, about half of them fail for one reason or another.

In Fellowship of Christian Athletes v. San Jose Unified School District Board of Education, Case No. 20-cv-02798-hsg (VKD), 2022 U.S. Dist. LEXIS 73339, at *7 (N.D. Cal. Apr. 21, 2022), the court recited one basic nearly universally-recognized attribute of the common interest doctrine – warning that "[t]he doctrine does not create a privilege but comes into play only if a privilege or protection already covers the material disclosed to the third party." That certainly is true about pre-existing historical documents that common interest participants share with each other. But of course in the right context, the common interest doctrine can also protect contemporaneous communications between the participants' lawyers. For those, the doctrine does create a privilege.

That frequently recited erroneous statement seems harmless. Perhaps the participants' lawyers rely on the work product doctrine when withholding those contemporaneous communications. And no court seems to have upheld a challenge to withholding such communications in a setting where the court acknowledges the common interest doctrine's general applicability.

- Roblox Corp. v. WowWee Grp. Ltd., Case No. 22-cv-04476-SI, 2023 U.S. Dist. LEXIS 219505, at *6-7 (N.D. Cal. Dec. 8, 2023) (in an opinion by Judge Illston, describing the common interest doctrine principles; “The common interest doctrine is not a separate privilege, but rather ‘an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with one another.’” In re Pacific Pictures Corp., 679 F.3d 1121, 1129 (9th Cir. 2012); see also U.S. v. Austin, 416 F.3d 1016, 1021 (9th Cir. 2005) (holding that the privilege ‘protects not only the confidentiality of communications passing from a party to [their] attorney but also from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel’) (internal quotation marks and citations omitted). The parties ‘must make the communication in pursuit of a joint strategy in accordance with some form of agreement.’ In re Pacific Pictures Corp., 697 F.3d at 1129. The agreement ‘may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation.’ United States v. Gonzalez, 669 F.3d 974, 979 (9th Cir. 2012). The parties must have ‘a common legal, as opposed to commercial, interest.’ Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 579 (N.D. Cal. 2007). To invoke the doctrine, the party asserting the privilege must show: ‘(1) the communication is made by separate parties in the course of a matter of common interest; (2) the communication is designed to further that effort; and (3) the privilege has not been waived.’ U.S. v. Bergonzi, 216 F.R.D. 487, 495 (N.D. Cal. 2003).” (alterations in original))

B. Litigation Requirement

- Osborn v. Griffin, Civ. A. Nos. 11-89-WOB-CJS & 13-32-WOB-CJS, 2013 U.S. Dist. LEXIS 201059, at *26, *27 (E.D. Ky. Nov. 19, 2013) (holding that Kentucky applied the common interest doctrine only in pending litigation; "KRE 503(b)(3) is not identical to the proposed Federal Rule 503. Unlike the proposed federal rule, KRE 503(b)(3) expressly requires that litigation be pending and that the communication concern a matter of common interest in that pending litigation." (footnote omitted); "Under the plain language of the Kentucky rule, the attorney-client privilege includes communications with a third party only if the third party is a 'lawyer or a representative of the lawyer representing another party in a pending action' and if the communication is on a 'matter of common interest therein.'" KRE 503(b)(3) (emphasis added). 'Thus, in Kentucky, pre-litigation communications among multiple clients and their counsel are not privileged. See In re: Matthew R. Klein/Cabinet for Health & Family Serv., 2010 WL 1989593.")

- [Privilege Point, 3/5/14]

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March 5, 2014

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These and many other similar cases did not address the common interest doctrine's applicability in the abstract. All of these participants and their lawyers thought they could avoid a waiver by entering into a common interest agreement, and later learned that the doctrine did not apply – after they had already waived their privilege by sharing protected documents.

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In IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal District, plaintiff claimed that defendant's in-house lawyer (who jointly represented the defendant and its "direct subsidiary") waived privilege protection by sending an email to several of defendant's employees — and one subsidiary employee. No. 16-cv-00146, 2016 U.S. Dist. LEXIS 42223, at *4 (W.D. La. Mar. 29, 2016). Defendant argued that such disclosure did not waive defendant's privilege, because the defendant shared a common interest with its own subsidiary. The court found the common interest doctrine inapplicable — because the subsidiary did not face any litigation threat. The court quoted plaintiff, which indicated that "it has no intention of ever making [the subsidiary] a party to this litigation." Id. at *5. Thus, the court held that defendant waived its privilege by disclosing the communication "to an employee of a non-party" — its own subsidiary. Id. Fortunately for defendant, the court also found the work product doctrine applicable, and held that disclosing the email to the subsidiary did not waive that separate protection.

This is a remarkable decision. The common interest doctrine should never have become an issue, because the in-house lawyer jointly represented the parent and its subsidiary. And the court's apparent insistence that every common interest participant must itself anticipate litigation could reward some obvious mischief — plaintiffs could threaten a number of possible defendants, but later disclaim any intent to sue one of them. All in all, cases like this highlight the risk of relying on the common interest doctrine.

- [Privilege Point, 2/8/17]

Courts Continue to Insist that Common Interest Participants Anticipate Litigation

February 8, 2017

The common interest doctrine can allow separately represented clients to safely share privileged communications in certain circumstances. Although many lawyers hope that courts will begin extending this helpful protection to transactional contexts, nearly every court continues to limit the protection to litigants or would-be litigants.

In One World Foods, Inc. v. Stubb's Austin Restaurant Co., Case No. A-14-CA-1071-SS, 2016 U.S. Dist. LEXIS 167125 (W.D. Tex. Dec. 2, 2016), plaintiff argued that the common interest doctrine protected its pre-closing disclosure of a privileged trademark legal opinion to its purchaser McCormick. Plaintiff ultimately sued defendant over the trademark issue, but not until months after McCormick purchased plaintiff. The court held that at the time McCormick purchased plaintiff there was no "palpable threat of litigation." Id. at *19. One week later, a New York state court similarly rejected a common interest argument advanced by defendants – holding that "there is no pending or anticipated litigation" against one of the common interest participants. Kagan v. Minkowitz, No. 500940/2016, 2016 N.Y. Misc. LEXIS 4577, at *7 (N.Y. Sup. Ct. Dec. 9, 2016). As in all similar situations, these common interest participants waived their privilege protection despite having entered into common interest agreements they undoubtedly thought would avoid such a waiver.

Courts have not only failed to expand the common interest doctrine to transactional settings, they also have injected enormous uncertainty into the doctrine's application. Court take widely varying approaches to the work product "anticipation" element that underlies most courts' common interest doctrine – ranging from "some possibility" of litigation to requiring "imminent" litigation.

- [Privilege Point, 3/8/17]

New York Decision Highlights Another Common Interest Doctrine Risk

March 8, 2017

Under the common interest doctrine, separately represented clients may sometimes avoid waiving their fragile privilege protection when they disclose protected documents to each other. Nearly every court applies the doctrine only in the context of litigation or anticipated litigation.

Most -- but not all -- courts extend the doctrine to participants who may not themselves anticipate litigation, but whose interests are closely aligned with those who do. In 59 South 4th LLC v. A-Top Insurance Brokerage, Inc., 2017 N.Y. Slip Op 30050(U) (N.Y. Sup. Ct. Jan. 10, 2017), defendant insurance company claimed that plaintiff developer waived its privilege protection by disclosing protected documents to its general contractor (who was not a party). Plaintiff claimed that it shared a common legal interest with its general contractor, but the court rejected that argument -- noting that the general contractor had assigned to the plaintiff all of its claims (including any claims against the defendant insurance company). As the court explained, because the general contractor was "not capable of mounting a common claim with [plaintiff] against defendants, the common interest doctrine does not apply to any communications between [plaintiff and its general contractor], including those between counsel for said parties." Id. at *6. Inexplicably, the court did not address possible work product protection -- which normally would have survived such disclosure to a friendly third party.

One might call this narrow common interest doctrine application the "weakest link" approach, because one participant's failure to meet the anticipated litigation standard destroys the privilege for all of the participants. This is yet another reason to enter into common interest agreements very warily.

- [Privilege Point, 4/11/18]

Court Says Anticipated Litigation Unnecessary to Support Common Interest Doctrine Protection

April 11, 2018

Despite litigants' and bar groups' valiant efforts to expand common interest doctrine protection to transactional settings, most courts limit that doctrine's protection to ongoing or anticipated litigation contexts. However, every now and then a court takes an expansive view.

In Eagle Forum v. Phyllis Schlafly's American Eagles, Case No. 3:16-cv-946-DRH-RJD, 2018 U.S. Dist. LEXIS 16618 (S.D. Ill. Feb. 1, 2018), the court addressed common interest doctrine protection for communications related to an ongoing trademark infringement action. Despite the litigation setting, the court explained that "[i]t is well settled that communications need not be made in anticipation of litigation to fall within the common interest doctrine" (citing a 2007 Seventh Circuit case). However, the court still rejected the doctrine's applicability to the communications at issue, holding that: (1) "for the doctrine to apply, the person with whom the privileged information is shared must have an identical – not merely similar – legal interest in the subject matter of the communication"; and (2) the communications "must be made in the course of furthering the ongoing, common enterprise" rather than just amounting to a "shared rooting interest in the successful outcome of a case" in which the participants simply favor one side rather than cooperate in a common legal strategy. Id. at *9. A few weeks later, the district court upheld the magistrate judge's "identical" interest analysis and conclusion – although the court did not address the magistrate judge's dicta about the common interest doctrine's application in non-litigation contexts. Case No. 16-0946-DRH, 2018 U.S. Dist. LEXIS 36393 (S.D. Ill. Mar. 6, 2018).

Litigants relying on the common interest doctrine must continue to be very wary of assuming that they can contractually avoid the waiver implications of disclosing privileged communications to third parties. Many – if not the majority of – cases reject the doctrine's applicability, by which time the participants have already waived their privilege protection by optimistically but erroneously relying on a common interest agreement or the doctrine to avoid a waiver.

- [Privilege Point, 10/3/18]

**Courts Continue to Diverge on the Common Interest Doctrine's
Dependence on Anticipated Litigation**

October 3, 2018

Most courts apply the common interest doctrine only in litigation-related circumstances, although a few courts extend the doctrine to transactional contexts.

In BlackRock Balanced Capital Portfolio (Fi) v. Deutsche Bank National Trust Co., Judge Netburn could not have been any clearer: "[t]he common interest doctrine only shields communications between codefendants, coplaintiffs, or persons who reasonably anticipate that they will become colitigants." No. 14-CV-09367 (JMF) (SN), 2018 U.S. Dist. LEXIS 124631, at *23 (S.D.N.Y. July 23, 2018). Two days later, the court in Heartland Consumer Products LLC v. DineEquity, Inc., No. 1:17-cv-01035-SEB-TAB, 2018 U.S. Dist. LEXIS 124654 (S.D. Ind. July 25, 2018), took a broader view. The court applied the common interest doctrine to communications between two companies that "were together in negotiations with [a third company], and [that] sought and received legal advice about the legal ramifications of aspects of that deal." Id. at *18. Because "the issues addressed in the communications were specific legal issues," they "do not lose their legal characteristics merely because they arise in the context of a business transaction." Id. at *19.

Companies and their lawyers hoping to maximize privilege protection should welcome these occasional decisions applying the common interest doctrine in transactional rather than just litigation contexts. But they are rare, and companies may not know whether they will be lucky enough to find themselves litigating in those few oases of an expansive common interest doctrine.

- Kindred Healthcare, Inc. v. SAI Global Compliance, Inc., 92 N.Y.S.3d 621, 621 (N.Y. App. Div. 2019) (holding that the common interest doctrine requires ongoing or anticipated litigation; “The common interest privilege is an exception to the traditional rule that the presence of a third-party at a communication between counsel and client is sufficient to deprive the communication of confidentiality. The common interest doctrine is a limited exception to waiver of the attorney-client privilege, and requires that: (1) the underlying material qualify for protection under the attorney-client privilege, (2) the parties to the disclosure have a common legal interest, and (3) the material must pertain to pending or reasonably anticipated litigation for it to be protected. The record, here, demonstrates that the common interest agreement was entered into in reasonable anticipation of litigation (see Ambac Assur. Corp. v Countrywide Home Loans, Inc., 27 NY3d 616, 36 NYS3d 838, 57 NE3d 30 [2016]). Concur— Friedman, J.P., Sweeny, Webber, Kahn, Kern, JJ.”)

- **[Privilege Point, 8/14/19]**

Several Courts Consider Common Interest Doctrine Requirements

August 14, 2019

Under certain conditions, the common interest doctrine can avoid what would otherwise be a waiver when separately represented clients share privileged communications to support a common legal strategy. As tempting as it would be to think that such clients' lawyers can automatically assure that favorable outcome by contracting among themselves for it, the doctrine is unpredictable and very risky.

In Ross v. Illinois Central R.R., the court rejected a common interest doctrine assertion – noting that "[e]ven when a common interest exists between parties, it is clear to us that the client must, at the time of the disclosure, have an agreement with the receiving party that that party will treat the information as privileged." 129 N.E.3d 641, 654 (Ill. App. Ct. 2019). The parties arguing for the doctrine's application acknowledged they "had no such agreement, written or otherwise." Id. Several weeks later, the court in JNL Management LLC v. Hackensack University Medical Center, followed states such as Hawaii, Maine, New Hampshire, New York and Vermont in rejecting a position advanced by Drinker Biddle and its client "that anticipated litigation is not a necessary requirement for the common interest doctrine to protect waived attorney-client privileged communications." Civ. A. No. 2:18-CV-5221-ES-SCM, 2019 U.S. Dist. LEXIS 91358, at *26-27 (D.N.J. May 31, 2019). A few weeks before that, the Federal Claims Court offered some good news. The court held that for the common interest doctrine to apply, "[t]he third party [to which privileged communications are disclosed] need not be a litigant in the present suit, or any suit, but its interest shared with the party in the present suit must be a legal one, not merely commercial." SecurityPoint Holdings, Inc. v. United States, No. 11-268C, 2019 U.S. Claims LEXIS 341, at *6 (Fed. Cl. Apr. 16, 2019) (unpublished). That is a more favorable approach than some courts take -- requiring that each common interest doctrine participant establish its own requisite involvement in or anticipation of litigation.

Unfortunately, courts never seem to settle on a uniform or expansive common interest doctrine. Corporate clients and their lawyers should always be wary of thinking that they can contractually assure protection that the law may not recognize.

- Spectrum Dynamics Med. Ltd. v. Gen. Elec. Co., No. 18-CV-11386 (VSB) (KHP), 2021 U.S. Dist. LEXIS 172201, at *8 (S.D.N.Y. Sept. 9, 2021) (“The common-interest exception applies where the communication pertains to a joint defense effort or other legal strategy in the context of pending or reasonably anticipated litigation.”)

- [Privilege Point, 11/30/22]

Minnesota Recognizes the Common Interest Doctrine

November 30, 2022

Under the common interest doctrine, separately represented clients can avoid the normal waiver implications of sharing privileged communications by entering into a contractual arrangement. In Energy Policy Advocates v. Ellison, 980 N.W.2d 146 (Minn. 2022), the Minnesota Supreme Court officially recognized the common interest doctrine – but left one key question unanswered, and extended the doctrine where it isn't necessary.

The Minnesota Supreme Court found that the common interest doctrine protected non-public climate change-related "communications among attorneys in public law agencies." Id. at 150. Significantly, the court stated that "the common legal interest can be in a litigated or non-litigated matter . . . [b]ut a purely commercial, political, or policy interest is insufficient for the common-interest doctrine to apply." Id. at 153. Nearly every other court has required either litigation or anticipated litigation before recognizing an effective common interest agreement. It is unclear if the Minnesota Supreme Court adopted the minority view that would apply the common interest doctrine in transactional settings – without any anticipation of litigation. The court also announced that "[w]e hold that the common interest doctrine applies to attorney work product." Id. at 155. Under universal work product waiver principles, avoiding work product waiver does not require the exacting common interest doctrine standards.

The Minnesota Supreme Court's acknowledgment of the common interest doctrine is good news. An explicit expansion to purely transactional settings would have been much more significant, but it is not clear whether the court went that far.

- [Privilege Point, 12/28/22]

Texas Courts' Contradictory Approach to the Common Interest Doctrine

December 28, 2022

The common interest doctrine sometimes allows separately represented clients to avoid the normal privilege waiver implications when sharing their privileged communications. Unfortunately for lawyers hoping for certainty, states and even courts within the same state disagree about the prerequisites for such contractual non-waiver protection.

In Luckenbach Texas, Inc. v. Engel, the court pointed to Fifth Circuit law finding the common interest doctrine available if there is a "palpable threat of litigation at the time of the communication, rather than a mere awareness" of possible litigation. No. 1:19-CV-00567-DH, 2022 U.S. Dist. LEXIS 187911, at *7-8 & *10-11 (W.D. Tex. Oct. 14, 2022) (citation omitted). But the court also held that the common interest doctrine "turns not on whether the parties are potential or actual co-defendants" – or "whether the parties are sued in the same lawsuit or not." Id. at *8-9. Somewhat surprisingly, the Texas federal court did not even mention a Texas state court rule that seems to limit the common interest doctrine protection to parties in actual ongoing litigation. Texas R. Evid. Rule 503(b)(1) (limiting the privilege to participants "in a pending action").

Such stark differences in courts even within the same state highlight the uncertain application of the common interest doctrine protection.

- [Privilege Point, 9/13/23]

State Court Takes a Narrow View of the Common Interest Doctrine

September 13, 2023

Under the common interest doctrine, separately represented clients may sometimes contractually avoid the normal waiver impact of disclosing privileged communications to each other. But federal and state courts take widely varying approaches to this helpful (but dangerously imprecise) waiver-avoidance arrangement.

In Hankin v. Sewall, the court pointed to Maine Rule of Evidence 502(b)(3) as limiting the common interest doctrine's application to a "pending action." No. BCD-REA-2023-00007, 2023 Me. Bus. & Consumer LEXIS 31, at *6 (Me. Bus. & Consumer Ct. July 3, 2023). Many courts are more generous, applying the doctrine if the common interest participants only anticipate litigation. The Maine court also warned that the common interest doctrine "does not extend ... to communications shared amongst the parties themselves that do not either involve attorneys or disclose privileged communication." Id. at *7. That seems like an odd formulation. All courts seem to require privilege protection for the communications shared among the participants. Some courts also require a lawyer's participation, while others do not. Maine apparently takes the more restrictive approach on both the litigation and the lawyer participation issues.

Lawyers should never assume that a generic "common interest doctrine" protection will apply. There are wide variations among federal and states courts, and some formulations do not bring the certainty that the participants seek.

- [Privilege Point, 11/29/23]

Did S.D.N.Y. Mean to Apply Expansive Common Interest Doctrine?

November 29, 2023

Under the widely recognized common interest doctrine, separately represented clients may sometimes contractually avoid the otherwise inevitable privilege waiver when sharing privileged communications. As explained previously in Privilege Points, some courts apply the doctrine only during pending litigation, and nearly every court seems to at least require anticipated litigation. But occasionally a court appears to articulate a far more expansive approach.

In Alta Partners, LLC v. Getty Images Holdings, Inc., No. 22-cv-8916 (JSR), 2023 U.S. Dist. LEXIS 156520 (S.D.N.Y. Sept. 5, 2023), prominent Southern District of New York Judge Rakoff issued a relatively short opinion on a number of topics. Judge Rakoff first understandably held that defendant Getty Images could not apply the common interest doctrine protection for its communications with its shareholders — because Getty only “shared a commercial or financial, rather than legal, interest” with its shareholders. Id. at *3. But then Judge Rakoff “accept[ed] Getty’s asserted common interest privilege with . . . Getty’s counter-party in its business combination agreement . . . and that counter-party’s sponsor.” Id. Although the opinion does not explain how a counter-party could have a common legal interest with Getty, perhaps more notable was the absence of any reference to litigation or anticipated litigation.

Some courts have hinted that the common interest doctrine can assure continued privilege protection among separately represented clients in a business context — with no anticipated litigation on the horizon. But courts have not started clearly adopting such a favorable approach — despite several bar groups’ and commentators’ efforts to push the law in that direction. Judge Rakoff’s enigmatic opinion probably won’t help much, but for some lawyers hope springs eternal.

C. Commonality Requirement

- [Privilege Point, 8/15/12]

Privilege Points: Courts Examine Two Elements of the Joint Defense/Common Interest Doctrine: Part I

August 15, 2012

Under the joint defense/common interest doctrine, separately represented clients can avoid what otherwise would be a waiver when they and their lawyers share privileged communications in pursuing a common legal strategy. Among other things, courts examine (1) the commonality of the participants' interest, and (2) whether they sufficiently anticipated litigation to invoke this non-waiver doctrine.

In McLane Foodservice, Inc. v. Ready Pac Produce, Inc., Civ. No. 10-6076 (RMB/JS), 2012 U.S. Dist. LEXIS 76343 (D.N.J. June 1, 2012), the court held that the common interest doctrine protected communications between two co-defendants (one of which supplied allegedly contaminated lettuce to the other company, which then processed it for Taco Bell restaurants). Plaintiffs argued that the common interest doctrine could not apply, because the processor had already sued the supplier in three other cases. However, the court found that the companies "have a common interest in establishing and arguing that lettuce did not cause the outbreak." Id. at *19. In contrast, a few weeks later the Western District of Virginia held that defendant company could not rely on the common interest doctrine to withhold some of its communications with the Commonwealth of Virginia, despite the latter's intervention in the case. Adair v. EQT Prod. Co., Case No. 1:10cv00037, 2012 U.S. Dist. LEXIS 89403 (W.D. Va. June 28, 2012). The court noted that "the Commonwealth's only 'common interest' with [the corporate defendant] in this litigation is to defend [a challenged state law] against constitutional attack." Id. at *11. The court held that the common interest doctrine did not cover communications dealing with issues other than constitutionality.

Lawyers considering reliance on the common interest doctrine must carefully examine the commonality of the interest and the exact communications they wish to protect. Next week's Privilege Point will deal with another issue – the required level of anticipated litigation that must underlie the common interest doctrine.

- Egiazaryan v. Zalmayev, 290 F.R.D. 421, 434 (S.D.N.Y. 2013) (analyzing a situation in which a defamation plaintiff's law firm had first worked with and later represented the plaintiff's public relations firm; holding that the PR agency was not within the privilege as the client's agent, and did not have a common interest with the plaintiff client; also holding that the PR agency could not create work product for the non-party, but that disclosing work product to the PR agency did not waive that protection; "Egiazaryan argues that he and BGR [public relations agency] had a common interest in 'protecting [his] legal interests' and 'formulating a legal strategy on [his] behalf' Opp. at 13. But the doctrine does not contemplate that an agent's desire for its principal to win a lawsuit is an interest sufficient to prevent waiver of privilege inasmuch as it does not reflect a common defense or legal strategy. . . . BGR is not a party to any of Egiazaryan's various lawsuits and thus has no need to develop a common litigation strategy in defending those lawsuits. Indeed, it makes no suggestion that it had a need to do so.")

- Keaton v. Hannum, No. 1:12-cv-00641-SEB-MJD, 2013 U.S. Dist. LEXIS 60519, at *25-26, *26 (S.D. Ind. Apr. 29, 2013) (holding that defendant's disclosure of work product to a Bar Disciplinary Committee to which she complained about plaintiff lawyer waived the work product protection, because there was no common interest between the defendant and the bar, and because making work product available to the bar made it possible for the plaintiff to obtain access to the materials because of the bar's duty to provide exculpatory evidence; "Zook has no legal interest in the outcome of the Disciplinary Commission case against Keaton. Likewise, the Disciplinary Commission has no legal interest in the outcome of Keaton's civil complaint against Zook. . . . The parties have expressed no concern that the Disciplinary Commission could be made a defendant to the Keaton/Zook case and likewise, the parties have not indicated that Zook could be made a defendant to the Disciplinary Commission complaint against Keaton. As a result, no common legal interest exists between Zook and the Disciplinary Commission that would protect documents exchanged between them that are work product."; "Because no common legal interest exists between Zook and the Disciplinary Commission, the act of sharing allegedly protected documents waived any protection the documents and communications may have had.")

- SCR-Tech LLC v. Evonik Energy Services LLC, 2013 NCBC 42, ¶¶ 18, 15, 26 (N.C. Super. Ct. Aug. 13, 2013) (reviewing the very sparse case law on privilege protection for communications with partially owned subsidiaries; dealing with communications to and from plaintiff SCR-Tech (1) when the company was partially owned by Ebinger; (2) when the company was then sold to, and wholly owned by, Catalytica, and (3) when the company later entered into a "common interest agreement" with Ebinger, because both faced similar litigation; applying a sort of sliding scale, considering both the percentage of ownership and any "shared legal interest"; concluding that the privilege protected communications during all three situations, because (1) SCR-Tech's shared legal interest with Ebinger meant that the court did not have to determine whether Ebinger's 37.5% ownership (which gave it control) was "too limited" to assure privilege protection by itself; (2) Catalytica's 100% ownership of, and shared legal interest with, SCR-Tech assured privilege protection; and (3) the "common interest" doctrine could protect communications between SCR-Tech and its former controlling shareholder Ebinger even in the absence of any corporate affiliation at that time.).

- [Privilege Point, 4/6/16]

Courts Analyze the Common Interest Doctrine's Application in a Patent Context

April 6, 2016

Courts recognizing the common interest doctrine limit its non-waiver effect to participants' common legal rather than financial interests. It can be difficult to apply this abstract principle to communications between a patent owner and another company that will earn royalties from the patent's use. The latter has an obvious interest in the patent's enforceability, but is that a legal or merely a financial interest?

In Rembrandt Patent Innovations, LLC v. Apple Inc., the court dealt with the common interest doctrine's applicability to communications between patents' inventors and their employer (the University of Pennsylvania), which had retained royalty rights but not ownership rights. Nos. C 14-05094 & -05093 WHA, 2016 U.S. Dist. LEXIS 13749 (N.D. Cal. Feb. 4, 2016). The court acknowledged that the Ninth Circuit had not addressed "the scope of a common legal interest with regard to transactions between the inventors of a patent and partners or potential partners in business ventures seeking to monetize that patent." Id. at *14. The court ultimately held that the common interest doctrine protected the communications -- because the inventors and Penn had a common legal interest "in licensing and enforcement opportunities, perfecting title in the patent, and defending the patent's validity." Id. at *16. About three weeks later, the District of Delaware reached the opposite conclusion. In Delaware Display Group LLC v. Lenovo Group Ltd., the court assessed a privilege claim for files belonging to non-party Rambus -- which had similarly retained patent royalty rights but not ownership rights. Civ. A. Nos. 13-2108-, -2109- & -2112-RGA, 2016 U.S. Dist. LEXIS 21461 (D. Del. Feb. 23, 2016). The court rejected the patent owner's argument that it shared a common interest with Rambus in assuring the patents' strength and enforceability. As the court put it, "[p]laintiffs' logic would find that any seller with rights to royalty payments is engaged in a common legal cause with its buyer. The only interest Rambus retained in the patents is a commercial one." Id. at *17.

Distinguishing between a legal and financial interest can be very difficult. Courts' disagreement about the common interest doctrine's applicability in the patent setting highlights the risk of relying on the common interest doctrine in seeking to avoid waiver of privilege protection.

- [Privilege Point, 5/18/16]

Court Issues a Surprising Common Interest Doctrine Decision

May 18, 2016

The common interest doctrine can sometimes allow separately represented clients to avoid the normal waiver implications of disclosing privileged communications to each other. However, courts take widely varying views of the doctrine's reach, and reject its applicability in about half of the reported cases — after the participants have already shared privileged communications, and therefore waived their respective privileges.

In IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal District, plaintiff claimed that defendant's in-house lawyer (who jointly represented the defendant and its "direct subsidiary") waived privilege protection by sending an email to several of defendant's employees — and one subsidiary employee. No. 16-cv-00146, 2016 U.S. Dist. LEXIS 42223, at *4 (W.D. La. Mar. 29, 2016). Defendant argued that such disclosure did not waive defendant's privilege, because the defendant shared a common interest with its own subsidiary. The court found the common interest doctrine inapplicable — because the subsidiary did not face any litigation threat. The court quoted plaintiff, which indicated that "it has no intention of ever making [the subsidiary] a party to this litigation." Id. at *5. Thus, the court held that defendant waived its privilege by disclosing the communication "to an employee of a non-party" — its own subsidiary. Id. Fortunately for defendant, the court also found the work product doctrine applicable, and held that disclosing the email to the subsidiary did not waive that separate protection.

This is a remarkable decision. The common interest doctrine should never have become an issue, because the in-house lawyer jointly represented the parent and its subsidiary. And the court's apparent insistence that every common interest participant must itself anticipate litigation could reward some obvious mischief — plaintiffs could threaten a number of possible defendants, but later disclaim any intent to sue one of them. All in all, cases like this highlight the risk of relying on the common interest doctrine.

- [Privilege Point, 6/14/17]

What Type of "Common Interest" Satisfies the Common Interest Doctrine?

June 15, 2017

Some lawyers incorrectly assume they can contractually assure that disclosing privileged communications to third parties does not waive the privilege – by entering into a "common interest" agreement. But nearly every month some courts reject the effectiveness of such agreements, by which time the participants will already have waived their privilege protection.

In Citibank, N.A. v. Bombshell Taxi LLC (In re Hypnotic Taxi LLC), 566 B.R. 305 (Bankr. E.D.N.Y. 2017), a settlor of several trusts claimed that he shared a common interest with the trusts in resisting defendant's efforts to enforce a judgment against him. But the court rejected his common interest assertion. The court acknowledged decisions upholding common interest agreements' effectiveness in the contexts of "an agent for a syndicated loan group and the members of the group," and "an assignor and assignee of trademark rights." Id. at 315. But because the settlor had transferred all of the pertinent assets to the trusts without retaining any interest in them, the court found that he lacked a common interest with the trusts. Instead, the settlor "shares only a personal or business interest with the Trusts, i.e. the desire for 'the protection of the assets [held by the] Trusts for the benefit of [the settlor's] heirs and/or parents.'" Id. at 317 (first alteration in original) (internal citation omitted). In other words, his desire to protect his children's and his parent's assets was not a sufficiently common legal interest to avoid waiving the privilege when he disclosed privileged communications to the trusts.

Lawyers must always remember the difficulty of successfully relying on common interest agreements.

- Violetta v. Steven Bros. Sports Mgmt., LLC, Case No. 16-1193-JTM-GEB, 2017 U.S. Dist. LEXIS 135861, at *34 (D. Kan. Aug. 24, 2017) (finding that the common interest doctrine applied only if the participants were working on a common legal strategy, not if one participant merely provided facts to other participants; "The relevant question with which the Court reviews the communications is this: were Defendants and their third-party insurers communicating to formulate a common legal strategy, which would entitle the third-party communications to privilege? Upon review of the documents, it appears Ms. Waldon, on behalf of the insurance company, was simply providing information to Defendants regarding the identity of the administrator and plan documents, such as benefits summaries and plan booklets -- not working with her to craft a common legal strategy." (footnote omitted))

- In re Premera Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230, 1247, 1248, 1249 (D. Or. Oct. 27, 2017) (holding that most documents related to Premera's data breach investigation did not deserve privilege or work product protection; among other things, holding that: (1) nearly all communications among Premera's nonlawyers were primarily motivated by business rather than legal concerns, although lawyer changes to drafts and documents prepared for litigation purposes might deserve privilege protection; (2) nearly all documents prepared by Premera employees and third party vendors (including a public relations firm) were primarily motivated by business rather than legal concerns, and therefore did not deserve privilege protection (although communications seeking legal advice about proposed public statements might be privileged), and did not deserve work product protection because they would have been prepared in the same form absent anticipated litigation; (3) documents relating to data breach consultant Mandiant did not deserve privilege protection, because (unlike the Target and Experian case) Mandiant's scope of work did not change when Mandiant switched from reporting to the client to reporting to outside counsel, and did not deserve work product protection because they served a business rather than litigation-related purpose; noting that some other third party vendors' documents might have been specifically motivated by legal concerns or litigation preparation and therefore protected; (4) the common interest doctrine did not protect communications between Premera and other Blue Cross plans that had experienced only similar but not identical data breaches, although disclosing privileged communications to them did not trigger a subject matter waiver; (5) the fiduciary exception did not apply, because most withheld communications related to Premera's defending itself; *"Documents that Premera is withholding, despite being sent to third parties, based on what Plaintiffs contend is an improper assertion of the joint defense (or common interest) exception (Category 4). The documents described in Category 4 involve Premera's assertion of a common interest or joint defense exception to waiver of privilege for other entities, such as Blue Cross Blue Shield, CareFirst, and Anthem entities, all of which have suffered data breaches and are facing similar litigation. The purported common interest is that defendants are defending different cases and government investigations throughout the country with common issues. . . . Premera and these entities have entered into common interest agreements that purport to allow them to share confidential and privileged information without waiving attorney-client privilege. Plaintiffs argue that because Premera and these entities are not defendants in the same litigation, they cannot assert the common interest or joint defense exception to waiver of privilege, and thus any documents that have been provided to these third parties have had the privilege waived for those communications, and all other communications on the same subject*

matter.” (underscored emphasis added); “Some of the entities with whom Premera has asserted a common interest are not only not part of this litigation, but they are not subject to potential liability from the same data breach. The lawsuits that they face may involve similar legal theories, claims, and defenses, but they arise from different facts and, most importantly, different data breaches.”; “Broyles, however, does not support Premera's contention that defendants in separate lawsuits based on separate data breaches occurring on separate occasions nevertheless can invoke the common interest doctrine when they discuss related legal issues and concepts. Broyles supports the traditional interpretation of 'common' interest -- that the parties share either a claim or potential liability in 'common,' which depends on a common nucleus of operative facts. Generally, this means that the common interest parties are in the same lawsuit, or at the minimum may share a common or related liability or claim.”; “Premera stretches the definition of 'common interest' beyond reasonable bounds. Under Premera's interpretation, different people or entities around the country that have a similar alleged product defect, or allegedly engaged in similar fraudulent schemes, or have been accused of similar forms of misconduct generally can claim a common interest and enter into common interest agreements. Under Premera's argument, as long as the claims asserted against those parties are the same or reflect the same the theory of liability, then they would have a 'common' defense. That is not, however, how the common interest or joint defense doctrine works.”; “To the extent that there are other matters arising out of the very same intrusion at issue in this case, and thus involving the same nucleus of operative facts that are part of this case, they would be part of the common liability and subject to the protections of the common interest doctrine. The agreement continues, however, to state that it includes litigation and investigations 'involving other conduct alleged to be similar to or connected with' the intrusion (emphasis added). Data breaches that merely are 'similar to' the underlying data breach or otherwise somehow 'connected with' it are not a common liability, properly understood, with this case and thus are not properly subject to the common interest doctrine. From the Court's review of the matters identified or described in Schedule A that was attached to the purported common interest agreement, they are all cases that are included in the multi-district litigation before this Court concerning the data breach at Premera. Thus, those parties are properly part of a common interest agreement. To the extent, however, that any documents were shared with any third party whose purported common interest is not based on the same underlying data breach as is the subject matter in this case, there is no common interest doctrine protection for those disclosures.”; “As discussed above, communications between Premera and entities with data breaches other than the data breach that is the subject of this case, even if the data

breach is 'similar' or 'connected to,' are not protected by the common interest doctrine. Thus, those communications are not privileged, and otherwise privileged information contained in such communications has had the privilege waived. . . . The Court finds that because Premera believed in good faith that it and these entities were subject to the common interest exception to waiver, under the unique circumstances of this case, fairness requires that the waiver of privilege extend only to the communications actually shared among the entities and not to all documents relating to the same subject matter that was addressed in the communications that were shared.” (emphasis added)).

- Acceleration Bay LLC v. Activision Blizzard, Inc., Civ. A. No. 16-453-RGA, 2018 U.S. Dist. LEXIS 21506, at *8, *8-9 (D. Del. Feb. 9, 2018) (holding that the work product doctrine did not protect communications to and from a litigation finance company and its lawyer Reed Smith, and that the litigant and its litigation funder did not share a common interest sufficient to avoid waiving privilege protection; apply the “AID” standard for work product protection; “Plaintiff argues that ‘[l]itigation funders provide funds ‘for the sake of securing, advancing, or supplying legal representation,’ and thus have a common legal interest with the plaintiffs they fund.’ Therefore, argues Plaintiff, because ‘Hamilton Capital [was] [P]laintiff’s litigation funder with a financial interest in [Plaintiff’s] successful enforcement of the patents,’ Plaintiff and Hamilton Capital had a common legal interest when the communications were exchanged. Plaintiff also cites an unpublished Court of Chancery opinion, Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A., 2015 Del. Ch. LEXIS 42, 2015 WL 778846, at *7 (Del. Ch. Feb. 24, 2015), for the proposition that ‘there is a community of legal interest between a patent owner and its litigation funder.’ Carlyle is about work product privilege, not common interest attorney-client privilege. 2015 Del. Ch. LEXIS 42, 2015 WL 778846, at *7.” (alterations in original) (internal citations omitted); “However, as explained by the Special Master, ‘even accepting Plaintiff’s representation’ of the confidential relationship between Plaintiff’s counsel and Hamilton Capital’s counsel, ‘it [does not] appear that there was any written agreement at [the time of the communications] to have a legally ‘common interest’ in whatever was provided by Plaintiff.’ Furthermore, the Special Master explained that the ‘documents were provided before any agreement was reached between Plaintiff and Hamilton Capital, and before any litigation was filed.’ Thus, Plaintiff has not shown that Plaintiff and Hamilton Capital possessed identical legal interests in the patents-in suit or were otherwise ‘allied in a common legal cause’ at the time of the communications. Because Plaintiff has not carried its burden of establishing a common legal interest, the privilege does not apply, and Plaintiff’s objection falls short.” (alterations in original) (citations omitted))

- **[Privilege Point, 1/2/19]**

State Courts Address Outsiders' Privilege Impact: Part I

January 2, 2019

Most client agents/consultants stand outside privilege protection. This means that: (1) communications with them do not deserve privilege protection; (2) their presence during otherwise privileged communications aborts that protection; and (3) disclosing pre-existing privileged communications to them waives that privilege. In the corporate setting, clients have other options for seeking privilege protection in such scenarios, but many of those fail.

In Technetics Group Daytona, Inc. v. N2 Biomedical, LLC, N2 and its lawyer retained a technology consultant "because of his expertise in relevant fields." 2018 NCBC LEXIS 115, ¶ 4 (N.C. Super. Ct. Nov. 8, 2018). In a later patent dispute, N2 claimed privilege protection for communications with that consultant. The court rejected the privilege claim, holding that the technology consultant: (1) was not the "functional equivalent" of an N2 employee (because he had no "continuous and close working relationship with the company," and he "does not maintain an office at N2 or spend a substantial amount of his time working for N2"); (2) was not within the narrow privilege protection for client agents/consultants who are "nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications" or "function more or less as a 'translator or interpreter' between the client and the lawyer" – but instead was "retained for the value of his own advice"; (3) could not claim that he had a "common interest" with N2, because he "help[ed] develop a solution to a technological problem" rather than cooperate "for purposes [of] indemnification or coordination in anticipated litigation." Id. ¶ 18, ¶¶ 23-24, ¶ 30 (citations omitted).

Corporate executives sometimes erroneously assume that confidentiality agreements with such outside agent/consultants assure privilege protection or avoid waiver. They do not. Next week's Privilege Point discusses the same issue in a family setting.

- [Privilege Point, 2/19/20]

Do Indemnitees And Indemnitors Always Share A Common Interest?

February 19, 2020

Last week's Privilege Point described a court's somewhat surprisingly narrow view of when counterparties reasonably anticipate litigation. Lawson v. Spirit AeroSystems, Inc., 410 F. Supp. 3d 1195 (D. Kan. 2019). A few pages later, the same court issued a somewhat surprisingly narrow common interest doctrine analysis.

In Lawson, Spirit's retired CEO began working as a consultant for an investor in Spirit's competitor. Spirit claimed that the arrangement violated the retired CEO's retirement non-compete. The arrangement required the investor to indemnify the retired CEO "for losses and expenses," but gave the investor "the option whether to assume [the retired CEO's] defense." Id. at 1210. The court held that the arrangement's option provision meant that the investor "therefore had only a commercial or financial interest with respect to litigation with Spirit over" the retired CEO's non-compete. Id. The court ultimately concluded that the common interest doctrine began to apply only "[w]hen [the investor] actually assumed [the retired CEO's] defense" -- because only at that point did "their legal interests bec[o]me truly aligned." Id.

Because the court had found work product protection as of the date Spirit's retired CEO and the investor executed their consulting arrangement, the work product doctrine's availability presumably made the common interest doctrine (necessary to preserve the fragile privilege) less important. But both holdings from the Lawson case highlight courts' differing applications of some work product and common interest doctrine nuances.

- Network-1 Technologies, Inc. v. Google LLC, Nos. 14-CV-02396 & -09558 (PGG)(SN), 2019 U.S. Dist. LEXIS 211910, at *5-6 (S.D.N.Y. Dec. 9, 2019) (holding that the common interest doctrine could not apply to communications between a patent seller and a patent purchaser because they had an insufficiently common interest; “Though ‘the common interest doctrine has routinely been applied in the context of patent litigation,’ the Court of Appeals ‘has warned that expansions of the attorney-client privilege under the common interest rule should be “cautiously extended.”” In re Rivastigmine Patent Litig., No. 05-MD-1661 (HB)(JCF), 2005 WL 2319005, at *3 (S.D.N.Y. Sept. 22, 2005) (citing In re F.T.C., No. 18-CIV-0304 (RJW), 2001 WL 396522, at *4 (S.D.N.Y. Apr. 19, 2001)). This case is distinguishable from Regents. The patentee and exclusive licensee in Regents were found to have identical legal interests because ‘of the potentially and ultimately exclusive nature of the Lilly-UC license agreement.’ Regents, 101 F.3d at 1390. Here, the patentee, Dr. Cox, sought to sell rather than license his interest in the patent. While the prospective purchaser, Network-1, doubtless had an interest ‘in obtaining strong and enforceable patents,’ see id., the patentee’s interest in the patent’s continued viability would be diminished following the sale. That Network-1 paid Dr. Cox’s legal fees and that he now acts as a consultant to Network-1, Joint Letter 5, ECF No. 191, does not render the parties’ legal interests identical at the time of sale negotiations. Instead, as ARE notes, these facts evidence the parties’ shared financial interest. Id. Moreover, many of the communications over which ARE asserts the common interest privilege were not made for the purpose of providing legal advice and instead involve business negotiations which ‘happen to include . . . a concern about litigation.’ See Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 447 (S.D.N.Y. 1995) (common interest privilege does not encompass a joint business strategy.)” (alteration in original)).

- [Privilege Point, 7/22/20]

Delaware Courts Address Common Interest Doctrine Issue: Part I

July 22, 2020

The common interest doctrine occasionally allows separately represented clients to share privileged communications without waiving that fragile protection. Nearly all courts require that the common interest doctrine participants share a common legal interest, rather than merely a common financial interest.

In RCS Creditor Trust v. Schorsch, C.A. No. 2017-0178-SG, 2020 Del. Ch. LEXIS 98 (Del. Ch. Mar. 20, 2020), bankrupt RCAP's reorganization plan created a Creditor Trust. Kramer Levin represented the Trust in suing defendants for breaching their fiduciary duties while at RCAP. During that litigation, Kramer Levin lawyers communicated with Skadden lawyers, who represented non-party Luxor -- which was RCAP's "largest unsecured creditor and . . . the largest stakeholder in the Trust." Id. at *3. Defendants sought discovery of those communications, contending that "the Trust and Luxor have, at most, a common financial interest in the outcome of this litigation." Id. at *3-4. The court rejected Defendants' efforts, explaining that "the Trust conducts no business, other than the maximization of value of the legal claims assigned to it in the Plan," so "in their nature practically all of the Trust's communications have a legal nexus." Id. at *13. Thus, Luxor "has a sufficient legal interest for communications with the Trust" in its role "[a]s the largest beneficiary and controller of the Trust." Id. at *14. This satisfied Delaware's "joint legal strategy or objective" common interest doctrine standard. Id. at *14-15.

With bankruptcies likely to multiply, lawyers representing debtors and creditors should familiarize themselves with this and other common interest doctrine principles. Next week's Privilege Point will discuss a later Delaware court decision addressing this issue.

- [Privilege Point, 7/29/20]

Delaware Courts Address Common Interest Doctrine Issue: Part II

July 29, 2020

Last week's Privilege Point described a favorable Delaware state court decision finding that a post-reorganization trust and its largest stakeholder could rely on the common interest doctrine to protect their communications – because they shared a common legal rather than just a common financial interest. Highlighting the unpredictability of the common interest doctrine, another Delaware state court took a much narrower view just a few months later.

In American Bottling Co. v. Repole, C.A. No. N19C-03-048 AML CCLD, 2020 Del. Super. LEXIS 225 (Del. Super. Ct. May 12, 2020), plaintiff sued defendant for terminating its sports drink distributorship after plaintiff's parent merged with defendant's competitor Keurig. Keurig had retained Skadden, Arps to represent it in that merger transaction. Defendants sought privileged documents Skadden sent to plaintiff's parent after the companies had signed their merger agreement, but before the closing. Plaintiff claimed that its parent and the acquiring company Keurig shared a common legal interest in "evaluating their rights" and "taking any available steps to protect those rights" under the plaintiffs' distribution agreement with defendant. Id. at *9 (internal citations omitted). Surprisingly, the court found a waiver – concluding that "the primary focus of the interest plainly was commercial" – even if the parties "may well have shared an interest in positioning the post-merger entity so as to capitalize on the distribution agreements." Id. at *13. Reaching this narrow conclusion, the court necessarily rejected a Skadden's lawyer's affidavit – which stated that Keurig had directed Skadden to conduct "legal analysis, including analyzing what payments, if any, would be payable pursuant to various termination provisions . . . if those termination provisions were triggered by the Merger." Id. at *8-9 (internal citation omitted).

These two Delaware state court decisions issued less than two months apart demonstrate the common interest doctrine's unreliability.

- Cho v. Depaul University, Case No. 18 C 8012, 2020 U.S. Dist. LEXIS 86299, at *5-6 (N.D. Ill. May 17, 2020) (holding that two Depaul employees could enter into a valid common interest doctrine agreement, although one tried to shift the blame to the other during a hearing; “DePaul seeks production between Cho, DePaul Professor Terry Smith, and attorney Fitzgerald Bramwell, who represented both of them. Cho invokes the common interest doctrine, under which a communication with counsel in the presence of a third party with a common legal interest does not amount to a waiver of privilege. See, e.g., United States v. Evans, 113 F.3d 1457, 1467 (7th Cir. 1997). She has established that this doctrine applies. DePaul specifically accused Cho and Smith of acting in concert to violate university policies. See Case No. 18 C 8117, dkt. no. 62, ¶ 65 (‘The essence of the Charge is that Professor Cho (allegedly acting in concert with Professor Smith) attempted to destroy the careers of Professors Lawton and Morales by opposing their applications for tenure for reasons of racial politics.’). Because DePaul accused of them of acting in concert to violate its policies and attempted to sanction them for this, Cho and Smith shared a common legal interest, making their communications with each other and their attorney privileged. The fact that their interests might not have aligned 100 percent—Cho evidently sought to shift blame to Smith during her hearing—does not eliminate or render inconsequential their underlying common interest in defending against a charge of concerted misconduct.”)

- [Privilege Point, 10/28/20]

California Federal Court Takes a Narrow View of the Common Interest Doctrine

October 28, 2020

The common interest doctrine sometimes allows separately represented parties to avoid the normal waiver implications of sharing privileged communications -- but some courts do not recognize the doctrine, and other courts take widely varying views of its applicability.

In Finjan, Inc. v. SonicWall, Inc., Case No. 17-cv-04467-BLF (VKD), 2020 U.S. Dist. LEXIS 128725, at *3-4 (N.D. Cal. July 7, 2020), plaintiff Finjan claimed privilege protection for documents disclosed during board meetings attended by a representative of Cisco (which “was an investor in Finjan and had a contractual right to observe meetings of Finjan’s board of directors”). The court rejected Finjan’s common interest argument – surprisingly holding that “Cisco’s investment in Finjan and its status as a board observer, with or without an obligation of confidentiality, did not create a common legal interest between Cisco and Finjan.” Id. at *11. The court also noted that: (1) “Cisco did not own any interest in any of the patents [the subject of the pertinent withheld documents]; its sole interest was as a shareholder of Finjan”; and (2) “[n]or did Finjan and Cisco anticipate joint litigation.” Id. Because “Finjan voluntarily disclosed the disputed materials to a third-party investor who merely observed its board meetings,” that “voluntary disclosure waived whatever attorney-client privilege otherwise attached to these materials.” Id. at *12.

Not all courts would take this narrow and somewhat counter-intuitive approach. But cases like this highlight the dangerous unpredictability of the common interest doctrine.

- **[Privilege Point, 9/8/21]**

Two Moms, Two Cases and Two Different Results: Part II

September 8, 2021

Last week's Privilege Point described a court's curt rejection of attorney-client privilege protection for a plaintiff's communications with her mom – and noted the court's surprising failure to address an obvious work product claim. Eight days later, another court dealt with mother-daughter communications.

In Pogorzelska v. VanderCook College of Music, No. 19 C 5683, 2021 U.S. Dist. LEXIS 120958 (N.D. Ill. June 29, 2021), a college student sued her college, and a classmate she alleged had sexually assaulted her. Defendants sought to discover three text messages plaintiff's mom sent the plaintiff two years after the incident. The court understandably found that most of the texts' content deserved work product protection, which was not waived by the mother-daughter disclosure (although inexplicably finding that certain portions did not deserve work product protection because they reflected "the mother's personal view"). Id. at *11. In addressing plaintiff's attorney-client privilege claim, the court understandably found that the plaintiff's mom was not her "agent" for attorney-client privilege purposes. Id. at *7-8. The court also rejected plaintiff's common interest doctrine argument – concluding that her mom had no "legal interest in the case whatsoever," and that "[t]he mere fact that Plaintiff and her mother are family, or that Plaintiff's mother hopes her daughter prevails and is interested in the course of the litigation is insufficient" to support a common interest doctrine claim. Id. at *5-6.

As with last week's Privilege Point, this decision is also important for what it fails to address. Although denying privilege protection, the court off-handedly noted that plaintiff "stat[ed] generally that her mother 'is also represented by Plaintiff's lawyers.'" Id. at *5. Such a joint representation normally would cinch privilege protection. One cannot help but wonder if plaintiff's lawyer put all the privilege protection eggs in the losing common interest basket.

- [Privilege Point, 10/27/21]

Adversaries on Some Litigation Issues Might Share a "Common Interest" on Other Issues

October 27, 2021

The unpredictable and frequently rejected common interest doctrine can sometimes avoid what would otherwise be a waiver when separately represented litigants share privileged communications or documents. Many clients and even lawyers erroneously believe they automatically can assure such a non-waiver benefit simply by entering into a common interest agreement. But when carefully utilized, the common interest doctrine can protect some communications that would otherwise seem vulnerable to discovery.

In Miller v. Boilermaker-Blacksmith National Pension Trust, No. 2:20-CV-317-RMP, 2021 U.S. Dist. LEXIS 129550 (E.D. Wash. July 12, 2021), PSF Industries' former owner Stanley Miller sought declaratory relief affirming that loan payments he received from PSF were not intended to avoid PSF's withdrawal liability under a federal statute. Defendant Pension Trust argued that the loan payments were intended to defraud the fund and other creditors. Defendant sought communications between Miller and PSF employees, but Miller asserted common interest protection. The court understandably rejected Miller's common interest claim for "communications or correspondence related to loans from Miller to PSF and payments or repayment of the same" – implicitly acknowledging that Miller and PSF were adversaries in connection with the loan and its repayment. Id. at *4. But the court properly extended common interest protection to communications between Miller and PSF "made in furtherance of the purported joint interest in defending against withdrawal liability." Id. (citation omitted). In other words, Miller and the company he formerly owned: (1) did not share a common interest in connection with PSF's loan repayments to Miller; but (2) did share a common interest in resisting defendant's argument that the payments violated a federal statute.

Lawyers must remember that they cannot assure common interest doctrine protection simply by entering into an agreement. That non-waiver protection can require a subtle analysis – sometimes protecting certain communications among the participants, but not other communications.

- Blackmon v. Bracken Constr. Co., 338 F.R.D. 91, 95 n.3 (M.D. La. 2021) (finding the common interest doctrine inapplicable in a situation in which an insurance company was disputing coverage issues; “Defendants also seem to suggest details establishing the common interest privilege are irrelevant because the privilege should be assumed to apply, presumably as early as June 2016, based simply on the status of the parties. More specifically, they argue ‘[t]he joint defense or common interest privilege applies to communications between insurers and insureds and their respective attorneys regardless of whether an agreement is formalized in writing.’ The Insurer Defendants cite two cases for this proposition, North River Insurance Company v. Columbia Casualty Company, 1995 U.S. Dist. LEXIS 53, 1995 WL 5792 (S.D.N.Y. 1995) and Nieman v. Hale, 2013 U.S. Dist. LEXIS 180397, 2013 WL 6814789 (N.D. Tex. Dec. 26, 2013).” (internal citation omitted); “But the Court declines to adopt such a bright-line rule. See McNally Tunneling Corp. v. City of Evanston, Illinois, 2001 U.S. Dist. LEXIS 17090, 2001 WL 1246630, at *3 (N.D. Ill. Oct. 18, 2001) (‘For example, although an insurer and an insured agree to cooperate in defending a lawsuit – reflecting their shared interest in lowering the total amount of damages – the common interest doctrine does not apply if those parties have an incentive to blame each other for alleged wrongful conduct.’); “Moreover, even if we accept the Insurer Defendants’ argument that the common interest doctrine applies to communications between an insurer, its insured, and counsel, that is not the situation here. Instead, this case involves communications among separate insurance companies, and the separate entities they insure, along with their various counsel.”)

- [Privilege Point, 2/23/22]

**Federal Court Coins a Useful Common Interest Doctrine Phrase:
"Rooting Interest"**

February 23, 2022

The widely misunderstood common interest doctrine occasionally allows separately represented clients to avoid the normal disastrous waiver implications of sharing privileged communications. Among other requirements, most courts demand that the common interest participants share an identical legal interest. For example, a recent Privilege Point described a court's rejection of the common interest doctrine's applicability to communications between a college student and her mother – finding that the mother had no "legal interest in the case whatsoever" in her daughter's lawsuit against a college. Pogorzelska v. VanderCook Coll. of Music, No. 19 C 5683, 2021 U.S. Dist. LEXIS 120958, at *5 (N.D. Ill. June 29, 2021).

In Diamond Services Management Co. v. C&C Jewelry Manufacturing, Inc., the court applied the standard narrow common interest doctrine protection – requiring that the participants share "an identical legal interest, as opposed to a business or rooting interest" Case No. 19 C 7675, 2021 U.S. Dist. LEXIS 236193, at *11 (N.D. Ill. Dec. 9, 2021) (emphasis added). Fortunately for the participants, the court found the common interest doctrine applicable to some documents that had been shared.

The court's clever and useful term "rooting interest" helpfully warns lawyers that relying on the common interest doctrine requires more than sharing other participants' hope of legal success.

- TERA II, LLC v. Rice Drilling D, LLC, Civ. A. No. 2:19-cv-2221, 2022 U.S. Dist. LEXIS 117294, at *11, *11-12 (S.D. Ohio July 1, 2022) (holding that the common interest agreement did not protect communications between a litigant and another company that filed an amicus brief supporting the litigant; “Simply put, an amicus's legal interest in the outcome of an action is not equivalent to that of a plaintiff or defendant, such that the amicus and the party can be considered truly united in a legal strategy or defense.”; “[I]t would appear that the amici are simply other mineral estate owners who, like Plaintiffs, seek rulings favorable to mineral estate owners. The same could undoubtedly be said of all the mineral estate owners in Ohio. But this shared commercial interest does not mean that Plaintiffs and the amici have an identical legal interest. Thus, even assuming that attorney-client privilege attaches to the underlying materials (which Plaintiffs do not meaningfully establish), the common interest doctrine would not protect that privilege from being waived by disclosure. Accordingly, the amici materials are not privileged and should be produced.”)

- Brunckhorst v. Bischoff, No. 21 Civ. 4362 (JPC), 2022 U.S. Dist. LEXIS 125838, at *5-6, *7-8 (S.D.N.Y. July 15, 2022) (holding that the trustees of a trust that owned part of a large company had a common interest with one of two competing family members seeking to purchase the trust's shares; explaining that the common interest doctrine continued to protect communications between one of the suitors and the trustees as they shared a common interest at the time, even though they later became technically adverse to each other in litigation; "Brunckhorst and the Trustees have provided ample evidence that they had a common legal interest in forming a shared legal strategy to contest Bischoff's purchase of the shares and to ensure that the Shareholder Agreement was properly enforced. See Brunckhorst Decl. ¶¶ 5-8; Dkt. 157 ("Trustees Decl.") ¶¶ 5-9. As one of the Trustees has said, they 'shared a common legal interest in contesting [Bischoff]'s claimed right to purchase Barbara [Brunckhorst]'s shares under the Shareholder's Agreement and in effectuating the signatories' intent that ownership of the Company remain evenly divided between the two founding families.' Trustees Decl. ¶ 7. The Trustees were concerned that '[Bischoff] would sue them in attempting to acquire' the shares because Bischoff had a long 'history of litigation between [Bischoff] and the Company,' including 'pending litigation in Florida between [Bischoff] and other Company shareholders related to the terms of the Shareholders' Agreement.' Id. ¶ 5. So after Bischoff gave his notice to try to buy the shares in January 2021, '[Brunckhorst] and the Trustees initially agreed to pursue a shared legal strategy to address Bischoff's claimed right to purchase Barbara [Brunckhorst]'s shares.' Id." (alterations in original); "Bischoff resists finding a common interest with four arguments. First, Bischoff argues that no common interest can exist because '[Brunckhorst] is the plaintiff in this action, while the Trustees are defendants.' Motion at 3. That argument confuses the parties' current relationship with their relationship when the subject communications occurred. That they no longer share a common interest 'does not alter the fact that [they] shared a common interest at the time the communications were made.' Kingsway Fin. Servs. v. Pricewaterhouse-Coopers LLP, No. 03 Civ. 5560 (RMB) (HBP), 2008 U.S. Dist. LEXIS 77018, 2008 WL 4452134, at *8 (S.D.N.Y. Oct. 2, 2008); In re United Mine Workers of Am. Emp. Benefit Plans Litig., 159 F.R.D. 307, 313 (D.D.C. 1994) ('[T]he common interest rule is concerned with the relationship between the transferor and the transferee at the time that the confidential information is disclosed.'). As one of the Trustees has explained, their 'legal interests remained aligned with [Brunckhorst]'s through late April 2021, when the Trustees decided to conduct an independent review and analysis of [Bischoff]'s and [Brunckhorst]'s competing claims of priority to acquire Barbara [Brunckhorst]'s shares.' Trustees Decl. ¶ 9." (alterations in original))

- Rodriguez v. Seabreeze Jetlev LLC, Case Nos. 4:20-cv-07073-YGR & 4:21-cv-01527-YGR (LB), 2022 U.S. Dist. LEXIS 143858, at *19 (N.D. Cal. Aug. 11, 2022) (analyzing privilege and work product issues in a wrongful death case; concluding that the common interest doctrine protected communications among estate beneficiaries and the plaintiff eligible under maritime law to pursue the litigation, but that non-beneficiaries did not have such a common interest even though they had a financial interest in maximizing the recovery; “Regarding the common interests between the plaintiff and non-party witnesses in this case, the plaintiff asserts that the non-party witnesses have a common ‘fiduciary interest’ to maximize the recovery of wrongful-death and survival damages. As many courts, including the Ninth Circuit, have held, a mere desire to reap a financial benefit from a certain litigation outcome is not an interest that is sufficient to invoke the common-interest doctrine.” (footnote omitted))
- KPH Healthcare Servs., Inc. v. Mylan, N.V., Case No. 2:20-cv-02065-DDC-TJJ, 2022 U.S. Dist. LEXIS 151439, at *22-23 (D. Kan. Aug. 23, 2022) (finding the common interest doctrine inapplicable; “In contrast to a situation in which identical legal interests exist, the weight of authority holds that a shared desire to prevail in litigation does not amount to a common legal interest justifying application of the common-interest doctrine. In July 2013, Pfizer transferred the underlying patents to Mylan. Pfizer also transferred the New Drug Application (‘NDA’) for various EpiPen products to Mylan, but retained a right of reversion in the event the supply agreements were terminated. The operative agreements prior to that transfer stated that Pfizer retained all intellectual property rights to its patents, and retained full responsibility for taking ‘all actions reasonably necessary to diligently prosecute and maintain any patents or patent applications relating to the products.’ These undisputed facts lead the Court to conclude that while Mylan and Pfizer had a shared desire to prevail in any potential litigation regarding the patents before July 2013, they did not have an identical legal interest until the transfer was effectuated.” (footnotes omitted))

- [Privilege Point, 11/9/22]

How Does the Common Interest Doctrine Work in the Intellectual Property Context?

November 9, 2022

The common interest doctrine sometimes prevents what would be a waiver when separately represented clients disclose privileged communications to each other. But the doctrine normally requires an identical legal interest, not just a shared financial interest in a litigation's outcome. Two recent intellectual property cases highlight courts' widely varying approaches to the common interest doctrine protection.

In BBAM Aircraft Management LP v. Babcock & Brown LLC, Case No. 3:20-cv-1056 (OAW), 2022 U.S. Dist. LEXIS 154791 (D. Conn. Aug. 29, 2022), the court took an expansive view of the common interest doctrine. Among other things, it found the doctrine available even to a non-party to the litigation. The court also found that the common interest doctrine could avoid a waiver "even if no attorney is involved" in the communication. Id. at *9. Finally, the court held that "the relationship between a trademark licensor and its licensee necessitates a common interest in the protection of the mark from infringing uses such that sharing attorney advice does not result in the waiver of privilege." Id. at *11-12. But just a few days earlier, the court in KPH Healthcare Services, Inc. v. Mylan, N.V., Case No. 2:20-cv-02065-DDC-TJJ, 2022 U.S. Dist. LEXIS 151439 (D. Kan. Aug. 23, 2022) applied a more demanding standard when assessing communications between Mylan and Pfizer involving patents for the commonly used EpiPen. Explicitly rejecting an earlier case requiring only "substantially identical" legal interests, the court demanded "identical" legal interests. Id. at *21-22. The court acknowledged that Mylan and Pfizer had "operative agreements" relating to the EpiPen patent before Pfizer transferred the patents to Mylan in July 2013. Id. at *22-23. But the court "conclude[ed] that while Mylan and Pfizer had a shared desire to prevail in any potential litigation regarding the patents before July 2013, they did not have an identical legal interest until the transfer was effectuated." Id. at *23. Oddly, the court did not assess any work product claims for pre-July 2013 withheld documents.

Some lawyers erroneously think that a court will automatically honor their contractual non-waiver agreement asserting the common interest doctrine. And such contracting clients normally begin to immediately share privileged communications based on such agreements. But even well-known companies represented by sophisticated lawyers frequently lose the common interest argument, by which time it is too late to have avoided privilege waiver.

- Northwest Senior Hous. Corp. v. Intercity Inv. Props., Inc. (In re Nw. Senior Hous. Corp.), Ch. 11 Case No. 22-30659, Adv. No. 22-03040, 2023 Bankr. LEXIS 331, at *22-23, *31 (N.D. Tex. Feb. 6, 2023) (finding that common interest doctrine did not protect from waiver documents shared with a third party; “The common interest or common legal interest privilege, an extension of the attorney-client privilege, has been recognized by the Fifth Circuit but applies narrowly to two types of communications: (1) communications between co-defendants in actual litigation and their counsel; and (2) communications between potential co-defendants and their counsel. For the privilege to apply to potential co-defendants and their counsel, there must be a ‘palpable threat of litigation’ at the time of the communication, rather than a mere awareness that one’s questionable conduct might some day result in litigation.” The privilege must be narrowly construed to those parties and their counsel that share a common interest. A shared business interest or rooting interest is insufficient to trigger the privilege.” (footnotes omitted); “the lack of any formal agreement is not necessarily dispositive in determining whether a common interest privilege exists; however, the Court would have expected to see such an agreement, particularly in this instance where UMB, Lifespace and the Plaintiff claim an interest many months before the Defendants’ conduct at issue in this Adversary Proceeding or the filing of the Chapter 11 cases. The parties claim an overarching strategy to work together towards a restructuring, but oddly never formalized this strategy. This is somewhat noteworthy given that the evidence reflected that UMB did enter into a joint defense agreement with its noteholders. The lack of such an agreement is at least some evidence against finding a common interest exists.” (footnotes omitted))

- [Privilege Point, 11/29/23]

Did S.D.N.Y. Mean to Apply Expansive Common Interest Doctrine?

November 29, 2023

Under the widely recognized common interest doctrine, separately represented clients may sometimes contractually avoid the otherwise inevitable privilege waiver when sharing privileged communications. As explained previously in Privilege Points, some courts apply the doctrine only during pending litigation, and nearly every court seems to at least require anticipated litigation. But occasionally a court appears to articulate a far more expansive approach.

In Alta Partners, LLC v. Getty Images Holdings, Inc., No. 22-cv-8916 (JSR), 2023 U.S. Dist. LEXIS 156520 (S.D.N.Y. Sept. 5, 2023), prominent Southern District of New York Judge Rakoff issued a relatively short opinion on a number of topics. Judge Rakoff first understandably held that defendant Getty Images could not apply the common interest doctrine protection for its communications with its shareholders — because Getty only “shared a commercial or financial, rather than legal, interest” with its shareholders. Id. at *3. But then Judge Rakoff “accept[ed] Getty’s asserted common interest privilege with . . . Getty’s counter-party in its business combination agreement . . . and that counter-party’s sponsor.” Id. Although the opinion does not explain how a counter-party could have a common legal interest with Getty, perhaps more notable was the absence of any reference to litigation or anticipated litigation.

Some courts have hinted that the common interest doctrine can assure continued privilege protection among separately represented clients in a business context — with no anticipated litigation on the horizon. But courts have not started clearly adopting such a favorable approach — despite several bar groups’ and commentators’ efforts to push the law in that direction. Judge Rakoff’s enigmatic opinion probably won’t help much, but for some lawyers hope springs eternal.

- Roblox Corp. v. WowWee Grp. Ltd., Case No. 22-cv-04476-SI, 2023 U.S. Dist. LEXIS 219505, at *6-7 (N.D. Cal. Dec. 8, 2023) (in an opinion by Judge Illston, describing the common interest doctrine principles; “The common interest doctrine is not a separate privilege, but rather ‘an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with one another.’” In re Pacific Pictures Corp., 679 F.3d 1121, 1129 (9th Cir. 2012); see also U.S. v. Austin, 416 F.3d 1016, 1021 (9th Cir. 2005) (holding that the privilege ‘protects not only the confidentiality of communications passing from a party to [their] attorney but also from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel’) (internal quotation marks and citations omitted). The parties ‘must make the communication in pursuit of a joint strategy in accordance with some form of agreement.’ In re Pacific Pictures Corp., 697 F.3d at 1129. The agreement ‘may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation.’ United States v. Gonzalez, 669 F.3d 974, 979 (9th Cir. 2012). The parties must have ‘a common legal, as opposed to commercial, interest.’ Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 579 (N.D. Cal. 2007). To invoke the doctrine, the party asserting the privilege must show: ‘(1) the communication is made by separate parties in the course of a matter of common interest; (2) the communication is designed to further that effort; and (3) the privilege has not been waived.’ U.S. v. Bergonzi, 216 F.R.D. 487, 495 (N.D. Cal. 2003).” (alterations in original))

D. Other Variations

- Restatement (Third) of Law Governing Lawyers § 132 cmt. g(ii) (“A lawyer who learns confidential information from a person represented by another lawyer pursuant to a common-interest sharing arrangement (see § 76) is precluded from a later presentation adverse to the former sharing person when information actually shared by that person with the lawyer or the lawyer’s client is material and relevant to the later matter (see Illustration 8 above). Such a threatened use of shared information is inconsistent with the under-taking of confidentiality that is part of such an arrangement.”)

- [Privilege Point, 3/14/22]

Court Finds That a Joint Defense Agreement Deserves Attorney-Client Privilege Protection

March 14, 2002

A "joint defense" (or "common interest") doctrine agreement can help assure that the attorney-client privilege protects communications between clients (or their lawyers) who share an identical legal interest, as long as the communications are in furtherance of that interest. But can the attorney-client privilege protect the agreement itself?

One recent decision extended the attorney-client privilege that far, and held that attorney-client privilege protected even the common interest agreement itself. McNally Tunneling Corp. v. City of Evanston, No. 00 C 6979, 2001 U.S. Dist. LEXIS 17090 (N.D. Ill. Oct. 16, 2001).

Not every court applies the attorney-client privilege so broadly, but lawyers participating in the preparation of joint defense agreements should familiarize themselves with the possible attorney-client privilege that might apply to the agreement itself.

- [Privilege Point, 3/11/09]

Case Highlights an Additional Risk of Common Interest Agreements

March 11, 2009

Although some lawyers jump at the chance to arrange for common interest agreements between their clients and others, such arrangements carry great risks. Among other things, neither the clients nor the lawyers will know for sure whether the common interest agreement will prevent a waiver of the privilege until after they have shared protected communications.

The lawyers themselves also face a risk. In Meza v. H. Muehlstein & Co., No. B201427, 2009 Cal. App. Unpub. LEXIS 396 (Cal. Ct. App. Jan. 20, 2009), a lawyer who had represented one defendant in a common interest arrangement later joined the law firm representing the plaintiff who had dismissed that defendant from the lawsuit. Other defendants moved to disqualify the plaintiff's firm, arguing that the lawyer had also obtained their confidences as part of the common interest arrangement. The lawyer filed a declaration stating that he never spoke with any of the other defendants while representing his former client, and that he did not share any information about the case with any lawyer at the plaintiff's firm. Despite this declaration, and the fact the lawyer left the plaintiff's firm after only seven months, the court disqualified the plaintiff's law firm.

Absent some prospective consent arrangement in the common interest agreement, lawyers representing common interest participants should realize that they may be barred from later adversity to the other participants.

- [Privilege Point, 3/5/14]

More Courts Reject Common Interest Doctrine's Applicability

March 5, 2014

The common interest doctrine occasionally allows separately represented clients to share privileged documents without waiving their fragile attorney-client privilege protection. However, lawyers cannot automatically assure the doctrine's applicability just by entering into a common interest agreement with another participant. Courts reject the doctrine's applicability in over half of the cases.

In Ducker v. Amin, Case No. 1:12-cv-01596-SEB-DML, 2013 U.S. Dist. LEXIS 181690 (S.D. Ind. Dec. 31, 2013), the court found that the common interest doctrine did not protect direct communications among the clients without at least one of the client's lawyers' participation in the communication. Three weeks later, in Integrated Global Concepts, Inc. v. j2 Global, Inc., Case No. 5:12-cv-03434-RMW (PSG), 2014 U.S. Dist. LEXIS 7294, at *5 (N.D. Cal. Jan. 21, 2014), the court found that two companies which had entered into a merger agreement could not rely on the common interest doctrine to resist discovery of privileged documents they had later shared – finding the doctrine inapplicable because the companies faced "no impending threat of litigation" at that time. One day later, another court found that the common interest doctrine could not apply "until litigation became a palpable reality." In re Application of Tinsel Grp., S.A., Misc. A. H-13-2836, 2014 U.S. Dist. LEXIS 7882, at *10 (S.D. Tex. Jan. 22, 2014).

These and many other similar cases did not address the common interest doctrine's applicability in the abstract. All of these participants and their lawyers thought they could avoid a waiver by entering into a common interest agreement, and later learned that the doctrine did not apply – after they had already waived their privilege by sharing protected documents.

- [Privilege Point, 3/8/17]

New York Decision Highlights Another Common Interest Doctrine Risk

March 8, 2017

Under the common interest doctrine, separately represented clients may sometimes avoid waiving their fragile privilege protection when they disclose protected documents to each other. Nearly every court applies the doctrine only in the context of litigation or anticipated litigation.

Most -- but not all -- courts extend the doctrine to participants who may not themselves anticipate litigation, but whose interests are closely aligned with those who do. In 59 South 4th LLC v. A-Top Insurance Brokerage, Inc., No. 650979/2015, 2017 N.Y. Slip Op 30050(U) (N.Y. Sup. Ct. Jan. 10, 2017), defendant insurance company claimed that plaintiff developer waived its privilege protection by disclosing protected documents to its general contractor (who was not a party). Plaintiff claimed that it shared a common legal interest with its general contractor, but the court rejected that argument -- noting that the general contractor had assigned to the plaintiff all of its claims (including any claims against the defendant insurance company). As the court explained, because the general contractor was "not capable of mounting a common claim with [plaintiff] against defendants, the common interest doctrine does not apply to any communications between [plaintiff and its general contractor], including those between counsel for said parties." Id. at *6. Inexplicably, the court did not address possible work product protection -- which normally would have survived such disclosure to a friendly third party.

One might call this narrow common interest doctrine application the "weakest link" approach, because one participant's failure to meet the anticipated litigation standard destroys the privilege for all of the participants. This is yet another reason to enter into common interest agreements very warily.

- [Privilege Point, 8/15/18]

Court Rejects the Common Interest Doctrine's Applicability for Yet Another Reason

August 15, 2018

The common interest doctrine can avoid the normal waiver implications of disclosing privileged communications to third parties. But some courts do not recognize the doctrine at all, and most courts impose various requirements on the doctrine that make it unpredictable and risky.

In Regents of University of California v. Affymetrix, Inc., 326 F.R.D. 275 (S.D. Cal. 2018), the court dealt with the Common interest doctrine's applicability to patent-related communications between the alleged infringer and a separate company -- that designed and manufactured the pertinent product. Before turning to the adversary's other arguments challenging the doctrine's applicability, the court found the doctrine inapplicable because the manufacturing company's employee was not represented by a lawyer at the time. The court acknowledged that no Ninth Circuit precedent "explicitly requires both parties be represented by separate counsel." Id. at 281. But the court nevertheless explained that "[t]he requirement that each party to a common interest arrangement have an attorney . . . comports 'with the intent behind the common interest privilege.'" Id. Thus, "[w]ithout clearing this first hurdle to invoke the common interest exception, the Court need not reach the remaining arguments." Id. at 282.

Lawyers hoping to rely on the common interest doctrine must keep a careful list of all the pertinent court's requirements. And of course defendants may not know which court will address their common interest doctrine argument until after they have entered into an agreement and shared privileged communications.

- Diva Limousine, Ltd. v. Uber Techs., Inc., Case No. 18-cv-05546-EMC, 2019 U.S. Dist. LEXIS 4274, at *2-3 (N.D. Cal. Jan. 9, 2019) (“On October 24, 2018, Uber filed the instant motion to disqualify Diva’s counsel Warren Postman and his firm, Keller Lenkner LLC (‘KL’). See Docket No. 40 (‘Mot.’). Uber contends that Mr. Postman, during his previous tenure at the U.S. Chamber of Commerce Litigation Center (‘the Chamber’), had worked with Uber on litigation implicating the driver classification question under a common interest agreement, pursuant to which he became privy to Uber’s privileged and confidential information.”)

- [Privilege Point, 2/13/19]

Courts Take Expansive View of the Common Interest Doctrine

February 13, 2019

Under the common interest doctrine, separately represented clients can avoid the normal waiver implications of disclosing privileged communications to third parties. Unfortunately, some courts do not recognize the doctrine, and most courts take a very narrow view – requiring that the common interest participants be in or anticipate litigation.

But some courts take an expansive view. In In re Intuniv Antitrust Litigation, Civ. A. Nos. 16-cv-12653-ADB (Direct) & 16-cv-12396-ADB (Indirect), 2018 U.S. Dist. LEXIS 207545 (D. Mass. Dec. 10, 2018), the court held that two companies considering a merger could rely on the common interest doctrine to safely share privileged communications about patent litigation involving one of the participants. Interestingly, the court did not point to the work product doctrine – which clearly would have covered the "litigation summar[ies]" the merging companies shared, and which would have survived such disclosure to a friendly third party. One day later, the court in AgroFresh Inc. v. Essentiv LLC, Civ. A. No. 16-662-MN-SRF, 2018 U.S. Dist. LEXIS 213204 (D. Del. Dec. 11, 2018), similarly held that a patent licensor and an exclusive licensee shared a common interest. The adversary argued that a patent licensee's interest is not "truly identical" to a licensor's interest, because "the licensee is free from the obligation to pay royalties on sales of the product if the patent is invalidated." Id. at *14. The court relied on earlier decisions in explaining that "licensors and exclusive licensees of patent rights are understood to share an identical legal interest in obtaining strong and enforceable patents." Id. Almost a year later, the magistrate judge's order was reversed on other grounds. 2019 U.S. Dist. LEXIS 172423 (D. Del. Oct. 4, 2019).

Expansive cases like this frequently generate hope that other courts will expand the common interest doctrine to transactional settings. But few courts have moved in that direction.

- **[Privilege Point, 8/14/19]**

Several Courts Consider Common Interest Doctrine Requirements

August 14, 2019

Under certain conditions, the common interest doctrine can avoid what would otherwise be a waiver when separately represented clients share privileged communications to support a common legal strategy. As tempting as it would be to think that such clients' lawyers can automatically assure that favorable outcome by contracting among themselves for it, the doctrine is unpredictable and very risky.

In Ross v. Illinois Central R.R., the court rejected a common interest doctrine assertion – noting that "[e]ven when a common interest exists between parties, it is clear to us that the client must, at the time of the disclosure, have an agreement with the receiving party that that party will treat the information as privileged." 129 N.E.3d 641, 654 (Ill App. Ct. 2019). The parties arguing for the doctrine's application acknowledged they "had no such agreement, written or otherwise." Id. Several weeks later, the court in JNL Management LLC v. Hackensack University Medical Center, followed states such as Hawaii, Maine, New Hampshire, New York and Vermont in rejecting a position advanced by Drinker Biddle and its client "that anticipated litigation is not a necessary requirement for the common interest doctrine to protect waived attorney-client privileged communications." Civ. A. No. 2:18-CV-5221-ES-SCM, 2019 U.S. Dist. LEXIS 91358, at *26-27 (D.N.J. May 31, 2019). A few weeks before that, the Federal Claims Court offered some good news. The court held that for the common interest doctrine to apply, "[t]he third party [to which privileged communications are disclosed] need not be a litigant in the present suit, or any suit, but its interest shared with the party in the present suit must be a legal one, not merely commercial." SecurityPoint Holdings, Inc. v. United States, No. 11-268C, 2019 U.S. Claims LEXIS 341, at *6 (Fed. Cl. Apr. 16, 2019). That is a more favorable approach than some courts take -- requiring that each common interest doctrine participant establish its own requisite involvement in or anticipation of litigation.

Unfortunately, courts never seem to settle on a uniform or expansive common interest doctrine. Corporate clients and their lawyers should always be wary of thinking that they can contractually assure protection that the law may not recognize.

- [Privilege Point, 4/8/20]

More Courts Disagree About Common Interest Doctrine Requirements

April 8, 2020

The common interest doctrine can sometimes avoid the normal waiver implications of separately represented clients sharing privileged communications -- if they do so in pursuit of a common legal strategy. Some states do not recognize the doctrine, most courts apply it only when the participants are in or anticipate litigation, and courts disagree about many of the doctrine's requirements.

In Bennett v. CIT Bank, N.A., 432 F. Supp. 3d 1370 (N.D. Ala. 2020), the court addressed the waiver implications of a common interest participant's disclosure to another participant (without a lawyer's involvement). The court ultimately held that "privileged attorney-client communications can remain privileged when the client shares those communications outside the presence of counsel with a third party who shares a common legal interest." Id. at 1377. On the same day, the court in In re Generic Pharmaceuticals Pricing Antitrust Litigation, took the opposite position: "To be protected, 'the communication must be shared with the attorney of the member of the community of interest' as '[s]haring the communication directly with a member of the community may destroy the privilege.'" 432 F. Supp. 3d 490, 494 (E.D. Pa. 2020) (alteration in original) (citing In re Teleglobe Commc'ns Corp. 493 F.3d 345, 364 (3d Cir. 2007)). This sort of stark and often dispositive judicial disagreement permeates many other common interest doctrine analyses.

Unfortunately, many corporations and their lawyers erroneously assume that they can contractually avoid the normal waiver implications of disclosing privileged communications to outsiders -- and then immediately start sharing fragile privileged communications. Even if those common interest doctrine participants carefully check the law of the jurisdiction in which they share such communications, they often have no way of knowing where an adverse third party will claim a waiver -- and therefore what court will apply its own common interest doctrine requirements.

- Grupo Petrotemex, S.A. de C.V. v. Polymetrix AG, Case No. 16-cv-02401 (SRN/HB), 2020 U.S. Dist. LEXIS 43465, at *8-9, *9, *9-10, *10, *10-11, *11 (D. Minn. Mar. 13, 2020) (inexplicably holding that although a parent corporation and its wholly owned subsidiary had a common interest, disclosing privileged communications to a third party required both of them to waive the privilege – so that the parent could not unilaterally waive privilege protection in connection with its possible sale of its wholly owned subsidiary; "The Court agrees that Polymetrix and Bühler shared a common legal interest. In or around July 2017, Bühler acquired 100% of Polymetrix's shares, and remained its sole and total owner until the sale to Sanlian on March 22, 2018. (Vögtli Decl. ¶¶ 3, 14; Müller Suppl. Decl. ¶¶ 2, 7.) GPT/DAK does not appear to contend otherwise. (See, e.g., Pls.' Suppl. Reply Mem[.] at 16, 23-25 (referring to the players as 'Polymetrix and Bühler, on the one hand, and Sanlian, on the other hand').) Thus, the sharing of the July 5, 2017, Wilming email between Polymetrix and Bühler did not destroy the privileged status of that communication or the communications upon which it was based."; "The crux of the parties' disagreement comes from what happened next. At some point, Bühler's in-house counsel directed a member of the Bühler Corporate Finance Projects team to give a copy of the July 5, 2017 Wilming email to Sanlian's attorneys at the Grandall law firm in China and the Schmid Rechtsanwälte law firm in Switzerland. (Vögtli Decl. ¶ 6.) It is undisputed that the email included the protected opinions of Polymetrix's attorneys Noah and Wilming, and that Bühler made the deliberate decision to transfer it to representatives of Sanlian, a separate corporation. GPT/DAK argue that this transfer waived any privilege attached to the email contents, since the voluntary disclosure of a communication protected by the attorney-client privilege is generally an express waiver of the privilege. United States v. Workman, 138 F.3d 1261, 1263 (8th Cir. 1998)."; "But it is a well-established component of the common interest doctrine that one party to a common enterprise cannot waive the privilege for another party. In re Grand Jury, 112 F.3d at 922; John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 555-56 (8th Cir. 1990); see also Restatement (Third) of the Law Governing Lawyers § 76, cmt. g. (2000). As a result, in cases where a member of a common interest group discloses privileged information received from another member without that member's consent, the courts have held the privilege was not waived as to the member to whom the privilege belonged. E.g., John Morrell & Co., 913 F.2d at 556; see also United States v. Gonzalez, 669 F.3d 974, 982 (9th Cir. 2012); United States v. BDO Seidman, LLP, 492 F.3d 806, 817 (7th Cir. 2007)."; "Here, all of the information before the Court indicates the decision to disclose the opinion to Sanlian was made by Bühler, for Bühler's benefit in its negotiations with Sanlian—negotiations in which Polymetrix played no part—and that Polymetrix did not even know about the disclosure, let

alone consent to it. (Müller Suppl. Decl. ¶ 4; Vögtli Decl. ¶¶ 8, 12; Wilming Decl. ¶ 4.) Significantly, GPT/DAK do not argue that Polymetrix's consent was unnecessary. On the contrary, they state: 'Polymetrix is correct that this disclosure [from Bühler to Sanlian] alone would not constitute a waiver of Polymetrix's attorney-client privilege to the extent that Polymetrix did not consent to Bühler's disclosure.' (Pls.' Suppl. Reply Mem. at 23.) Nor does GPT/DAK advance an argument that Polymetrix gave its consent to the disclosure of the email at the time it was disclosed."; "In sum, the Court finds that Polymetrix did not consent to Bühler's disclosure of the July 5, 2017 email Sanlian prior to or at the time of the disclosure, and that absent such consent, it did not waive the attorney-client privilege as to that email, its contents, or the communications and opinions of counsel upon which it was based. Polymetrix never 'voluntarily [disclosed] a communication protected by the attorney-client privilege'— Bühler did. Workman, 138 F.3d at 1263. As a result, the Court need not reach the question of whether Bühler's disclosure to Sanlian was protected by a common interest relationship between those two entities because Polymetrix did not give Bühler permission to share the document in the first place and Bühler could not waive the attorney-client privilege on Polymetrix's behalf.").

- In re Dealer Management Systems Antitrust Litigation, 335 F.R.D. 510, 514 (N.D. Ill. 2020) (holding that the absence of a written common interest agreement weighed against a common interest doctrine argument; “After reviewing the parties’ briefs and the documents submitted, the Court is not persuaded by Authenticom’s arguments and concludes that Authenticom has failed to establish that the common interest doctrine applies to the communications and documents at issue. The purpose of the common interest doctrine is to ‘foster communication’ between parties that share a common interest and to ‘protect the confidentiality of communications . . . where a joint . . . effort or strategy has been decided upon or undertaken by the parties and their respective counsel.’ United States v. Evans, 113 F.3d 1457, 1467 (7th Cir. 1997). The common interest doctrine is designed to encourage ‘parties with a shared legal interest to seek legal assistance in order to meet legal requirements and to plan their conduct accordingly.’ BDO Seidman, LLP, 492 F.3d at 815 (internal citations omitted); Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 964 (N.D. Ill. 2010). Here, there is no evidence there was any joint legal planning. Nor is there any evidence that purported members of the Common Interest Group jointly sought legal assistance to pursue a common goal other than maybe a general consensus to approach the Federal Trade Commission (‘FTC’) in hopes that the FTC would agree to take legal action against CDK and Reynolds and Reynolds. Other than its own assertions, Authenticom has not submitted any evidence that the purported Common Interest Group actually existed and that such a group contemplated and pursued a specific joint effort or enterprise.”)

- Adkisson v. Jacobs Eng'g Grp., Inc., No. 3:13-CV-505-TAV-HBG, 2021 U.S. Dist. LEXIS 7982, at *34, *36 (E.D. Tenn. Jan. 15, 2021) (holding that the common interest doctrine can protect communications among private litigants and a quasi-governmental entity; "Plaintiffs assert that Defendant does not have a common interest with TVA because TVA 'a quasi-governmental entity, is not a party in this litigation,' and 'it remains unclear whether TVA has agreed to indemnity [Defendant], or has refused to do so.'" (alteration in original) (internal citation omitted); "Here, after in camera review, the Court finds that Defendant has met its burden to establish the necessary elements for the common interest exception to apply with respect to the communications at issue with TVA.")
- Blackmon v. Bracken Constr. Co., 338 F.R.D. 91, 94 n.1 (M.D. La. 2021) (noting the mixed caselaw on common interest agreements; "The Court has reviewed the Joint Defense Agreement along with the cases cited by both sides. But while each side provided caselaw from district courts throughout the country supporting its position, the Court is not bound by any of them. Beyond that, caselaw in this area is not entirely helpful. As other courts have noted, 'cases addressing the question of whether JDAs are privileged fall, quite frankly, all over the lot.'" Wausau Underwriters Ins. Co. v. Reliable Transportation Specialists, Inc., 2018 U.S. Dist. LEXIS 151745, 2018 WL 4235077, at *1 n.1 (E.D. Mich. Sept. 6, 2018) (quoting Steuben Foods, Inc. v. GEA Process Eng'g, Inc., 2016 U.S. Dist. LEXIS 42538, 2016 WL 1238785, at *1 (W.D.N.Y. Mar. 30, 2016))." (internal citations omitted))

- Sandoz Inc. v. Lannett Co., 570 F. Supp. 3d 258, 270, 270-71 (E.D. Pa. 2021) (in analyzing the common interest doctrine, holding that to deserve common interest protection a communication must involve both participants' lawyers; "I therefore conclude that Lannett's expansive interpretation is inconsistent with Pennsylvania precedent. I decline to follow TD Bank and hold instead that an attorney must be involved for the common interest privilege exception to attach."; "There is less clarity as to whether attorneys for both parties must be involved in the exchange. Cogent arguments can be advanced on either side of the issue. In the absence of clear guidance from Pennsylvania appellate courts, I default to the overarching principle emanating from the Supreme Court, that exceptions to disclosure are to be construed narrowly. Accordingly, where both parties were not represented by counsel in an exchange of information, I find the privilege waived.")
- TERA II, LLC v. Rice Drilling D, LLC, Civ. A. No. 2:19-cv-2221, 2022 U.S. Dist. LEXIS 117294, at *11, *11-12 (S.D. Ohio July 1, 2022) (holding that the common interest agreement did not protect communications between a litigant and another company that filed an amicus brief supporting the litigant; "Simply put, an amicus's legal interest in the outcome of an action is not equivalent to that of a plaintiff or defendant, such that the amicus and the party can be considered truly united in a legal strategy or defense."; "[I]t would appear that the amici are simply other mineral estate owners who, like Plaintiffs, seek rulings favorable to mineral estate owners. The same could undoubtedly be said of all the mineral estate owners in Ohio. But this shared commercial interest does not mean that Plaintiffs and the amici have an identical legal interest. Thus, even assuming that attorney-client privilege attaches to the underlying materials (which Plaintiffs do not meaningfully establish), the common interest doctrine would not protect that privilege from being waived by disclosure. Accordingly, the amici materials are not privileged and should be produced.")

- Brunckhorst v. Bischoff, No. 21 Civ. 4362 (JPC), 2022 U.S. Dist. LEXIS 125838, at *9, *12-13 (S.D.N.Y. July 15, 2022) (holding that the trustees of a trust that owned part of a large company had a common interest with one of two competing family members seeking to purchase the trust's shares; explaining that the common interest can apply even if no lawyer was involved in the communication; "If information that is otherwise privileged is shared between parties that have a common legal interest, the privilege is not forfeited even though no attorney either creates or receives that communication." Gucci Am., Inc. v. Gucci, No. 07 Civ. 6820 (RMB) (JCF), 2008 U.S. Dist. LEXIS 101760, 2008 WL 5251989, at *1 (S.D.N.Y. Dec. 15, 2008)."); holding that the common interest doctrine could apply despite the absence of a written agreement, and noting that the later-memorialized agreement also covered past communications; "Bischoff makes three arguments resisting this conclusion. None are persuasive. First, Bischoff claims that Brunckhorst lacks any evidence that there was a common interest before June 18, 2021 (the date when the Martins and Brunckhorst signed a common interest agreement). Motion at 4. But here too, Brunckhorst and the Martins have provided declarations affirming that the oral agreement began in March 2019. See Brunckhorst Decl. ¶¶ 9-11; Martin Decl. ¶¶ 10-12. And '[a] formal written common interest agreement is not necessary.' United States v. Zhu, 77 F. Supp. 3d 327, 330 (S.D.N.Y. 2014). When Brunckhorst and the Martins entered into a written agreement in June 2021, that agreement explicitly covered 'past' communication, further bolstering Brunckhorst's claim that an earlier agreement existed. Brunckhorst Decl. ¶ 11; Martin Decl. ¶ 12." (alteration in original))

- Rodriguez v. Seabreeze Jetlev LLC, Case Nos. 4:20-cv-07073-YGR & 4:21-cv-01527-YGR (LB), 2022 U.S. Dist. LEXIS 143858, at *14 (N.D. Cal. Aug. 11, 2022) (analyzing privilege and work product issues in a wrongful death case; concluding that the common interest doctrine protected communications among estate beneficiaries and the plaintiff eligible under maritime law to pursue the litigation, but that non-beneficiaries did not have such a common interest even though they had a financial interest in maximizing the recovery; “Restricting the application of the common-interest doctrine to represented parties is appropriate because the doctrine is based on the parties reaching an agreement to pursue a joint legal strategy.”)

- Mewawalla v. Middleman, 21-cv-09700-EMC, 2023 U.S. Dist LEXIS 46739, at *2, *3 (N.D. Cal. Mar. 20, 2023) (holding that a common interest agreement did not itself deserve attorney-client privilege protection, although not considering work product protection for the agreement; “The Court has reviewed the Common Interest Agreement in camera. It generally recites Plaintiff’s and Mr. Beard’s invocation of common legal interests and factual issues, sets forth general terms of sharing information and waiving any conflict of interest, and memorializes the parties to the agreement.”; “Upon review, the Common Interest Agreement here does not contain substantive legal advice or additional information that can be construed as privileged. The entirety of the agreement concerns only the ‘general purpose’ of recognizing that Plaintiff and Mr. Beard have a common legal interest.”)

- [Privilege Point, 9/13/23]

State Court Takes a Narrow View of the Common Interest Doctrine

September 13, 2023

Under the common interest doctrine, separately represented clients may sometimes contractually avoid the normal waiver impact of disclosing privileged communications to each other. But federal and state courts take widely varying approaches to this helpful (but dangerously imprecise) waiver-avoidance arrangement.

In Hankin v. Sewall, the court pointed to Maine Rule of Evidence 502(b)(3) as limiting the common interest doctrine's application to a "pending action." No. BCD-REA-2023-00007, 2023 Me. Bus. & Consumer LEXIS 31, at *6 (Me. Bus. & Consumer Ct. July 3, 2023). Many courts are more generous, applying the doctrine if the common interest participants only anticipate litigation. The Maine court also warned that the common interest doctrine "does not extend ... to communications shared amongst the parties themselves that do not either involve attorneys or disclose privileged communication." Id. at *7. That seems like an odd formulation. All courts seem to require privilege protection for the communications shared among the participants. Some courts also require a lawyer's participation, while others do not. Maine apparently takes the more restrictive approach on both the litigation and the lawyer participation issues.

Lawyers should never assume that a generic "common interest doctrine" protection will apply. There are wide variations among federal and states courts, and some formulations do not bring the certainty that the participants seek.

- SEC v. GPB Cap. Holdings, LLC, No. 21-CV-583 (MKB) (VMS), 2023 U.S. Dist. LEXIS 218226, at *54-55 (E.D.N.Y. Dec. 7, 2023) (in an opinion by Judge Brodie, describing the waiver rules for common interest/joint defense arrangement participants; “A client who is part of a joint defense arrangement is entitled to waive the privilege for his own statements, and his co-defendants cannot preclude him from doing so.” United States v. Agnello, 135 F. Supp. 2d 380, 383 (E.D.N.Y. 2001), aff’d, 16 F. App’x 57 (2d Cir. 2001); see also United States v. Hatfield, No. 06-CR-550, 2009 U.S. Dist. LEXIS 106269, 2009 WL 3806300, at *12 (E.D.N.Y. Nov. 13, 2009) (‘A member of a joint defense agreement can waive the privilege with respect to its own communications, but typically cannot disclose privileged information received from other joint defense agreement members.’ (first citing Agnello, 135 F. Supp. 2d at 383; then citing United States v. Salvagno, 306 F. Supp. 2d 258, 273 (N.D.N.Y. 2004); and then citing In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922 (8th Cir. 1997))); Sicarelli v. Jeneric/Pentron Inc., No. 03-CV-4934, 2005 WL 8156861, at *3 (E.D.N.Y. June 16, 2005) (‘Thus, even if the [c]ourt had found the existence of a common interest work product privilege between plaintiffs and Ivoclar, Ivoclar, as the party that either independently commissioned or created [the documents], was entitled to waive any privilege it may have over such documents.’ (citing Agnello, 135 F. Supp. 2d at 383)).” (alterations in original))

E. Work Product Issues

- [Privilege Point, 1/12/11]

Do Companies Need a Common Interest Agreement to Avoid Waiving Work Product Protection?

January 12, 2011

Given the fragility of the attorney-client privilege, companies hoping to avoid waiving that protection by sharing privileged communications with third parties must meet the fairly exacting standards of the "common interest" doctrine. However, work product can be much more easily shared with non-adversarial third parties – because that doctrine offers hardier protection than the privilege.

In WI-Lan, Inc. v. Acer, Inc., Case No. 2:07-CV-473-TJW c/w 2:07-CV-474-TJW, 2010 U.S. Dist. LEXIS 110351 (E.D. Tex. Oct. 18, 2010), the seller of patent assets disclosed work product to potential purchaser Broadcom during its due diligence. When there was a later falling-out, Broadcom claimed that the disclosure waived any available protections. The court noted that "[b]oth sides spend the bulk of their arguments discussing whether the [work product] was subject to the common interest doctrine at the time of its disclosure to Broadcom." Id. at *27. The court ultimately concluded that "the Court need not reach that issue because it finds that [the seller's] disclosure of the [work product] to Broadcom in the Data Room during the purchase due diligence does not constitute a waiver of the work product immunity, regardless of whether or not the common interest doctrine applies." Id. The court explained that "Broadcom cannot be seen as an adversary at the time of the purchase due diligence such that [the seller's] disclosure of the [work product] constituted a waiver of the work product privilege." Id. at *29.

Decisions like this highlight the wisdom of analyzing both the attorney-client privilege and the work product doctrine. The work product doctrine might not provide the absolute protection of the attorney-client privilege, but usually survives disclosure to non-adversarial third parties.

- Keaton v. Hannum, No. 1:12-cv-00641-SEB-MJD, 2013 U.S. Dist. LEXIS 60519, at *25-26, *26 (S.D. Ind. Apr. 29, 2013) (holding that defendant's disclosure of work product to a Bar Disciplinary Committee to which she complained about plaintiff lawyer waived the work product protection, because there was no common interest between the defendant and the bar, and because making work product available to the bar made it possible for the plaintiff to obtain access to the materials because of the bar's duty to provide exculpatory evidence; "Zook has no legal interest in the outcome of the Disciplinary Commission case against Keaton. Likewise, the Disciplinary Commission has no legal interest in the outcome of Keaton's civil complaint against Zook. . . . The parties have expressed no concern that the Disciplinary Commission could be made a defendant to the Keaton/Zook case and likewise, the parties have not indicated that Zook could be made a defendant to the Disciplinary Commission complaint against Keaton. As a result, no common legal interest exists between Zook and the Disciplinary Commission that would protect documents exchanged between them that are work product."; "Because no common legal interest exists between Zook and the Disciplinary Commission, the act of sharing allegedly protected documents waived any protection the documents and communications may have had.")

- [Privilege Point, 5/18/16]

Court Issues a Surprising Common Interest Doctrine Decision

May 18, 2016

The common interest doctrine can sometimes allow separately represented clients to avoid the normal waiver implications of disclosing privileged communications to each other. However, courts take widely varying views of the doctrine's reach, and reject its applicability in about half of the reported cases — after the participants have already shared privileged communications, and therefore waived their respective privileges.

In IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal District, plaintiff claimed that defendant's in-house lawyer (who jointly represented the defendant and its "direct subsidiary") waived privilege protection by sending an email to several of defendant's employees — and one subsidiary employee. No. 16-cv-00146, 2016 U.S. Dist. LEXIS 42223, at *4 (W.D. La. Mar. 29, 2016). Defendant argued that such disclosure did not waive defendant's privilege, because the defendant shared a common interest with its own subsidiary. The court found the common interest doctrine inapplicable — because the subsidiary did not face any litigation threat. The court quoted plaintiff, which indicated that "it has no intention of ever making [the subsidiary] a party to this litigation." Id. at *5. Thus, the court held that defendant waived its privilege by disclosing the communication "to an employee of a non-party" — its own subsidiary. Id. Fortunately for defendant, the court also found the work product doctrine applicable, and held that disclosing the email to the subsidiary did not waive that separate protection.

This is a remarkable decision. The common interest doctrine should never have become an issue, because the in-house lawyer jointly represented the parent and its subsidiary. And the court's apparent insistence that every common interest participant must itself anticipate litigation could reward some obvious mischief — plaintiffs could threaten a number of possible defendants, but later disclaim any intent to sue one of them. All in all, cases like this highlight the risk of relying on the common interest doctrine.

- [Privilege Point, 3/8/17]

New York Decision Highlights Another Common Interest Doctrine Risk

March 8, 2017

Under the common interest doctrine, separately represented clients may sometimes avoid waiving their fragile privilege protection when they disclose protected documents to each other. Nearly every court applies the doctrine only in the context of litigation or anticipated litigation.

Most -- but not all -- courts extend the doctrine to participants who may not themselves anticipate litigation, but whose interests are closely aligned with those who do. In 59 South 4th LLC v. A-Top Insurance Brokerage, Inc., No. 650979/2015, 2017 N.Y. Misc. LEXIS 107 (N.Y. Sup. Ct. Jan. 10, 2017) (unpublished opinion), defendant insurance company claimed that plaintiff developer waived its privilege protection by disclosing protected documents to its general contractor (who was not a party). Plaintiff claimed that it shared a common legal interest with its general contractor, but the court rejected that argument -- noting that the general contractor had assigned to the plaintiff all of its claims (including any claims against the defendant insurance company). As the court explained, because the general contractor was "not capable of mounting a common claim with [plaintiff] against defendants, the common interest doctrine does not apply to any communications between [plaintiff and its general contractor], including those between counsel for said parties." Id. at *11. Inexplicably, the court did not address possible work product protection -- which normally would have survived such disclosure to a friendly third party.

One might call this narrow common interest doctrine application the "weakest link" approach, because one participant's failure to meet the anticipated litigation standard destroys the privilege for all of the participants. This is yet another reason to enter into common interest agreements very warily.

- [Privilege Point, 5/8/19]

Courts Assess The Common Interest Doctrine's Applicability To Work Product: Part I

May 8, 2019

The common interest doctrine occasionally allows separately represented clients to avoid waiving their fragile privilege protection when sharing privileged communications while cooperating in a common legal strategy. Many of those efforts fail, because a court finds that the participants' interests were primarily business-driven rather than legal, were not sufficiently aligned, etc. These frequent failures reflect the attorney-client privilege's fragility.

Unfortunately, some courts erroneously demand the same strict requirements when companies or individuals share documents protected by the much more robust work product doctrine. In Burroughs Diesel, Inc. v. Travelers Indemnity Co. of America, the court acknowledged that it "has not found a case considering Mississippi law on common-interest privilege in the realm of work product, but it has been addressed in the context of attorney-client privilege." Civ. A. No. 2:18-cv-48-KS-MTP, 2019 U.S. Dist. LEXIS 24190, at *13 (S.D. Miss. Feb. 14, 2019). The court then quickly concluded that the companies sharing work product could not meet the exacting common interest standard under Mississippi law, and "have not provided any binding authority to support [their] position" . . . "[n]o matter how expansive or overlapping [their] business interests are." Id. at *14.

Perhaps the reason the court did not find any cases considering the common interest doctrine's application "in the realm of work product" is because it does not apply there. Next week's Privilege Point will discuss a decision that correctly recognized this critical point.

- [Privilege Point, 5/15/19]

Courts Assess The Common Interest Doctrine's Applicability To Work Product: Part II

May 15, 2019

Last week's Privilege Point described a case erroneously applying the demanding common interest doctrine to companies' sharing of work product. In stark contrast to the privilege, work product protection holders waive that robust protection only by disclosing it to adversaries or conduits to adversaries. Fortunately most courts understand that friendly litigants or would-be litigants (represented or not) may thus safely share work product without waiving that hardy protection.

In Washington Coalition for Open Government v. Pierce County, No. 50718-8-II, 2019 Wash. App. LEXIS 392 (Wash. Ct. App. Feb. 20, 2019), the court properly rejected plaintiffs' attempt to apply the common interest doctrine to work product disclosures. The court explained that plaintiff "confuses waiver under the work product doctrine with waiver of attorney-client privilege." Id. at *13. The court correctly noted that plaintiff "fails to show that the County's disclosure of work product [to friendly third parties] created a significant likelihood that an adversary or potential adversary . . . would obtain these documents." Id. at *14. The court then noted that plaintiff relied on a 2012 Ninth Circuit case "to argue that a shared desire for the same outcome in a legal matter was insufficient to create a common interest agreement between the County [and friendly third parties]." Id. The court bluntly explained that the Ninth Circuit case was "inapplicable because that case involved waiver of the attorney-client privilege, not the work product doctrine." Id. at *15.

Courts' confusion about the common interest doctrine's inapplicability to work product can result in seriously flawed decisions. Ironically, most courts' limitation of the common interest doctrine's reach to participants who are in or anticipate litigation means that many such participants do not need to rely on the demanding common interest doctrine – because they are sharing work product, not fragile privileged communications.

- Blackmon v. Bracken Constr. Co., 338 F.R.D. 91, 96 n.5 (M.D. La. 2021) (holding that the work product doctrine protected a common interest agreement; “Although the Court finds the Joint Defense Agreement is protected as ordinary work product, a stronger argument from Plaintiffs may have resulted in a difference [sic] outcome. The terms of this particular Agreement are standard, it includes boilerplate language. Other courts considering similar agreements have rejected assertions of work product. See United States v. Hsia, 81 F. Supp. 2d 7, 11 n.3 (D.D.C. 2000) (‘These decisions do not convince this Court that either the existence or the terms of a JDA are privileged.’); U.S.A. v. Omid, 2020 U.S. Dist. LEXIS 214944, 2020 WL 6600172, at *2 (C.D. Cal. Aug. 12, 2020) (‘The Court has reviewed the JDA in camera. It generally recites the participating parties’ invocation of a common defense interest, sets forth general terms of their understanding and procedure, and memorializes the parties to the agreement. It does not contain any substantive legal advice or additional information that can be construed as privileged.’); Rodriguez v. Gen. Dynamics Armament & Tech. Prod., Inc., 2010 WL 1438908, at *3 (D. Haw. Apr. 7, 2010) (‘Having reviewed the JDA in camera, the Court finds that it does not contain any privileged or protected material. Instead, the contents include information disclosed by the parties during the course of litigation via motions, disclosures, documents and pleadings.’).”)

- Rodriguez v. Seabreeze Jetlev LLC, 620 F. Supp. 3d 1009, 1020 (N.D. Cal. 2022) (analyzing privilege and work product issues in a wrongful death case; concluding that the common interest doctrine protected communications among estate beneficiaries and the plaintiff eligible under maritime law to pursue the litigation, but that non-beneficiaries did not have such a common interest even though they had a financial interest in maximizing the recovery; “Thus, the common-interest doctrine preserves work-product protection over materials communicated to third parties, so long as they generally share the client's interests and are not adversaries, irrespective of whether they have representation.”; “Concerning the temporal scope of the common-interest doctrine, it applies while the joint agreement, which may be written or unwritten, is in effect.”)

- [Privilege Point, 11/30/22]

Minnesota Recognizes the Common Interest Doctrine

November 30, 2022

Under the common interest doctrine, separately represented clients can avoid the normal waiver implications of sharing privileged communications by entering into a contractual arrangement. In Energy Policy Advocates v. Ellison, 980 N.W.2d 146 (Minn. 2022), the Minnesota Supreme Court officially recognized the common interest doctrine – but left one key question unanswered, and extended the doctrine where it isn't necessary.

The Minnesota Supreme Court found that the common interest doctrine protected non-public climate change-related "communications among attorneys in public law agencies." Id. at 150. Significantly, the court stated that "the common legal interest can be in a litigated or non-litigated matter . . . [b]ut a purely commercial, political, or policy interest is insufficient for the common-interest doctrine to apply." Id. at 153. Nearly every other court has required either litigation or anticipated litigation before recognizing an effective common interest agreement. It is unclear if the Minnesota Supreme Court adopted the minority view that would apply the common interest doctrine in transactional settings – without any anticipation of litigation. The court also announced that "[w]e hold that the common interest doctrine applies to attorney work product." Id. at 155. Under universal work product waiver principles, avoiding work product waiver does not require the exacting common interest doctrine standards.

The Minnesota Supreme Court's acknowledgment of the common interest doctrine is good news. An explicit expansion to purely transactional settings would have been much more significant, but it is not clear whether the court went that far.

- HSBC Bank USA, N.A. v. Stewart Info Servs. Corp., Case No. 2:21-cv-00637-RFB-BNW, 2023 U.S. Dist. LEXIS 24703, at *12 (D. Nev. Feb. 13, 2023) (finding the common interest doctrine applicable; inexplicably also analyzing the doctrine in the work product context; finding that the doctrine also applied to shared work product; “In other words, for the common interest privilege to apply to work product, (1) the communicating parties must anticipate litigation (2) against a common adversary (3) on the same issue or issues and (4) have a strong common interest in sharing their work product. Id.”)

- **[Privilege Point, 4/19/23]**

Some Courts Understand Work Product Waiver, and Some Don't

April 19, 2023

Unlike the very fragile attorney-client privilege (which can be waived even by disclosure to family members), the more robust work product doctrine protection survives disclosure to friendly third parties.

Most courts understand this. In Pfizer Inc. v. Regor Therapeutics Inc., the court correctly understood that “[t]he work product doctrine has a different rationale [from the privilege], and therefore presents different waiver considerations.... A party therefore waives work product protection when it discloses those thought processes to its adversary, and when it discloses them to a non-adversary in a way ‘that substantially or materially increases the likelihood that adversary will obtain the information.’” Civ. No. 3:22-cv-00190 (JAM), 2023 U.S. Dist. LEXIS 18898, at *14 (D. Conn. Feb. 3, 2023) (citation omitted). But some courts don’t get it — demanding that those sharing work product satisfy the rigorous common interest doctrine prerequisites. For instance, in Cotter v. Eighth Judicial District Court, the Nevada Supreme Court insisted that “[f]or the common interest rule to apply, the ‘transferor and transferee [of work product] [must] anticipate litigation against a common adversary on the same issue or issues’ and ‘have strong common interest in sharing the fruit of the trial preparation efforts.’” 416 P.3d 228, 232 (Nev. 2018) (en banc) (second alteration in original) (citation omitted).

The very demanding common interest doctrine prerequisites to avoid waiver apply only to the fragile privilege protection — not to the work product doctrine protection. Lawyers must be prepared to explain this key distinction to courts that improperly equate the two evidentiary protections.

VIII. WAIVER

A. Intentional Express Waiver

- [Privilege Point, 2/23/11]

Court Deals With a Strange Reversal of Positions

February 23, 2011

In most situations, a client hiring a lawyer to conduct an investigation of some incident argues that the lawyer's report deserves privilege protection. However, in some situations clients have the opposite incentive.

In Lerman v. Turner, Case No. 10 C 2169, 2011 U.S. Dist. LEXIS 715 (N.D. Ill. Jan. 5, 2011), Columbia College Chicago hired a lawyer from Schiff Hardin to investigate the college's termination of a tenured professor. The college placed the Schiff Hardin lawyer's report in the professor's personnel file, which it then made available to the terminated professor. The professor argued that this waived the college's privilege, triggering a subject matter waiver that entitled her to additional privileged documents on the same subject. To avoid this disaster, the college argued that the Schiff Hardin lawyer had acted merely as an investigator and not a legal advisor, so his report did **not** deserve privilege protection. The court agreed with the professor – pointing to the lawyer's "Upjohn warnings" to an interviewee, his transmittal of the report to the college's general counsel and other factors. Id. at *19. The court also agreed with the professor that the college's waiver of the privilege triggered a subject matter waiver (although finding only a narrow scope of that waiver).

Strange situations like this do not frequently arise, but they usually reflect a client's failure to properly protect privileged communications and later attempts to avoid a subject matter waiver.

- [Privilege Point, 1/14/15]

The Strange History of Rule 502 and Selective Waivers: Part I

January 14, 2015

In nearly every situation, disclosing privileged communications to any third party renders the communications accessible to all other third parties. This general principle normally precludes what is called a "selective waiver" — disclosing privileged communications to a litigation adversary or some other third party while withholding it from everyone else. Despite some courts' and even occasional congressional efforts to allow corporations' selective waiver when disclosing privileged communications to the government or some other third party, all but a handful of courts have rejected that possibility.

After what some saw as the federal government's attempt to bully corporations into disclosing privileged communications, in 2008 the Federal Advisory Committee on Rules of Evidence proposed a new evidence rule (Rule 502) assuring that corporations disclosing protected communications to the federal government did not waive the protection "in favor of non-governmental persons or entities." See Minutes of Advisory Comm. On Evidence Rules Meeting (Apr. 12-13, 2007). But the Judicial Conference of the United States quickly abandoned that provision. The Congressional Record's legislative history makes it clear that the as-adopted Rule 502 "does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information." 154 Cong. Rec. H7817, H7818 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence). In an even more explicit statement, the rule's sponsor explained that Rule 502 "does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking information." Id. at H7818-19 (statement of Rep. Sheila Jackson-Lee).

However, the as-adopted Federal Rule of Evidence 502 indicates that federal courts "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." Fed. R. Evid. 502(d). The next two Privilege Points (Part II and Part III) will discuss what this provision means, and how some federal courts have relied on it in attempting to arrange selective waivers.

- **[Privilege Point, 1/21/15]**

The Strange History of Rule 502 and Selective Waivers: Part II

January 21, 2015

Last week's Privilege Point explained that Federal Rule of Evidence 502's legislative history rejected the notion of selective waivers, despite the black letter rule's recognition that federal courts can enter orders indicating that disclosure of privileged communications in one proceeding does not operate as a waiver in other proceedings.

Rule 502's Explanatory Note indicates that such a court order may "provide for return of documents without waiver irrespective of the care taken by the disclosing party." Advisory Committee Notes to Fed. R. Evid. 502, Explanatory Note (revised Nov. 28, 2007), subdivision (d). In essence, such an order can save the producing party from a waiver if it conducts a sloppy privilege review or no privilege review at all. But as the legislative history indicates, Rule 502 does not change the waiver analysis "resulting from [the producing party] having acquiesced in any use of otherwise privileged information." In other words, the black letter rule's provision allows the producing party to retrieve privileged documents without triggering a waiver. But allowing the producing party to acquiesce in adversaries' continued possession and use of protected documents would permit the type of "selective waiver" the Judicial Conference explicitly abandoned early in the Rule 502 drafting process.

Rule 502's non-waiver provision supports federal courts' claw-back orders. However, an increasing number of courts point to that provision as permitting selective waivers. The next Privilege Point will focus on those decisions.

- [Privilege Point, 1/28/15]

The Strange History of Rule 502 and Selective Waivers: Part III

January 28, 2015

The last two Privilege Points (Part I and Part II) discussed Federal Rule of Evidence 502, which contains a non-waiver provision intended to allow producing parties' retrieval of inadvertently or even sloppily produced privileged documents without triggering a waiver. The Rule's legislative history and Explanatory Note indicate that the provision does not allow for selective waivers.

However, several courts have entered or offered to enter Rule 502 orders allowing litigants to disclose protected communications to their adversaries — without triggering a broader waiver permitting other third parties to obtain those documents. Chevron Corp. v. Weinberg Grp., 286 F.R.D. 95, 101 (D.D.C. 2012); Radian Asset Assurance, Inc. v. Coll. of Christian Bros. of N.M., No. Civ. 09-0885 JB/DJS, 2010 U.S. Dist. LEXIS 144756, at *23-26 (D.N.M. Oct. 22, 2010). Most recently, the Eastern District of Pennsylvania took this approach. In In re Processed Egg Products Antitrust Litigation, MDL No. 2002 08-md-02002, 2014 U.S. Dist. LEXIS 160747 (E.D. Pa. Nov. 17, 2014), defendant trade associations produced privileged documents to one category of plaintiffs, but resisted efforts from other plaintiffs to obtain the same documents. The court denied the other plaintiffs' Motion to Compel, pointing to a magistrate judge's earlier Rule 502 order. That order permitted the first plaintiff category to "inspect the ostensibly privileged documents, consider their import, and use them in determining future action." Id. at *21. The court did not address Rule 502's legislative history — which indicated that traditional waiver doctrines apply when a producing party "acquiesced in the use of otherwise privileged information." Addendum to Advisory Comm. Notes, Statement of Congressional Intent Regarding R. 502 of Fed. Rules of Evid. (Sept. 14, 2009), subdivision (d).

An increasing number of courts have entered Rule 502 orders purporting to allow selective waivers. Time will tell whether other courts will honor those orders. Despite Rule 502's legislative history and Explanatory Note, courts relying on comity and their inherent power may well do so.

- [Privilege Point, 2/12/14]

Avoiding Waiver When Disclosing Facts to the Government: Part I

February 12, 2014

All but a handful of courts find that companies disclosing privileged communications or protected work product to the government waive both of those protections. Courts properly analyzing waiver rules also recognize that disclosing historical facts does not cause a waiver – because historical facts are not privileged.

In two related cases, Judge Francis of the Southern District of New York dealt with the intersection of these basic principles. In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 170559 (S.D.N.Y. Nov. 5, 2013), Weatherford retained Latham & Watkins and Davis Polk to conduct two separate corporate investigations into material weaknesses in the company's internal controls over financial reporting. The court acknowledged that both investigations deserved work product protection. However, the court also found that the company waived its privilege and fact (but not opinion) work product protection by disclosing information about the investigations to the SEC. In defining the scope of the resulting waiver, the court (1) rejected plaintiffs' argument that the waiver extended to "all materials relevant" to the investigations; (2) found that the waiver covered any material actually given to the SEC, and any oral representations company lawyers made to the SEC; and (3) held that the waiver also extended to any "underlying factual material explicitly referenced" in such material or representations. Id. at *28, *27.

Perhaps not surprisingly, the parties soon disagreed about the company's interpretation of the waiver's scope – which resulted in another opinion one month later.

- [Privilege Point, 2/19/14]

Avoiding Waiver When Disclosing Facts to the Government: Part II

February 19, 2014

Last week's Privilege Point described a Southern District of New York decision holding that a company providing information to the SEC about two internal corporate investigations waived privilege and fact work product protection for material or oral representations given to the SEC, and any "underlying factual material explicitly referenced" in such material or representations. In re Weatherford Int'l Sec. Litig., No. 11 Civ. 1646 (LAK (JCF), 2013 U.S. Dist. LEXIS 170559, at *27 (S.D.N.Y. Nov. 5, 2103).

About a month later, the court had to provide additional guidance. In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 176278, at *7 (S.D.N.Y. Dec. 16, 2013), the court first focused on "interview materials" Davis Polk lawyers used to create four PowerPoint presentations to the SEC. The court held that the company did not have to produce any interview materials "unless those specific materials are explicitly identified, cited, or quoted in information disclosed to the SEC." Id. at *10. Interestingly, the court rejected plaintiffs' argument that the company crossed that line "where the presentations assert that a particular witness made a statement." Id. at *7. The court acknowledged that such a representation to the SEC obviously implied "that an interview took place" and also provided "a strong inference that it was memorialized in some way" – but ultimately concluded that "plaintiffs have not shown that those memorializations were, themselves, explicitly referenced in communications with the SEC." Id. at *7-8.

The court then turned to the company's redactions in the interview summaries produced in response to the earlier ruling.

- **[Privilege Point, 2/26/14]**

Avoiding Waiver When Disclosing Facts to the Government: Part III

February 26, 2014

The last two Privilege Points (Part I & Part II) discussed the scope of a privilege and fact work product waiver caused by a company's presentations to the SEC about two internal corporate investigations. The Southern District of New York held that the waiver covered materials or oral representations given to the SEC, as well as "any underlying factual material explicitly referenced in" the materials or representations – but then had to provide additional guidance. In re Weatherford Int'l Sec. Litig., No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 170559, at *27 (S.D.N.Y. Nov. 5, 2013).

In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 176278, at *10 (S.D.N.Y. Dec. 16, 2013), the court addressed plaintiffs' complaint that the company had not fully produced those witness interview summaries that were "explicitly identified, cited, or quoted in information disclosed to the SEC." The company explained that it had produced "only the 'portions of summaries . . . that were . . . read or conveyed in substantial part to the SEC,'" and redacted the rest. Id. at *12 (internal citation omitted). Criticizing that as a "crabbed view of their discovery obligations," the court ordered the company to produce all factual portions of any such interview summaries -- redacting "only material that reflects an attorney's 'explicit mental impressions, conclusions, opinions or legal theories.'" Id. at *12-13 (citation omitted). In other words, the company had to produce all non-opinion portions of any witness interview summaries the company had quoted to the SEC.

It can be very difficult to reconcile two basic principles: (1) disclosure of privileged communications or work product to the government generally waives those protections; and (2) disclosing historical facts does not waive either protection. As explained in these opinions by widely-respected S.D.N.Y. Judge Francis, companies hoping to avoid a broad waiver when making disclosures to the government should limit their presentations to historical facts – without explicitly referencing, identifying, citing, or quoting any underlying material or witness interviews.

- [Privilege Point, 5/18/16]

Court Issues a Surprising Common Interest Doctrine Decision

May 18, 2016

The common interest doctrine can sometimes allow separately represented clients to avoid the normal waiver implications of disclosing privileged communications to each other. However, courts take widely varying views of the doctrine's reach, and reject its applicability in about half of the reported cases — after the participants have already shared privileged communications, and therefore waived their respective privileges.

In IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal District, plaintiff claimed that defendant's in-house lawyer (who jointly represented the defendant and its "direct subsidiary") waived privilege protection by sending an email to several of defendant's employees — and one subsidiary employee. No. 16-cv-00146, 2016 U.S. Dist. LEXIS 42223, at *4 (W.D. La. Mar. 29, 2016). Defendant argued that such disclosure did not waive defendant's privilege, because the defendant shared a common interest with its own subsidiary. The court found the common interest doctrine inapplicable — because the subsidiary did not face any litigation threat. The court quoted plaintiff, which indicated that "it has no intention of ever making [the subsidiary] a party to this litigation." Id. at *5. Thus, the court held that defendant waived its privilege by disclosing the communication "to an employee of a non-party" — its own subsidiary. Id. Fortunately for defendant, the court also found the work product doctrine applicable, and held that disclosing the email to the subsidiary did not waive that separate protection.

This is a remarkable decision. The common interest doctrine should never have become an issue, because the in-house lawyer jointly represented the parent and its subsidiary. And the court's apparent insistence that every common interest participant must itself anticipate litigation could reward some obvious mischief — plaintiffs could threaten a number of possible defendants, but later disclaim any intent to sue one of them. All in all, cases like this highlight the risk of relying on the common interest doctrine.

- [Privilege Point, 8/9/17]

Drawing the Line Between Waiver and Non-Waiver: Part I

August 9, 2017

Clients describing their past or intended future actions obviously do not waive their privilege protection – even if the clients are following their lawyers' advice. But clients voluntarily disclosing privileged communications nearly always waive their privilege protection, and can trigger a subject matter waiver. It can be easy to cross that tenuous line.

In Siras Partners LLC v. Activity Kuafu Hudson Yards LLC, defendant business executive sent an email to a third party investor with the following sentence: "I was about to write, to you this email last Friday but I decided to [wait until we all sit down with attorneys this morning. It is concluded by legal counsels that we have no choice but buying the note from UBS immediately to clean up the mess at Hudson Rise." No. 650868/2015, 2017 NY Slip Op. 31216 (U) at 3 (N.Y. Sup. Ct. June 5, 2017) (emphasis added). The court concluded that defendant's email "provided a detailed description of specific legal advice and the course of action given to him by his attorneys." Id. at 4. Contrary to most case law, the court found a subject matter waiver – and "directed [defendants] to produce any communications and documents 'pertaining to the subject matter of the email.'" Id. (citation omitted).

Defendant presumably would not have waived privilege protection or risked a subject matter waiver if his email had not included the three words "by legal counsels." The fact that defendant met with his lawyers did not deserve privilege protection, and his intended course of action following the meeting likewise did not deserve privilege protection. Clients can describe their intended actions, but should never attribute those to lawyers' advice. Next week's Privilege Point will discuss a similar decision from another court about two weeks later. The Privilege Point after that will discuss the subject matter waiver implications of the decisions described here and in the next Privilege Point.

- [Privilege Point, 8/16/17]

Drawing the Line Between Waiver and Non-Waiver: Part II

August 16, 2017

Last week's Privilege Point described a New York court's predictable waiver conclusion based on a client's description of his intended future conduct -- explicitly attributed to lawyers' advice. Siras Partners LLC v. Activity Kuafu Hudson Yards LLC, No. 650868/2015, 2017 NY Slip Op. 31216(U) (N.Y. Sup. Ct. June 5, 2017). Another court dealt with a similar situation about two weeks later.

In Smith v. Ergo Solutions, LLC, Civ. A. No. 14-382 (JDB), 2017 U.S. Dist. LEXIS 94337 (D.D.C. June 20, 2017), Title VII plaintiffs sought to discover an outside lawyer's report produced after that lawyer investigated an earlier sexual harassment claim against defendant's managing partner. The court found that the report deserved privilege protection, but that the managing partner waived that protection in deposition testimony describing the report's recommendations and his compliance with them. As the court put it, "[b]y discussing [the investigating lawyer's] specific recommendations -- that [the managing partner] stay away from [the company] for six months, pay a \$10,000 fine, and see a therapist -- [he] revealed [the lawyer's] key conclusions and thus disclosed the 'gist' of the report." Id. at *11-12. Based on this waiver, the court ordered the report produced.

Most courts are more forgiving when considering the waiver implications of fast-paced deposition testimony. But the managing partner defendant presumably could have avoided a waiver risk by declining to testify about the report's recommendations -- and instead simply describing what he did after the company received the report. Corporations' lawyers should educate their clients' executives and employees about the dispositive distinction between (1) describing the companies' or their own past actions or future intended actions (without attributing them to lawyers' advice), and (2) disclosing privileged communications' content. The former does not waive anything, while the latter waives privilege protection and may trigger a subject matter waiver. Next week's Privilege Point discusses subject matter waiver issues.

- [Privilege Point, 8/23/17]

Drawing the Line Between Waiver and Non-Waiver: Part III

August 23, 2017

The last two Privilege Points described decisions in which courts found a subject matter waiver when (1) a business executive described his future intended conduct, explicitly attributing it to his lawyers' advice (Siras Partners LLC v. Activity Kuafu Hudson Yards LLC, No. 650868/2015, 2017 NY Slip Op. 31216(U) (N.Y. Sup. Ct. June 5, 2017)); and (2) a business executive described his past conduct, explicitly attributing it to a lawyer's earlier sexual harassment investigation and report (Smith v. Ergo Solutions, LLC, Civ. A. No. 14-382 (JDB), 2017 U.S. Dist. LEXIS 94337 (D.D.C. June 20, 2017)). Both courts' subject matter waiver conclusions seem out of the mainstream.

In Siras Partners, the executive's disclosure was in a non-judicial setting. Most courts hold that non-judicial disclosures do not trigger subject matter waivers. In re von Bulow, 828 F.2d 94, 102 (2d Cir. 1987) ("the extrajudicial disclosure of an attorney-client communication – one not subsequently used by the client in a judicial proceeding to his adversary's prejudice – does not waive the privilege as to the undisclosed portions of the communication"). Federal Rule of Evidence 502 adopts the same narrow approach. In Smith, the executive testified in a deposition about his lawyer's advice. Many if not most courts hold that such deposition testimony does not trigger a subject matter waiver, as long as the deponent disclaims any intent to later rely on the testimony to gain some litigation advantage. The legislative history of Rule 502 explains that subject matter waivers are "limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner" to "mislead the fact finder to the disadvantage of the other party." Fed. R. Evid. 502 advisory committee's note, subdiv. (a); 154 Cong. Rec. H7817, H7819 (daily ed. Sept. 8, 2008).

Corporations and their executives should not count on courts properly applying the subject matter waiver doctrine. Instead, they should seek to avoid ever waiving privilege protection, thus eliminating the risk that courts will stretch the waiver too far.

- In re Application of Financialright GmbH, No. 17-mc-105 (DAB), 2017 U.S. Dist. LEXIS 107778, at *4-5, *15, *15-16, *16, *16-17 (S.D.N.Y. June 23, 2017) (addressing plaintiffs' efforts to discover documents related to Jones Day's investigation into the Volkswagen "emissions scandal"; finding that attorney-client privilege and the work product doctrine protected documents related to the investigation, and that Jones Day did not waive either protection by disclosing protected documents to the government, pursuant to an agreement of which DOJ agreed to keep the documents confidential except if it decided in its "sole discretion" that it could disclose the documents to discharge its duties; "One issue here is whether Volkswagen waived any privilege covering the documents in question. Jones Day says that it 'has never submitted its interview notes to VW or to the DoJ, or shared the content with the public, and it has not even commented publicly on its representation of [Volkswagen].' In the course of cooperating with the DOJ criminal investigation, Jones Day entered into an agreement with the DOJ 'to preserve VW's claims of attorney-client privilege and work product protection for information disclosed to DOJ in the course of that cooperation.' The agreement states that 'VW, through its counsel Jones Day, intends to provide DOJ oral briefings regarding its investigation, and may furnish additional documents or other information to DOJ in connection with such oral briefings.' The agreement further says that 'to the extent any [privileged materials] are provided to DOJ pursuant to this agreement, VW does not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege.' (Id.) Under the agreement, DOJ was to keep any privileged materials confidential 'except to the extent that [it] determine[d] in its sole discretion that disclosure would be in furtherance of [its] discharge of its duties and responsibilities or is otherwise required by law.' Applicants point to a press release which states that the Volkswagen 'Supervisory Board directed the law firm Jones Day to share all findings of its independent investigation of the diesel matter with the DOJ. The Statement of Facts draws upon Day's extensive work, as well as on evidence developed by the DOJ.'" (alterations in original) (emphases added) (internal citations omitted); "The Second Circuit, however, has declined to adopt a 'rigid rule' in 'situations in which [a government agency] and the disclosing party have entered into an explicit agreement that the [agency] will maintain the confidentiality of the disclosed materials.' Courts in this Circuit have varied in their approaches to such a situation and have held that waiver should be determined on a case-by-case basis." (alterations in original) (emphasis added); "Jones Day, in assisting Volkswagen's cooperation with authorities, entered into a non-waiver agreement regarding privileged documents. The agreement states that while Jones Day will provide oral briefings and additional documents in connection with its VW investigation, 'to the extent any [privileged

materials] are provided to DOJ pursuant to this agreement, VW does not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege." (alteration in original); "The Court here is swayed by the cases holding that disclosures made pursuant to non-waiver agreements do not waive the protections of the work-product doctrine or attorney-client privilege, recognizing, among other factors the 'strong public interest in encouraging disclosure and cooperation with law enforcement agencies; [and that] violating a cooperating party's confidentiality expectations jeopardizes this public interest." (alteration in original) (emphasis added); "Applicants point to the provision stating that DOJ was to keep any privileged materials confidential 'except to the extent that [it] determine[d] in its sole discretion that disclosure would be in furtherance of [its] discretion of its duties and responsibilities or is otherwise required by law.' That the DOJ has such discretion does not change the Court's determination. While the agreement gives DOJ discretion, that discretion is cabined by the requirement that any disclosure would be in furtherance of it duties or otherwise required by law. Furthermore, courts making a selective-waiver determination have still held that there was no waiver when nearly identical discretionary provisions were at issue. E.g., In re Symbol Techs., 2016 U.S. Dist. LEXIS 139200, 2016 WL 8377036, at *14." (alterations in original) (emphases added) (internal citation omitted)).

- [Privilege Point, 12/27/17]

Trump-Related Circuit Court Decision Includes Troubling Waiver Analysis

December 27, 2017

Because historical facts do not deserve privilege protection, disclosing those facts does not trigger a privilege waiver. Thus, disclosing historical facts to the government should not waive the disclosing client's privilege protection for communications with her lawyer about those facts.

But some decisions take a different, troubling, approach. In In re Grand Jury Investigation, Misc. A. No. 17-2336 (BAH), 2017 U.S. Dist. LEXIS 186420 (D.D.C. Oct. 2, 2017), the court ordered former Trump campaign manager Paul Manafort's lawyer to testify before a grand jury. In addition to applying the crime-fraud exception, the court held that the lawyer waived her clients' privilege protection by making representations about historical facts in submissions to the DOJ. The court noted that the lawyer's submissions "made specific factual representations to DOJ that are unlikely to have originated from sources other than [Manafort and a colleague], and, in large part, were explicitly attributed to one or both [of their] recollections." Id. at *32. The court relied on this unsurprising circumstance in holding that the representations "impliedly waived the privilege as to [the clients'] communications with [their lawyer] to the extent that these communications related to the . . . Submissions' contents." Id.

A lawyer's disclosure of historical facts should not strip away privilege protection from the lawyer's communications with her client about those facts.

- [Privilege Point, 1/3/18]

What Happens to a Corporation's Privilege When a Former Employee Goes "Rogue"?

January 3, 2018

Corporations must sometimes deal with the privilege implications of former employees turning into adversaries. If those employees had access to the company's privileged communications, what happens if they take privileged documents with them or blurt out privileged communications during depositions?

In Blake v. Batmasian, plaintiffs claimed that defendant corporation lost its privilege protection when its now-adverse former CFO/Controller Baker (1) "misappropriated hundreds of thousands of pages of documents" when he left, and (2) disclosed privileged communications when the company's lawyer deposed him. Case No. 15-cv-81222-MARRA/MATTHEWMAN, 2017 U.S. Dist. LEXIS 166208, at *24 (S.D. Fla. Oct. 5, 2017). The court rejected plaintiffs' contentions, noting that (1) the company "sent demand letters to Baker demanding return of the documents," and later sued him for "misappropriation of confidential documents" (id. at *9-10); and (2) the company's lawyer indicated at the deposition that he did not want Baker to disclose any privileged communications, and also sought to file the transcript under seal. Id. at *24-25, *26-27.

It may seem counterintuitive, but companies do not lose their privilege just because privileged communications become widely known - only a voluntary disclosure waives the privilege. In dealing with rogue former (or even current) employees, companies generally will not lose their privilege protection if they take reasonable steps and rely on available judicial remedies to retrieve any purloined privileged documents, and to stop rogue employees from disclosing or at least widely disseminating privileged communications.

- U.S. SEC v. Herrera, 324 F.R.D. 258, 265 (S.D. Fla. 2017) (in a 12/5/17 opinion, analyzing the work product waiver impact of Morgan Lewis's PowerPoint presentation and "oral downloads" to the SEC of the results of its investigation into inventory accounting errors in a client's Brazilian subsidiary; concluding that Morgan Lewis's oral download to the SEC of witness interview content waived work product protection, and triggered a subject matter waiver as to those witnesses; also concluding that Morgan Lewis's PowerPoint presentation to the SEC only disclosed historical facts, and therefore did not deserve work product protection – so its disclosure to the government did not trigger a waiver; "Defendants contend that ML made other oral disclosures of work-product information to the SEC, above and beyond the oral downloads of the 12 interviews. The Undersigned cannot reach any conclusions about further disclosures unless and until ML provides additional clarification about what was disclosed. Defendants contend that the ML attorneys took notes of the discussions they had with the SEC and perhaps with the Department of Justice. Defendants request that the Undersigned review in camera ML's attorneys' notes of an October 29, 2013 meeting. ML does not oppose this request. . . . But the Undersigned is unsure about whether ML attorneys met with the SEC and/or the Department of Justice on days other than [sic] October 29, 2013." (emphasis added); "Therefore, ML shall, within seven days from this Order, file under seal a copy of all attorney notes discussing or reflecting what information was disclosed to the SEC or the Department of Justice during meetings (or otherwise)." (emphasis added)).

- United States v. Colliot, Cause No. AU-16-CA-01281-SS, 2017 U.S. Dist. LEXIS 203664, at *4-5, *5, *5-6 (W.D. Tex. Dec. 11, 2017) (holding that the IRS did not waive the government's privilege protection by using language and a communication to a taxpayer that was taken from a privileged internal part of a document – because the agent did not quote the document and did not attribute the language to a lawyer; "Colliot contends IRS Agent Anton Pukhalenko effected a broad waiver of attorney-client privilege by inserting language from IRS counsel memos into several IRS forms provided to Colliot. The IRS form at issue -- Form 886A -- is sometimes provided to taxpayers in order to explain actions taken or penalties imposed by the IRS. In connection with assessments of penalties against Colliot for failure to report his financial interests in foreign bank accounts, the IRS provided several such forms to explain why the IRS had imposed the penalties. In addition to discussing the factual bases for the imposition of penalties, the forms also contain a 'Law & Analysis' section which lays out the legal basis for the penalties."; "In filling out the 'Law and Analysis' portion of Form 886A, Agent Pukhalenko sometimes borrowed language from communications with IRS counsel in order to explain the assessment of tax penalties imposed upon Colliot. . . . Agent Pukhalenko did not present the language as having come from IRS counsel, but instead presented it as his own attempt to set forth the legal bases underlying the assessment of the penalties. Colliot contends this use of the IRS counsel memos constitutes a 'voluntary and substantial disclosure' which 'completely waives attorney-client privilege' as to all of the documents identified in the Government's privilege log." (emphasis added); "The Court finds Colliot has not met his burden of demonstrating waiver has occurred. For one, though Colliot claims it is 'axiomatic' that restatements of an attorney's legal advice or legal conclusions waive attorney-client privilege, Colliot has pointed to no factually analogous precedent within this Circuit which might justify his position. . . . Here, Agent Pukhalenko did not disclose the actual attorney communications to Colliot, nor did he indicate that the borrowed language had come from an IRS attorney. The Court finds Agent Pukhalenko did not waive privilege as to the IRS counsel memos when he used language borrowed from those memos to convey the IRS's legal conclusions." (emphasis added)).

- [Privilege Point, 7/4/18]

Should Litigants Count on Private Non-Waiver Agreements?

July 4, 2018

When negotiating their respective privilege claims, litigants sometimes face the temptation to agree among themselves that producing some arguably protected withheld documents will not trigger a subject matter waiver requiring them to produce additional withheld documents. Is that wise?

Courts generally honor such private agreements. In Butler v. Mueller Cooper Tube Co., the court noted that defendant had "produced over 800 pages of . . . claims file[s]" – "after counsel agreed that such disclosure would not waive all claims of privilege." Civ. A. No. 1:17CV-19-DAS, 2018 U.S. Dist. LEXIS 61424, at *2 (N.D. Miss. Apr. 11, 2018). The court rejected plaintiffs' later waiver argument, explaining that "[w]hile selective production of documents or privilege information can result in a waiver of the privilege, the court sees no compelling reason to excuse the plaintiffs from the agreement they made with defense counsel." Id. at *6 (citation omitted).

In one-off commercial litigation where there are no other adversaries or would-be adversaries, such private non-waiver agreements might make sense. But in pattern litigation or other situations where there are existing or possible future adversaries, such private agreements are too risky. They only bind signatories, and do not prevent third parties from claiming a subject matter waiver. In those circumstances, the only safe bet is to incorporate such agreements into court orders.

- [Privilege Point, 10/2/19]

Can A Trademark Case Defendant Avoid Privilege Waiver After Its Executive Testified That Its Lawyer "Cleared The Name For Us?"

October 2, 2019

Corporations can expressly waive their privilege when responsible loyal employees disclose privileged communications, and they can impliedly waive their privilege by relying on a lawyer's advice to gain some advantage in litigation. When either one of those occurs, what can a corporation do to avoid the consequences?

In Airhawk International, LLC v. Ontel Products Corp., defendant's Vice President of Product Strategy and Business Development testified at a trademark case deposition that "legal counsel 'clear[ed] the name for us.'" Case No. 18-cv-0073-MMA-AGS, 2019 U.S. Dist. LEXIS 122675, at *2 (S.D. Cal. July 23, 2019) (alteration in original). The court found that the deposition testimony could result in an implied waiver and "may also support a claim for express waiver." Id. at *7. But the court then assured defendant that it "may preserve the confidentiality of its communications by abandoning the basis for the implied waiver." Id. at *9. If so, defendant would have to "file a stipulation that: (1) it will not use attorney-client communications in any way before the Court . . . and (2) it will ensure that its witnesses are instructed about this stipulation, to ensure that they do not inadvertently disclose such attorney-client communications." Id.

Corporations should welcome the chance some courts give them to avoid the consequences of obvious express waivers or apparent implied waivers.

- [Privilege Point, 1/29/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part III**

January 29, 2020

The last two Privilege Points described four favorable analyses from a Southern District of New York decision (Judge Gorenstein) assessing defendant Barnes & Noble's privilege assertions covering its investigation and later firing of its CEO for sexual harassment. Parneros v. Barnes & Noble, Inc., 332 F.R.D. 482 (S.D.N.Y. 2019).

Fifth, the court addressed fired CEO Parneros's argument that Barnes & Noble waived its privilege by eliciting at his deposition extensive testimony about a meeting at which Parneros "apologized for his conduct" to the company's Senior VP, and another meeting attended by Barnes & Noble's Founder and Chairman. Id. at 489. The court rejected Parneros's argument – noting that the company had not asserted privilege for either one of the meetings, but rather "taken the position that certain notes taken at the apology meeting as part of the investigation overseen by [General Counsel] Feuer are privileged." Id. at 496. This meant that the deposition testimony about those non-privileged meetings did not waive any privilege. But the privilege still protected the "notes taken by an attorney or his designee at a non-privileged meeting . . . as long as the notes were taken for the purpose of allowing counsel to give legal advice." Id. As with other interview notes prepared by General Counsel Feuer, the court did not address work product protection – which would seem to be a more appropriate protection. Sixth, the court addressed fired CEO Parneros's argument that the privilege did not protect drafts of press releases that were sent to General Counsel Feuer and/or outside counsel at Paul, Weiss. The court rejected Parneros's argument, pointing to Feuer's declaration that the company's Senior VP of Corporate Communications of Public Affairs and VP of Investor Relations sent draft press releases to him and to Paul Weiss "for his 'review and legal advice' and were sent to 'outside counsel concerning the wording of the announcement for their review and legal advice.'" Id. at 498.

The next Privilege Point will describe other favorable language from this significant case.

- [Privilege Point, 2/5/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part IV**

February 5, 2020

The last three Privilege Points described six favorable analyses from a Southern District of New York decision (Judge Gorenstein) assessing defendant Barnes & Noble's privilege assertions covering its investigation and later firing of its CEO for sexual harassment. Parneros v. Barnes & Noble, Inc., 332 F.R.D. 482 (S.D.N.Y. 2019).

Seventh, the court addressed fired CEO Parneros's argument that Barnes & Noble waived its privilege protection for communications relating to its press release when announcing Parneros's firing – because the press release said Parneros's termination "was taken by the Company's Board of Directors who were advised by the law firm Paul, Weiss." Id. at 500. The court rejected Parneros's argument, noting that "[b]ecause the . . . press release does not disclose the substance of counsel's advice, but rather only discloses the fact of counsel's consultation, there was no waiver based on the inclusion of the statement in the press release." Id. Eighth, the court addressed fired CEO Parneros's argument that Barnes & Noble triggered an "at issue" waiver by including in its Answer a contention that Barnes & Noble's termination decision was "clearly made in good faith." Id. at 501-02. The court rejected Parneros's argument – explaining that "the mere use of the term 'good faith' in an Answer does not reflect reliance on a 'good faith' defense," and emphasizing that "Barnes & Noble has disclaimed any intention to assert a 'good faith' defense." Id. at 502.

This extensive well-reasoned opinion by such a well-respected judge in such a high-profile case provides favorable holdings and practical guidance for corporations seeking to maximize their investigation-related privilege protection.

- [Privilege Point, 8/26/20]

Opinion Highlights the Risk of Rogue Constituents' Privilege Waiver

August 26, 2020

Many courts have dealt with corporate and other organizational entities' constituents' ability to waive those entities' privilege protection. In the corporate context, most courts hold that any constituent (even middle management, etc.) trusted to handle privileged communications can waive the corporation's privilege -- if she acted in the corporation's interest rather than adverse to its interest.

In Gibson-Carter v. Rape Crisis Center, No. 4:19-cv-122, 2020 U.S. Dist. LEXIS 94424 (S.D. Ga. May 29, 2020), defendant RCC argued that its board member was not authorized to waive RCC's privilege by disclosing an investigation report to the plaintiff suing the RCC. The court rejected RCC's argument that a single Board member could not waive RCC's privilege -- pointing to a Georgia statute indicating that Georgia non-profit corporations' board members have authority to act on those corporations' behalf. The court bluntly stated that "the Georgia statute lack[s] any restrictions on an individual board member's authority to act unilaterally." Id. at *36.

This conclusion rested on statutory authority. But there is a troubling possibility that a rogue member of a corporate board, a board of supervisors, etc. could unilaterally waive those entities' privilege protection. Courts probably would find no waiver if such individuals selfishly acted in their own personal interest (like a disloyal employee), but might conclude otherwise if those individuals were acting in what they thought was the entities' interest or even the public interest. That does not make much sense.

- [Privilege Point, 12/8/21]

Lawyers Beware: Seeking Hard-Copy Printouts of Privileged Emails Can Forfeit the Privilege

December 8, 2021

Many of us (especially the older generation) like to deal with hard-copy printouts of electronic communications. But inattention to the printout process can have disastrous results.

In Fourth Dimension Software v. Der Touristik Deutschland GMBh, Case No. 19-cv-05561-CRB (AGT), 2021 U.S. Dist. LEXIS 174728 (N.D. Cal. Sept. 14, 2021), a company's president received a privileged email from the company's former in-house lawyer. Apparently desiring a hard copy, the president forwarded the email to a Berlin hotel front desk with the subject line "Please print one copy. I am waiting at the front desk. Thanks." The court held that the president waived privilege protection – concluding that he failed to explain why "printing was necessary at all to transmit the information, especially considering [he] was already in possession of [the lawyer's] email." Id. at *8-9. In rejecting the company's argument that the president's disclosure to the hotel front desk was "reasonably necessary," the court noted: (1) the president sent the privileged email to "a generic email address that any number of hotel staff presumably had access to"; and (2) "the forwarded email contains no confidentiality warnings or other language alerting the hotel desk recipient(s) not to read it or share its contents and to delete it after printing"; and (3) "it is unclear whether [the president] was even a guest at the hotel." Id. at *9.

Although this was an extreme example, corporate lawyers and their clients should be wary of arguably similar scenarios. For instance, it would be wise to consider the waiver risk of sending privileged corporate communications (such as board of directors reports) to an outside director's regular employer.

- United States ex rel. Mitchell v. CIT Bank, N.A., Civ. A. No. 4:14-CV-00833, 2021 U.S. Dist. LEXIS 185751, at *7-8, *8 (E.D. Tex. Sept. 28, 2021) (finding inapplicable a statute allowing institutions to disclose privileged communications to bank regulators without waiving their privilege; “The dispute over communications and documents between CIT and Navigant primarily concerns the applicability of 12 U.S.C. § 1828(x), an anti-waiver statute in the banking regulation context. Under § 1828(x), a bank's submission of any information to ‘any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such Bureau, agency, supervisor, or authority shall not be construed as waiving destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or state law as to any person or entity other than such Bureau, agency, supervisor, or authority.’ 12 U.S.C. § 1828(x).”; “CIT argues that the anti-waiver statute embodied by 12 U.S.C. § 1828(x) protects the communications and documents it shared with Navigant from disclosure. Mitchell contends that the statute does not apply, and CIT waived any claim of privilege by sharing information with Navigant, an independent third-party. Accordingly, the court first evaluates whether § 1828(x) protects the subject communications from waiver.” (internal citations omitted); “As a starting point, CIT's sharing of information with Navigant is not protected under the plain terms of the statute because Navigant is not a ‘Federal banking agency, State Bank Supervisor, or foreign banking authority.’ See 12 U.S.C. § 1828(x).”)
- Mauer v. Union Pac. R.R., No. 8:19CV410, 2021 U.S. Dist. LEXIS 204741, at *7 (D. Neb. Oct. 25, 2021) (holding that disclosing the factual portion of a document while withholding a privileged portion does not trigger a waiver requiring production of the redacted privileged portion; “And whether at a deposition or otherwise, disclosing a document redacted to exclude privileged and work product information while disclosing the fact information within that document does not waive confidentiality as to the redacted information.”)

- United States v. Coburn, Civ. No. 2:19-cr-00120 (KM), 2022 U.S. Dist. LEXIS 21429, at *18-19, *19, *19-20 (D.N.J. Feb. 1, 2022) (analyzing privilege and work product issues involving defendant's third party subpoena on another company (Cognizant); "To begin with, Cognizant may not now claim privilege over materials that it furnished to the Government. These disclosures, referred to as the 'DLA Downloads' in the parties' briefing, consist of 'detailed accounts of 42 interviews of 19 Cognizant employees, including Defendants.' (Mot. To Compel Cognizant, Cat. A at 68-69.) By disclosing this information to the Government while under threat of prosecution, Cognizant handed these materials to a potential adversary and destroyed any confidentiality they may have had, undermining the purpose of both attorney-client and work-product privileges. See Chevron, 633 F.3d at 165 (holding that 'purposeful disclosure of [] purportedly privileged material to a third-party' may waive attorney-client and work product privileges 'if that disclosure undermines the purpose behind each privilege')." (alteration in original); The next question concerns the breadth of the waiver. Cognizant's voluntary turnover of materials or revelation of the fruits of its investigation to the DOJ also entailed a waiver of the privilege as to communications that 'concern the same subject matter' and 'ought in fairness be considered together' with the actual disclosures to DOJ. Shire LLC v. Amneal Pharms., LLC, No. 2:11-CV-03781, 2014 [WL 1509238], at *6 (D.N.J. Jan. 10, 2014) (citing Fed. R. Evid. 502(a))."; "First, to the extent that summaries of interviews were conveyed to the government, whether orally or in writing, the privilege is waived as to all memoranda, notes, summaries, or other records of the interviews themselves. Second, to the extent the summaries directly conveyed the contents of documents or communications, those underlying documents or communications themselves are within the scope of the waiver. Third, the waiver extends to documents and communications that were reviewed and formed any part of the basis of any presentation, oral or written, to the DOJ in connection with this investigation." (footnote omitted))

- Sweet v. City of Mesa, No. CV-17-001520-PHX-GMS, 2022 U.S. Dist. LEXIS 19848, at *7-8, *8 (D. Ariz. Feb. 3, 2022) (holding that plaintiff waived her privilege protection but not her work product protection by disclosing communications to her mother, who assisted plaintiff in her lawsuit; “Although Marcie was involved with the preparation of her daughter’s case, her involvement did not create an agency relationship for purposes of the federal law of attorney-client privilege. The emails establish that Marcie was deeply concerned about her daughter’s legal prospects, that she advised Laney to retain her current counsel, and that she held herself out on occasion as having been authorized by Laney to speak on her behalf. However, they do not establish that Marcie provided the kind of professional services she would ordinarily be paid to provide, nor that her services were necessary to assist Laney’s attorneys in providing their legal advice—facts central to the Dempsey court’s determination that the plaintiff’s parents were his agents. Therefore, even if Marcie’s involvement in her daughter’s case was substantial, it does not rise to the level of creating an agency relationship between her and Laney.” (footnotes omitted); “Having determined that Marcie is not Laney’s agent, her receipt of email communications between Laney and her attorneys expressly waives the attorney-client privilege. Sanmina, 968 F.3d at 1116. That Laney or her attorneys may not have subjectively intended to waive the privilege is immaterial. See Bittaker, 331 F.3d at 719 n.4. Consequently, the attorney-client privilege has been waived as to all emails marked with Dispute Codes 1, 2, and 3.”)

- Appel v. Wolf, Case No. 18-cv-814-L-BGS, 2022 U.S. Dist. LEXIS 114002, at *29-30, *30 (S.D. Cal. June 27, 2022) (finding that a former employee properly refused to answer questions about privileged communications while at his former employer, because the former employee was not authorized to waive the company's privilege; "[N]one of these address whether a former corporate officer like Plaintiff could be compelled to answer questions implicating the corporation's attorney-client privilege when he lacks authority to waive the privilege on behalf of the corporation. This is not a situation where the Court is determining if a former officer could waive privilege on behalf of the corporation or if the former corporate officer can assert it 'over the wishes of current managers.' See Commodity Futures Trading Comm'n, 471 U.S. at 349 ('Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.') (emphasis added). Here, there is no dispute Plaintiff cannot waive the privilege for Millennium, and the record before the Court reflects Plaintiff is not asserting privilege over the wishes of anyone. He is simply not waiving the privilege and not answering questions implicating his former employer's privilege."; "Defendant is effectively saying that because Plaintiff is no longer an officer, he cannot assert the privilege to protect Millennium's privileged communications. However, as Plaintiff explains, if Defendant's 'position were adopted, then the attorney-client privilege owed to a corporation [could] easily be circumvented by deposing the corporation's former directors and officers in their individual capacities.' Additionally, as a practical matter Plaintiff would effectively be disclosing Millennium's privileged communications despite Plaintiff lacking the ability to waive privilege. The Court is not persuaded, based on Defendant's briefing and cases cited, that the attorney-client privilege should be so easily extinguished. Plaintiff's assertion of the privilege was proper under the circumstances." (alteration in original) (internal citation omitted))

- [Privilege Point, 8/10/22]

If a Court Finds Attorney-Client Privilege Waiver, Must It Also Consider Work Product Waiver?

August 10, 2022

The attorney-client privilege provides absolute protection, but is very fragile. Work product doctrine protection does not provide absolute protection (fact work product protection can be overcome), but is robust. Of course, documents and communications can be protected by both protections, one but not the other, or neither. Courts normally must assess each asserted protection's applicability, and (if the circumstances require it) each protection's separate waiver implications.

In Sure Fit Home Products, LLC v. Maytex Mills, Inc., No. 21 Civ. 2169 (LGS) (GWG), 2022 U.S. Dist. LEXIS 90833, at *1 (S.D.N.Y. May 20, 2022) (as corrected July 24, 2022), the Southern District of New York (Judge Gorenstein) explained that "[b]ecause we conclude that plaintiffs waived any claim to privilege over these documents . . . we need not reach the question of whether the exhibits would otherwise enjoy work product protection." The court's conclusion made sense in this case, because plaintiffs "produced [the protected documents] to their adversaries in two separate matters." Id. at *5. But different circumstances would have required a different analysis. If plaintiffs had disclosed the documents to friendly third parties rather than to adversaries, that disclosure might have waived the fragile privilege protection but not the more robust work product protection. In that situation, the court must assess possible work product protection, which might have survived the disclosure.

Lawyers should always consider both privilege and work product protection when analyzing withholding documents during discovery and when assessing waiver implications.

- Gammons v. Adroit Med. Sys., Inc., No. 3:21-cv-173-TAV-DCP, 2023 U.S. Dist. LEXIS 43560, at *13 (E.D. Tenn. Mar. 15, 2023) (finding that disclosing privileged text messages to a spouse does not waive the attorney-client privilege; “Despite the above, and without finding whether there was a waiver of the attorney-client privilege, the Court finds the Text Messages are protected. As several other circuits have held, ‘a disclosure of documents to one’s spouse does not waive the attorney-client privilege.’”)

- **[Privilege Point, 4/26/23]**

Waiver Implications of Disclosing Work Product to the Government

April 26, 2023

Last week's Privilege Point described a court's refreshingly correct acknowledgment that disclosing work product to friendly third parties does not waive that robust protection — in contrast to the more fragile privilege protection.

In the same opinion, the court in Pfizer, Inc. v. Regor Therapeutics Inc., helpfully explained three possible waiver implications of disclosing protected work product to the government: (1) such disclosure would not waive work product protection if “the private party and the government agency were allied in an active litigation”; (2) such disclosure would not waive work product protection if it was compelled, but could waive work product protection if the disclosure was only impliedly “coerc[ed]” (such as disclosure intended to “forestall enforcement proceedings”); (3) such disclosure would waive work product protection in “cases in which the private party voluntarily discloses its work product to a government agency ‘to incite it to attack the informant’s adversary.’” Civ. No. 3:22-cv-00190 (JAM), 2023 U.S. Dist. LEXIS 18898, at *16-17 (D. Conn. Feb. 3, 2023) (citations omitted).

The government is almost always an adversary, so lawyers must carefully assess the waiver impact of disclosing work product to government authorities — relying on such helpful analyses from courts that get it.

- [Privilege Point, 5/31/23]

Another Difference Between the Attorney-Client Privilege and the Work Product Doctrine

May 31, 2023

The ancient attorney-client privilege protection provides absolute but fragile immunity from discovery. The relatively new litigation-related work product doctrine provides limited but robust immunity from discovery. Lawyers should always be on the lookout for both types of protection.

Another more subtle distinction plays a role in litigation over these protections. In Luckenbach Texas, Inc. v. Skloss, No. 1:21-CV-00871-RP, 2023 U.S. Dist. LEXIS 36506, at *6-7 (W.D. Tex. Mar. 6, 2023), the court recognized that “[t]he burden of proving waiver of the work product privilege falls on the party asserting waiver” (quoting an earlier case). Four days later, the court in Boines v. JARS Cannabis, LLC, articulated the universal rule that “[t]he burden of establishing the attorney-client privilege rests with the party asserting it” — “unless the protection is waived.” Case No. 2:21-cv-13010, 2023 U.S. Dist. LEXIS 41070, at *5 (E.D. Mich. Mar. 10, 2023) (citations omitted).

Most courts similarly: (1) require a litigant challenging an adversary’s work product claim to prove waiver while (2) requiring a litigant asserting attorney-client privilege protection to prove **lack** of waiver. This conceptual distinction could have practical consequences in discovery disputes.

- **[Privilege Point, 7/12/23]**

Privilege Implications of Spousal Communications

July 12, 2023

Most courts hold that the incredibly fragile attorney-client privilege can be waived by disclosure even to family members (such as Martha Stewart's disclosure to her own daughter). The separate "spousal privilege" recognized in many states complicates the analysis with those family members.

In IsoNova Technologies LLC v. Rettig, the court noted that "[s]ome courts have . . . held that the presence of a spouse on an attorney-client communication destroys the attorney-client privilege unless the spouse's presence was necessary for the lawyer to effectuate the representation" (which is the standard for all client agents and normally fails). Case No. 20-CV-71-CJW-KEM, 2023 U.S. Dist. LEXIS 94454, at *11 (N.D. Iowa May 31, 2023). The court referred to Iowa's spousal privilege statute as taking the more generous contrary view. Noting that the Iowa statute protected the defendant's disclosure of privileged communication to his wife, the court explained that "[i]t does not make sense then that by including his spouse from the start, the emails lose their privileged nature." Id.

Lawyers should still warn their married clients to be very careful — states recognizing a spousal privilege may place that protection in different places (statutes, rule, etc.) and take widely varying approaches (applying just in criminal cases, etc.). The good news is that work product protection almost always survives disclosure to friendly third parties like a spouse.

- [Privilege Point, 7/26/23]

Corporations May Risk Waiving Privilege Protection When Communicating With Their Own Board Members

July 26, 2023

It seems obvious that corporations do not waive privilege protection by disclosing privileged communications to their own board members. But what about outside board members receiving such communications where they work or live?

In O'Neill v. City of Springfield, Civ. No. 30036-MGM, 2023 U.S. Dist. LEXIS 82572 (D. Mass. May 11, 2023), family members sued the City after their sister died in custody. Although the City and the police union shared a common interest in resisting plaintiff's claims, the court understandably held that their common interest agreement did not apply to negotiating the terms of a disciplinary memorandum criticizing police conduct — so the City and the union were adversaries in that context. The police union's president used his City email address when communicating with the union's lawyer — which the court found had waived the union's privilege and required those communications' production.

The court distinguished the case from the decision in United States ex rel. Wollman v. Massachusetts General Hospital, Inc., 475 F. Supp. 3d 45 (D. Mass. 2020), in which Mass. General's board chair received privileged emails at her employer Simmons College email address. That decision declined to find a waiver, pointing to the communications' privilege label, lack of any evidence that "the report had been inappropriately disseminated at Simmons," and Mass. General's quick request that Simmons respond to a subpoena seeking such documents by including those communications on its privilege log. O'Neill, 2023 U.S. Dist. LEXIS 82572, at *21. The police union's president and lawyer had not taken such protective steps.

Corporations would be wise to avoid communicating electronically to their outside directors using those directors' employers' email addresses. They should also consider similar protective actions even when mailing privileged board material to their outside directors' employers or residential personal addresses.

- SEC v. GPB Cap. Holdings, LLC, No. 21-CV-583 (MKB) (VMS), 2023 U.S. Dist. LEXIS 218226, at *54-55 (E.D.N.Y. Dec. 7, 2023) (in an opinion by Judge Brodie, describing the waiver rules for common interest/joint defense arrangement participants; “A client who is part of a joint defense arrangement is entitled to waive the privilege for his own statements, and his co-defendants cannot preclude him from doing so.” United States v. Agnello, 135 F. Supp. 2d 380, 383 (E.D.N.Y. 2001), aff’d, 16 F. App’x 57 (2d Cir. 2001); see also United States v. Hatfield, No. 06-CR-550, 2009 U.S. Dist. LEXIS 106269, 2009 WL 3806300, at *12 (E.D.N.Y. Nov. 13, 2009) (‘A member of a joint defense agreement can waive the privilege with respect to its own communications, but typically cannot disclose privileged information received from other joint defense agreement members.’ (first citing Agnello, 135 F. Supp. 2d at 383; then citing United States v. Salvagno, 306 F. Supp. 2d 258, 273 (N.D.N.Y. 2004); and then citing In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922 (8th Cir. 1997))); Sicurelli v. Jeneric/Pentron Inc., No. 03-CV-4934, 2005 WL 8156861, at *3 (E.D.N.Y. June 16, 2005) (‘Thus, even if the [c]ourt had found the existence of a common interest work product privilege between plaintiffs and Ivoclar, Ivoclar, as the party that either independently commissioned or created [the documents], was entitled to waive any privilege it may have over such documents.’ (citing Agnello, 135 F. Supp. 2d at 383)).” (alterations in original))

B. Unintentional Express Waiver

- [Privilege Point, 1/14/15]

The Strange History of Rule 502 and Selective Waivers: Part I

January 14, 2015

In nearly every situation, disclosing privileged communications to any third party renders the communications accessible to all other third parties. This general principle normally precludes what is called a "selective waiver" — disclosing privileged communications to a litigation adversary or some other third party while withholding it from everyone else. Despite some courts' and even occasional congressional efforts to allow corporations' selective waiver when disclosing privileged communications to the government or some other third party, all but a handful of courts have rejected that possibility.

After what some saw as the federal government's attempt to bully corporations into disclosing privileged communications, in 2008 the Federal Advisory Committee on Rules of Evidence proposed a new evidence rule (Rule 502) assuring that corporations disclosing protected communications to the federal government did not waive the protection "in favor of non-governmental persons or entities." See Minutes of Advisory Comm. On Evidence Rules Meeting (Apr. 12-13, 2007). But the Judicial Conference of the United States quickly abandoned that provision. The Congressional Record's legislative history makes it clear that the as-adopted Rule 502 "does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information." 154 Cong. Rec. H7817, H7818 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence). In an even more explicit statement, the rule's sponsor explained that Rule 502 "does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking information." Id. at H7818-19 (statement of Rep. Sheila Jackson-Lee).

However, the as-adopted Federal Rule of Evidence 502 indicates that federal courts "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." Fed. R. Evid. 502(d). The next two Privilege Points (Part II and Part III) will discuss what this provision means, and how some federal courts have relied on it in attempting to arrange selective waivers.

- **[Privilege Point, 1/21/15]**

The Strange History of Rule 502 and Selective Waivers: Part II

January 21, 2015

Last week's Privilege Point explained that Federal Rule of Evidence 502's legislative history rejected the notion of selective waivers, despite the black letter rule's recognition that federal courts can enter orders indicating that disclosure of privileged communications in one proceeding does not operate as a waiver in other proceedings.

Rule 502's Explanatory Note indicates that such a court order may "provide for return of documents without waiver irrespective of the care taken by the disclosing party." Advisory Committee Notes to Fed. R. Evid. 502, Explanatory Note (revised Nov. 28, 2007), subdivision (d). In essence, such an order can save the producing party from a waiver if it conducts a sloppy privilege review or no privilege review at all. But as the legislative history indicates, Rule 502 does not change the waiver analysis "resulting from [the producing party] having acquiesced in any use of otherwise privileged information." In other words, the black letter rule's provision allows the producing party to retrieve privileged documents without triggering a waiver. But allowing the producing party to acquiesce in adversaries' continued possession and use of protected documents would permit the type of "selective waiver" the Judicial Conference explicitly abandoned early in the Rule 502 drafting process.

Rule 502's non-waiver provision supports federal courts' claw-back orders. However, an increasing number of courts point to that provision as permitting selective waivers. The next Privilege Point will focus on those decisions.

- [Privilege Point, 1/28/15]

The Strange History of Rule 502 and Selective Waivers: Part III

January 28, 2015

The last two Privilege Points (Part I and Part II) discussed Federal Rule of Evidence 502, which contains a non-waiver provision intended to allow producing parties' retrieval of inadvertently or even sloppily produced privileged documents without triggering a waiver. The Rule's legislative history and Explanatory Note indicate that the provision does not allow for selective waivers.

However, several courts have entered or offered to enter Rule 502 orders allowing litigants to disclose protected communications to their adversaries — without triggering a broader waiver permitting other third parties to obtain those documents. Chevron Corp. v. Weinberg Grp., 286 F.R.D. 95, 101 (D.D.C. 2012); Radian Asset Assurance, Inc. v. Coll. of Christian Bros. of N.M., No. Civ. 09-0885 JB/DJS, 2010 U.S. Dist. LEXIS 144756, at *23-26 (D.N.M. Oct. 22, 2010). Most recently, the Eastern District of Pennsylvania took this approach. In In re Processed Egg Products Antitrust Litigation, MDL No. 2002 08-md-02002, 2014 U.S. Dist. LEXIS 160747 (E.D. Pa. Nov. 17, 2014), defendant trade associations produced privileged documents to one category of plaintiffs, but resisted efforts from other plaintiffs to obtain the same documents. The court denied the other plaintiffs' Motion to Compel, pointing to a magistrate judge's earlier Rule 502 order. That order permitted the first plaintiff category to "inspect the ostensibly privileged documents, consider their import, and use them in determining future action." Id. at *21. The court did not address Rule 502's legislative history — which indicated that traditional waiver doctrines apply when a producing party "acquiesced in the use of otherwise privileged information." Addendum to Advisory Comm. Notes, Statement of Congressional Intent Regarding R. 502 of Fed. Rules of Evid. (Sept. 14, 2009), subdivision (d).

An increasing number of courts have entered Rule 502 orders purporting to allow selective waivers. Time will tell whether other courts will honor those orders. Despite Rule 502's legislative history and Explanatory Note, courts relying on comity and their inherent power may well do so.

- [Privilege Point, 12/17/14]

It Can be Nearly Impossible to Satisfy Some Courts' Privilege Protection Standards: Part I

December 17, 2014

Although federal courts generally articulate the same basic attorney-client privilege principles, they can demonstrate enormous variation when applying those principles. In some situations, it might be nearly impossible for companies to successfully assert privilege protection.

In United States ex rel. Schaengold v. Memorial Health, Inc., No. 4:11-cv-58, 2014 U.S. Dist. LEXIS 156595 (S.D. Ga. Nov. 5, 2014), defendants sought to retrieve one document (out of 30,000 documents produced) that they claimed to have inadvertently produced to the government. They described the document as a draft sent to the company's lawyer, portions of which the client deleted at the lawyer's request before disclosing the final version to third parties. The court found that the document did not deserve privilege protection, because the lawyer's supporting affidavit "fails to show who exactly sent the Draft Document, whether the primary purpose of the communication was for legal advice, or whether the communication was indeed confidential." Id. at *9. Turning to the inadvertent production issue, the court found defendants' "naked assertion of a privilege review" inadequate — because defendants did not describe "when [the] review occurred, how much time [Prior Counsel] took to review the documents, what ['certain'] documents were reviewed, and other basic details of the review process." Id. at *17 (alterations in original) (citation omitted).

The next Privilege Point will describe another federal court's similar decision issued seven days later.

- [Privilege Point, 4/17/19]

Can The Flu Affect A Waiver Analysis?

April 17, 2019

Fed R. Evid. 502 adopts the earlier majority common law view, finding that the inadvertent production of documents does not waive privilege or work product protection if: (1) it was inadvertent; (2) the protection holder "took reasonable steps to prevent disclosure"; and (3) "the holder promptly took reasonable steps to rectify the error." In analyzing the last factor, courts understandably assess the context. Most if not all courts start the rectification clock ticking when the holder learns of the inadvertent disclosure. After that, the holder must act quickly.

In Ranger Construction Industries, Inc. v. Allied World National Assurance Co., the defendant inadvertently included several privileged documents in a December 20 production – which the court helpfully noted was "right before the Christmas holiday." Civ. No. 17-81226-CIV-Marra/Matthewman, 2019 U.S. Dist. LEXIS 18617, at *19 (S.D. Fla. Feb. 5, 2019). Eight days later, plaintiff's lawyer alerted her counterpart that the production included possibly privileged documents. The court acknowledged that plaintiff's lawyer had not provided those documents' Bates numbers, but explained that "she was ill with the flu over the holidays and ultimately hospitalized, which certainly accounts for any alleged deficiency in the letter." Id. at *20. Because "Defendant's counsel's office was closed for the holidays until January 2," the lawyers did not confer until that day – at which time defendant's lawyer acknowledged the inadvertence, and sought the documents' return. Id. at *19. The court ultimately concluded that defendant's lawyer "took reasonable steps to rectify the error" – thus avoiding a privilege waiver despite the nearly two-week delay since the production. Id. at *21.

Not all courts would be this generous, so litigants who inadvertently produce protected documents should immediately alert the recipient and at least demand their return or destruction.

- [Privilege Point, 10/21/20]

What Factors Do Courts Consider When Analyzing the Waiver Implications of Accidentally Producing Privileged Documents?

October 21, 2020

Courts assessing the waiver implications of a litigant accidentally producing privileged documents normally look at several factors: (1) Did the producing party adopt a reasonable protocol for identifying and withholding privileged documents? (2) Did the producing party follow that protocol? (3) How many documents slipped through? (4) How quickly did the producing party seek their return? Within that general framework, courts have adopted various other measures for assessing a producing party's diligence (and thus the mistaken production's waiver implication).

In Ocean Garden Products Inc. v. Blessings Inc., Nos. CV-18-00322-TUC-RM & CV-19-00284-TUC-RM, 2020 U.S. Dist. LEXIS 122355 (D. Ariz. July 13, 2020), the court held that defendants had not waived their privilege protection by accidentally producing several documents they later claimed deserved privilege protection. Among other things, the court applied an analysis some other courts have adopted – calculating the percentage of accidentally produced documents that the defendants claimed were privileged: “although [defendant] does not describe in detail its initial privilege review, the fact that the inadvertently disclosed documents constituted less than 0.14% of a production totaling over 30,000 pages is sufficient to show that [defendant's] initial privilege review was reasonably effective in preventing the disclosure of privileged documents.” Id. at *13.

Although all courts now seem to have settled on the basic principles governing the waiver implications of accidentally producing privileged documents, litigants and their lawyers must be familiar with variations in those general analyses.

- [Privilege Point, 2/15/23]

Analyzing an Inadvertent Production's Waiver Impact: What Does the "Inadvertent" Element Mean?

February 15, 2023

In federal court and in state courts following the same approach, Fed R. Evid. 502(b) sometimes allows claw backs if a privileged document's production was "inadvertent." That term could have several meanings — ranging from a mistaken legal analysis to accidental inclusion of the document in a production.

In T&W Holding Co. v. City of Kemah, 641 F. Supp. 3d 378 (S.D. Tex. 2022), the court noted that Fed. R. Evid. 502(b) does not define the term "inadvertent." The court described two approaches that courts can take: (1) assessing "several factors," such as the document production's volume, the review process and the producing party's retrieval efforts — some of which already appear as other Rule 502(b) factors; (2) using a "simpler" approach — "asking . . . whether the production was a mistake." Id. at 382 (citation omitted). The court "wholeheartedly agree[d]" with the second approach. Id. at 383. The court explained that "[a]s a former trial lawyer," he understood that "mistakes are inevitable" in large document productions. Id. But the court noted that in this case the litigant only produced a few hundred pages, and that it "produced the same privileged document not once, but twice, further indicating that the production was not an isolated mistake." Id. This meant that the litigant's lawyer must have "made a conscious decision to identify certain documents as those they may rely on in this case, and they cannot now run away from that decision claiming mistake or inadvertence." Id.

Under this unforgiving approach, only logistical or clerical mistakes presumably satisfy the "inadvertent" element — not a legal misunderstanding or later regret. But the waiver analysis presumably then turns to the other Rule 502(b) factors.

C. Implied Waiver and At Issue Doctrine

- In re Royal Ahold N.V. Securities & ERISA Litigation, 230 F.R.D. 433, 435, 436, 437, 437-38, 438 (D. Md. 2005) (addressing work product protection and waiver Issues relating to White & Case's investigation into accounting irregularities, and preparation of 827 interview memoranda; holding that the work product doctrine did not protect White & Case's investigation, because the client was required to conduct the investigation to satisfy its outside auditor, so it would have undertaken the investigation even without anticipating litigation: "Lead plaintiffs argue persuasively that the principal reason was to satisfy the requirement of Royal Ahold's outside accountants, who would not otherwise complete the work necessary to issue the company's audited 2002 financial statements. In turn, completion of the 2002 audit was critical to Royal Ahold's receipt of [euro] 3.1 billion in financing. Undoubtedly the company was also preparing for litigation, as the first class action was filed February 24, 2003, but the investigation would have been undertaken even without the prospect of preparing a defense to a civil suit." (alteration in original) (footnote omitted); "Accordingly, at least for memoranda of interviews conducted for the purposes described above, Royal Ahold has not met its burden of demonstrating that the work product protection applies."; also holding that Royal Ahold had waived its work product protection by: (1) publicly disclosing the investigation results; and (2) by disclosing 269 of the 827 witness interview memoranda to the federal government; "The plaintiffs present two grounds for finding waiver. First is the public disclosure of the results of the investigations; second is the actual production of the witness material to the Department of Justice ('DOJ') and the Securities and Exchange Commission ('SEC')."; "The public disclosure argument is consistent with the position that the driving force behind the internal investigations was not this litigation but rather the need to satisfy Royal Ahold's accountants, and thereby the SEC, financial institutions, and the investing public, that the identified 'accounting' issues were being addressed and remedied. To this end, the information obtained from the witness interviews, and the conclusions expressed in the internal investigative reports, have largely been made public in the Form 20-F filed with the SEC by Royal Ahold on October 16, 2003. (See Royal Ahold and USF Mem. In Opp'n, Baumstein Decl., Ex 2.) This document discusses in some detail the findings of fraud at USF, the improper consolidation of joint ventures, other accounting irregularities, and the steps the company has taken to address these issues. In addition, several of the key investigative reports have been turned over to the lead plaintiffs. Those reports rely heavily on and indeed in some instances quote from the witness interview memoranda. (See July 22, 2005 Entwistle Aff., Exs. B and C.) Accordingly, testimonial use has been made of material that

might otherwise be protected as work product." (emphases added); "By its public disclosures in the Form 20-F and the production of several of the internal reports to the plaintiffs, Royal Ahold has therefore waived the attorney-client privilege and non-opinion work product protection as to the subject matters discussed in the 20-F and the reports. The remaining question is whether the interview memoranda constitute opinion work product which may yet be protected."; allowing Royal Ahold to redact demonstrable opinion work product from materials related to the public disclosure; "[R]elevant interview memoranda reflecting facts within the subject matter of the 20-F disclosures and the internal investigation reports are not necessarily protected. They must be produced to plaintiffs' counsel, except as to those portions Royal Ahold can specifically demonstrate would reveal counsel's mental impressions and legal theories concerning this litigation."; explaining that Royal Ahold's confidentiality agreement with the federal government did not preclude a work product waiver (even for opinion work product), and ominously pointing to the company's public disclosures intended to "improve its position with investors, financial institutions, and the regulatory agencies"; "While in some circumstances, a confidentiality agreement might be sufficient to protect opinion work product, in this case Royal Ahold already has disclosed information obtained from the witness interviews to the public in its Form 20-F filing with the SEC, and to the plaintiffs through the internal investigation reports. Likewise, to the extent that Royal Ahold offensively has disclosed information pertaining to its internal investigation in order to improve its position with investors, financial institutions, and the regulatory agencies, it also implicitly has waived its right to assert work product privilege as to the underlying memoranda supporting its disclosures. Finally, the language of the confidentiality agreements allows substantial discretion to the SEC and to the U.S. Attorney's office in disclosing any of the interview memoranda to other persons. Under all the circumstances, Royal Ahold has not taken steps to preserve the confidentiality of its opinion work product sufficient to protect the interview memoranda it already has disclosed to the government. These memoranda, if relevant to the claims in the amended consolidated complaint, must be turned over to plaintiffs in their entirety." (emphasis added) (footnote omitted); ordering Royal Ahold to produce "(a) a list of all interview memoranda disclosed to the Department of Justice or the Securities and Exchange Commission; (b) all portions of the interview memoranda disclosed to the Department of Justice or the Securities and Exchange Commission that are relevant to the claims in the consolidated complaint, other than those containing statements of the 36 'blocked witnesses' as to which the government has sought a stay; (c) a list of the other 558 interview memoranda; (d) all portions of the other interview memoranda containing factual information underlying the public disclosures, including the 20-F and the investigative

reports provided to plaintiffs, that are relevant to the claims in the consolidated complaint, unless a specific showing of opinion work product can be made to the court.")

- Chin v. Rogoff & Co., P.C., No. 05 Civ. 8360 (NRB), 2008 U.S. Dist. LEXIS 38735, at *14, *14-15, *16, *17-18, *19, *20-21 (S.D.N.Y. May 6, 2008) (in an opinion by Judge Naomi Buchwald, assessing a claim by a defendant accounting firm sued for accounting malpractice that the plaintiff had triggered an "at issue" waiver that required the plaintiff to produce documents from its law firm Akin Gump; "But a client may impliedly waive the attorney client privilege when he or she places the subject of a privileged communication 'at issue' in a lawsuit."; "New York law on 'at issue' waiver derives from Hearn and close parallels federal law. . . . New York courts have held that an 'at issue' waiver occurs 'where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information.'" (citation omitted); "Both New York and Federal cases have emphasized that a key component of an 'at issue' waiver is the extent to which the privileged documents are indispensable to a party's claims or defenses."; "Applying these principles here, we find that plaintiffs have placed Akin Gump's legal advice 'at issue' in this case. The evidence shows that both Shelly Goch and Akin Gump advised plaintiffs about whether or not to release First Data from the indemnity agreement. Plaintiffs' claims for damages depend entirely on the presence of a causal link between Goch's alleged erroneous advice and the plaintiffs' ultimate decision to execute that release. But if, as it appears, Akin Gump was advising plaintiffs not to sign the release even after an despite Goch's determination that there would be no adverse consequences to the plaintiffs, then the existence of any causal link between Goch's advice and the plaintiffs' damages can only be assessed by invading the privilege and examining the nature of the advice that Akin Gump gave to plaintiffs. In other words, reliance and causation are dispositive issues here, and cannot be adequately resolved without invasion of the privilege." (emphasis added); noting that affidavits filed by the Akin Gump partner and associate were "framed carefully, if not deceptively"; "Finally, we note that any invasion of the attorney client privilege under these circumstances is consistent with the important policy considerations that justify the existence of the privilege. It is well established that the privilege exists so as 'to encourage clients to make full disclosure to their attorneys.' Fisher v. United States, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976). That purpose would be ill served by allowing plaintiffs to bring suit against one advisor, Goch, while shrouding what they were told by another advisor, Akin Gump, when it is unclear which advice ultimately compelled them to act as they did. The privilege does not exist to allow clients to mask important elements of their claims against third parties.").

- [Privilege Point, 2/20/13]

Does Asserting a “Good Faith” Defense Trigger a Privilege Waiver?

February 20, 2013

In contrast to express waivers (which involve the disclosure of privileged communications), implied waivers can occur without such disclosure. The most common type of implied waiver involves the client’s explicit reliance on the fact of a privileged communication – such as filing an “advice of counsel” affirmative defense.

The most extreme form of implied waiver is called an “at issue” waiver. This type of waiver can occur if the client affirmatively advances some position that justifies analyzing the client’s mental state or motivation – including any legal input. In Wang v. Hearst Corp., No. 12 CV 793 (HB), 2012 U.S. Dist. LEXIS 179609, at *3 (S.D.N.Y. Dec. 19, 2012), defendant Hearst Corp. filed an affirmative defense that it had acted in “good faith” in trying to comply with the Fair Labor Standards Act and a parallel New York law. Plaintiff claimed that the defense triggered an “at issue” waiver. Hearst resisted, “citing court cases from other circuits for the proposition that ‘[t]here are many ways to establish good faith under the FLSA that do not involve the advice of counsel.’” Id. at *5. Judge Harold Baer rejected defendant’s argument, citing an earlier Second Circuit case holding that “‘testimony that [a litigant] thought his actions were legal would have put his knowledge of the law and the basis of his understanding of what the law required in issue.’” Id. at *6 (citation omitted). The court did not order defendant to immediately produce the documents, instead directing an in camera review which presumably would use this unforgiving standard.

“At issue” waivers represent a real danger, because corporations can trigger such waivers without disclosing any privileged communications, or explicitly relying on or even referencing privileged communications.

- [Privilege Point, 10/23/13]

Court Applies the "At Issue" Doctrine

October 23, 2013

The "at issue" doctrine represents the most frightening type of implied waiver. Litigants can trigger such a waiver without disclosing, referring to, or relying on privileged communications. Instead, an "at issue" waiver can occur if litigants assert some position that necessarily places "at issue" such privileged communications.

In Gefre v. Davis Wright Tremaine, LLP, 306 P.3d 1264 (Alaska 2013), shareholders filed a derivative action against a company's director and former law firm. The shareholders alleged that defendants engaged in fraudulent conduct of which the shareholders were unaware – although they were represented at the time by their own lawyer. The court found an "at issue" waiver – explaining that the shareholders "cannot be permitted to thrust their lack of knowledge into the litigation while simultaneously retaining the attorney-client privilege to frustrate proof of knowledge that negates the very foundation necessary to their positions." Id. at 1280. The court ordered the shareholders to produce communications with their lawyer during the time they claimed ignorance of defendants' alleged wrongdoing.

Corporations and their lawyers should be wary of assertions that might trigger a stealthy "at issue" doctrine waiver.

- Koumoulis v. Independent Financial Marketing Group, Inc., 29 F. Supp. 3d 142, 147-48, 149, 149-50, 149 n.4, 150 (E.D.N.Y. 2014) (upholding a Magistrate Judge's opinion that neither the attorney-client privilege nor the work product doctrine protected communications between a Duane Morris lawyer and a corporate client's human resource executive; finding the attorney-client privilege inapplicable because the advice was primarily business-related and not legal; "This document contains an e-mail from Defendants' outside counsel, Ann Bradley, Esq. [Duane Morris lawyer], setting forth more than a full page of detailed, multi-part instructions on how to deal with Mr. Komoulis's personnel issues, including a recommendation that Defendants call Mr. Komoulis 'to express concern and disappointment, identify the fundamental problem and find out who he trusts to advise him,' and goes so far as to prescribe detailed instructions to be given to Plaintiff on how he should conduct himself with Defendants' customers. . . . This advice plainly is not legal advice, but rather human resources advice on personnel management and customer relations." (emphasis added); finding the work product doctrine inapplicable for a number of reasons; "Based on its review of the Submitted Documents, the Court concurs with Judge Scanlon's assessment that the communications between Defendants and outside counsel related to human resources issues, e.g., the internal investigation related to Mr. Komoulis and responding to his complaints. Such advice would have been provided even absent the specter of litigation, and therefore do [sic] not constitute litigation-related work product."; "Defendants concede that 'LPL [defendant] ha[d] an obligation to investigate' Koumoulis's complaints about alleged discrimination and retaliation,' regardless of the potential for litigation. . . . The alleged motivation for which these documents were sought is not enough to overcome what appears on the face of the documents themselves." (second alteration in original) (footnote omitted); "[E]ven assuming the internal investigation was conducted in anticipation of litigation, otherwise work-product privileged communications relating to the investigation would still be discoverable once Defendants assert a Faragher/Ellerth [Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998)] defense. Indeed, Defendants acknowledged as much when they disclosed their in-house attorneys' notes and correspondence regarding the investigation. Defendants offer no justification for treating their outside counsel's communications regarding the investigation differently than their in-house counsel's communications on that topic."; "Defendants acknowledge that this advice was intended, in part, to prevent Plaintiff from bringing claims of retaliation. . . . Legal advice given for the purpose of preventing litigation is different than advice given in an anticipation of litigation." (emphasis added); "[S]imply declaring that something is prepared in 'anticipation of litigation' does not necessarily make it so. . . . [T]he

contents of the communications directly contradict Defendants' privilege claim. These communications, on their face, relate to advice given by Ms. Bradley on how to prevent a lawsuit, not on how to defend one."
(emphasis added)).

- [Privilege Point, 9/2/15]

Does Asserting a "Good Faith" Affirmative Defense Waive the Attorney-Client Privilege?: Part I

September 2, 2015

As the most extreme example of an implied waiver, the "at issue" doctrine can waive privilege protection if a litigant affirmatively raises an issue that implicates privileged communications. Some courts hold that corporations relying on an affirmative defense that they acted in "good faith" reliance on the law necessarily implicate their lawyer's advice — and therefore trigger such an "at issue" waiver.

In Edwards v. KB Home, Civ. A. No. 3:11-CV-00240, 2015 U.S. Dist. LEXIS 93584 (S.D. Tex. July 18, 2015), FLSA defendant KB Home relied upon the 29 U.S.C. § 259 defense of good faith reliance on administrative regulations, etc., in defending its employee classifications. KB Home "emphasize[d] that it is not relying on advice of counsel to prove its good faith defenses" — instead explaining that its "witnesses will say that their own independent judgment (based on a review of the DOL letters and perhaps other considerations) caused them to conclude that the classification was lawful." Id. at *7. The court rejected this argument — concluding that privileged communications "are highly probative of whether [KB Home] had a good faith belief in the lawfulness of its policy." Id. at *9. The court reminded KB Home that it "may elect to withdraw its good faith defenses, in which case the privilege would still attach." Id. at *14. Four days later, another court found that a defendant had waived its privilege by arguing that its patent infringement accusations against the plaintiff "were grounded in a good-faith belief" that the plaintiff had infringed its patent. Skyline Steel, LLC v. Pilepro, LLC, No. 13-CV-8171 (JMF), 2015 U.S. Dist. LEXIS 95929, at *6 (S.D.N.Y. July 22, 2015). The court quoted an earlier decision in holding that defendant cannot "be permitted, on the one hand, to argue that it acted in good faith and without an improper motive and then, on the other hand, to deny [the adversary] access to the advice given by counsel where that advice . . . played a substantial and significant role in formulating [its] actions." (quoting Pereira v. United Jersey Bank, No. 94-CV-1565 (LAP), 1997 WL 773716, at *6 (S.D.N.Y. Dec. 11, 1997)). Id. at *8-9.).

Litigants putting their mental state at issue or referring to withheld documents to support an assertion might waive their privilege. Next week's Privilege Point discusses two cases going the other way.

- [Privilege Point, 9/9/15]

Does Asserting a "Good Faith" Affirmative Defense Waive the Attorney-Client Privilege?: Part II

September 9, 2015

Last week's Privilege Point described several cases in which litigants waived their privilege protection by filing a statutory "good faith" defense or just arguing that they acted in good faith.

Other courts take a different view. In Bacchi v. Massachusetts Mutual Life Insurance Co., defendant resisting a policyholder class action filed affirmative defenses "that it acted in good faith . . . and that its actions were approved by the appropriate regulatory agency." 110 F. Supp. 3d 270, 275 (D. Mass. 2015). Not surprisingly, plaintiff claimed a waiver. The court rejected plaintiff's argument — noting that defendant "does not intend to rely on counsel's opinion or advice" — but instead "will argue that it took the same types of steps that other similar situated entities would take if they were proceeding in good faith to do what the law required." Id. at 277. About five weeks later, the Fourth Circuit reached the same conclusion about plaintiff's claim against an insurance company, based on the company's handling of an underlying lawsuit — about which the company obviously received its lawyers' advice. Smith v. Scottsdale Ins. Co., 621 F. App'x 743 (4th Cir. 2015). The plaintiff claimed an "at issue" waiver, but the court disagreed. The court noted that the insurance company "did not assert any claim or defense based on counsel's advice in the underlying case; instead, it maintained that its actions were based on its own evaluation of the case." Id. at 746.

Litigants defending their actions do not automatically waive privilege protection for communications with their lawyers about those actions. But litigants relying on a formal affirmative defense of "good faith" or arguing generally that they acted reasonably must hope that the court will let them support that defense while withholding privileged communication that informed their decisions.

- [Privilege Point, 12/23/15]

Corporations Can Risk Privilege Protection by Relying Too Heavily on Legal Advice when Firing Employees

December 23, 2015

Corporations firing employees normally must explain why. All corporate lawyers recognize that affirmatively pleading “advice of counsel” as an employment case defense normally waives privilege protection, but the risks can be more subtle.

In Piazza v. County of Luzerne, Civ. A. No. 3:13-CV-1755, 2015 U.S. Dist. LEXIS 147283 (M.D. Pa. Oct. 30, 2015), plaintiff claimed that the county unlawfully fired him. When asked why the county fired plaintiff, the county’s decision-maker (and co-defendant) answered “I did so on the advice of counsel.” Id. at *2 (internal citation omitted). When asked if there was “[a]nything else?,” the witness responded, “That’s all at this point.” Id. Later in the deposition, the county’s lawyer objected to questions about whether the decision-maker’s “beliefs were based on advice from counsel,” and what “sources of information informed [the decision-maker’s] belief that Plaintiff had exceeded his authority.” Id. at *4. Acknowledging that the defendants had not filed a formal “advice of counsel” defense, the court nevertheless found a privilege waiver — pointing to (1) the decision-maker’s testimony “that he initially had nothing to add to his statement that he terminated Plaintiff ‘on the advice of counsel,’” and (2) his later testimony that the firing was based on his belief that the plaintiff acted improperly “and this belief was based on his conversations” with the county’s lawyer. Id. at *11. The court held that the waiver extended to all “communication[s] relied on by [the decision-maker] which he testified formed the basis of his termination decision.” Id.

Corporations (and other institutions) can impliedly waive their privilege protection without affirmatively pleading an “advice of counsel” defense. In employment cases, decision-makers should rely on underlying facts from sources other than just their lawyers, and should be prepared to testify about the reasons for employment decisions other than those lawyers’ advice.

- Roseman v. Bloomberg L.P., No. 14-CV-2657 (TPG) (KNF), 2016 U.S. Dist. LEXIS 89595, at *19-20 (S.D.N.Y. June 17, 2016) (holding that a denial of bad faith in an FLSA case triggered an at-issue waiver; “Here, the plaintiffs asserted that they intend to question Asman and Golden concerning their advice to the defendant about overtime pay decisions. Moreover, the plaintiffs contend in their opposition that the purpose of deposing counsel is to ascertain from counsel: (a) what the defendant did to learn about its legal wage-hour obligations; (b) what it learned; and (c) what it did to comply with its obligations. These questions appear certain to involve privileged communications between counsel and the defendant as well as the work-product doctrine. Indeed, the plaintiffs concede that they seek privileged and protected information by arguing that the attorney-client privilege or work-product protection have been waived by the defendant. Upon considering the circumstances of this case, including the fact that the purpose of deposing the defendant’s counsel is almost exclusively to elicit privileged communications and protected information, the Court finds that the defendant established good cause for the issuance of a protective order.”)

- [Privilege Point, 10/19/16]

Can You "Undo" an Implied Waiver?

October 19, 2016

An intentional express disclosure of privileged communications normally triggers an irreversible waiver, although the disclosure might or might not cause a subject matter waiver. The waiver implications of implied waivers present more subtle issues, because clients can impliedly waive their privilege protection without disclosing privileged communications. For instance, pleading an "advice of counsel" defense impliedly waives privilege protection for pertinent privileged communications.

In United States ex rel. Calilung v. Ormat Industries, Ltd., a qui tam defendant filed an affirmative defense that it "'acted reasonably and in good faith in light of all circumstances and in compliance with all applicable legal requirements.'" No. 3:14-cv-00325-RCJ-VPC, 2016 U.S. Dist. LEXIS 100292, at *5 (D. Nev. Aug. 1, 2016) (internal citation omitted). The court found that defendant's "affirmative defenses go beyond mere denial of scienter to put its state of mind and knowledge of the [legal] requirements at issue." Id. at *14. The court thus held that defendant's implied waiver required it to produce all privileged communications about the applicable legal provisions. But then the court found it "appropriate to give [defendant] a choice": (1) "proceed with its good faith defenses and produce the relevant documents," or (2) "preserve the communications' confidentiality by abandoning the defenses that giv[e] rise to the waiver." Id. at *18.

Not all courts would be this generous, but most courts allow litigants to "undo" implied waivers by withdrawing the assertion that would otherwise require disclosure of privileged communications.

- [Privilege Point, 5/10/17]

Privilege Implications of an Explicit or Implicit "Advice of Counsel"
Defense: Part I

May 10, 2017

All lawyers know that pleading an "advice of counsel" affirmative defense waives privilege protection. But lawyers must remember such waivers' breadth.

In United States v. Trotter, defendant Trotter announced his intent to assert a "good faith reliance on the advice of counsel" defense, and "submitted waivers" from three lawyers. Case No. 14-20273, 2017 U.S. Dist. LEXIS 31681, at *2 (E.D. Mich. Mar. 7, 2017). But the government noted that Trotter had received pertinent advice from four other lawyers. The court ordered Trotter to "(1) identify all attorneys who advised him on his management practices, (2) waive the attorney-client privilege for these attorneys, and (3) produce all materials relating to legal advice on these management practices in his possession." Id. at *3. The court specifically rejected Trotter's lawyers' argument that they had already produced all pertinent documents in their possession – ordering his lawyers "to request these materials from" Trotter. Id.

Pleading an "advice of counsel" defense normally waives privilege protection for the client's communications with any lawyers providing advice on the pertinent matter, and usually also extends to the client's communication of facts to such lawyers that preceded the advice. Next week's Privilege Point will describe another defendant's less explicit reliance on advice of counsel, but which had the same waiver impact.

- [Privilege Point, 5/17/17]

Privilege Implications of an Explicit or Implicit "Advice of Counsel"
Defense: Part II

May 17, 2017

Last week's Privilege Point described the normal broad subject matter waiver triggered by litigants' explicit defensive reliance on legal advice. Litigants' implicit reliance can have the same effect.

In Maar v. Beall's, Inc., FLSA defendant Beall's contended that any employee miscalculations were "not willful, and made in a good faith attempt to comply with the law." 237 F. Supp. 3d 1336, 1337 (S.D. Fla. 2017). Answering interrogatories about one of its defenses, Beall's noted that it "consulted with legal counsel regarding such classification." Id. (emphasis and internal citation omitted). The court concluded that Beall's waived its privilege protection "by setting forth an affirmative defense that invoked its good faith belief in the legality of its employee classification." Id. at 1340. The court even ordered Beall's to produce its lawyer to be deposed "concerning the substance of advice the company received from legal counsel as to the classification of Area Managers." Id. at 1341. Beall's argued that the court's draconian standard would give FLSA plaintiffs "automatic access" to companies' legal advice whenever they assert a "good faith" defense. Id. at 1340. The court rejected what it called Beall's "dire pronouncement" -- explaining that companies "can always deny the element of a plaintiff's claim alleging a certain mental state 'without affirmatively asserting' a good faith belief in an act's legality." Id. (citation omitted). The court did not explain how that approach would work.

Corporations and their lawyers must remember the scope of any explicit "advice of counsel" defense, and the less obvious danger of implicitly relying on their good faith attempt to comply with the law.

- [Privilege Point, 6/28/17]

In-House Lawyers Should Avoid Being Employment Decision-Makers

June 28, 2017

In-house lawyers obviously can play an important role when their corporate clients decide whether to terminate employees. But they should avoid being the ultimate decision-makers, or playing a business role in any termination decisions.

In Price v. Jarett, No. 8:15CV200, 2017 U.S. Dist. LEXIS 61066 (D. Neb. Apr. 21, 2017), terminated employee plaintiff sought to depose a Union Pacific in-house lawyer. The lawyer had served on a panel that another witness testified "would have to come to a 'unanimous consensus to move forward on [a] termination.'" Id. at *2 (alteration in original) (internal citation omitted). Union Pacific claimed that the panel did not meet as a group to decide on terminations, and that the lawyer's "role in evaluating Plaintiff's termination was solely to review whether there were legal implications of concern for Union Pacific." Id. But the court allowed the deposition to proceed, noting that the testimony "regarding the need for unanimous consent for termination indicates that [the lawyer] may have some[] non-cumulative, non-privileged factual information relevant to the case." Id. at *6.

In-house lawyers should assure that their clients do not face a similar circumstance – in which there is (as the Price court put it) "uncertainty surrounding the 'hat' [they are] wearing while serving" on such panels or in some other way involved in termination decisions. Id. at *7.

- Reyes v. Collins & 74th, Inc., Case No. 16-24362-CIV-Lenard/Goodman, 2017 U.S. Dist. LEXIS 101982, at *13, *13-14, *14, *14-15, *15 (S.D. Fla. June 30, 2017) (holding that an FLSA "good faith" defense triggered an at issue waiver; "Although Defendants here have not in their answer expressly asserted the advice of counsel defense, they are, for all practical purposes, using that defense as the foundation for their position that they did not willfully violate the FLSA (and that the statute of limitations is two years, not three years). Moreover, Mr. Hossain's deposition testimony -- including answers to questions posed by Ms. Langbein -- makes it clear that Defendants are, in fact, relying on an advice-of-counsel theory." (emphasis added); "The issue of Defendants' good faith is relevant in this case for an additional issue beyond the 'willfulness' issue for statute of limitations purposes. Under the FLSA, an employer can avoid 'liquidated damages,' otherwise known as double damages, if he proves 'that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation' of the FLSA. 29 U.S.C. § 260. If Plaintiff obtains a trial verdict in his favor, then the issue of Defendants' good faith would arise -- which would then implicate the advice they received from Ms. Langbein." (emphasis added); "This strategic choice (of asserting Ms. Langbein's legal advice as a defense) mandates a finding that Defendants have impliedly waived the attorney-client privilege on matters concerning the advice Ms. Langbein provided to her labor-law clients in this case." (emphasis added); "Under these circumstances, it would be patently unfair to Plaintiff to prevent him from obtaining full discovery on the very advice which Defendants are relying upon to prove that they did not act willfully and that the statute of limitations should be two years, rather than three years. Likewise, it would also be inequitable to prevent Plaintiff from obtaining the specifics about the legal advice provided to Defendants when he might need to address the advice after trial, when advocating for double damages and arguing against Defendants' inevitable argument that liquidated damages are unavailable because they acted in good faith." (emphasis added); "Therefore, Plaintiff may take Ms. Langbein's deposition and may retake Mr. Hossain's deposition (on the issues raised by Defendants' reliance on their attorney's employment-law advice). He may also obtain any letters, memoranda or notes, which Ms. Langbein provided to her clients about complying with the FLSA.").

- Johnson v. J. Walter Thompson U.S.A., LLC, No. 16 Civ. 1805 (JPO) (JCF), 2017 U.S. Dist. LEXIS 126185, at *24, *24-26, *26 (S.D.N.Y. Aug. 9, 2017) (in an opinion by Magistrate Judge Francis, holding that drafts of and communications relating to an investigation conducted by the Proskauer Rose law firm into client's alleged Title VII violation deserved both privilege and work product protection; also noting that the defendant had abandoned a Faragher-Ellerth defense, but that the court would have to review the withheld documents in camera to determine if defendant waived either protection by using the report for "context" in connection with its "good faith" defense; "In this case, the Corporate Defendants raised a Faragher/Ellerth defense in their Answer. . . . However, they have since disavowed use of the Proskauer Report in connection with any Faragher/Ellerth defense. They first made this clear at a court conference. . . and they state unequivocally in their reply memorandum that 'Defendants will not be using the legal conclusions in the Proskauer Report . . . to support their position that there has been no violation of the law'" (third and fourth alterations in original) (first emphasis added); "This does not, however, end the inquiry. The Corporate Defendants have indicated that they do not intend to rely on the Proskauer Report 'to provide context for the actions they took as a result of the business recommendations in the Report.' . . . Reliance by the Corporate Defendants on the conclusions of the report does not open up to discovery the details of the investigation that led to the report. . . . Therefore, there is no waiver with respect to the categories of the Proskauer Documents that could be relevant, if at all, only to the accuracy of the findings in the report, specifically, notes of interviews of JWT employees, drafts of the report, and invoices." (emphasis added); "However, when a party asserts a good faith defense, as the Corporate Defendants appear to do here, it may not selectively proffer the information upon which it relied. . . . Here, the extent to which the Corporate Defendants acted in good faith on the basis of the Proskauer Report is dependent upon the totality of the legal advice they received. Thus, the communications related to Proskauer's conclusions, but not the reliability of the investigation leading to those conclusions, are discoverable. Accordingly, if they intend to introduce the Proskauer Report in evidence, the Corporate Defendants shall produce for my in camera review any documents withheld on grounds of privilege that reflect communications between themselves and Proskauer or between Proskauer and David & Gilbert concerning the subject matter of the Proskauer Report. In that way, I can determine whether fairness necessitates the disclosure of these documents to the plaintiff." (emphasis added)), clarified by 2017 U.S. Dist. LEXIS 176815 (S.D.N.Y. Oct. 25, 2017).

- [Privilege Point, 12/27/17]

Trump-Related Circuit Court Decision Includes Troubling Waiver Analysis

December 27, 2017

Because historical facts do not deserve privilege protection, disclosing those facts does not trigger a privilege waiver. Thus, disclosing historical facts to the government should not waive the disclosing client's privilege protection for communications with her lawyer about those facts.

But some decisions take a different, troubling, approach. In In re Grand Jury Investigation, Misc. A. No. 17-2336 (BAH), 2017 U.S. Dist. LEXIS 186420 (D.D.C. Oct. 2, 2017), the court ordered former Trump campaign manager Paul Manafort's lawyer to testify before a grand jury. In addition to applying the crime-fraud exception, the court held that the lawyer waived her clients' privilege protection by making representations about historical facts in submissions to the DOJ. The court noted that the lawyer's submissions "made specific factual representations to DOJ that are unlikely to have originated from sources other than [Manafort and a colleague], and, in large part, were explicitly attributed to one or both [of their] recollections." Id. at *32. The court relied on this unsurprising circumstance in holding that the representations "impliedly waived the privilege as to [the clients'] communications with [their lawyer] to the extent that these communications related to the . . . Submissions' contents." Id.

A lawyer's disclosure of historical facts should not strip away privilege protection from the lawyer's communications with her client about those facts.

- [Privilege Point, 3/7/18]

State Appellate Courts Assess Implied and "At Issue" Waivers: Part I

March 7, 2018

Disclosing privileged communications to third parties normally waives that fragile protection. But even without disclosure, clients relying on privileged communications or placing such communications "at issue" can also waive their privilege protection – sometimes in unpredictable situations.

In Jensen v. Charon Solutions, Inc., No. B276050, 2017 Cal. App. Unpub. LEXIS 8683 (Cal. Ct. App. Dec. 20, 2017), a successful malicious prosecution plaintiff recovered \$400,000 in attorney's fees. The defendant appealed, claiming that the trial court erroneously allowed the plaintiff's lawyer to testify about the fees without producing his bills (except for the dates and amounts). Acknowledging that "descriptions of work redacted from the bills may well have been covered by the attorney-client privilege," the appellate court nevertheless reversed the fee award – holding that plaintiff had impliedly waived any privilege protection by seeking a fee award as damages. Id. at *28. As the court put it, "[t]he near-complete redaction was also fundamentally unfair because it precluded [defendants] from conducting any meaningful cross-examination of [plaintiff's] attorney." Id. at *29. The court remanded for a new hearing, "at which the privilege attaching to the attorney's bills has been waived." Id. at *32.

Courts take varying approaches to this issue. Among other things, some courts (1) allow lay or expert testimony alone to support litigants' fee claims; (2) allow limited redaction of specific privileged billing entries; (3) allow litigants to redact portions of bills, but then forego any fees for that work. In the most frighteningly extreme approach, one court held that a litigant seeking to make the adversary pay for the litigant's legal work must not only disclose the bills – but must also disclose the work itself. Next week's Privilege Point will address another type of even more worrisome implied waiver.

- **[Privilege Point, 3/14/18]**

State Appellate Courts Assess Implied and "At Issue" Waivers: Part II

March 14, 2018

Last week's Privilege Point discussed the implied privilege waiver sometimes triggered by a litigant's attempt to recover attorney's fees. An even more counter-intuitive implied waiver involves what courts frequently call an "at issue" waiver.

In Outpost Solar, LLC v. Henry, Henry & Underwood, P.C., No. M2016-00297-COA-R9-CV, 2017 Tenn. App. LEXIS 841 (Tenn. Ct. App. Dec. 29, 2017), two companies sued their former lawyer for malpractice. The defendant sought to dismiss one of the plaintiff's claims, noting that it was filed after Tennessee's one year legal malpractice statute of limitations had run. The plaintiff responded to the statute of limitations defense by arguing that "it discovered the [malpractice] cause of action within the limitations period." Id. at *2-3. Defendant "then sought through discovery to have the former client produce communications from the client's new counsel." Id. at *1. The plaintiff claimed privilege protection – but the trial court found a waiver. The appellate court upheld the lower court's conclusion "that Plaintiffs put their privileged information at issue by pleading the discovery rule" – because "by pleading ignorance of this cause of action against Defendants, Plaintiffs have made 'what Plaintiffs knew and when Plaintiffs knew it' the dispositive issue of this case." Id. at *21-22.

Not all courts would take this draconian approach, but it makes some sense. And it would be easy for lawyers to overlook the privilege waiver risk of asserting ignorance in this setting – because the assertion does not disclose, explicitly rely on, or even refer to, any privileged communications. This is why "at issue waivers" represent the most frightening form of implied waiver.

- [Privilege Point, 4/4/18]

May a Defendant Avoid an Implied Privilege Waiver by Withdrawing an "Advice of Counsel" Defense?

April 4, 2018

Because implied waivers do not involve actual disclosure of privileged communications, litigants triggering an implied waiver can sometimes change their position before it is too late.

In Aboudara v. City of Santa Rosa, the FLSA defendant filed an amended answer raising "an affirmative defense of good faith" – "specifically alleg[ing] that it acted in good faith because, among other things, 'Defendant consulted with legal counsel regarding its FLSA compliance.'" Case No. 17-cv-01661-HSG (JSC), 2018 U.S. Dist. LEXIS 10033, at *2 (N.D. Cal. Jan. 22, 2018) (internal citation omitted). However, defendant then prohibited its witness "from answering any questions as to advice she received," and refused "to produce any documents reflecting such advice." Id. Plaintiff moved to compel the discovery, but the court rejected the plaintiff's motion. The court noted that defendant "has offered to stipulate that it will not in any way rely on advice of counsel in support of its good faith defense and will move to amend its answer if need be." Id. at *3. But the court closed its analysis with an obvious warning about what it called defendant's "change of heart" -- "of course, Defendant is now bound by its current representation and may not in any way rely on the fact that legal advice was sought." Id. at *2, *4.

Corporate defendants not appreciating the waiver implications of early pleadings normally have a chance to reconsider and avoid potentially disastrous implied waivers.

- [Privilege Point, 5/9/18]

Fifth Circuit Issues a Favorable "At Issue" Doctrine Decision

May 9, 2018

The frightening "at issue" variety of implied waiver can destroy privilege protection if litigants affirmatively seek some advantage by (among other things) relying on their actions' "good faith." If the litigants sought legal advice about the actions that they claim to have been taken in "good faith," many courts order discovery of those otherwise privileged communications.

In In re Itron, Inc., 883 F.3d 553 (5th Cir. 2018), plaintiff claimed that three corporate officers of a company it acquired lied about the purchased company's contractual obligations to a third party. Plaintiff litigated with and eventually settled with that third party. Plaintiff then sued the defendant officers for "negligent misrepresentation, seeking as compensatory damages the cost of the . . . litigation and settlement." Id. at 555. The trial court had ordered plaintiff to produce its communications with its Gibson Dunn lawyers – noting that defendants were "seek[ing] to uncover that [plaintiff] followed unreasonable advice from its law firm (Gibson Dunn), which might arguably relieve Defendants of liability as a superseding cause." Id. at 566. The Fifth Circuit took the extraordinary step of granting a petition for writ of mandamus "to correct [the trial court's] significant misapplication of attorney-client privilege law." Id. at 555. The court held that "the mere act of filing this lawsuit effected no waiver of any attorney-client privilege," and that "the objective reasonableness of [plaintiff's] conduct should be apparent from the facts known to [plaintiff] at the time (which again, are not privileged) coupled with objective legal analysis." Id. at 556, 566.

The Fifth Circuit's forceful rejection of a broad "at issue" waiver approach should encourage corporate defendants who seek lawyers' advice before taking actions, if the corporations may later rely on those actions in pursuing or defending litigation.

- In re Itron, Inc., 883 F.3d 553, 558, 558 n.2, 560, 561, 563, 564, 565, 566 (5th Cir. 2018) (in a 2/21/18 opinion, analyzing the implied waiver and at issue implications of a corporate buyer who settled a claim by a third party and then sued a corporate seller for negligent misrepresentation; explaining that the corporate buyer sought recovery from the seller of the settlement amount and litigation costs; holding that the reasonableness of the settlement involved an objective standard, and therefore did not trigger an implied waiver or at issue waiver; "[A] client waives the privilege by affirmatively relying on attorney-client communications to support an element of a legal claim or defense -- thereby putting those communications 'at issue' in the case."; "This opinion does not concern the 'anticipatory waiver' version of this rule, which finds waiver 'when a privilege-holder pleads a claim or a defense in such a way that he will be forced inevitably to draw upon a privileged communication at trial in order to prevail,' Smith v. Kavanaugh, Pierson & Talley, 513 So. 2d 1138, 1145 (La. 1987), and which no party has invoked."; "Defendants would have us broaden the Jackson Medical [Jackson Med. Clinic for Women, P.A. v. Moore], 836 So. 2d 767 (Miss. 2003)] rule such that waiver occurs whenever the client files a lawsuit to which privileged communications, if disclosed, might prove 'highly relevant' -- even if the client never relies on or uses those communications to make her legal case. The magistrate judge embraced a more expansive rule, requiring only simple relevance. These expansions of Jackson Medical find no support in the Mississippi Rules of Evidence, see Miss. R. Evid. 502(d), or any Mississippi caselaw. And given Jackson Medical and other persuasive authorities, we conclude this is not the law the Mississippi Supreme Court would apply."; "Our circuit and others agree that '[r]elevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, . . . even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.' Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 864 (3d Cir. 1994) (emphasis added)." (alterations in original); "Defendants fall back on dicta in an out-of-circuit federal district court opinion, decided in 1975, which no reported Mississippi case has cited. The case is Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975)."; "Here, Defendants ask us to apply an interpretation of Hearn that would require only that the privileged material have high relevance to case. But as discussed above, that view has no basis in Mississippi law, contradicts prevailing notions of waiver, and would effectively nullify the privilege." (emphasis added); "Even accepting for the sake of argument that the privilege takes flight whenever privileged communications become 'highly relevant' to an adversary's defense -- which, we emphasize, it does not -- Defendants still fail to show how Itron's privileged communications meet that standard." (emphasis added); "Defendants' primary theory of relevance apparently concerns whether

Itron took reasonable steps to mitigate its damages. According to Itron's complaint, Defendants' negligent misrepresentations caused Itron to become liable to Consort, necessitating the Consort litigation which Itron eventually settled. There is thus a colorable argument that, under ordinary tort principles, Itron cannot recover the cost of the settlement as damages to the extent Defendants show the settlement to have been unreasonable. See Rolison v. Fryar, 204 So. 3d 725, 736 (Miss. 2016) ('An injured party has a duty to take reasonable steps to mitigate damages.'); see also Wall v. Swilley, 562 So. 2d 1252, 1258 (Miss. 1990) (in Mississippi, failure to mitigate 'is an affirmative defense' defendants must plead and prove)." (emphasis added); "But this does not render the opinions of Itron's counsel 'highly relevant.' Instead, '[t]he reasonableness of the settlement . . . [must] be examined under an objective standard.'" (alterations in original) (emphasis added); "Defendants similarly claim they must see Itron's privileged communications to know 'whether Itron's settlement damages are attributable to [Defendants], a third party, or Itron itself.' Although Defendants' argument is not entirely clear, they apparently seek to uncover that Itron followed unreasonable advice from its law firm (Gibson Dunn), which might arguably relieve Defendants of liability as a superseding cause." (alterations in original); "Either way, the argument fails for at least the reasons just discussed: Both potential theories turn on whether Itron engaged in a course of action that was objectively reasonable. And as discussed above, the objective reasonableness of Itron's conduct should be apparent from the facts known to Itron at the time (which again, are not privileged) coupled with objective legal analysis." (emphasis added)).

- [Privilege Point, 10/10/18]

Waiver Implications of Lawyers' Self-Defense Privilege Disclosures

October 10, 2018

The ethics rules and attorney-client privilege principles both allow lawyers to disclose privileged communications when defending themselves from clients' and even third parties' attacks. But do such disclosures waive the clients' privilege, thus allowing the whole world to see the communications?

In United States v. Lander, the court understandably held that a criminal defendant's allegation that his former lawyer "coerced" him into pleading guilty waived the client's privilege protection for "all communications" that the former lawyer "reasonably believes necessary to disapprove the allegations." No. 13-CR-151-A, 2018 U.S. Dist. LEXIS 129133, at *1-2 (W.D.N.Y. Aug. 1, 2018). The court did not explain whether it would review the privileged communications in camera rather than in open court. About a week later, the court in Siser North America, Inc. v. World Paper Inc., Case No. 16-cv-14369, 2018 U.S. Dist. LEXIS 133379 (E.D. Mich. Aug. 8, 2018), took a more subtle approach in a civil context. Defendants' lawyer withdrew after the magistrate judge sanctioned him. In defending himself, the lawyer disclosed privileged communications: (1) to his own personal lawyer; and (2) in attachments to a defensive pleading filed with the court (under seal) and served on plaintiffs. Now represented by a new lawyer, defendants sought an order requiring plaintiffs to return those privileged attachments. The plaintiffs argued that the withdrawn lawyer's disclosures to his personal lawyer and to them waived defendants' privilege, thus freeing them to use those communications. The court rejected plaintiff's argument and ordered it to return (and not use) the privileged documents -- concluding: (1) that the accused lawyer "was permitted to disclose privileged information to his attorney . . . in defending against such allegations" (id. at *11); (2) that the accused lawyer's "disclosure [in the defensive pleading attachments] did not constitute a waiver of privilege since it was done pursuant to [the ethics rules] for the limited scope of defending himself." Id. at *8.

Lawyers' ability to defend themselves from clients' or third parties' accusations can trigger waiver issues. In either situation, clients should be on guard to protect against a wider waiver.

- [Privilege Point, 5/22/19]

Clients Suing Their Lawyers For Malpractice Risk A Subject Matter Waiver

May 22, 2019

Clients and lawyers asserting claims against each other can waive privilege protection without disclosing any privileged communications. But such implied or "at issue" waivers often require balancing of participants' interests. For instance, some courts hold that clients suing their former lawyers for malpractice must disclose their communications with successor counsel. Other courts take the opposite position, finding such intrusion inappropriate.

In Heth v. Satterlee Stephens Burke & Burke LLP, No. 650379/2015, 2019 NY Slip Op 30555(U) (N.Y. Sup. Ct. Mar. 5, 2019), the court dealt with a malpractice defendant's efforts to discover communications between the plaintiff former client and the defendant's co-counsel – not its successor counsel. The court allowed such discovery, explaining that the disclosure of such communications between plaintiff client and the malpractice defendant's co-counsel was "essential" to defendant's defense that it "did not proximately cause [client's] alleged damages" – because the client had relied on co-counsel's rather than defendant's advice. Id. at 3.

While clients contemplating malpractice cases against their former lawyers may be able to protect their communications with successor counsel, they normally should not expect the same treatment for their communications with defendant's co-counsel during the pertinent time.

- United States ex rel. Derrick v. Roche Diagnostics Corp., No. 14 CV 04601, 2019 U.S. Dist. LEXIS 69681, at *6-7 (N.D. Ill. Apr. 24, 2019) (holding that a company did not trigger a waiver by asserting good faith reliance on applicable law in responding to a False Claims Act allegation; “The Court finds Roche has not waived its attorney-client privilege merely by asserting the separate defenses of good faith and reliance on applicable law or by producing documents that indicate it consulted with counsel when it documented its agreement with Humana. In the Court’s view, Roche must not only assert a defense, but also attempt to support that defense by relying on advice of counsel or disclosing an attorney-client communication before it may be deemed to have waived the privilege. In other words, by putting counsel’s advice in issue, Roche has not yet done so. Roche has denied the allegations made by Relator and asserted, generally, the affirmative defenses it intends to present. This does not automatically waive the privilege as to any communications Roche may have had with counsel concerning the legality of its agreement with Humana.”).

- [Privilege Point, 8/21/19]

Court Rejects Advice of Counsel Waiver Argument

August 21, 2019

Privilege holders can waive their privilege protection without disclosing any privileged communications — for instance, by relying on an "advice of counsel" defense. But all or most courts wisely reject adversaries' attempts to trigger a "gotcha" advice of counsel implied waiver.

In Kleeberg v. Eber, plaintiffs argued that defendants had waived their attorney-client privilege protection as to "any legal advice they received" about the pertinent transactions, "because [defendants] testified at their depositions that they relied on the advice of counsel to effectuate some of the transactions at issue in this case." No. 16-CV-9517 (LAK) (KHP), 2019 U.S. Dist. LEXIS 80428, at *22 (S.D.N.Y. May 13, 2019). The court bluntly rejected plaintiffs' argument, noting that "it is well established that merely testifying that an attorney was consulted, without revealing the substance of those communications, does not waive privilege." Id.

Most corporate deponents would have to acknowledge that they relied on lawyers' advice before consummating transactions or taking other important steps. If such limited deposition testimony triggered a waiver, the privilege could be easily overcome. Instead, corporations waive their privilege only if their employees disclose that advice, or if they defend themselves by explicitly relying on the fact of that advice.

- [Privilege Point, 10/2/19]

Can A Trademark Case Defendant Avoid Privilege Waiver After Its Executive Testified That Its Lawyer "Cleared The Name For Us?"

October 2, 2019

Corporations can expressly waive their privilege when responsible loyal employees disclose privileged communications, and they can impliedly waive their privilege by relying on a lawyer's advice to gain some advantage in litigation. When either one of those occurs, what can a corporation do to avoid the consequences?

In Airhawk International, LLC v. Ontel Products Corp., defendant's Vice President of Product Strategy and Business Development testified at a trademark case deposition that "legal counsel 'clear[ed] the name for us.'" Case No. 18-cv-0073-MMA-AGS, 2019 U.S. Dist. LEXIS 122675, at *2 (S.D. Cal. July 23, 2019) (alteration in original). The court found that the deposition testimony could result in an implied waiver and "may also support a claim for express waiver." Id. at *7. But the court then assured defendant that it "may preserve the confidentiality of its communications by abandoning the basis for the implied waiver." Id. at *9. If so, defendant would have to "file a stipulation that: (1) it will not use attorney-client communications in any way before the Court . . . and (2) it will ensure that its witnesses are instructed about this stipulation, to ensure that they do not inadvertently disclose such attorney-client communications." Id.

Corporations should welcome the chance some courts give them to avoid the consequences of obvious express waivers or apparent implied waivers.

- [Privilege Point, 2/5/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part IV**

February 5, 2020

The last three Privilege Points described six favorable analyses from a Southern District of New York decision (Judge Gorenstein) assessing defendant Barnes & Noble's privilege assertions covering its investigation and later firing of its CEO for sexual harassment. Parneros v. Barnes & Noble, Inc., 332 F.R.D. 482 (S.D.N.Y. 2019).

Seventh, the court addressed fired CEO Parneros's argument that Barnes & Noble waived its privilege protection for communications relating to its press release when announcing Parneros's firing – because the press release said Parneros's termination "was taken by the Company's Board of Directors who were advised by the law firm Paul, Weiss." Id. at 500. The court rejected Parneros's argument, noting that "[b]ecause the . . . press release does not disclose the substance of counsel's advice, but rather only discloses the fact of counsel's consultation, there was no waiver based on the inclusion of the statement in the press release." Id. Eighth, the court addressed fired CEO Parneros's argument that Barnes & Noble triggered an "at issue" waiver by including in its Answer a contention that Barnes & Noble's termination decision was "clearly made in good faith." Id. at 501-02. The court rejected Parneros's argument – explaining that "the mere use of the term 'good faith' in an Answer does not reflect reliance on a 'good faith' defense," and emphasizing that "Barnes & Noble has disclaimed any intention to assert a 'good faith' defense." Id. at 502.

This extensive well-reasoned opinion by such a well-respected judge in such a high-profile case provides favorable holdings and practical guidance for corporations seeking to maximize their investigation-related privilege protection.

- [Privilege Point, 3/11/20]

Alabama Supreme Court Adopts A Narrow "At Issue" Waiver Approach

March 11, 2020

The "at issue" doctrine can strip away privilege when a litigant relies on her ignorance, knowledge, action, inaction, etc. in an effort to gain some litigation advantage – if in fairness the adversary should be given access to privileged communications related to the litigant's mental state or actions. For instance, some courts require a litigant to produce privileged communications about its settlement of a claim if the litigant later seeks indemnification or contribution from a third party for the amount it paid in that earlier settlement.

Other courts take a narrower view. In In re Dow Corning Alabama, Inc., 297 So. 3d 373 (Ala. 2019), defendant settled a personal injury case, and later sought indemnity from a third party for the settlement amount. The third party argued that "reports, evaluations, and recommendations regarding liability exposure, potential verdict range, and settlement value . . . are relevant to establishing whether the settlement . . . was reasonable and was made in good faith." Id. at 377. Thus, the third party contended that "the Dow parties have, by seeking indemnity and putting the reasonableness and good faith of the settlement in issue, waived the attorney-client privilege and the protection afforded by the work-product doctrine." Id. The court noted that "[b]oth sides in this dispute rely on cases from other jurisdictions." Id. at 378. The court ultimately found "persuasive those opinions in which courts have concluded that the reasonableness and good faith of a settlement in the context of an indemnity claim are to be judged using an objective standard." Id. at 378-79. Thus, "proving or disproving the objective reasonableness and good faith of the settlement in [the underlying] personal-injury case does not require the production of attorney-client privileged materials or materials protected by the work-product doctrine." Id. at 380.

As with other disputes, courts must sometimes choose from among differing approaches to privilege and waiver issues.

- Cage v. Harper, Case No. 17-CV-7621, 2019 U.S. Dist. LEXIS 217983, at *2, *4 (N.D. Ill. Dec. 19, 2019) (holding that defendant University had not triggered an “at issue” waiver in a wrongful termination case brought by the University’s former General Counsel by asserting good faith and qualified immunity; “Plaintiff seeks to compel the production of communications between legal counsel (Akerman) and its client (the Board of Trustees and Chicago State University) on the basis that Defendants have pled affirmative defenses of good faith and qualified immunity, and therefore have waived the attorney-client privilege.”; “Here, Plaintiff has not established that Defendants have placed the attorney-client communications at issue. Instead, Defendants have explicitly stated it is not relying upon the advice of counsel in proving any of its affirmative defenses. Nor have Defendants relied upon the advice of counsel or any communications with counsel at any deposition or in response to any discovery request. See e.g., Capital Tax Corp., 2011 U.S. Dist. LEXIS 40747, 2011 WL 1399258, at *2 (finding that at issue waiver did not occur where a plaintiff intended to meet its burden of proof on a claim without using privileged information). In turn, Plaintiff has not provided any specific instance in which a Defendant has referenced or identified communications with counsel as being part of the assertion of any affirmative defense. Moreover, Defendants can seek to establish through non-privileged communications and actions these affirmative defenses; nothing about these defenses mandates that advice of counsel be used to prove them.”)

- [Privilege Point, 3/18/20]

Southern District of New York Applies A Broad "At Issue" Waiver Doctrine

March 18, 2020

Last week's Privilege Point described an Alabama Supreme Court decision applying a narrow "at issue" waiver approach. The "at issue" doctrine can trigger a privilege waiver even if the privilege's owner does not disclose, rely on, or even mention privileged communications.

But some courts apply the doctrine very broadly. In Brown v. Barnes & Noble, Inc., 474 F. Supp. 3d 637, 652 (S.D.N.Y. 2019), the Southern District of New York (Magistrate Judge Parker) found that FLSA defendant Barnes & Noble had "impliedly waived [privilege and work product] protection insofar as it has asserted a good faith defense" to its job classifications. The court noted that other Southern District courts have found a waiver "in cases where the claim involves the proper classification of a position under the FLSA" – because "a plaintiff is entitled to explore whether the defendant acted contrary to legal advice when classifying a position as exempt from overtime or minimum wage requirements." Id. at 653. Most troubling, the court emphasized that "[a] waiver has been found even when the defendant asserted that it was not relying on advice of counsel." Id.

There is not much that corporations' employees and lawyers can do in jurisdictions taking such a broad "at issue" waiver approach -- other than following the always-wise practice of being careful what they write.

- McGowan v. JPMorgan Chase Bank, N.A., No. 18 Civ. 8680 (PAC) (GWG), 2020 U.S. Dist. LEXIS 73051, at *22, *22-23 (S.D.N.Y. Apr. 24, 2020) (holding that an internal investigation that was undertaken by a non-lawyer did not deserve privilege protection, but that once a lawyer became involved it morphed into a privileged investigation; holding that JPMorgan did not trigger an “at issue” waiver by generally claiming “good faith,” but ordering JPMorgan to indicate whether it intended to rely on a privileged investigation in its defense; “It would have made things much simpler if JPMC had at least stated that the nature of the investigation would not be a fact that JPMC would put at issue in its defense of the case.”; “In light of JPMC’s refusal to do so, and the continued inclusion of the defense in its Answer, the Court will require JPMC to state now whether it intends to offer evidence of the nature of the investigation as any part of the defense of this action. If it intends to do so, it shall so state in a letter filed within 14 days of the date of this decision.”)
- Profit Point Tax Technologies, Inc. v. DPAD Group, LLP, 336 F.R.D. 177, 181 (W.D. Wis. 2020) (rejecting the Hearn “at issue” doctrine approach, and instead adopting the Rhone-Poulenc approach; “However, unlike the near-uniformity that exists with respect to the elements of the attorney-client privilege, not all courts agree with the expansive view of the ‘at issue’ waiver doctrine as espoused in Synalloy and Hearn. One such court is the Court of Appeals for the Third Circuit. In Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851 (3rd Cir. 1994), a diversity case involving claims arising under Pennsylvania law, the court declared such decisions to be of ‘dubious validity,’ insofar as they rested merely on the conclusion that the communications were relevant and should in fairness be disclosed. . . . In the Third Circuit’s view, a party puts privileged communications ‘at issue’ only where ‘the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.’ Id. at 863 (citations omitted). Classic examples are where a party files a malpractice action against the lawyer, or where an alleged patent infringer relies on an advice of counsel defense to avoid a finding of willful infringement. Id.”)

- In re Perrigo Co. PLC Sec. Litig., No. 19cv70 (DLC), 2020 U.S. Dist. LEXIS 230972, at *3, *6 (S.D.N.Y. Dec. 8, 2020) (holding that a securities lawsuit defendant waived privilege protection by notifying plaintiffs that it intended to rely on an advice of counsel defense; “Perrigo represents that it consulted with multiple in-house and external counsel and other advisors concerning its disclosure obligation. It gave notice to plaintiffs on August 21, 2020 that, as it relates to advice provided to Perrigo regarding the disclosure decisions pertaining to the November 8, 2018 Form 10-Q, it intends to rely on an advice of counsel defense in order to negate the plaintiffs’ allegations of scienter.”; “The plaintiffs have submitted exemplar emails and their attachments to show that the defendants waived their attorney-client privilege both as to the advice they received about their disclosure obligations and the advice they received about the merits of Irish Revenue’s tax assessment. These documents explain that Perrigo was advised that it would not have to disclose the \$1.9 billion tax assessment in its Form 10-Q because counsel advised Perrigo that it would prevail on the merits in its dispute with Irish Revenue. Perrigo’s waiver of its attorney-client privilege therefore requires the disclosure of its communications with its attorneys regarding the merits of the underlying tax dispute.”)
- Meskunas v. Auerbach, No. 17 Civ. 9129 (VB) (JCM), 2020 U.S. Dist. LEXIS 244746, at *12-13 (S.D.N.Y. Dec. 30, 2020) (finding that plaintiff impliedly waived privilege protection by filing a malpractice case against his former lawyer, requiring the plaintiff to produce communications with other lawyers who gave him advice on the same issue; “The Court agrees that by placing Auerbach’s advice at issue, Plaintiffs waived their privilege regarding any advice they received from other counsel, including Eichen, on whether to default on the Mortgage, because such advice ‘bears on the issue of reasonable reliance.’ See In re Gaming Lottery Securities Litig., No. 96 Civ. 5567 (RPP), 2000 U.S. Dist. LEXIS 3931, 2000 WL 340897, at *3 (S.D.N.Y. Mar. 30, 2000); accord Erie, 546 F.3d at 228. Since Plaintiffs’ malpractice claim rests on the supposition that they relied on Defendants’ negligent advice, ‘legal advice they received from any other lawyers on that subject relates to the reasonableness of [Plaintiffs’] reliance [on Defendants’ advice] and is not subject to the attorney/client privilege.’” (alterations in original))

- Wier v. United Airlines, Inc., No. 19 CV 7000, 2021 U.S. Dist. LEXIS 73397, at *29, *30-31 (N.D. Ill. Apr. 16, 2021) (rejecting plaintiff's claim that defendant triggered an "at issue waiver" by filing affirmative defenses; "Wier argues that United has waived any privilege by asserting two affirmative defenses. First, Wier points to United's Second Affirmative Defense, which states, 'All actions taken by United were made without malice, in good faith, and for legitimate, non-discriminatory and non-retaliatory reasons. Such good faith and legitimate reasons are a complete defense to Plaintiff's allegations and further preclude recovery of punitive damages.'"; "Wier is mistaken. Although United failed to direct this Court to relevant case law supporting its position, Wier's waiver argument is incorrect, and the cases upon which she attempts to rely are inapposite. Courts in this district have adopted the Third Circuit's approach to the 'at issue' waiver doctrine. See Beneficial Franchise Co. v. Bank One, N.A., 205 F.R.D. 212, 216 (N.D. Ill. 2001); United States ex rel. Derrick v. Roche Diagnostics Corp., No. 14 CV 04601, 2019 U.S. Dist. LEXIS 69681, 2019 WL 1789883, at *2 (N.D. Ill. Apr. 24, 2019); Cage v. Harper, No. 17-CV-7621, 2019 U.S. Dist. LEXIS 217983, 2019 WL 6911967, at *1 (N.D. Ill. Dec. 19, 2019). 'In Rhone-Poulenc, the Third Circuit specifically rejected the proposition that a party impliedly waives the privilege merely by asserting a defense that would make an attorney's advice relevant.' Beneficial Franchise, 205 F.R.D. at 216. "Rather, the Third Circuit held that 'the advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication.'" Id. (citing Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851 (3d Cir. 1994))." (footnote omitted) (internal citation omitted))

- [Privilege Point, 6/23/21]

S.D.N.Y. Issues Frightening Waiver Decision in Employment Case

June 23, 2021

Wise employment lawyers know that they should never be the decision makers when a client terminates an employee. Instead, those lawyers should be one of many inputs into the business person's decision to terminate.

In Kahlon v. Project Verte Inc., No. 20-cv-3774 (MKV), 2021 U.S. Dist. LEXIS 75825 (S.D.N.Y. Apr. 20, 2021), the Southern District of New York (Judge Vyskocil) addressed a terminated employee plaintiff's effort "to compel production of a memo, prepared by corporate counsel, about the basis for his termination that Defendant . . . has withheld on the basis of attorney-client privilege." Id. at *1. After reading the memo in camera, the court noted that it "opines that Kahlon's refusal to sign certain convertible notes justified firing him for cause" — and that "[t]he memo was read aloud to the Board at the meeting where the Board voted to fire Kahlon." Id. at *1-2. The defendant "argue[d] that there is another 'source of direct proof' on the Board's reasons for Kahlon's termination" — the Board minutes. Id. at *2-3. The court rejected defendant's argument, and ordered the memo produced. Noting that the Board minutes "do not reflect the contents of the memo or the Board's reasoning," the court pointed to defendant's "recent letter to the Court describing the grounds for its contemplated motion for summary judgment . . . [which] asserts that it was '[a]cting on the advice of counsel' when it fired Kahlon." Id. at *3 (third alteration in original).

This scenario presumably plays out constantly in termination decision scenarios. Perhaps the court's inexplicable decision rested on defendant's affirmative "advice of counsel" grounds for seeking summary judgment. Companies should never do that without weighing the obvious risk of an implied waiver of attorney-client privilege protection. But most courts would give a company the chance to abandon that reliance on a lawyer's advice, and instead defend the termination by pointing to the actual facts justifying it.

- Sparrow Fund Mgmt. LP v. Mimedx Grp., Inc., No. 18-cv-4921 (PGG) (KHP), 2021 U.S. Dist. LEXIS 91653, at *9-10, *10, *10-11, *17, *18 (S.D.N.Y. May 13, 2021) (finding that a defendant's defense against a malicious prosecution claim that it had acted in good faith did not trigger an at issue waiver; "Sparrow asserts that MiMedx put advice of counsel at issue by relying on counsel's investigation of Sparrow as a defense in this action. Sparrow also asserts that MiMedx has selectively disclosed some documents pertaining to its pre and post-suit investigations about whether Sparrow was Aurelius and that MiMedx, in fairness, must disclose all documents pertaining to those investigations."; "MiMedx claims that it produced documents generated by the investigators as well as communications about the process of the investigation and investigation results, whether generated by counsel or not. On the other hand, MiMedx admits to withholding attorney-client communications discussing the investigation in the context of forming a litigation strategy and providing legal advice. In other words, MiMedx argues it is not relying on the advice of counsel as part of its defense, but rather on the results of its investigations. Further, Mimedx maintains that it has not selectively disclosed documents from the investigation that are helpful and hidden documents that are unhelpful. In fact, it has produced some reports suggesting that there was no basis to believe that Sparrow was Aurelius and others suggesting the opposite."; "To start, MiMedx has clearly waived privilege as it relates to all facts its investigators and attorneys collected as part of the pre and post-suit investigations, attorney-client communications relaying those facts, and attorney-client communications drawing factual conclusions based on the facts collected. Indeed, MiMedx acknowledges this waiver and has produced the entirety of its pre-filing investigation to Sparrow. MiMedx argues, however, that the selective waiver doctrine does not act as a waiver of privilege for attorney-client communications created for the purposes of rendering and receiving legal advice as to whether and how MiMedx could take and continue legal action against Sparrow based on the investigation results."; "Based on this rationale, I find that Sparrow impliedly raised the issue of whether MiMedx acted in good faith by asserting a claim of malicious prosecution. While MiMedx asserts, among other defenses, that it did not act with malice or bad faith, that defense is necessitated by the malicious prosecution claim itself. It is difficult to imagine any party contesting an allegation of malice — one of the core elements of a malicious prosecution claim under New York law — without contending that it acted in good faith. Therefore, and in light of the case law discussed above, I find that MiMedx's assertion of good faith did not impliedly put otherwise privileged communications concerning litigation strategy based on the results of the pre and post-filing investigations at issue."; "In this case, as already stated, MiMedx has waived privilege as to the substance of the investigation and has already produced documents

from it. Accordingly, MiMedx has not put good faith at issue or selectively disclosed documents such that the attorney-client privilege should be vitiated.”)

- [Privilege Point, 7/7/21]

The Stealthy Rule 612 Risk to Privilege Protection

July 7, 2021

Lawyers preparing their clients and others for deposition or trial testimony frequently show them documents. Courts disagree about whether such lawyers can withhold from the adversary those documents' identity. The majority of courts seems to allow that, based on the understandable assumption that the documents' identity might reflect the lawyers' strategy. But such preparation risks a far more dangerous possibility – waiving any privilege protection for such documents themselves (not just their identity).

In Johnson v. Baltimore Police Dep't, Case No. ELH-19-698, 2021 U.S. Dist. LEXIS 94323 (D. Md. May 18, 2021), the court dealt with both of these issues. In response to defendants' lawyer's deposition questions, the plaintiff's lawyer instructed an unrepresented non-party witness not to disclose the identity of documents the witness reviewed in preparation for his deposition. The court took the minority view, stating that "when plaintiff's counsel showed [the unrepresented witness] documents in advance of his deposition, plaintiff waived any opinion work product protection it might have had over the compilation of the documents." Id. at *12. The court then turned to Fed. R. Evid. 612, which indicates that courts finding it "in the interests of justice" may order the production of documents a witness reviewed: (1) "for the purpose of testifying"; and (2) which refreshed the witness's recollection. Id. at *4; Fed. R. Evid. 612 Judiciary Comm. Notes to H. Rep. No. 93-650. Noting that the incident at issue had occurred 30 years earlier, the court explained that "[a]fter a review [of] the deposition transcript and the materials shown the deponent, I am convinced that plaintiff's counsel shared the documents with [the witness] to refresh his recollection" – and ordered them produced. Johnson, 2021 U.S. Dist. LEXIS 94323, at *16.

On its face, Rule 612 case applies to any witness – even a deponent or trial witness who reviewed undeniably privileged documents (perhaps even her own) before testifying. If the court finds that the documents refreshed the witness's recollection, the court can order those documents produced if "justice requires." Lawyers preparing witnesses to testify must keep this unexpected and somewhat counter-intuitive waiver principle in mind.

- Vazquez v. Mayorkas, Case No. 18-cv-07012-JCS, 2021 U.S. Dist. LEXIS 101765, at *1 (N.D. Cal. May 28, 2021) (holding that a plaintiff's allegation against her lawyer triggered a privilege waiver; "As discussed at the hearing, Ms. Vazquez has waived attorney-client privilege as to communications regarding the purported settlement by asserting that her attorneys acted without authorization and 'railroaded' her.")

- [Privilege Point, 7/28/21]

"At Issue" Waivers Implicate Subtle Distinctions

July 28, 2021

The frighteningly unpredictable "at issue" waiver doctrine can strip away attorney-client privilege protection when the client seeks some legal advantage by putting "at issue" its knowledge, ignorance, conduct, etc. This type of waiver does not involve any actual disclosure of privilege communications or any explicit reliance on lawyers or their advice. So they are hard to see coming, and frequently involve very subtle issues.

In SEC v. Ripple Labs, Inc., the court assessed the waiver implications of defendant's "fair notice" affirmative defense – which pointed to the "lack of clarity and fair notice regarding [Ripple's] obligations under the law, in addition to the lack of clarity and fair notice regarding [the SEC's] interpretation of the law." No. 20-CV-10832 (AT) (SN), 2021 U.S. Dist. LEXIS 102002, at *8 (S.D.N.Y. May 30, 2021) (Netburn, J.). The SEC analogized Ripple's affirmative defense to a "good faith" defense in similar settings – which many (but not all) courts find triggers an "at issue" waiver (requiring those litigants to disclose any privileged communications that formed their legal understanding). The court rejected the SEC's argument. The court noted that "a 'good faith' defense is grounded in a party's subjective belief that its behavior complied with the law, thus putting at issue any legal advice it received bearing on that question." Id. at *10. The court contrasted such a "good faith" defense with a "fair notice" defense. The latter's "focus on the enforcing agency's behavior reveals that the fair notice defense was not rooted in the defendant's state of mind. Rather it is an objective test of how a reasonable person would have interpreted the agency's conduct." Id. Thus, because "Ripple focuses on the SEC's failure to provide fair notice to the market about the Commission's state of mind as to whether XRP qualified as a security[,] [i]t is not clear that such a defense even requires that a defendant act in good faith." Id. at *11-12.

Not all courts would be this deliberate and careful, so corporations and their lawyers should always consider the risk of possibly relying on their client's knowledge (or lack of knowledge) to gain some advantage in litigation.

- [Privilege Point, 1/12/22]

Court Issues a Favorable Privilege Decision About an Investigation Report Resulting in an Employee's Firing

January 12, 2022

Courts frequently face a common scenario: an in-house lawyer investigates alleged employee misconduct, and prepares a report that the company relies on in firing the employee. Do such reports deserve privilege protection, and what happens if the employer produces a redacted version of such a report to justify the firing?

In Maiurano v. Cantor Fitzgerald Securities, No. 19 Civ. 10042 (KPF), 2021 U.S. Dist. LEXIS 207746 (S.D.N.Y. Oct. 27, 2021), Cantor Fitzgerald's Deputy General Counsel investigated an employee's alleged financial transaction improprieties. Cantor Fitzgerald fired the employee, who then sued the company. Cantor Fitzgerald produced its lawyer's investigation report, but "redacted the entire sections entitled 'Conclusion' and 'Observations and Recommendations.'" Id. at *2. Not surprisingly, plaintiff argued that Cantor Fitzgerald waived its privilege by "producing the redacted version of the Memorandum and relying on it as a basis for Plaintiff's termination." Id. at *3. The court first said it "has little difficulty finding" that the redacted portions of the Memorandum deserved privilege protection. Id. at *5. More significantly, the court then accepted Cantor Fitzgerald's argument "that its decision to terminate Plaintiff was 'based, only in part, on the factual findings of the [Memorandum], all of which have been disclosed to Plaintiff.'" Id. at *7 (alteration in original). The court ultimately denied plaintiff's waiver argument, emphasizing that Cantor Fitzgerald "further states that it will not rely 'on the privileged portions of the [Memorandum] as the basis for terminating [Plaintiff's] employment, which will be presented through objective proof of [Plaintiff's] misconduct.'" Id. (alterations in original).

This helpful case provides a useful roadmap for companies finding themselves in the same situation.

- [Privilege Point, 2/9/22]

Defendant Dodges a Bullet When Preparing a Two-Part Faragher- Ellerth Report

February 9, 2022

Based on two United States Supreme Court decisions, defendants sometimes may assert what is known as a "Faragher- Ellerth" affirmative defense to discrimination and harassment claims. To successfully assert that affirmative defense, litigants must demonstrate that they investigated any claims, and then took reasonable remedial steps. Not surprisingly, litigants relying on such a defense normally cannot withhold as privileged or as protected work product the investigation results upon which they intend to rely.

In Rheeder v. City of Marion, 973 N.W. 875 (Table format), 2021 Iowa App. LEXIS 1013 (Iowa Ct. App. 2021), defendant asserted a Faragher- Ellerth affirmative defense, and thus acknowledged that it could not withhold an outside lawyer's investigation report about alleged sexual harassment. But the defendant withheld about seven pages of the thirty-four page report, arguing that "it never waived privilege as to the redacted portion of the report dealing with disparate treatment" – because "it did not intend to rely on that portion to support its affirmative defense." Id. at 15. Based on defendant's outside lawyer's affidavit, the court concluded that she "submitted to the city one report on both phases of her investigation" and that "[t]he results of the investigation could well have been divided into two separate reports." Id. at *19. After reviewing the full report in camera, the court allowed the City to assert its Faragher- Ellerth affirmative defense while withholding the other portion of the outside lawyer's investigation report.

This case provides a useful warning about the danger of preparing a Faragher- Ellerth investigation report that goes beyond the clients' specific needs for an affirmative defense.

- [Privilege Point, 5/18/22]

Plaintiffs Suing Jones Day for Retaliation Must Identify Lawyers With Whom They Consulted Before Filing Their Lawsuit

May 18, 2022

Last week's Privilege Point addressed a case in which defendant Holland & Knight could withhold the names of clients to whom it provided advice allegedly similar to advice plaintiffs claimed was fraudulent. A few weeks later, another court assessed whether plaintiffs suing Jones Day for alleged retaliation against them for seeking parental leave had to identify lawyers with whom they consulted before suing that law firm.

In Savignac v. Jones Day, Title VII plaintiffs had earlier sent Jones Day an email alleging that the law firm engaged in illegal discrimination in denying their parental leave, and boasted that "[w]e have also discussed the matter with other competent attorneys" who agreed with them. 586 F. Supp. 3d 16, 17 (D.D.C. 2022) (internal citation omitted). Jones Day sought the names of those "other competent attorneys," but plaintiffs claimed work product protection. The court bluntly rejected their work product assertion, noting that under Title VII plaintiffs must "demonstrate a good faith, reasonable belief that the challenged practice violates Title VII." Id. at 20. Noting that "the good faith requirement requires a subjective inquiry into the plaintiffs' beliefs and motivations," the court agreed with Jones Day that "[t]o the extent that Plaintiffs did not consult with 'other competent attorneys,' as they claimed, or that those individuals did not believe that Jones Day's leave policies violated Title VII, that information would tend to make Plaintiffs' good faith 'less probable than it would be without the evidence.'" Id. at 20 (citation omitted).

The attorney-client privilege and work product doctrine sometimes protect the identity of lawyers' clients and clients' lawyers, but sometimes they do not. Lawyers representing those clients must understand the differences.

- [Privilege Point, 6/15/22]

Plaintiff Relying on a Former Lawyer's Testimony Can't Avoid a Privilege Waiver

June 15, 2022

Most courts hold that a litigant does not automatically waive privilege protection by listing a former lawyer as a witness – because that lawyer might testify about non-privileged facts. But not surprisingly, such a step can have disastrous results if the litigant and her current lawyer do not think ahead.

In Ellis v. Salt Lake City Corp., a wrongful termination plaintiff called her former lawyer as a fact witness to testify that defendant denied plaintiff a reasonable accommodation. Plaintiff argued that her former lawyer "made [plaintiff] aware of [these] opinions in non-confidential ways (e.g., in letters, emails, phone calls and other communications to Defendants)." No. 2:17-cv-00245-JNP-JCB, 2022 U.S. Dist. LEXIS 70036, at *8 (D. Utah Apr. 15, 2022). But plaintiff then resisted discovery of her communications directly with her former lawyer. The court overruled her objection, holding that: (1) if they were privileged, Fed. R. Evid. 502(a) triggered a subject matter waiver covering those other communications, which "must, in fairness, be considered together" with "the disclosed communications" (id. at *13 n.16); or (2) plaintiff placed her former lawyer's advice "at issue" by relying on it to gain an advantage in the litigation; or (3) plaintiff's testimony that "'she believed' that [her former lawyer] 'believed' that the proposed accommodations were unreasonable" could only have come through her direct communications with her [former] lawyer (id. at *23 n.31).

Some courts would essentially give plaintiff an "off ramp" – allowing her to avoid a waiver by withdrawing her reliance on her former lawyer's testimony. Perhaps that is what happened after this unfavorable opinion.

- Brown v. Town of Front Royal, Civ. A. No. 5:21-cv-00001, 2022 U.S. Dist. LEXIS 80013, at *11 n.7, *20 (W.D. Va. May 3, 2022) (in an opinion by Judge Cullen, holding that defendant Town of Front Royal had triggered an “at issue” waiver in a Title VII case, requiring the Town to produce documents related to its outside counsel’s investigation into plaintiff’s sexual harassment claim and alleged retaliation resulting in her termination; noting that the Town had not affirmatively asserted an “advice of counsel” or an Ellerth/Faragher defense; but had reserved its right to do so; “The Town has not expressly raised the Ellerth/Faragher affirmative defense in this case, but it has reserved its right to rely on any affirmative defenses that become available. . . . It is also worth noting that, in her brief in support of the motion to compel, Brown stated her belief that the Town will advance an Ellerth/Faragher affirmative defense, but the Town did not confirm or deny its intent to rely on that defense.”; “The Town must disclose, as [Magistrate] Judge Hoppe directed, all communications with Judkins [outside counsel] regarding that investigation, Judkins’s factual findings and conclusions from the investigations, and her advice about any remedial measures taken in response to Sealock’s [plaintiff’s supervisor] alleged harassment.”)

- [Privilege Point, 12/14/22]

Courts Assess Protection for Lawyers' Billing Entries: Part II

December 14, 2022

Last week's Privilege Point described courts' varied approaches to losing litigants' efforts to discover the winning lawyers' billing entries when the winners seek recovery of their attorney's fees.

In Blonder v. Independence Capital Recovery, LLC, No. 21-CV-0912 (ARR) (AYS), 2022 U.S. Dist. LEXIS 165096, at *3 (E.D.N.Y. Sept. 13, 2022), the court handling a Fair Debt Collection Practices Act case approved some of the winning plaintiff's redactions, but found that other "billing entries were incorrectly redacted as they do not reveal any actual communications with the client or the mental impressions of any attorney working on behalf of Plaintiff." Three days later, the court in Blue Buffalo Co. v. Wilbur-Ellis Co. agreed with a Special Master's conclusion that the winning plaintiff "cannot demand that [defendant] pay for a specific task while at the same time refusing to reveal what that task is." Case No. 4:14 CV 859 RWS, 2022 U.S. Dist. LEXIS 167569, at *8 (E.D. Mo. Sept. 16, 2022) (internal citation omitted). The court allowed plaintiff only to protect from discovery "genuinely confidential information or sensitive attorney advice" – ordering plaintiff to produce entries that "mostly describe work done at a high level of generality." Id. at *15-16. Eleven days after that, the court in Clerk of the Common Council v. Freedom of Information Comm'n also adopted this general approach – noting that "[t]here is a general agreement that attorney billing statements and time records are protected by the attorney-client privilege only to the extent that they reveal litigation strategy and/or the nature of services performed." 263 A.3d 1, 12 (Conn. App. Ct. 2022) (citation omitted).

Few if any courts acknowledge the common sense conclusion that a litigant's lawyer's billing records are by definition work product – presumably adopting a sort of implicit "substantial need" analysis on the work product side.

- Moreau v. U.S. Olympic & Paralympic Comm., Civ. A. No. 1:20-cv-00350-CNS-MEH, 2022 U.S. Dist. LEXIS 171825, at *3, *4-6, *6 (D. Colo. Sept. 22, 2022) (analyzing the at issue doctrine; finding that the defendant had triggered an at issue waiver by asserting defenses which placed privileged documents at issue, but withheld them during discovery; “First, USOPC has engaged in an affirmative act. USOPC asserted several defenses in its Amended Answer. Specific to the Magistrate Judge’s analysis were USOPC’s seventh, eleventh, and sixteenth defenses. Assertion of these defenses constitutes an affirmative act for determining whether the ‘at issue’ waiver applies. See, e.g., State Farm Fire & Cas. Co. v. Griggs, 419 P.3d 572, 575, 2018 CO 50 (Colo. 2018).” (internal citations omitted); “Second, after reviewing the privileged documents, USOPC has put the documents at issue by asserting the defenses in its Amended Answer. In its seventh defense, USOPC asserts Dr. Moreau’s claims are barred because he did not engage in protected activity and failed to put his USOPC on notice that he was engaging in any allegedly protected conduct. In its eleventh defense, USOPC asserts it has at all times made good faith efforts to comply with the law (Id.) And in its sixteenth defense, USOPC maintains that to the extent Dr. Moreau raised any concerns about athlete safety, those concerns were taken seriously and acted upon (Id. at 42). By placing at issue a privileged document going directly to a claim or defense, see DiFede, 780 P.2d at 543, or where the defense depends on the privileged document, see State Farm, 419 P.3d at 575, a party impliedly waives the attorney-client privilege with respect to that document. Contrary to USOPC’s argument that its defenses have not put the privileged documents at issue, the Magistrate Judge correctly observed adjudication of these defenses depends on the privileged documents . . . DiFede, 780 P.2d at 544 (concluding it would be unfair for a party to assert a ‘lack of knowledge’ of the law by claiming fraudulent inducement ‘while simultaneously retaining the attorney-client privilege’). Therefore, after reviewing the privileged documents identified in Dr. Moreau’s Motion and the Magistrate Judge’s Order, the Court concludes USOPC’s assertion of these defenses has placed the documents at issue.” (internal citations omitted); “Third, the privileged documents are vital to Dr. Moreau’s position. The Magistrate Judge summarized allegations from the First Amended Complaint in his Order. These allegations concern Dr. Moreau’s communications with USOPC, which include the privileged documents. Accordingly, the Magistrate Judge properly determined this element was satisfied . . . DiFede, 780 P.2d at 544 (concluding factors of the ‘at issue’ waiver were satisfied where it would be ‘unfair’ for a party to retain privilege and ‘frustrate attempts’ by opposing party to prove her knowledge of the state of law through use of privileged communications).” (internal citations omitted))

- [Privilege Point, 1/11/23]

FLSA Cases Raise Interesting Privilege Issues: Part I

January 11, 2023

Fair Labor Standards Act cases frequently involve privilege issues, in part because employers' treatment of employees' status and their treatment of compensation frequently (if not normally) implicate legal advice that those employers have received.

In Raymond v. Renew Therapeutic Massage, Inc., Civ. Case No. 18-13760, 2022 U.S. Dist. LEXIS 196908, at *2 (E.D. Mich. Oct. 28, 2022), plaintiff filed a Motion in Limine "seeking to exclude evidence or testimony related to advice of counsel regarding [defendant] Renew's classification of [plaintiff] Raymond as an independent contractor" for compensation purposes. Plaintiff filed her motion after defendant's counsel noted during a pretrial conference "that he intended to defend against [plaintiff]'s FLSA claims and damages by using the advice of counsel defense." Id. at *3. The court granted plaintiff's motion, noting that: (1) defendant Renew "never identified an advice of counsel affirmative defense on the record" (id. at *11-13); and (2) Renew "refused to allow Raymond to inquire about the legal advice obtained by [defendant's deponent] in a deposition, asserting attorney-client privilege." Id. at *16. Although not using the word karma, the court explained that "it would be unfair to Raymond to argue against a defense regarding communications that she was prevented from inquiring about during discovery." Id. at *17.

Next week's Privilege Point will describe an FLSA case decided three days later, which focused on another privilege principle.

- [Privilege Point, 1/18/23]

FLSA Cases Raise Interesting Privilege Issues: Part II

January 18, 2023

Last week's Privilege Point described a case predictably holding that an FLSA defendant could not present defensive evidence at trial of the advice it received from its lawyer about plaintiff employee's classifications after asserting privilege protection for such advice during discovery.

Three days later, the court in Walters v. Professional Labor Group, LLC, addressed a fascinating issue triggered when defendant's Rule 30(b)(6) witness "appeared to assert an advice of counsel defense" based on advice he had received from the defendant's lawyer. No. 1:21-cv-02831-JRS-MJD, 2022 U.S. Dist. LEXIS 197345, at *1 (S.D. Ind. Oct. 31, 2022). As it turned out, the witness had received that advice fourteen years earlier — when he was employed by a different company which was then represented by the same lawyer. Understandably labeling the situation a "conundrum," the court held that: (1) the previous employer owns the privilege protection covering that earlier advice; (2) absent that previous employer's waiver, the defendant would be prohibited "from offering testimony or other evidence relating to any advice of counsel" its executive received while employed at the previous company that owned the privilege. Id. at *2-3.

This strange case highlights the importance of identifying the attorney-client privilege protection's ownership, especially in the corporate context.

- [Privilege Point, 7/19/23]

Texas Federal Court Applies the “At Issue” Waiver Doctrine

July 19, 2023

Clients can waive their privilege protection by intentionally or accidentally disclosing privileged communications, or by explicitly relying on privileged communications (such as pleading “advice of counsel” as a defense). They can also waive their privilege protection without disclosure and without such explicit references.

In Smith v. MV Transportation, Inc., Civ. No. 1:21-CV-349-DII-SH, 2023 U.S. Dist. LEXIS 84747 (W.D. Tex. May 15, 2023), defendant sought to enforce an FLSA settlement agreement. Plaintiff resisted defendant’s effort, contending that he had not authorized his lawyer to settle on those terms. The court understandably held that by challenging the agreement and by “asserting that [his lawyer] lacked authority to settle the case, [plaintiff] puts his communications with [his lawyer] about the settlement at issue and thereby waived his right to assert privilege over those communications.” Id. at *9 (emphasis omitted). As with all waivers, the court then had to assess the waiver’s scope. The court wisely held that the “temporal scope of a waiver generally is limited to the period when the disclosing party placed the privileged material at issue” – and thus did not extend to plaintiff’s replacement lawyer. Id. at *12.

These so-called “at issue” waivers are the most frightening, because they can apply without disclosure of, or explicit reliance on, privileged communications. Clients triggering such a waiver must then hope that the waiver’s scope will be limited, to minimize any damage.

- [Privilege Point, 12/13/23]

The Crypto King's and Others' Reliance on Legal Advice: Part I

December 13, 2023

Defendants seeking to avoid liability by relying on a lawyer's advice trigger a classic "implied waiver." Although asserting that defense does not itself disclose any privileged communications (as with an intentional or unintentional disclosure of privileged communications), fairness prohibits such a litigant from gaining a litigation advantage by pointing to legal advice without disclosing the advice and the related communications.

The implied waiver implications of relying on lawyers' advice arose in United States v. Bankman-Fried, No. S6 22-cr-0673 (LAK), 2023 U.S. Dist. LEXIS 176572 (S.D.N.Y. Oct. 1, 2023). Judge Kaplan addressed Bankman-Fried's intent to testify about his awareness that lawyers were involved in FTX's actions. The government sought to "preclude [Bankman-Fried] from **unduly** focusing on the fact of attorneys' involvement." Id. at *3 (citation omitted). Judge Kaplan barred Bankman-Fried "from referring in his opening statement to the presence or involvement of attorneys" and offering such evidence "absent prior notice to the Court and the government outside of the presence of the jury." Id. at *9.

Judge Kaplan himself first heard Bankman-Fried's testimony about FTX lawyers' involvement — then severely limited what the jury could hear of that. Apparently they weren't very impressed. The next two weeks' Privilege Points will describe two other recent cases addressing this "advice of counsel" issue.

- [Privilege Point, 12/20/23]

The Crypto King's and Others' Reliance on Legal Advice: Part II

December 20, 2023

Last week's Privilege Point described an "advice of counsel" issue that arose in Bankman-Fried's recent criminal trial. The day after S.D.N.Y. Judge Kaplan's ruling in that case, another court dealt with this issue.

In New Vision Gaming & Development, Inc. v. LNW Gaming, Inc., Case No. 2:17-cv-01599-APG-BNW, 2023 U.S. Dist. LEXIS 177955 (D. Nev. Oct. 2, 2023), plaintiff New Vision moved for partial summary judgment — relying in part on an employee's declaration that its lawyer found that defendant's poker game infringed plaintiff's patent. Acknowledging that "disclosing that legal counsel was consulted, the subject of the matter as to which advice was received, or that action was taken based on that advice, does not necessarily waive the privilege protection," the court explained that in contrast to that scenario plaintiff's declaration "explicitly stated his attorney's conclusion that [defendant] had infringed [plaintiff]'s patent and that this gave rise to a claim." Id. at *6, *7. The court understandably ordered plaintiff's representative to answer deposition questions "as to whether his attorney considered all information, including any contradictory information, to see whether his opinion was well-founded." Id. at *9.

Because the scope of an implied waiver rests on notions of fairness, courts finding such a waiver must define the extent to which the implied waiver strips away privilege protection. Next week's Privilege Point will describe a New York opinion decided ten days later, which also focused on that scope of waiver issue.

D. Scope of Waiver

- In re Royal Ahold N.V. Securities & ERISA Litigation, 230 F.R.D. 433, 435, 436, 437, 437-38, 438 (D. Md. 2005) (addressing work product protection and waiver Issues relating to White & Case's investigation into accounting irregularities, and preparation of 827 interview memoranda; holding that the work product doctrine did not protect White & Case's investigation, because the client was required to conduct the investigation to satisfy its outside auditor, so it would have undertaken the investigation even without anticipating litigation: "Lead plaintiffs argue persuasively that the principal reason was to satisfy the requirement of Royal Ahold's outside accountants, who would not otherwise complete the work necessary to issue the company's audited 2002 financial statements. In turn, completion of the 2002 audit was critical to Royal Ahold's receipt of [euro] 3.1 billion in financing. Undoubtedly the company was also preparing for litigation, as the first class action was filed February 24, 2003, but the investigation would have been undertaken even without the prospect of preparing a defense to a civil suit." (alteration in original) (footnote omitted); "Accordingly, at least for memoranda of interviews conducted for the purposes described above, Royal Ahold has not met its burden of demonstrating that the work product protection applies."; also holding that Royal Ahold had waived its work product protection by: (1) publicly disclosing the investigation results; and (2) by disclosing 269 of the 827 witness interview memoranda to the federal government; "The plaintiffs present two grounds for finding waiver. First is the public disclosure of the results of the investigations; second is the actual production of the witness material to the Department of Justice ('DOJ') and the Securities and Exchange Commission ('SEC')."; "The public disclosure argument is consistent with the position that the driving force behind the internal investigations was not this litigation but rather the need to satisfy Royal Ahold's accountants, and thereby the SEC, financial institutions, and the investing public, that the identified 'accounting' issues were being addressed and remedied. To this end, the information obtained from the witness interviews, and the conclusions expressed in the internal investigative reports, have largely been made public in the Form 20-F filed with the SEC by Royal Ahold on October 16, 2003. (See Royal Ahold and USF Mem. In Opp'n, Baumstein Decl., Ex 2.) This document discusses in some detail the findings of fraud at USF, the improper consolidation of joint ventures, other accounting irregularities, and the steps the company has taken to address these issues. In addition, several of the key investigative reports have been turned over to the lead plaintiffs. Those reports rely heavily on and indeed in some instances quote from the witness interview memoranda. (See July 22, 2005 Entwistle Aff., Exs. B and C.) Accordingly, testimonial use has been made of material that

might otherwise be protected as work product." (emphases added); "By its public disclosures in the Form 20-F and the production of several of the internal reports to the plaintiffs, Royal Ahold has therefore waived the attorney-client privilege and non-opinion work product protection as to the subject matters discussed in the 20-F and the reports. The remaining question is whether the interview memoranda constitute opinion work product which may yet be protected."; allowing Royal Ahold to redact demonstrable opinion work product from materials related to the public disclosure; "[R]elevant interview memoranda reflecting facts within the subject matter of the 20-F disclosures and the internal investigation reports are not necessarily protected. They must be produced to plaintiffs' counsel, except as to those portions Royal Ahold can specifically demonstrate would reveal counsel's mental impressions and legal theories concerning this litigation."; explaining that Royal Ahold's confidentiality agreement with the federal government did not preclude a work product waiver (even for opinion work product), and ominously pointing to the company's public disclosures intended to "improve its position with investors, financial institutions, and the regulatory agencies"; "While in some circumstances, a confidentiality agreement might be sufficient to protect opinion work product, in this case Royal Ahold already has disclosed information obtained from the witness interviews to the public in its Form 20-F filing with the SEC, and to the plaintiffs through the internal investigation reports. Likewise, to the extent that Royal Ahold offensively has disclosed information pertaining to its internal investigation in order to improve its position with investors, financial institutions, and the regulatory agencies, it also implicitly has waived its right to assert work product privilege as to the underlying memoranda supporting its disclosures. Finally, the language of the confidentiality agreements allows substantial discretion to the SEC and to the U.S. Attorney's office in disclosing any of the interview memoranda to other persons. Under all the circumstances, Royal Ahold has not taken steps to preserve the confidentiality of its opinion work product sufficient to protect the interview memoranda it already has disclosed to the government. These memoranda, if relevant to the claims in the amended consolidated complaint, must be turned over to plaintiffs in their entirety." (emphasis added) (footnote omitted); ordering Royal Ahold to produce "(a) a list of all interview memoranda disclosed to the Department of Justice or the Securities and Exchange Commission; (b) all portions of the interview memoranda disclosed to the Department of Justice or the Securities and Exchange Commission that are relevant to the claims in the consolidated complaint, other than those containing statements of the 36 'blocked witnesses' as to which the government has sought a stay; (c) a list of the other 558 interview memoranda; (d) all portions of the other interview memoranda containing factual information underlying the public disclosures, including the 20-F and the investigative

reports provided to plaintiffs, that are relevant to the claims in the consolidated complaint, unless a specific showing of opinion work product can be made to the court.")

- SEC v. Schroeder, No. C07-03798 JW (HRL), 2009 WL 1125579, at *7, *9, *8, *10, *12 (N.D. Cal. Apr. 27, 2009) (addressing Skadden's representation of a Special Committee in investigating KLA-Tencor Corp.'s options backdating; explaining that the SEC had sued one of KLA's executives, who in turn sought several categories of Skadden's communications and documents; ordering production of Skadden's final interview memoranda that had been given to the SEC, but not its raw material that had never been disclosed outside the law firm; pointing to Skadden affidavits that the raw material represented opinion work product; "[E]ach of the individual Skadden attorneys who participated in the interviews has submitted a declaration attesting that they did not merely record verbatim (or substantially verbatim) the witnesses' statements. Rather, they used their knowledge about the facts and theories of the case to identify and filter which facts and comments by the witnesses were important to the investigation."; explaining that Skadden had only provided an oral report to KLA's outside auditors and that disclosure to the auditor did not waive work product protection -- noting that "disclosures to outside auditors do not have the 'tangible adversarial relationship' requisite for waiver" (emphasis added); "Schroeder seeks the production of documents and communications between the Special Committee and KLA's outside auditors. The only auditor that has been identified here is PwC. Reportedly, PwC has been KLA's auditor since at least 1994 and was KLA's auditor with respect to the restatement of the options in question. (Miller Decl., ¶¶ 23-24). Skadden says that, in connection with that restatement, PwC requested information about the Special Committee's investigation. On October 18, 2006, Skadden made an oral presentation to PwC, including a PowerPoint presentation. No documents were provided to PwC at that time. (Id. ¶ 25). According to Skadden, at PwC's request, Skadden attorneys also later discussed information learned from certain witness interviews, using the Final Interview Memoranda to refresh their recollection. The Final Memoranda were not provided to PwC. (Id.[] Skadden's opposition brief states that Skadden and the Special Committee disclosed certain documents to PwC to assist in the audit of KLA and the restatement of the company's historical financial statements. (Skadden Opp. at 18). On the record presented, it is not clear precisely what those documents are, save the PowerPoint presentation that was made. (See Miller Decl. ¶¶ 23-26)." (emphases added); contrasting the KLA scenario with the Royal Ahold case; "Schroeder's other cited cases do not support the broad waiver he seeks here. In Royal Ahold N.V. Securities Litig., F.R.D. 433 (D. Md. 2005), a securities class action, the defendant company disclosed the details of its internal investigation in a public SEC filing and produced investigative reports (which quoted from witness interview memoranda) to the lead plaintiffs, but nonetheless withheld the majority of the underlying interview memoranda. The court

found that because the company publicly disclosed details of its internal investigation 'in order to improve its position with investors, financial institutions, and the regulatory agencies, it also implicitly has waived its right to assert work product privilege as to the underlying memoranda supporting its disclosures.' Id. at 437. Here, by contrast, Schroeder already has the interview memoranda underlying the Special Committee's disclosure to the SEC."; rejecting the executive's effort to obtain communications between Skadden and its forensic accounting investigation consultant; "Communications between Skadden and its consultant, LECG, need not be produced. The withheld communications reportedly contain 'documents related to methods for document review and retention, discussions regarding how to locate and interpret metadata, a collection of documents that LECG deemed important related to a particular witness, and emails discussing special projects that LECG completed during the investigation.' (Miller Decl. ¶ 34). It is not apparent that any of those communications were disclosed beyond Skadden and LECG. Further, it appears that these communications comprise opinion work product, and Schroeder has not demonstrated a substantial need for any facts that might be contained in them. Schroeder's motion as to these documents is denied." (emphases added); ordering Skadden to produce the factual portion of documents provided to KLA and its law firm Morgan Lewis, but not Skadden's drafts or other documents "that contain or reflect" opinion work product; "With respect to the communications between and among Skadden/the Special Committee and KLA/Morgan Lewis, it is not clear exactly what this universe of documents includes. However, the withheld communications reportedly comprise 'documents reflecting numerous requests for information from the Company and discussions of what Skadden did during the investigation.' (Miller Decl. ¶ 35). This court finds that any factual information contained in these documents should be produced. However, drafts and other documents that contain or reflect an attorney's mental impressions (if any) need not be produced (or, if feasible, such information may be redacted). See Roberts, 254 F.R.D. at 383 (ordering production of attorney notes reflecting communications with the company's board of directors, with opinion work product redacted)." (emphases added); "As for the KLA opinion grant binders, on the record presented, it appears that the option summaries and legal memoranda comprise facts that are inextricably intertwined with opinion work product.")

- [Privilege Point, 11/25/09]

Court Analyzes the Scope of a Waiver in an Employment Context

November 25, 2009

Every lawyer knows that a company relying on “advice of counsel” as a defense impliedly waives the attorney-client privilege. However, the court must then determine the waiver’s **scope** — focusing both on the horizontal scope (the subject matters involved) and the temporal scope (the time period to which the waiver applies).

In Asberry v. Corinthian Media, Inc., No. 09 Civ. 1013 (CM)(DFE), 2009 U.S. Dist. LEXIS 86493 (S.D.N.Y. Sept. 18, 2009), an employment discrimination plaintiff sought documents from Troutman Sanders — her former employer’s law firm. She pointed to the company’s “defense that the June 2007 termination was made by them in reliance on advice of counsel,” and sought “the entire litigation files of the Troutman law firm concerning her litigation.” Id. at *4 & *3. United States Magistrate Judge Douglas Eaton rejected plaintiff’s argument. He limited the horizontal scope of the waiver “to [the company’s] decision to terminate Plaintiff’s employment” — noting that “there is no need to probe [defendants’] motivation as to any aspect of their litigation conduct.” Id. at *6. As for the temporal scope, Judge Eaton indicated that “I have drawn the line at June 30, 2007, sixteen days after the termination.” Id. at *7. He explained that communications occurring immediately after the termination “may give insight into Defendants’ motivation at the time of the firing” — and that the sixteen-day post-firing period “is ample to capture any communications that may have occurred soon after the termination but before the parties entered into a rigid litigation mode.” Id.

Companies justifying their termination of an employee or some other action by pointing to the advice of their lawyers must analyze both the horizontal and temporal scope of the waiver that they will trigger.

- [Privilege Point, 2/23/11]

Court Deals With a Strange Reversal of Positions

February 23, 2011

In most situations, a client hiring a lawyer to conduct an investigation of some incident argues that the lawyer's report deserves privilege protection. However, in some situations clients have the opposite incentive.

In Lerman v. Turner, Case No. 10 C 2169, 2011 U.S. Dist. LEXIS 715 (N.D. Ill. Jan. 5, 2011), Columbia College Chicago hired a lawyer from Schiff Hardin to investigate the college's termination of a tenured professor. The college placed the Schiff Hardin lawyer's report in the professor's personnel file, which it then made available to the terminated professor. The professor argued that this waived the college's privilege, triggering a subject matter waiver that entitled her to additional privileged documents on the same subject. To avoid this disaster, the college argued that the Schiff Hardin lawyer had acted merely as an investigator and not a legal advisor, so his report did not deserve privilege protection. The court agreed with the professor – pointing to the lawyer's "Upjohn warnings" to an interviewee, his transmittal of the report to the college's general counsel and other factors. Id. at *19. The court also agreed with the professor that the college's waiver of the privilege triggered a subject matter waiver (although finding only a narrow scope of that waiver).

Strange situations like this do not frequently arise, but they usually reflect a client's failure to properly protect privileged communications and later attempts to avoid a subject matter waiver.

- [Privilege Point, 2/12/14]

Avoiding Waiver When Disclosing Facts to the Government: Part I

February 12, 2014

All but a handful of courts find that companies disclosing privileged communications or protected work product to the government waive both of those protections. Courts properly analyzing waiver rules also recognize that disclosing historical facts does not cause a waiver – because historical facts are not privileged.

In two related cases, Judge Francis of the Southern District of New York dealt with the intersection of these basic principles. In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 170559 (S.D.N.Y. Nov. 5, 2013), Weatherford retained Latham & Watkins and Davis Polk to conduct two separate corporate investigations into material weaknesses in the company's internal controls over financial reporting. The court acknowledged that both investigations deserved work product protection. However, the court also found that the company waived its privilege and fact (but not opinion) work product protection by disclosing information about the investigations to the SEC. In defining the scope of the resulting waiver, the court (1) rejected plaintiffs' argument that the waiver extended to "all materials relevant" to the investigations; (2) found that the waiver covered any material actually given to the SEC, and any oral representations company lawyers made to the SEC; and (3) held that the waiver also extended to any "underlying factual material explicitly referenced" in such material or representations. Id. at *28, *27.

Perhaps not surprisingly, the parties soon disagreed about the company's interpretation of the waiver's scope – which resulted in another opinion one month later. The next two Privilege Points describe that decision.

- [Privilege Point, 2/19/14]

Avoiding Waiver When Disclosing Facts to the Government: Part II

February 19, 2014

Last week's Privilege Point described a Southern District of New York decision holding that a company providing information to the SEC about two internal corporate investigations waived privilege and fact work product protection for material or oral representations given to the SEC, and any "underlying factual material explicitly referenced" in such material or representations. In re Weatherford Int'l Sec. Litig., No. 11 Civ. 1646 (LAK (JCF), 2013 U.S. Dist. LEXIS 170559, at *27 (S.D.N.Y. Nov. 5, 2013).

About a month later, the court had to provide additional guidance. In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 176278, at *7 (S.D.N.Y. Dec. 16, 2013), the court first focused on "interview materials" Davis Polk lawyers used to create four PowerPoint presentations to the SEC. The court held that the company did not have to produce any interview materials "unless those specific materials are explicitly identified, cited, or quoted in information disclosed to the SEC." Id. at *10. Interestingly, the court rejected plaintiffs' argument that the company crossed that line "where the presentations assert that a particular witness made a statement." Id. at *7. The court acknowledged that such a representation to the SEC obviously implied "that an interview took place" and also provided "a strong inference that it was memorialized in some way" – but ultimately concluded that "plaintiffs have not shown that those memorializations were, themselves, explicitly referenced in communications with the SEC." Id. at *7-8.

The court then turned to the company's redactions in the interview summaries produced in response to the earlier ruling. Next week's Privilege Point will address that analysis.

- **[Privilege Point, 2/26/14]**

Avoiding Waiver When Disclosing Facts to the Government: Part III

February 26, 2014

The last two Privilege Points (Part I & Part II) discussed the scope of a privilege and fact work product waiver caused by a company's presentations to the SEC about two internal corporate investigations. The Southern District of New York held that the waiver covered materials or oral representations given to the SEC, as well as "any underlying factual material explicitly referenced in" the materials or representations – but then had to provide additional guidance. In re Weatherford Int'l Sec. Litig., No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 170559, at *27 (S.D.N.Y. Nov. 5, 2013).

In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 176278, at *10 (S.D.N.Y. Dec. 16, 2013), the court addressed plaintiffs' complaint that the company had not fully produced those witness interview summaries that were "explicitly identified, cited, or quoted in information disclosed to the SEC." The company explained that it had produced "only the 'portions of summaries . . . that were . . . read or conveyed in substantial part to the SEC,'" and redacted the rest. Id. at *12 (internal citation omitted). Criticizing that as a "crabbed view of their discovery obligations," the court ordered the company to produce all factual portions of any such interview summaries -- redacting "only material that reflects an attorney's 'explicit mental impressions, conclusions, opinions or legal theories.'" Id. at *12-13 (citation omitted). In other words, the company had to produce all non-opinion portions of any witness interview summaries the company had quoted to the SEC.

It can be very difficult to reconcile two basic principles: (1) disclosure of privileged communications or work product to the government generally waives those protections; and (2) disclosing historical facts does not waive either protection. As explained in these opinions by widely-respected S.D.N.Y. Judge Francis, companies hoping to avoid a broad waiver when making disclosures to the government should limit their presentations to historical facts – without explicitly referencing, identifying, citing, or quoting any underlying material or witness interviews.

- [Privilege Point, 4/1/15]

The Subject Matter Waiver Risk Continues to Recede

April 1, 2015

In some situations, disclosure or reliance on privileged communications or protected work product triggers a "subject matter waiver" — requiring the owner's disclosure of additional related communications or work product. Historically, some jurisdictions found a subject matter waiver in many counterintuitive contexts — for instance, based even on litigants' inadvertent production of a protected document.

Many jurisdictions eventually adopted a common law doctrine finding subject matter waivers only upon intentional disclosure in a judicial setting. Recently, Federal Rule of Evidence 502 has limited subject matter waivers to litigants' disclosure or use of protected communications to paint a misleading picture in litigation. Courts are taking these developments to heart. In Mitre Sports International, Ltd. v. Home Box Office, Inc., 304 F.R.D. 369, 371, at *3 (S.D.N.Y. 2015), defendant HBO argued that Mitre triggered a subject matter waiver covering its investigation of possible child labor violations by (1) allowing its Rule 30(b)(6) witness to testify about the investigation, and (2) "attaching the products of its investigation to its complaint" against HBO. The court rejected HBO's argument, holding that (1) the witness's deposition answers and Rule 30(b)(6) designation did not amount to "an attempt by Mitre to use protected information to influence a decision maker" (noting that Mitre had not cited any of the testimony in its summary judgment motion) (*id.* at 372); and (2) Mitre's "attaching the products of its investigation to its complaint seems to have been done more for public relations reasons than legal reasons" — because "[t]he complaint is not evidence, and Mitre cannot offer it as such." *Id.* at 374.

Corporations should be relieved by the declining threat of subject matter waivers, although they should still avoid the disclosure of, affirmative use of, or reliance on privileged communications or protected work product to gain some advantage in litigation.

- [Privilege Point, 10/21/15]

More Courts take a Narrow View of Subject Matter Waivers

October 21, 2015

Thanks to common law developments and Federal Rule of Evidence 502, the frightening specter of subject matter waivers now usually only arises when litigants affirmatively rely on privileged communications to gain some litigation advantage.

In In re General Motors LLC Ignition Switch Litigation, Nos. 14-MD-2543 & 14-MC-2543 (JMF), 2015 U.S. Dist. LEXIS 106170 (S.D.N.Y. Aug. 11, 2015), the court handling the GM ignition switch MDL rejected plaintiffs' attempt to depose Jenner & Block partner Anton Valukas about the basis for his widely-publicized report on GM's conduct. The court pointed to GM's pledge not to make offensive use of the Valukas Report at trial, or call Valukas to testify. The court concluded that GM's commitment "undermines" plaintiffs' attempt to explore witnesses' disagreement with Valukas' conclusions. Id. at *1004. One day earlier, another court dealt with a GM trademark issue. In Cue, Inc. v. General Motors LLC, Civ. A. No. 13-12647-IT, 2015 U.S. Dist. LEXIS 104638 (D. Mass. Aug. 10, 2015), plaintiff argued that GM triggered a subject matter waiver by pointing to its lawyer's trademark advice as demonstrating its lack of bad faith. The court "agree[d] that GM's use of that fact would place its counsel's advice at issue," but took GM at its word that the company "did not intend to rely on advice of its counsel" at trial. Id. at *24. The court therefore denied plaintiff's motion to compel disclosure of related privileged communications — "without prejudice to renewal if GM seeks to use the legal department's 'okay' in order to show a lack of bad faith." Id.

Corporations should be relieved that courts are increasing focus on documents and arguments the corporations plan to use at trial — rather than on the disclosure of privileged communication during fast-paced discovery or pretrial pleading skirmishes.

- [Privilege Point, 5/10/17]

Privilege Implications of an Explicit or Implicit "Advice of Counsel"
Defense: Part I

May 10, 2017

All lawyers know that pleading an "advice of counsel" affirmative defense waives privilege protection. But lawyers must remember such waivers' breadth.

In United States v. Trotter, defendant Trotter announced his intent to assert a "good faith reliance on the advice of counsel" defense, and "submitted waivers" from three lawyers. Case No. 14-20273, 2017 U.S. Dist. LEXIS 31681, at *2 (E.D. Mich. Mar. 7, 2017). But the government noted that Trotter had received pertinent advice from four other lawyers. The court ordered Trotter to "(1) identify all attorneys who advised him on his management practices, (2) waive the attorney-client privilege for these attorneys, and (3) produce all materials relating to legal advice on these management practices in his possession." Id. at *3. The court specifically rejected Trotter's lawyers' argument that they had already produced all pertinent documents in their possession – ordering his lawyers "to request these materials from" Trotter. Id.

Pleading an "advice of counsel" defense normally waives privilege protection for the client's communications with any lawyers providing advice on the pertinent matter, and usually also extends to the client's communication of facts to such lawyers that preceded the advice. Next week's Privilege Point will describe another defendant's less explicit reliance on advice of counsel, but which had the same waiver impact.

- [Privilege Point, 8/9/17]

Drawing the Line Between Waiver and Non-Waiver: Part I

August 9, 2017

Clients describing their past or intended future actions obviously do not waive their privilege protection – even if the clients are following their lawyers' advice. But clients voluntarily disclosing privileged communications nearly always waive their privilege protection, and can trigger a subject matter waiver. It can be easy to cross that tenuous line.

In Siras Partners LLC v. Activity Kuafu Hudson Yards LLC, defendant business executive sent an email to a third party investor with the following sentence: "I was about to write, to you this email last Friday but I decided to [wait until we all sit down with attorneys this morning. It is concluded by legal counsels that we have no choice but buying the note from UBS immediately to clean up the mess at Hudson Rise." No. 650868/2015, 2017 NY Slip Op. 31216(U), at 3 (N.Y. Sup. Ct. June 5, 2017) (emphasis added). The court concluded that defendant's email "provided a detailed description of specific legal advice and the course of action given to him by his attorneys." Id. at 4. Contrary to most case law, the court found a subject matter waiver – and "directed [defendants] to produce any communications and documents 'pertaining to the subject matter of the email.'" Id. (citation omitted).

Defendant presumably would not have waived privilege protection or risked a subject matter waiver if his email had not included the three words "by legal counsels." The fact that defendant met with his lawyers did not deserve privilege protection, and his intended course of action following the meeting likewise did not deserve privilege protection. Clients can describe their intended actions, but should never attribute those to lawyers' advice. Next week's Privilege Point will discuss a similar decision from another court about two weeks later. The Privilege Point after that will discuss the subject matter waiver implications of the decisions described here and in the next Privilege Point.

- [Privilege Point, 5/29/19]

Court Issues A Common Sense Rejection Of A Subject Matter Waiver Claim

May 29, 2019

Disclosing privileged communications to gain some advantage can sometimes trigger a subject matter waiver, requiring disclosure of additional related communications. Courts agree that fairness dictates the existence and scope of such subject matter waivers. Despite subject matter waivers' inherently unpredictable nature, some courts get it right.

In DealDash Oyj v. ContextLogic Inc., Case No. 18-cv-02353-MMC (JCS), 2019 U.S. Dist. LEXIS 38891, at *2 (N.D. Cal. Mar. 11, 2019), plaintiff claimed that a party's outside counsel triggered a subject matter waiver by filing a declaration stating that: (1) the client's general counsel "has advised me that as far as he knew," the client never received a "cease and desist letter" from plaintiff; and (2) the client "has advised me" that the pertinent trade name "is not important to it," and that the client would stop using it. The court rejected plaintiff's argument seeking a subject matter waiver, noting that plaintiff would not be asserting a waiver if "[the party's] counsel had appeared in court" to say the same things. Id. at *4. As the court explained, "[l]awyers routinely make such representations to courts," and "one of the basic functions of an attorney is to communicate a client's positions to the court." Id. at *5. While acknowledging that "a more thorough attorney" might have submitted the client's supporting declarations, "the shortcut taken in this case, in context of administrative motion to extend the time, does not in fairness call for a broad waiver of privilege." Id. at *5-6.

While it is always risky for lawyers to quote their clients (or vice versa), fairness sometimes prevails to prevent a subject matter waiver.

- [Privilege Point, 10/2/19]

Can A Trademark Case Defendant Avoid Privilege Waiver After Its Executive Testified That Its Lawyer "Cleared The Name For Us?"

October 2, 2019

Corporations can expressly waive their privilege when responsible loyal employees disclose privileged communications, and they can impliedly waive their privilege by relying on a lawyer's advice to gain some advantage in litigation. When either one of those occurs, what can a corporation do to avoid the consequences?

In Airhawk International, LLC v. Ontel Products Corp., defendant's Vice President of Product Strategy and Business Development testified at a trademark case deposition that "legal counsel 'clear[ed] the name for us.'" Case No. 18-cv-0073-MMA-AGS, 2019 U.S. Dist. LEXIS 122675, at *2 (S.D. Cal. July 23, 2019) (alteration in original). The court found that the deposition testimony could result in an implied waiver and "may also support a claim for express waiver." Id. at *7. But the court then assured defendant that it "may preserve the confidentiality of its communications by abandoning the basis for the implied waiver." Id. at *9. If so, defendant would have to "file a stipulation that: (1) it will not use attorney-client communications in any way before the Court . . . and (2) it will ensure that its witnesses are instructed about this stipulation, to ensure that they do not inadvertently disclose such attorney-client communications." Id.

Corporations should welcome the chance some courts give them to avoid the consequences of obvious express waivers or apparent implied waivers.

- [Privilege Point, 1/1/20]

The New York Times Loses A Subject Matter Waiver Argument

January 1, 2020

Fortunately for litigants hoping to successfully assert, and not lose, privilege protection, common law and federal rule developments now generally limit subject matter waivers to a litigant's intentional reliance on privileged communications to gain an advantage in a judicial setting. Despite these very favorable developments, some defendants still lose.

In Stolarik v. New York Times Co., No. 17 Civ. 5083 (PGG), 2019 U.S. Dist. LEXIS 160994 (S.D.N.Y. Sept. 20, 2019), a former New York Times photographer filed a Fair Labor Standards Act claim against the newspaper. The newspaper produced five documents that had earlier appeared on its privilege log, and also allowed an Assistant Managing Editor to testify about "the role that lawyers had played in [the challenged independent contractor] decision and the advice they had given." Id. at *4. But the newspaper continued to withhold communications with its outside law firm Proskauer Rose. The court ordered the New York Times to produce the documents – concluding after an in camera review that "all of these documents address the same subject matter." Id. at *8. As the court bluntly put it, there was "no principled basis . . . to distinguish between the advice the in-house lawyers provided to their clients, and the advice that Proskauer provided to the in-house lawyers for purposes of determining whether there has been a waiver of the attorney-client privilege." Id. at *8 n.1.

Although subject matter waivers have become less worrisome, corporations must remember the remaining risks of relying on some privileged communications while withholding others.

- New York State Div. of Human Rights v. Cooper Square Realty, Inc., No. 450486/2013, 2019 NY Slip Op 32996(U), at 1, 2 (N.Y. Sup. Ct. Oct. 10, 2019) (holding that an emotional therapist was outside privilege protection, but that disclosing privileged communications to her did not trigger a subject matter waiver; "In this action, plaintiff-intervenor Geraldine Pauling seeks to recover for the emotional distress she allegedly suffered as a result of defendants' failure to accommodate her disability. The lawsuit was originally commenced by the New York State Division of Human Rights in 2013 and plaintiff-intervenor filed her own complaint seeking injunctive relief and damages for emotional distress in 2017. Throughout the pendency of this lawsuit, Ms. Pauling has been treating with a licensed therapist, Lauren Taylor."; "It is undisputed that Ms. Pauling's communications with her attorney regarding this lawsuit are privileged and thus the issue is whether Ms. Pauling's disclosure of these communications constitutes a waiver of the privilege. As a general matter, communications between counsel and client which are shared voluntarily with third-parties are generally not privileged. People v. Osorio, 75 N.Y.2d 80, 84, 549 N.E.2d 1183, 550 N.Y.S.2d 612 (1989); Robert V. Straus Prod. v. Pollard, 289 A.D.2d 130, 131, 734 N.Y.S.2d 170 (1st Dep't 2001). An exception to waiver exists for one serving as an agent of either attorney or client in certain circumstances since a client has a reasonable expectation that such communication will remain confidential. Osorio, 75 N.Y.2d at 84. Here, plaintiff does not assert that this exception to waiver is applicable and thus has failed to meet her burden of showing that the privilege has not been waived by her disclosure of attorney-client communications to her therapist. Thus, plaintiff has waived the attorney-client privilege with respect to the specific communications she disclosed to her therapist.").

- **[Privilege Point, 9/16/20]**

Southern District of New York Emphasizes the Sword-Shield Analogy in Analyzing Subject Matter Waivers

September 16, 2020

As if waiving privilege protection (either intentionally or inadvertently) was not frightening enough, the sinister subject matter waiver doctrine might force disclosure of additional privileged documents on the same topic. At the high-water mark of the subject matter waiver doctrine, some courts even held that inadvertently waiving privilege in a document production triggered a subject matter waiver.

In In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation, Civ. A. No. 14 MD 2542 (VSB) (SLC), 2020 U.S. Dist. LEXIS 99206 (S.D.N.Y. June 5, 2020), Magistrate Judge Cave continued the welcoming trend toward limiting subject matter waiver risk. The court dealt with defendant's argument that plaintiff triggered a subject matter waiver by "producing a partially redacted . . . [e]mail and [because of] the limited deposition testimony of the 30(b)(6) witness." Id. at *32. The court recited holdings from several earlier cases narrowing the subject matter waiver doctrine: "the subject matter waiver is appropriate only 'when a party uses an assertion of fact to influence the decisionmaker while denying its adversary access to privileged materials'"; "[s]ubject matter waiver is reserved for the rare case where a party either places privileged information affirmatively at issue, or attempts to use privileged information as both a sword and a shield in litigation." Id. at *26 (citations omitted). The In re Keurig court rejected defendant's subject matter waiver argument, noting that it "has not shown that [plaintiff], as yet, intends to rely on the [redacted email] 'to influence a decision maker.'" Id. at *30 (citation omitted). Continuing its analysis, the court stated that a subject matter waiver "may arise in the future in this litigation, for example, if [plaintiff]'s counsel were to question a witness about the redacted portions of the [arguably privileged email] during in-court testimony or use the [email] in support of summary judgment, but those events have not yet occurred." Id.

This increasingly common and appropriate approach should comfort lawyers agonizing over producing arguably privileged emails, and (perhaps more importantly) lawyers whose deposition witnesses blurt out some privileged communication during a deposition. Disclaiming any intent to rely on those "to influence a decision maker" should eliminate a subject matter waiver risk.

- [Privilege Point, 11/4/20]

Court Applies the General Rule Finding a Privilege Waiver When Clients Disclose Privileged Communications to Public Relations Consultants

November 4, 2020

One of the most dangerous misperceptions among corporate clients is that disclosing privileged communications to such friendly outsiders as public relations consultants does not waive privilege protection as long as there is a confidentiality agreement in place. A steady stream of cases have rejected that approach, yet large corporate clients and sophisticated law firms continue to rely on that mistaken view.

In United States ex rel. Wollman v. Massachusetts General Hospital, Inc., 475 F. Supp. 3d 45 (D. Mass. 2020), Mass. General Hospital hired a former U.S. Attorney and his law firm Cooley, LLP, to investigate allegations that Mass. General fraudulently billed Medicare and Medicaid. The government sought the investigation report, and Mass. General predictably resisted. Unsurprisingly, Mass. General first claimed work product, but the court rejected that assertion: “there is no indication in the engagement letter, the Report itself, or the employee interviews that the Investigation was intended to relate to the [eventual litigation].” Id. at 60-61. The court then turned to Mass. General’s privilege claim – noting that Mass. General had disclosed the Report to public relations consultant Rasky “to assist in responding to an investigation by the [newspaper] Boston Globe Spotlight Team into the practice of overlapping surgeries.” Id. at 65-66. The court bluntly concluded that “the production of the Report to Rasky waived the attorney-client privilege.” Id. at 68. But the court found that because Mass. General and other defendants “have not sought to use the . . . Report in any fashion, much less to gain an adversarial advantage,” the waiver did not trigger a subject matter waiver. Id. at 69. The court explained that “[w]hile an argument can be made that they used the Report as a ‘sword and shield’ in their dealings with the press, the distinction between use in a judicial and nonjudicial setting is significant.” Id.

All of these conclusions follow generally accepted principles. It is remarkable that one of America’s great hospitals, a former U.S. Attorney, and a prestigious law firm would be involved in such a disclosure.

- [Privilege Point, 3/10/21]

Three Subject Matter Waiver Decisions Send Mixed Signals: Part III

March 10, 2021

Under general common law doctrine and Federal Rule of Evidence 502, courts normally hold that disclosing privileged communications only triggers a subject matter waiver if the disclosure seeks some advantage in court. But some courts find a subject matter waiver in broader circumstances.

In Dougherty v. Esperion Therapeutics, Inc., securities fraud plaintiffs argued that defendant waived its privilege protection by sending optimistic draft press releases to the FDA and the SEC that the company mentioned were "drafted on the advice of counsel." No. 16-10089, 2020 U.S. Dist. LEXIS 222811, at *9 (E.D. Mich. Nov. 30, 2020). The company later sent revised (more pessimistic) press releases that caused its stock to drop 48% in one day. Plaintiffs claimed that the first press releases misrepresented the FDA's position on some testing. Pointing to notions of "fairness," the court found that defendant had waived its privilege – and required it to produce "all drafts of both . . . press releases" and "counsel's notes, editorial comments, memoranda, and emails related to the drafting of and revisions to the various drafts." Id. at *12-13.

Many courts would not have found a waiver in this circumstance – apparently based merely on defendant's unsurprising statement that its lawyer advised it to issue a press release. And most courts would not impose such a remarkably broad subject matter waiver. But any time a client references a lawyer's involvement when seeking some advantage (even outside a court), a subject matter waiver risk looms. It is best if lawyers are never mentioned.

- [Privilege Point, 2/24/21]

Three Subject Matter Waiver Decisions Send Mixed Signals: Part I

February 24, 2021

Understandably based on fairness notions, the subject matter waiver doctrine prevents litigants from explicitly or impliedly using privileged communications as a "sword" while simultaneously asserting the privilege as a "shield" to prevent discovery of related communications. As with many privilege concepts, applying the subject matter waiver doctrine can involve subtle analyses.

In Strand v. USANA Health Sciences, Inc., Case No. 2:17-cv-00925-HCN-JCB, 2020 U.S. Dist. LEXIS 232348, at *4 (D. Utah Dec. 9, 2020), plaintiff intentionally produced privileged documents "disclos[ing] facts that are favorable . . . while redacting facts that may be of value to" defendant. Rejecting plaintiff's husband's effort to resist production of the unredacted version of the documents, the court ordered plaintiff to produce all of the pertinent documents in their "unredacted form." Id. at *7-8.

Some courts might have permitted a litigant to avoid a subject matter waiver by firmly disclaiming any intent to rely on such intentionally produced privileged communications. Because it should be the unfair use of privileged communications as a sword (rather than just their production) that triggers a subject matter waiver, some courts might allow litigants to "put the toothpaste back in the tube." Next week's Privilege Point addresses a subject matter decision decided the next day, in a higher stakes context.

- [Privilege Point, 3/3/21]

Three Subject Matter Waiver Decisions Send Mixed Signals: Part II

March 3, 2021

Last week's Privilege Point described a decision applying the subject matter waiver doctrine, which relies on fairness notions to prevent litigants from relying on privileged communications as a "sword" while simultaneously using the privilege as a "shield." Does the doctrine apply to statements outside a judicial setting?

In Utesch v. Lannett Co., Civ. A. No. 16-5932, 2020 U.S. Dist. LEXIS 232413 (E.D. Pa. Dec. 10, 2020), securities fraud class action plaintiffs alleged that defendant lied about its law firm Fox Rothschild's investigation into alleged price fixing. Among other things, the court rejected plaintiffs' argument that Lannett triggered a subject matter waiver by: (1) "informing the public, outside the present litigation, that the reported results of the investigation found no wrongdoing," and (2) "stating in various SEC filings that '[b]ased on reviews performed to date by outside counsel, [Lannett] currently believes that it has acted in compliance with all applicable laws and regulations' with respect to its pricing practices." Id. at *33 (alteration in original). The court pointed to a seminal Second Circuit case in explaining that "the extrajudicial disclosure of privileged communications waives privilege only as to the protected information 'actually revealed.'" Id. (citing In re von Bulow, 828 F.2d 94, 103 (2d Cir. 1987)).

Not all courts would be this forgiving. Next week's Privilege Point describes an earlier case taking a frighteningly more expansive view.

- K.F. v. Baker Sch. Dist. 5J, Case No. 2:20-cv-00693-IM, 2021 U.S. Dist. LEXIS 42848, at *11-12 (D. Or. Mar. 8, 2021) (citing In re von Bulow, 828 F.2d 94, 103 (2d Cir. 1987), in holding that a non-judicial disclosure of privileged communications in a school board meeting waived privilege, but did not trigger a subject matter waiver; “This Court finds such reasoning persuasive and accordingly denies Plaintiffs’ Motion to the extent it argues that Defendant’s waiver extends ‘beyond those matters actually revealed.’ In re von Bulow, 828 F.2d at 103. Plaintiffs have not identified any unfairness that would arise in the litigation context due to this lack of further disclosure. Defendant affirmed at the hearing that it will not rely in any part on the requested materials in this litigation. Accordingly, this Court does not find that there is any ‘legal prejudice that warrants a broad court-imposed subject matter waiver,’ id., which would reach beyond Witty’s discussion of three high-level audit report recommendations to the rest of the report and its underlying materials. As this Court stated at the hearing on this Motion, to the extent that Defendant later seeks to rely upon the requested materials in this litigation, Plaintiffs may renew this Motion to Compel.”)

- Maxus Energy Corp. v. YPF, S.A., Nos. 16-11501 & 18-50489, 2021 Bankr. LEXIS 571, at *5-6, *6, *8-9 (Bankr. D. Del. Mar. 11, 2021) (inexplicably holding that non-litigation disclosure of privileged communications triggered a subject matter waiver; “Doe 1 v. Baylor University [320 F.R.D. 430 (W.D. Tex. 2017)], is also instructive on this point. In Baylor University, female students who were sexually assaulted while enrolled as students at the university brought an action against the university, asserting claims that the university's policy of discouraging them from reporting that they had been sexually assaulted, and failing to investigate adequately each of the assaults created a harassing education environment that deprived them of a normal college education. The students moved to compel the production of work product related to an investigation and the implementation of the university's reforms. The university had hired a law firm to conduct an independent and external review of the university's institutional responses and compliance issues.” (footnote omitted); “The Baylor University court found that the university had waived the attorney-client privilege by making repeated disclosures regarding the law firm's investigation. Having so decided, the court turned to the consideration of the scope of the waiver. The court held that the university has waived attorney-client privilege with respect to the whole of its communications with the law firm regarding the investigation by disclosing a subset of information as it would not be fair to the parties seeking production to allow the university to protect the remaining undisclosed details on the issue.”; “The Executive Summary, however, is taken virtually word for word from the Memorandum and the Memorandum discusses in detail the facts and issues raised in the Executive Summary. Moreover, YPF argues that this instance is somehow more favorable to YPF than with regard to the expert report because the contents of the Produced Documents and Memorandum were not publicly disclosed for YPF's advantage, whereas the Trust referenced the report in its publicly filed complaint. The issue is not whether the disclosure of attorney-client privilege was or was not public. The issue is the extent of the disclosure and whether fairness would allow for the document to remain privileged. The disclosure in connection with the Produced Documents may not have been public, but it was extensive and purposeful, i.e., not inadvertent. YPF chose to share the Produced Documents with one or more Maxus fiduciaries, triggering the waiver of attorney-client privilege. This is a very different situation from the Court's previous decision and the facts and circumstances here compel a different result. Fairness dictates that, having waived attorney-client privilege as to the Executive Summary, the entire Memorandum from which the Executive Summary was lifted virtually word for word must be produced.”)

- Ruderman v. Law Office of Yuriy Prakhin, P.C., No. 19-CV-2987 (RJD), 2021 U.S. Dist. LEXIS 53913, at *11-12 (E.D.N.Y. Mar. 22, 2021) (holding that the disclosure of privileged communications during deposition testimony did not trigger a subject matter waiver; “[W]here, as here, the testimony was given at a deposition, rather than before the factfinder, such extrajudicial statements have been held not to trigger a waiver under a selective-disclosure theory. See In re County of Erie, 546 F.3d at 230 (‘the fact that the deponent was not before a ‘decisionmaker or fact finder’ when he made the statements . . . means that Respondents have not been placed in a disadvantaged position at trial’); In re Sims, 534 F.3d 117, 141 (2d Cir. 2008) (‘Given that Sims cannot introduce any of his own deposition testimony at trial . . . , Sim’s deposition testimony does not place respondents in a disadvantageous position at trial.’); Gardner v. Major Auto. Companies, Inc., No. 11 Civ. 1664(FB)(VMS), 2014 U.S. Dist. LEXIS 44877, 2014 WL 1330961, at *9 (E.D.N.Y. Mar. 31, 2014) (deposition testimony did not implicitly waive privilege).” (alterations in original))
- Mauer v. Union Pac. R.R., No. 8:19CV410, 2021 U.S. Dist. LEXIS 204741, at *7 (D. Neb. Oct. 25, 2021) (holding that disclosing the factual portion of a document while withholding a privileged portion does not trigger a waiver requiring production of the redacted privileged portion; “And whether at a deposition or otherwise, disclosing a document redacted to exclude privileged and work product information while disclosing the fact information within that document does not waive confidentiality as to the redacted information.”)

- United States v. Coburn, Civ. No. 2:19-cr-00120 (KM), 2022 U.S. Dist. LEXIS 21429, at *18-19, *19, *19-20 (D.N.J. Feb. 1, 2022) (analyzing privilege and work product issues involving defendant's third party subpoena on another company (Cognizant); "To begin with, Cognizant may not now claim privilege over materials that it furnished to the Government. These disclosures, referred to as the 'DLA Downloads' in the parties' briefing, consist of 'detailed accounts of 42 interviews of 19 Cognizant employees, including Defendants.' (Mot. To Compel Cognizant, Cat. A at 68-69.) By disclosing this information to the Government while under threat of prosecution, Cognizant handed these materials to a potential adversary and destroyed any confidentiality they may have had, undermining the purpose of both attorney-client and work-product privileges. See Chevron, 633 F.3d at 165 (holding that 'purposeful disclosure of [] purportedly privileged material to a third-party' may waive attorney-client and work product privileges 'if that disclosure undermines the purpose behind each privilege')." (alteration in original); The next question concerns the breadth of the waiver. Cognizant's voluntary turnover of materials or revelation of the fruits of its investigation to the DOJ also entailed a waiver of the privilege as to communications that 'concern the same subject matter' and 'ought in fairness be considered together' with the actual disclosures to DOJ. Shire LLC v. Amneal Pharms., LLC, No. 2:11-CV-03781, 2014 [WL 1509238], at *6 (D.N.J. Jan. 10, 2014) (citing Fed. R. Evid. 502(a))."; "First, to the extent that summaries of interviews were conveyed to the government, whether orally or in writing, the privilege is waived as to all memoranda, notes, summaries, or other records of the interviews themselves. Second, to the extent the summaries directly conveyed the contents of documents or communications, those underlying documents or communications themselves are within the scope of the waiver. Third, the waiver extends to documents and communications that were reviewed and formed any part of the basis of any presentation, oral or written, to the DOJ in connection with this investigation." (footnote omitted))

- [Privilege Point, 6/15/22]

Plaintiff Relying on a Former Lawyer's Testimony Can't Avoid a Privilege Waiver

June 15, 2022

Most courts hold that a litigant does not automatically waive privilege protection by listing a former lawyer as a witness – because that lawyer might testify about non-privileged facts. But not surprisingly, such a step can have disastrous results if the litigant and her current lawyer do not think ahead.

In Ellis v. Salt Lake City Corp., a wrongful termination plaintiff called her former lawyer as a fact witness to testify that defendant denied plaintiff a reasonable accommodation. Plaintiff argued that her former lawyer "made [plaintiff] aware of [these] opinions in non-confidential ways (e.g., in letters, emails, phone calls and other communications to Defendants)." No. 2:17-cv-00245-JNP-JCB, 2022 U.S. Dist. LEXIS 70036, at *8 (D. Utah Apr. 15, 2022). But plaintiff then resisted discovery of her communications directly with her former lawyer. The court overruled her objection, holding that: (1) if they were privileged, Fed. R. Evid. 502(a) triggered a subject matter waiver covering those other communications, which "must, in fairness, be considered together" with "the disclosed communications" (id. at *13 n.16); or (2) plaintiff placed her former lawyer's advice "at issue" by relying on it to gain an advantage in the litigation; or (3) plaintiff's testimony that "'she believed' that [her former lawyer] 'believed' that the proposed accommodations were unreasonable" could only have come through her direct communications with her [former] lawyer (id. at *23 n.31).

Some courts would essentially give plaintiff an "off ramp" – allowing her to avoid a waiver by withdrawing her reliance on her former lawyer's testimony. Perhaps that is what happened after this unfavorable opinion.

- Rains v. Westminster College, Case No. 2:20-cv-00520, 2022 WL 4120771, at *3, *7, *8 (D. Utah Sept. 9, 2022) (inexplicably finding a broad subject matter waiver based on disclosure of an investigation’s final report; “Westminster College’s president issued a termination letter to Ms. Rains on October 18, 2018. The termination letter references Mr. Durham’s investigation and states the president ‘carefully consider[ed] the investigation report.’” (alteration in original) (internal citation omitted); “Westminster College intentionally waived attorney-client privilege for the report. Similarly, Defendants intentionally waived privilege by disclosing different versions of the report in this litigation. Thus, the first element is met.” (footnote omitted); “Under the third element, these undisclosed documents ‘ought in fairness to be considered together’ with the disclosed versions of the final report.”; “Where Westminster College relied on the report in terminating Ms. Rains but disclosed differing versions of the report, it would be fundamentally unfair to allow Defendants to withhold communications which could shed light on how these versions came to exist, which version(s) Westminster College relied on, and the role of the investigation in Ms. Rains’ termination. This information is relevant to central issues in this case, including whether Westminster College’s stated reason for terminating Ms. Rains was legitimate or a pretext for discrimination.”; “The scope of this waiver also extends to the categories of documents listed in Ms. Rains’ subpoena to Stoel Rives. Ms. Rains requests all documents related to the investigators’ work on the investigation, including contracts identifying the scope of the investigation, communications with Westminster College employees and agents regarding the investigation, invoices regarding work performed, and documents related to discussions with third parties about the investigation. Defendants argue these documents are protected by attorney-client privilege and/or work-product protection. But these documents concern the same subject matter as the disclosed reports, and they ought in fairness be considered together with the reports, for reasons similar to those set forth above. The subpoenaed documents could shed light on the various versions of the final report and what information was considered in the termination decision. For these reasons, Defendants’ subject-matter waiver of privilege and work-product protection related to the Durham investigation applies to subpoenaed documents. Defendants’ motion to quash the subpoena to Stoel Rives is denied.” (internal citation omitted) (emphases added))

- [Privilege Point, 8/30/23]

**Federal and State Courts Issue Helpful Investigation-Related Decisions:
Part I**

August 30, 2023

Internal corporate or other entity investigations frequently generate discovery motions that focus on privilege and work product creation and waiver issues. Two recent decisions offer some good news for defendants resisting discovery of investigation-related documents.

In Wisk Aero LLC v. Archer Aviation Inc., Case No. 21-cv-02450-WHO (DMR), 2023 U.S. Dist. LEXIS 103780 (N.D. Cal. June 14, 2023), the court understandably held that defendant waived some work product protection by relying on its expert FTI Consulting's forensic investigation of alleged trade secret misappropriation and patent infringement. But the court properly held that defendant's "waiver extends to 'factual' work product concerning the same subject matter as the disclosed work product — FTI's investigation — but does not extend to opinion work product." Id. at *28-29. This generally accepted favorable waiver scope standard protects what in most cases the investigating corporation worries most about disclosing.

This absolute or nearly absolute protection for opinion work product adds to the litany of factors making work product more attractive in some cases than the attorney-client privilege. Next week's Privilege Point will describe a favorable Texas Supreme Court investigation-related decision.

- Thomas v. Marshall Pub. Sch., --- F. Supp. 3d ---, 2023 U.S. Dist. LEXIS 156933, at *39, *39-40 (D. Minn. Sept. 6, 2023) (in an opinion by Judge Foster, rejecting defendants' argument that Federal Rule of Evidence 502 allowed it to disclose privileged communications to some third parties but withhold them from others; "In making this argument Defendants flagrantly overread Rule 502(d). 'The Rule 'is designed to enable a court to enter an order . . . that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege to preclude use in litigation of information disclosed in such discovery.'" Sleep No. Corp. v. Young, 20-cv-1507 (NEB/ECW), 2021 U.S. Dist. LEXIS 229923, 2021 WL 5644322, at *18 (D. Minn. Dec. 1, 2021) (emphasis added) (quoting Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, 154 Cong. Rec. H. 7817 (2008), reprinted in Fed. R. Evid. 502 Advisory Committee Notes subdivision (d))."; "While Rule 502(d) allows a party who discloses privileged material to claw them back without having to prove the disclosure was 'inadvertent', it does not sanction the tactical, selective disclosure of some privileged materials for use in litigation while withholding others on the same subject. See, e.g., XY, LLC v. Trans Ova Genetics, Lc, 2018 U.S. Dist. LEXIS 239539, 2018 WL 11000694, at *4-*6 (D. Colo. May 14, 2018); Potomac Elec. Power Co. and Subsidiaries v. United States, 107 Fed. Cl. 725 (2012); Smith v. Best Buy Stores, L.P., 2017 U.S. Dist. LEXIS 130010, 2017 WL 3484158, at *3 (D. Idaho Aug. 14, 2017). Stated another way, the Court's PTSO allows the parties to claw back any privileged materials they might have produced without waiver as to the disclosed materials only; it has no bearing on whether the purposeful disclosure of privileged materials for use in litigation will create a waiver as to any other materials. Since Defendants made it clear at the motions hearing that they did not wish to claw back any of the privileged materials they previously disclosed, they cannot avail themselves of the PTSO and Rule 502(d) to mitigate their waivers.")

IX. WORK PRODUCT DOCTRINE

A. Creation Issues and Variations

- 2 Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide 1353-54 (Va. Law Found. 3d ed.) (2013) (noting the enormously significant variations among federal courts applying the same federal work product rule, including differing positions on the following issues: (1) "Whether the work product doctrine can protect documents created by those who are not parties to the litigation in which the work product protection issue arises, even if they reasonably anticipate litigation in that case or other cases"; (2) "What type of non-judicial proceedings count as 'litigation' for purposes of the work product doctrine protection"; (3) "Whether a litigant must identify a 'specific claim' before successfully asserting the work product protection"; (4) "The type of 'anticipation' of litigation required – ranging from 'imminent' to 'some possibility'"; (5) "Whether the work product doctrine protects intangible work product, or only protects 'documents and tangible things' (as described in the rule itself)"; (6) "Whether work product protection is limited to documents with 'legal content' or can also protect non-substantive documents such as those setting up a meeting"; (7) "Whether the opinion work product protection extends to clients' opinions, or is limited to client representatives' opinions"; (8) "The degree of protection given to a lawyer's selection of documents or facts that arguably reflect the lawyer's opinion"; (9) "Duration of the work product doctrine protection"; (10) "The degree of protection given to opinion work product (absolute or simply higher than that provided to fact work product).")

- **[Privilege Point, 4/17/02]**

Company Loses a Work Product Fight by Not Complying With its Own Procedures

April 17, 2002

Because the work product doctrine does not protect from disclosure materials created in a company's "ordinary course of business" (which would have been prepared even if the company had not anticipated litigation), careful companies create parallel procedures for investigating incidents, one of which covers any incidents and one of which begins only if the company anticipates litigation. These best-laid plans can go awry if the company does not follow its own procedures.

In Poseidon Oil Pipeline Co. v. Transocean Sedco Forex, Inc., No. 00-760 c/w 00-2154 Section "T" (2), 2001 U.S. Dist. LEXIS 18553 (E.D. La. Oct. 30, 2001), a company had astutely created parallel procedures, and sought the work product protection for materials created during an investigation. However, the Court cited the company's written internal memoranda in denying the work product claim. The Court noted that the company's written procedures required that a company lawyer be involved in any litigation-related investigation – yet no company lawyer participated in the investigation at issue.

Establishing parallel procedures for investigations provides the best chance to assure work product protection, but companies which do not follow their own procedures should not expect to receive the work product protection that they tried to create.

- [Privilege Point, 3/9/11]

Courts Disagree About Work Product Protection for Witness Affidavits

March 9, 2011

Most courts provide work product protection for drafts of witness affidavits lawyers prepare in the midst of, or in anticipation of, litigation. But what about final executed witness affidavits? They meet the majority standard for work product protection (they would not exist but for the litigation), but it seems strange to protect notarized recitations of fact intended to be used in litigation.

In Institute for Development of Earth Awareness v. PETA, 272 F.R.D. 124, 125 (S.D.N.Y. 2010), Judge Castel found that "executed affidavits of non-party witnesses remained work product until the lawyer elected to serve and file them" – because "[u]ntil the moment of service and filing, the lawyer reserves the right to reverse course and refrain from using the affidavits." Eleven days later, another federal court took exactly the opposite position. In Arminak & Associates v. Saint-Gobain Calmar, Inc., Case No. 1:10 MC 102, 2011 U.S. Dist. LEXIS 2080, at *6 n.2 (N.D. Ohio Jan. 10, 2011), the court acknowledged that draft witness affidavits deserve work product protection – then noted that "final versions of affidavits prepared by third party witnesses are generally not protected by the work product doctrine."

Because courts apply their own work product rules, lawyers and clients unfortunately will never know what work product approach will govern until they know where litigation will occur.

- **[Privilege Point, 4/17/13]**

Can the Work Product Doctrine Protect Intangible Work Product?

April 17, 2013

On its face, Fed. R. Civ. P 26(b)(3) refers to "documents and tangible things that are prepared in anticipation of litigation or for trial." However, most courts also protect intangible work product (such as deposition testimony) – either ignoring the rule's literal language or relying on a parallel federal common law work product doctrine.

In Baird v. Dolgencorp, L.L.C., No. 4:11 CV 1589 DDN, 2013 U.S. Dist. LEXIS 17269 (E.D. Mo. Feb. 5, 2013), the court dealt with an investigator's surveillance videotapes of a plaintiff. The court rejected defendants' motion to quash plaintiffs' subpoena to depose the investigator. The court noted that the subpoena sought "testimony rather than documents or tangible things" – and "[w]hat [the investigator] witnessed, that is relevant to the case, may be the subject of his deposition." Id. at *4.

It makes far more sense to extend work product protection to the intangible articulation of what would clearly be protected if memorialized in writing. However, some courts read the work product rule literally.

- [Privilege Point, 4/24/13]

Does Work Product Protection Depend on a Specific Case or Claim?

April 24, 2013

Fed. R. Civ. P. 26(b)(3) provides protection for "documents and tangible things that are prepared in anticipation of litigation or for trial." Courts have debated whether the term "litigation" includes administrative proceedings, arbitrations, etc. Even in the context of traditional civil litigation, federal courts disagree about whether a litigant must point to a specific anticipated case or claim – rather than a general anticipation of litigation.

In Prowess, Inc. v. Raysearch Laboratories AB, Civ. Case No. WDQ-11-1357, 2013 U.S. Dist. LEXIS 21449 (D. Md. Feb. 11, 2013), the court rejected a litigant's work product claim for documents prepared in connection with a patent prosecution. The court pointed to deposition testimony by a patent attorney that he always prepares applications "with the mindset that there would be a potential for litigation." Id. at *24. The court concluded that "no specific litigation was anticipated when the document was created," and that "work product protection only extends to documents created because a specific litigation is anticipated." Id. at *23-24. A few weeks later, the District of Columbia district court reached the same conclusion about a Department of Homeland Security memorandum that "reflects advice and direction on how to handle 'cases of the types specifically contemplated.'" Judicial Watch, Inc. v. United States Dep't of Homeland Sec., 926 F. Supp. 2d 121, 142-43 (D.D.C. 2013) (internal citation omitted). The court acknowledged that "[w]hile the memorandum may be, in the literal sense, 'in anticipation of litigation' – it simply does not anticipate litigation in the way the work-product doctrine demands" – because it was not "relevant to any specific, ongoing or prospective case or cases." Id. at 143.

Courts sometimes rely on this doctrine to deny corporate litigants' work product claims for process-related documents, such as those describing how the company will handle future product liability or employment discrimination claims, etc. Lawyers should carefully review such documents, knowing that a court might not protect them.

- [Privilege Point, 6/5/13]

Court Holds that only a "Party" Can Create Protected Work Product

June 5, 2013

On its face, the federal work product rule and its state parallel rules protect only documents "prepared in anticipation of litigation or trial by or for another party or its representative[s]." Fed. R. Civ. 26(b)(3)(A) (emphasis added). However, all courts recognize that the rule does not limit protection to only litigation "parties," and most courts extend the protection even to a non-party that did not itself anticipate being involved in any litigation -- if denying the protection would frustrate the rule's purpose.

A small number of courts apply the rule's language literally. In Castro v. Sanofi Pasteur Inc., No. 13 C 2086, 2013 U.S. Dist. LEXIS 56287 (N.D. Ill. Apr. 19, 2013), defendant sought communications between the plaintiffs' law firm and Navigant Consulting. Plaintiffs sought to exclude from the scope of discovery its law firm's communication with Navigant before the plaintiffs hired the law firm. The court acknowledged the judicial debate about the meaning of "party," but ultimately concluded that "the rule means what it says." Id. at *7. The court denied plaintiffs' request "to modify the Court's prior order to reflect the date that non-party clients retained [plaintiffs' law firm] to investigate claims against [defendant]." Id. at *7-8.

Such a narrow reading of the rule could result in real mischief. For instance, a would-be plaintiff might threaten litigation against five companies, but sue only four of them -- and then seek what would otherwise be protected work product created by the company that plaintiff deliberately left out of its complaint.

- [Privilege Point, 7/10/13]

Does Work Product Protection Depend on a Lawyer's Involvement?

July 10, 2013

Perhaps the most remarkable judicial disagreement about the work product doctrine involves the issue of a lawyer's involvement. The rule could not be any clearer. Federal Rule of Civil Procedure 26(b)(3)(A) protects documents prepared in anticipation of litigation or trial "by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." (Emphasis added).

Some courts apply the rule as written. In In re MI Windows & Doors, Inc., Prod. Liab. Litig., the court recognized that "even if no lawyer was involved, these notes would be protected by work product," because "[t]he work product immunity protects material prepared by non-lawyers in anticipation of litigation." MDL No. 2333, Case No. 2:12-mn-00001, 2013 U.S. Dist. LEXIS 63392, at *4 (D.S.C. May 1, 2013). About two weeks later, the Southern District of New York took the same approach. Vaher v. Town of Orangetown, No. 10 Civ. 1606 (KMK) (GAY), 2013 U.S. Dist. LEXIS 69559 (S.D.N.Y. May 15, 2013). However, two days after that, the Western District of Washington inexplicably took a different position. In Warren v. Bastyr University, No. 2:11-cv-01800-RSL, 2013 U.S. Dist. LEXIS 71269, at *7 (W.D. Wash. May 17, 2013), the court rejected defendant's work product argument – noting among other things that "there is no indication that an attorney requested, created, or reviewed the withheld" document. A few other courts have taken this puzzling approach. See, e.g., United States ex rel. Dye v. ATK Launch Sys. Inc., Case No. 1:06-CV-00039-CW, 2011 U.S. Dist. LEXIS 28536, at *15 (N.D. Utah Mar. 9, 2011) ("ATK agrees that the Wecker and Davidson Slides were not prepared at the direction of counsel, so the work product doctrine does not apply.")

Lawyers appearing in a court taking the narrow view face the awkward task of gently suggesting that the court actually read the rule.

- [Privilege Point, 10/30/13]

Can the Work Product Doctrine Protect Oral Communications?

October 30, 2013

The federal work product rule and its state counterparts on their face protect only "documents and tangible things." Fed. R. Civ. P. 26(b)(3)(A). Some courts apply the rule literally, and deny any work product claim for oral communications – even if the doctrine would protect memorializations of those communications. Courts taking an expansive view either ignore the rule's literal language, or rely on the parallel federal work product common law articulated in Hickman v. Taylor, 329 U.S. 495 (1947).

Some courts take a middle ground. In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 110928 (S.D.N.Y. Aug. 5, 2013), Judge James Francis cited an earlier Southern District of New York decision in extending work product to oral communications which reflect a lawyer's legal strategy or thought process. In essence, this approach protects intangible work product only if it meets the "opinion" work product standard.

Lawyers should not assume that the work product doctrine automatically protects their oral communications with witnesses and other third parties.

- [Privilege Point, 8/6/14]

Can the Work Product Doctrine Protect "Intangible" Work Product?

August 6, 2014

Among many other variations in federal courts' analyses of the work product rule, courts disagree about whether the doctrine only applies to "documents and tangible things" — per Fed. R. Civ. P. 26(b)(3)(A)'s language. Most courts find that federal common law extends the same protection to intangible work product, such as a witness's memory being probed by an adversary's deposition questions.

Some courts take a narrower view. In Smyth v. Williamson, No. 2:13-cv-2553-DCN, 2014 U.S. Dist. LEXIS 64777 (D.S.C. May 12, 2014), automobile accident plaintiff Smyth sent a deposition subpoena to defendant Williamson's insurance company State Farm. Smyth sought a State Farm representative's testimony about (among other things) the "substance" of any statement Williamson gave to a State Farm agent. Id. at *3. Although the work product doctrine's applicability to either a document memorializing any statement (or even the statement itself) could present a close question, the court short-circuited any work product analysis. The court bluntly held that "Rule 26 does not apply to the current motion" — because "Smyth is not seeking discovery of any [documents or tangible] items but is rather seeking to depose a State Farm representative." Id. at *9.

Such a narrow work product view does not always have important ramifications. However, it would be easy to envision litigants prejudiced by allowing their adversaries to depose private investigators, consultants, or even paralegals, and ask about the "substance" of written reports that would clearly deserve work product protection.

- [Privilege Point, 4/22/15]

District of Columbia Circuit Provides Good News and Bad News in a Work Product Case

April 22, 2015

Ironically, federal courts applying the federal work product rule take widely varying positions on a number of key elements, including the protection's duration; its applicability to litigation-related business documents; and the standard under which adversaries can overcome a work product claim.

In FTC v. Boehringer Ingelheim Pharmaceuticals, Inc., 778 F.3d 142 (D.C. Cir. 2015), the D.C. Circuit held that: (1) work product "prepared. . . for one lawsuit will retain its protected status even in subsequent, unrelated litigation" (id. at 149); (2) the work product doctrine could protect documents memorializing a business arrangement included as part of adverse companies' litigation settlement agreement, even if the arrangement "has some independent economic value to both parties" — if it was "nonetheless crafted for the purpose of settling litigation" (id. at 150); and (3) an adversary can satisfy the "substantial need" element for overcoming a litigant's work product by demonstrating that the withheld materials "are relevant to the case" and "have a unique value apart from those already in the [adversary's] possession" — without showing "that the requested documents are critical to, or dispositive of, the issues to be litigated." (Id. at 155-56.) The first two holdings represent a broad view of the work product protection, but the third holding makes it easier for adversaries to overcome a company's work product protection.

Other courts take different approaches to all of these issues. Unfortunately, defendant companies often do not know where they will be sued, and therefore will not know in advance what work product standards will apply to documents they may have already created.

- **[Privilege Point, 6/17/15]**

Courts Disagree About Basic Work Product Doctrine Elements: Part II

June 17, 2015

Last week's Privilege Point discussed an important variation in courts' interpretation of the same sentence in their work product rule. Two other cases highlight additional disagreements: (1) the standard for overcoming opinion work product protection; and (2) the work product protection's duration.

In Byman v. Angelica Textile Services, Inc. (In re Sadler Clinic, PLLC), the court described courts' varied opinion work product protection levels — including the Fourth Circuit's absolute protection for such work product. Ch. 7 Case No. 12-34546, Adv. No. 14-03231, 2015 Bankr. LEXIS 1369, at *16 (Bankr. S.D. Tex. Apr. 17, 2015). But the court rejected that approach — instead applying a "compelling or extraordinary need" standard for overcoming opinion work product protection. Id. at *18-19. A few weeks earlier, a Delaware state court adopted a similar standard — finding that an adversary could overcome a litigant's opinion work product protection if the document "is directed to the pivotal issue in the litigation and the need for the information is compelling." Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co., C.A. No. 07C-12-134-JRJ, 2015 Del. Super. LEXIS 166, at *10 (Del. Super. Ct. Mar. 31, 2015) (unpublished opinion). The Angelica Textile Services court also dealt with another variation — work product protection's duration. The court noted that some courts protect work product created in one litigation only in "closely related" later litigation. 2015 Bankr. LEXIS 1369, at *12. The court found that approach too narrow — instead extending work product protection "to all subsequent litigation, related or not." Id. at *13.

Because corporations normally find themselves litigation defendants, they usually do not know where they will be sued — and therefore will not know until that time which work product doctrine variation(s) the court will apply.

- **[Privilege Point, 2/10/16]**

Court Refreshingly Interprets the Work Product Rule as it is Written

February 10, 2016

In one of the greatest mysteries involving the work product doctrine, some federal courts only protect documents created by or at the direction of lawyers — although Fed. R. Civ. P. 23(b)(3) cannot possibly be read to include such a requirement.

In Nichol v. City of Springfield, No. 6:14-cv-1983-AA, 2015 U.S. Dist. LEXIS 169901 (D. Or. Dec. 18, 2015), the court held that the plaintiff's friend could create protected work product. In analyzing the rule's language protecting documents prepared "by or for another party or its representative," the court noted that "[t]he plain meaning of this broad provision encompasses four categories of materials: those prepared (1) by a party; (2) by a party's representative; (3) for a party; or (4) for a party's representative." Id. at *8-9. The court observed that most work product cases involve documents prepared by or for a party's representative, but properly concluded that the lack of such case law protecting documents created for a party (the third category) "does not authorize the court to ignore the plain meaning of Rule 26(b)(3)." Id. at *10. The court acknowledged that the "lack of attorney involvement in creating materials imposes a heightened burden on a party to prove they were prepared in anticipation of litigation." Id. at *11.

Fed. R. Civ. P. 26(b)(3) clearly states that the work product doctrine can protect documents created by or for a party — without a lawyer's involvement. It is remarkable that some federal courts do not apply the rule that way.

- [Privilege Point, 10/18/17]

Courts Use Rule Language and Common Sense to Expand Work Product Protection: Part I

October 18, 2017

Unlike the common law-dominated attorney-client privilege which developed organically in each state, work product protection comes from court rules. One might think that this would simplify courts' application of that protection, but it does not. Courts taking an expansive view sometimes rely on little-noticed rule language and sometimes essentially ignore rule language.

In Hobart Corp. v. Dayton Power & Light Co., Case No. 3:13-cv-115, 2017 U.S. Dist. LEXIS 136682 (S.D. Ohio Aug. 24, 2017), the court extended the heightened opinion work product protection to a paralegal's witness interview notes. This correctly applied the opinion work product provision of Fed. R. Civ. P. 26(b)(3)(B) – which flatly indicates that courts "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" (emphases added). On its face, the rule thus provides such heightened protection to the opinions of nonlawyer client representatives such as paralegals, accountants, consultants, etc.

Although the work product rule broadly defines opinion work product protection, courts disagree about that protection's strength. Some courts absolutely protect such opinion work product, while some provide only a somewhat higher level of protection than they give fact work product. Next week's Privilege Point will discuss another court's expansive work product doctrine interpretation – which ignored rather than relied on Rule 26's language.

- [Privilege Point, 10/25/17]

Courts Use Rule Language and Common Sense to Expand Work Product Protection: Part II

October 25, 2017

Last week's Privilege Point explained that on its face the federal work product rule (and most states' parallel rules) provide heightened opinion work product protection to any client representative's opinions -- not just lawyers' opinions.

Some courts expand work product protection by ignoring rather than relying on rule language. In Under Seal 1 v. United States (In re Grand Jury Subpoena), 870 F.3d 312, 317 (4th Cir. 2017), the Fourth Circuit extended opinion work product protection to a "lawyer's recollection of a witness interview" – finding that the protection could apply to such opinions "whether memorialized in writing or retained in the recesses of an attorney's mind." On its face, the work product doctrine protects only "documents and tangible things." Fed. R. Civ. P. 26(b)(3)(A). In fact, the rule itself is entitled "Documents and Tangible Things." In Smyth v. Williamson, No. 2:13-cv-2553-DCN, 2014 U.S. Dist. LEXIS 64777 (D.S.C. May 12, 2014), for instance, the court allowed plaintiff to depose an insurance company representative about his conversation with the insured. The court rejected defendant's work product claim, bluntly holding that "Rule 26 does not apply to the current motion" – because plaintiff "is not seeking discovery of any [documents or tangible] items but is rather seeking to depose a State Farm representative." Id. at *8-9.

Fortunately for defendants, most courts extend work product protection to intangible work product such as deposition testimony -- either ignoring the rule language or relying on a shadowy parallel common law work product protection.

- [Privilege Point, 4/18/18]

Courts Debate Work Product Issues: Part I

April 18, 2018

Ironically, federal courts interpreting the two-sentence work product rule in Fed. R. Civ. P. 26(b)(3)(A) take more varied views than when they apply the federal common law attorney-client privilege protection. Among other things, federal courts disagree about whether work product protection can apply only to materials created by a "party" to the litigation in which an adversary seeks those materials. Of course, the term "party" could either mean a formal litigant or a third party.

All or nearly all courts allow non-litigants who anticipate litigation to create protected work product, even if they are never sued. Most courts also extend work product protection to non-litigants who themselves may not anticipate litigation, but who act as a litigant's or would-be litigant's "representative" or otherwise have an interest in the litigation. But some courts take a narrower view. In Acceleration Bay LLC v. Activision Blizzard, Inc., Civ. A. Nos. 16-453 to -455-RGA, 2018 U.S. Dist. LEXIS 21506 (D. Del. Feb. 9, 2018), the court quoted a treatise and cited another case in concluding that "work product protection does not apply, even if the nonparty is a party to closely related litigation." *Id.* at *6. A few courts take this frighteningly narrow approach to the extreme. For instance, in Bryant v. Ferrellgas, Inc., Civ. A. Nos. 07-10447 & -13214, 2008 U.S. Dist. LEXIS 47148 (E.D. Mich. June 17, 2008), individual plaintiffs and an insurance company sued the same defendants in separate cases (which were later consolidated) arising from the same incident. The defendants issued a subpoena in the individual plaintiffs' case – seeking the insurance company's work product. Remarkably, although the cases had been consolidated, the court ordered production – because the insurance company was not a "party" to the individual plaintiffs' case in which the defendants issued their subpoena.

Fortunately, this illogical interpretation represents the minority, if not aberrational, view. But because courts apply their own work product approach without a choice of laws analysis, corporations may not know whether they will be sued in a court applying such a restrictive view. This highlights the wisdom of writing all documents very carefully. Next week's Privilege Point will explore another variable in courts' work product application.

- [Privilege Point, 4/25/18]

Courts Debate Work Product Issues: Part II

April 25, 2018

Last week's Privilege Point addressed courts' varying views on whether work product protection can extend to a non-party's documents. Courts also disagree about the heightened opinion work product protection, under which a court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning a litigation." Fed. R. Civ. P. 26(b)(3)(B) (emphasis added).

In Beltran v. InterExchange, Inc., Civ. A. No. 14-cv-03074-CMA-CBS, 2018 U.S. Dist. LEXIS 22564, at *24 (D. Colo. Feb. 12, 2018), the court inexplicably held that "[t]he Tenth Circuit is clear that work product privilege concerns the mental impressions of counsel," and therefore cannot extend to nonlawyers' opinions. Other courts take the same narrow approach – which ignores the Rule's clear language. A more subtle disagreement focuses on whether a corporate litigant's employee's litigation-related documents can deserve opinion work product protection. The fact work product rule clearly covers a "party," but the opinion work product doctrine on its face protects only opinions "of a party's attorney or other representative." Rule 26(b)(3)(B). Some courts hold that a corporate litigant's employee counts as a "party" and therefore cannot claim the heightened opinion work product protection, while other courts hold that such employees are a party's "representative" and therefore can assert opinion work product protection.

Next week's Privilege Point addresses another key judicial disagreement about the work product doctrine, which involves the protection's basic reach rather than specific rule language.

- In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., No. 05-MD-1720 (MKB), 2018 U.S. Dist. LEXIS 34113, at *119, *120, *121-22, *121 n.13 (E.D.N.Y. Feb. 26, 2018) (“Rule 26 of the Federal Rules of Civil Procedure protects only ‘documents and tangible things’ that are prepared for litigation. Fed. R. Civ. P. 26(b)(3).”; “The protection afforded under Hickman, while including intangible matters such as mental impressions, is limited to mental impressions of an attorney. Hickman [v. Taylor], 329 U.S. at 508-09. In Hickman, the Supreme Court ruled that attorney recollections were not subject to discovery due to work product protection, emphasizing lawyers’ need for ‘privacy, free from unnecessary intrusion by opposing parties and their counsel’ and noted that an opposite ruling would have a ‘demoralizing’ effect on the ‘legal profession.’”; “Here, Mr. Fellman is not an attorney, his impressions are not protected by Hickman, and his oral responses to the questions at deposition are not protected by the work product doctrine. . . . The Court makes no determination as to whether 7-Eleven is entitled to depose Mr. Fellman about his personal opinion as to [TEXT REDACTED BY THE COURT]. The Court’s ruling is limited to its finding that Fellman’s oral responses to questions that do not ask for his impressions formed in consultation with counsel are not protected by the work product doctrine.” (alteration in original); “Although in Bross v. Chevron U.S.A. Inc., No. 06-CV-1523, 2009 U.S. Dist. LEXIS 25391, 2009 WL 854446, (W.D. La. Mar. 25, 2009), in declining to extend the work product protection to a deponent-employee’s responses, the court differentiated between documents as opinion work product and witness’ verbal responses at deposition as ‘underlying facts,’ the court also noted the ‘intangib[ility]’ of deposition responses and the fact that they were by ‘non-attorneys.’ 2009 U.S. Dist. LEXIS 25391, [WL] at *5-6 (emphasis added). Moreover, in setting guidelines for the deposition, the court only prohibited the inquiries that would reveal attorney-client privilege or ‘counsel’s mental impressions concerning [the] case.’ 2009 U.S. Dist. LEXIS 25391, [WL] at *7.” (alterations in original))

- [Privilege Point, 8/22/18]

Another Court Inexplicably Rejects a Work Product Claim Because No Lawyer Was Involved

August 22, 2018

Some courts seem to ignore the plain language of the federal work product rule or state parallels by requiring lawyers' involvement.

In Rafferty v. KeyPoint Government Solutions, Inc., the court correctly quoted the federal work product rule indicating that "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." Case No. 4:16-cv-00210-DCN, 2018 U.S. Dist. LEXIS 104369, at *19 (D. Idaho June 19, 2018). Without noting that the accurately quoted language does not even mention lawyers, the court nevertheless concluded that "[b]ecause [defendant] KeyPoint has not established that an attorney or an attorney's agent prepared the document, the document is not protected by the work product doctrine." Id. at *20-21.

Cases like this represent a remarkable phenomenon. On its face, the work product rule simply does not require lawyers' involvement either in the creation or the direction of documents that can deserve protection. In fact, the rule explicitly indicates otherwise.

- [Privilege Point, 10/24/18]

Is the Work Product Doctrine Broader or Narrower Than the Attorney-Client Privilege?

October 24, 2018

In In re National Prescription Opiate Litigation, the court explained that the work product doctrine is "broader than the attorney-client privilege." Case No. 17-MD-2804, 2018 U.S. Dist. LEXIS 142270, at *61 (N.D. Ohio Aug. 1, 2018) (citation omitted). One week later, the court in Wolff v. Biosense Webster, Inc., indicated that "[t]he work-product doctrine is narrower than the attorney-client privilege." No. EP-17-CV-00328-PRM, 2018 U.S. Dist. LEXIS 133742, at *5 (W.D. Tex. Aug. 8, 2018). Two days after that, the court in Burrow v. Forjas Taurus S.A., stated that the work product doctrine is "broader than the attorney-client privilege." 334 F. Supp. 3d 1222, 1227 (S.D. Fla. 2018). Which is it?

The work product doctrine is both broader and narrower than the attorney-client privilege. It is broader, because: (1) anyone (not just lawyers or clients) can create protected work product, if motivated by anticipated litigation; (2) the work product doctrine can protect such disparate items as documents, accident scene pictures, translations, collections of newspaper articles, etc.; and (3) the work product doctrine is more robust than the privilege, so disclosing work product to non-adverse third parties normally does not waive that protection. The work product doctrine is narrower than the attorney-client privilege, because: (1) it applies only at certain times – during or in anticipation of litigation; and (2) it can be overcome -- if the adversary establishes substantial need for the withheld work product and the inability to obtain its substantial equivalent without undue hardship.

Corporations and their lawyers should always consider both possible protections – each has advantages and disadvantages.

- [Privilege Point, 12/12/18]

Privilege and Work Protection For Lawyers' Communications With Third Parties and Reports of Those Communications: Part I

December 12, 2018

Lawyers' communications with the third parties generally cannot deserve privilege protection, but what about work product protection?

In Booth v. Galveston Cnty., Civ. A. No. 3:18-CV-00104, 2018 U.S. Dist. LEXIS 181063 (S.D. Tex. Oct. 10, 2018), the court addressed work product protection for emails between plaintiffs' lawyer and two fact witnesses. The court acknowledged that "[a]t first blush, it might be inconceivable how documents exchanged with a third-party can fall within the sphere of privileged status." But then the court explained that "[i]f a written statement made by a third-party witness is covered by the work-product privilege, it is hard to imagine why an email exchange between counsel and a third-party witness providing the same information would not be protected by the same privilege." The court therefore protected the emails as work product, because they were "created for litigation purposes."

Most courts would also protect the "intangible" work product reflected in any similar oral communications between lawyers and fact witnesses. Next week's Privilege Point will address possible privilege and work product protection for lawyers' reports to their clients about such third party communications.

- [Privilege Point, 1/30/19]

Courts Issue Conflicting Work Product Doctrine Opinions: Part II

January 30, 2019

Last week's Privilege Point discussed a New York federal court's and a New York state court's opposite positions on a key work product issue.

Courts also disagree about whether the work product doctrine can extend to non-substantive documents such as litigation-related transmittal memos, email message traffic about scheduling meetings, etc. On its face, the rule should cover such documents. See, e.g., Breneisen v. Motorola, Inc., No. 02 C 50509, 2003 U.S. Dist. LEXIS 11485, at *15-16 (N.D. Ill. July 3, 2003) ("While most of these documents are merely communications regarding deposition dates and schedules, they fit under the work-product privilege."). But most courts require substantive content. In Chan v. Big Geyser, Inc., No. 17-CV-06473 (ALC) (SN), 2018 U.S. Dist. LEXIS 198776 (S.D.N.Y. Nov. 21, 2018), Judge Netburn rejected defendants' work product claim for its COO's litigation-related statements in weekly corporate reports. The court found those statements "analogous to an internal public relations campaign" – acknowledging that "even though the statements may have been created 'because of' Plaintiffs' lawsuit, they are not protected under work product immunity because they do not relate to Defendants' legal strategy." Id. at *7, *9.

Lawyers must familiarize themselves with the pertinent courts' and sometimes even presiding judges' interpretation of applicable work product rules – remembering the enormous and often dispositive disagreements about the doctrine's application.

- [Privilege Point, 5/20/20]

Accountants Implicate Subtle Privilege and Work Product Issues: Part II

May 20, 2020

Last week's Privilege Point described a case applying the generally-accepted view that accountants assisting clients rather than the clients' lawyers are outside privilege protection -- so copying them on privileged emails waives that fragile protection. An equally well-settled rule is just the opposite on the work product side -- disclosing protected work product to a non-adverse accountant does not waive that robust protection.

In United States v. Petit, 438 F. Supp. 3d 212 (S.D.N.Y. 2020), the Southern District of New York (Judge Rakoff) addressed a different work product issue. The court held that documents created by Ernst & Young themselves deserved work product protection. The court explained that "the fact that E&Y, not [King & Spalding], took the notes at issue does not disqualify the materials from receiving work product protection." Id. at 214. The court correctly noted that non-lawyers can create protected work product if they are primarily motivated by litigation or anticipated litigation.

Nearly every court agrees that: (1) accountants assisting clients cannot engage in privileged communications; and (2) disclosing privileged communications or documents to accountants usually waives the privilege. On the work product side, nearly every court agrees that: (1) disclosing work product to non-adverse accountants does not waive that protection, and (2) in some circumstances, accountants themselves can even create protected work product.

- [Privilege Point, 5/6/20]

Federal and State Courts Wrestle with Work Production Doctrine Variations

May 6, 2020

Ironically, federal courts interpreting a single sentence from a federal rule take dramatically differing approaches to the work product doctrine. And a handful of states have not adopted that federal work product rule.

In Marquette Transportation Co. Gulf Inland LLC, the court highlighted some of these federal variations -- holding that the work product doctrine: (1) can apply even if "litigation is not imminent"; but (2) only protects documents whose primary purpose "was to aid in possible future litigation." Some federal courts take a narrower approach on the first issue -- only protecting documents prepared when litigation is "imminent." Case No. 6:18-CV-01222 LEAD, 2020 U.S. Dist. LEXIS 21399, at *7-8 (W.D. La. Feb. 3, 2020) (citation omitted). Most federal courts take a broader approach on the second issue -- not requiring that the documents' primary purpose was to "aid" (use) in the upcoming litigation. A few weeks later, a Pennsylvania state court in Ford-Bey v. Professional Anesthesia Services of North America, LLC, quoted Pennsylvania's state court work product rule -- which recognizes only the narrow "opinion" work product doctrine (which is just a subset of the federal protection). 229 A.3d 984, 992-93 (Pa. Super. Ct. 2020).

Because work product protection is based on a rule, there is no choice of laws analysis -- courts just apply their own rules. And because defendants often do not know where they will be sued, they usually cannot know in advance what work product rule will apply.

- Revak v. Miller, No. 7:18-CV-206-FL, 2020 U.S. Dist. LEXIS 40287, at *22 (E.D.N.C. Mar. 9, 2020) (protecting intangible work product; “While the work-product provision in the Federal Rules applies to ‘documents and tangible things,’ id., the common law work-product privilege also covers ‘counsel’s mental impressions, conclusions or opinions [] sought in the context of a deposition, rather than as memorialized on paper[.]’ Maynard v. Whirlpool Corp., 160 F.R.D. 85, 87 (S.D.W. Va. 1995) (citing Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947)).” (alterations in original))

- [Privilege Point, 6/24/20]

Are “Litigation Holds” Protected by the Privilege or the Work Product Doctrine?

June 24, 2020

With pandemic-triggered litigation predicted to increase, corporations’ lawyers undoubtedly will address the possible duty to impose “litigation holds,” which direct corporate employees to preserve pertinent documents.

Do such “litigation holds” themselves deserve any protection? They might theoretically convey legal advice to corporate employees who need it – thus meriting attorney-client privilege protection. But most “litigation holds” do not provide sufficient detail to justify that assertion. In In re 3M Combat Arms Earplug Products Liability Litigation, Case No. 3:19-md-2885, 2020 U.S. Dist. LEXIS 48461 (N.D. Fla. Mar. 20, 2020), the court dealt with the more commonly-asserted work product protection. Taking the majority view, the court found that litigation holds are “textbook work product” – because “[u]nlike normal business activities . . . litigation hold notices are prepared because of the prospect of litigation.” Id. at *23. The court also adopted the majority view in assessing whether the adversary could overcome that work product protection – understandably explaining that “[t]he prevailing view is that litigation hold notices are discoverable only if there is a preliminary showing of spoliation.” Id. at *22.

This approach makes sense. It does not provide absolute protection, but instead prevents corporations’ adversaries from second-guessing such “litigation holds” absent evidence that the holds did not properly result in document preservation.

- [Privilege Point, 8/12/20]

Is Work Product Protection Limited to “Documents and Tangible Things”?

August 12, 2020

On its face, Fed. R. Civ. P. 26(b)(3)(A)’s work product doctrine only protects “documents and tangible things.” But do courts apply the work product doctrine in that limited fashion?

In Kleiman v. Wright, No. 2:20-cv-00593-BJR, 2020 U.S. Dist. LEXIS 84556 (W.D. Wash. May 13, 2020), a non-party deposition witness claimed to have acted as defendant’s “litigation liaison” and declined to answer deposition questions based on the attorney-client privilege. The court rejected that protection. And in a troubling footnote, the court also noted that “in numerous places in his response to the motion to compel [the witness] claims his communications are protected by the work product doctrine.” Id. at *3 n.3. The court also rejected his work product claim – noting that “this doctrine only protects ‘documents or tangible things.’” Id. Because “Plaintiffs do not seek to compel further document production, but, rather, [the witness’s] continued deposition testimony [T]he work product doctrine does not reach such testimony.” Id.

Most courts extend work product protection to “intangible” work product such as oral communications, deposition testimony, etc. Those courts either ignore the Rule’s limited language, or rely on a shadowy common law work product protection based on Hickman v. Taylor, 329 U.S. 495 (1947). Restricting work product protection to “documents and tangible things” can create great mischief. Take the example of a defendant who relied on a private investigator to uncover facts and write up an opinion-laden report with strategic recommendations. Narrowly construing the work product doctrine presumably would allow plaintiff to depose the investigator -- asking what she found, what conclusions she reached, what strategic recommendations she made to the defendant, etc. Those would clearly deserve work product protection if they were in written form, and most courts logically also protect them in testimonial form.

- [Privilege Point, 9/30/20]

Lawyers' Failure to Consider Work Product Protection Prejudices Their Clients: Part I

September 30, 2020

The attorney-client privilege and the work product doctrine differ dramatically in their age, source, scope, strength and fragility. Lawyers must always consider both. But because clients, lawyers, and even courts usually use the word "privilege" to describe both of those totally different protections, some lawyers forget the work product doctrine's possible applicability.

In Stavale v. Stavale, 957 N.W.2d 387, 389 (Mich. Ct. App. 2020), a wife seeking divorce "issued subpoenas to [her husband's] employer requesting emails that [her husband] had sent to his personal attorney through his employer-provided email address." The court applied what it correctly described as the "seminal case in the federal system" addressing privilege protection for such communications: "In re Asia Global Crossing, Ltd. (322 BR 247 Bankr. SD NY, 2005)." Id. at 390. The court concluded that the company's email policy "unambiguously provided that [the husband] had no expectation of privacy when using his employer-provided e-mail," but remanded to the trial court to "give particular focus to whether and to what extent defendant was notified or otherwise made aware of the policy." Id. at 396. The court then noted in a footnote that the defendant husband "briefly asserts, as an alternative issue at the end of his reply brief on appeal, that even to the extent the e-mails at issue are not protected by the attorney-client privilege, they are work-product that should be excluded on that ground." Id. at 396 n.8. The court "decline[d] to address defendant's reliance on the work-product doctrine" -- because he had not raised it in his initial pleading or in his supporting brief. Id.

The work product doctrine almost certainly would have protected emails between the husband and his personal divorce lawyer. And because the robust work product protection normally survives disclosure to friendly third parties (which do not increase the risk of the work product falling into an adversary's hands), work product protection might well survive the Asia Global standard. Next week's Privilege Point describes a case in which one of America's largest corporations made the same mistake.

- [Privilege Point, 10/7/20]

Lawyers' Failure To Consider Work Product Protection Prejudices Their Clients: Part II

October 7, 2020

Last week's Privilege Point described a husband's probable loss of attorney-client privilege protection when using his employer's email system for communications with his personal lawyer. Because he had only raised the alternative work product protection argument at the end of his appellate reply brief, he missed the chance to claim that broader and more robust protection. Even large and well-represented corporations sometimes make the same mistake.

In Naumoski v. Costco Wholesale Corp., No. 2:19-cv-491, 2020 U.S. Dist. LEXIS 97026, at *3 (N.D. Ind. June 3, 2020), an ADA plaintiff claimed that defendant Costco waived its attorney-client privilege when its regional operations manager forwarded to her several privileged communications between Costco's manager and Costco's "internal and external employment counsel." Fortunately for Costco, the court found that the operations manager's "disclosure [to plaintiff] of the email communications was a mistake," and ordered plaintiff to return them. Id. at *11. But the court was more sympathetic to plaintiff's motion to strike Costco's parallel work product claim -- noting that "Costco, for the first time, in its reply argued that the email communications were protected by the work product doctrine." Id. at *4. The court emphasized that "Costco's motion for protective order . . . failed to raise the work product doctrine," and "[i]n fact, neither party even mentioned the work product doctrine nor presented any argument or case authority based upon it." Id. at *5. The court therefore granted plaintiff's "Motion to Strike the Portions of Defendant's Reply that Assert Work Product Doctrine." Id.

Communications and documents created before anyone anticipated litigation can either be privileged or not – but they generally will not deserve work product protection. In contrast, documents or communications created during or in anticipation of litigation, but involving or shared with outsiders, may be protected work product -- but generally will not deserve the narrower and more fragile privilege protection. Litigation-related communications between lawyers and their clients may deserve both, and lawyers owe it to their clients to consider both.

- [Privilege Point, 11/4/20]

Court Applies the General Rule Finding a Privilege Waiver When Clients Disclose Privileged Communications to Public Relations Consultants

November 4, 2020

One of the most dangerous misperceptions among corporate clients is that disclosing privileged communications to such friendly outsiders as public relations consultants does not waive privilege protection as long as there is a confidentiality agreement in place. A steady stream of cases have rejected that approach, yet large corporate clients and sophisticated law firms continue to rely on that mistaken view.

In United States ex rel. Wollman v. Massachusetts General Hospital, Inc., 475 F. Supp. 3d 45 (D. Mass. July 29, 2020), Mass. General Hospital hired a former U.S. Attorney and his law firm Cooley, LLP, to investigate allegations that Mass. General fraudulently billed Medicare and Medicaid. The government sought the investigation report, and Mass. General predictably resisted. Unsurprisingly, Mass. General first claimed work product, but the court rejected that assertion: “there is no indication in the engagement letter, the Report itself, or the employee interviews that the Investigation was intended to relate to the [eventual litigation].” Id. at 60-61. The court then turned to Mass. General’s privilege claim – noting that Mass. General had disclosed the Report to public relations consultant Rasky “to assist in responding to an investigation by the [newspaper] Boston Globe Spotlight Team into the practice of overlapping surgeries.” Id. at 65-66. The court bluntly concluded that “the production of the Report to Rasky waived the attorney-client privilege.” Id. at 68. But the court found that because Mass. General and other defendants “have not sought to use the . . . Report in any fashion, much less to gain an adversarial advantage,” the waiver did not trigger a subject matter waiver. Id. at 69. The court explained that “[w]hile an argument can be made that they used the Report as a ‘sword and shield’ in their dealings with the press, the distinction between use in a judicial and nonjudicial setting is significant.” Id.

All of these conclusions follow generally accepted principles. It is remarkable that one of America’s great hospitals, a former U.S. Attorney, and a prestigious law firm would be involved in such a disclosure.

- **[Privilege Point, 1/6/21]**

Some States Do Not Follow the Federal Work Product Rule Approach

January 6, 2021

Attorney-client privilege protection started in Roman times, evolved in the common law, developed organically in each jurisdiction, and differs somewhat from state to state. But ironically, there is a greater variation in federal courts' application of the single sentence work product doctrine articulated in Fed. R. Civ. P. § 26(b)(3). Not surprisingly, the same level of variation exists in the vast majority of states that have essentially adopted verbatim the federal work product doctrine rule.

And to complicate matters further, several states' work product rule differs dramatically from the federal rule. In Colton v. West Penn Power Co., 241 A.3d 525 (Table format), 2020 Pa. Super. Unpub. LEXIS 3238, at *11 (Pa. Super. Ct. Oct. 15, 2020), the court assessed a work product protection claim under Pa. R. Civ. P. 4003.3 for accident scene photographs taken by a utility claims rep, which he later gave to the utility's in-house lawyer "for his use and for inclusion in the Legal Department's file." After concluding that the claims rep did not take the photographs "at the behest of the attorney," the court rejected the work product claim. Id. at *20 (citation omitted). The court cited an earlier opinion emphasizing "the clear distinction that the [Pennsylvania] Rule makes between the work[] product of an attorney with that of a non-attorney representative." Id. at *21 (second alteration in original) (citation omitted). The federal work product rule does not contain such a distinction.

Lawyers representing clients in unfamiliar state courts should not automatically assume that those states follow federal work product doctrine standards (which themselves vary even among federal courts).

- King County v. Viracon, Inc., Civ. A. No. 2:19-cv-508-BJR, 2020 U.S. Dist. LEXIS 198934, at *11-12 (W.D. Wash. Oct. 26, 2020) (holding that the work product doctrine protection applied in later unrelated litigation; "The work product doctrine does not require that Viracon anticipated litigation with King County related to the Chinook Building. Rather, the work product doctrine applies to work conducted in anticipation of any litigation.")

- [Privilege Point, 7/14/21]

Correctly Applying Work Product Protection Continues to Elude Some Courts

July 14, 2021

As Privilege Points have periodically mentioned, some courts inexplicably limit work product protection to documents lawyers prepare or order to be prepared – in the face of Fed. R Civ. P 26(b)(3)(A)'s requirement only that the documents were "prepared in anticipation of litigation or for trial by or for another party or its representative" (listing lawyers as only one of six such possible representatives). Emphasis added. But that type of mistake is not the only one that some courts make.

In American Insurance Co. v. Pine Terrace Homeowners Ass'n, Civ. A. No. 20-cv-00654-DDD-KMT, 2021 U.S. Dist. LEXIS 97203 (D. Colo. May 21, 2021), the court dealt with the next work product rule provision (Rule 26(b)(3)(B)) – which requires that courts ordering discovery of work product "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Emphasis added. The court inexplicably "stresse[d]" that to be protected by the work product doctrine, even if documents were prepared in anticipation of litigation, the documents must also contain the mental processes of the attorney, or must divulge the attorney's strategies or legal impressions." American Insurance, 2021 U.S. Dist. LEXIS 97203, at *20 (emphases added).

Lawyers may have to gently remind courts: (1) that Rule 26(b)(3)(A) protects non-lawyers' litigation-motivated documents; and (2) that Rule 26(b)(3)(B) extends heightened "opinion" work product protection to their client's non-lawyer "other representative[s]."

- **[Privilege Point, 10/20/21]**

Court Issues Strange Intangible Work Product Decision

October 20, 2021

Although the federal work product rule and parallel state work product rules extend only to "documents and tangible things," most courts also protect intangible work product such as oral communications – at least to the extent that they reflect a lawyer's thought process. But it can be difficult to distinguish between such intangible work product and historical facts, which of course do not deserve any protection.

In Arizona Grain Inc. v. Barkley Ag Enterprises LLC, No. CV-18-03371-PHX-GMS, 2021 U.S. Dist. LEXIS 136049 (D. Ariz. July 21, 2021), plaintiff deposed a defendant's executive vice president, who had attended an interview conducted by defendant's lawyer of a former employee of defendant's predecessor-in-interest. Plaintiff's lawyer had asked the vice president "what [the former employee] said during the course of [the interview]." Id. at *2 (second alteration in original). Defendant's lawyer had objected on work product grounds. The judge rejected the work product claim – stating that the former employee's "answers are not sufficiently tied to an attorney's mental processes to warrant protection." Id. at *4.

The court's ruling would make sense if the former employee's answers were extensive and general. But if they were focused and narrow, disclosing them presumably would provide palpable insight into defendant's lawyer's specific areas of inquiry, worrisome topics, etc. It would have been better for the court to simply direct plaintiff's lawyer to ask his or her own questions about the historic facts – rather than allowing him to piggyback on the defendant's lawyer's questions.

- Blackmon v. Bracken Constr. Co., 338 F.R.D. 91, 96 n.5 (M.D. La. 2021) (holding that the work product doctrine protected a common interest agreement; “Although the Court finds the Joint Defense Agreement is protected as ordinary work product, a stronger argument from Plaintiffs may have resulted in a difference [sic] outcome. The terms of this particular Agreement are standard, it includes boilerplate language. Other courts considering similar agreements have rejected assertions of work product. See United States v. Hsia, 81 F. Supp. 2d 7, 11 n.3 (D.D.C. 2000) (‘These decisions do not convince this Court that either the existence or the terms of a JDA are privileged.’); U.S.A. v. Omid, 2020 U.S. Dist. LEXIS 214944, 2020 WL 6600172, at *2 (C.D. Cal. Aug. 12, 2020) (‘The Court has reviewed the JDA in camera. It generally recites the participating parties’ invocation of a common defense interest, sets forth general terms of their understanding and procedure, and memorializes the parties to the agreement. It does not contain any substantive legal advice or additional information that can be construed as privileged.’); Rodriguez v. Gen. Dynamics Armament & Tech. Prod., Inc., 2010 WL 1438908, at *3 (D. Haw. Apr. 7, 2010) (‘Having reviewed the JDA in camera, the Court finds that it does not contain any privileged or protected material. Instead, the contents include information disclosed by the parties during the course of litigation via motions, disclosures, documents and pleadings.’).”)

- [Privilege Point, 5/25/22]

You Textin' to Me? Robert De Niro Loses a Work Product Claim

May 25, 2022

Actor Robert De Niro's feud with a former production company manager has generated several opinions by Southern District of New York Magistrate Judge Katharine Parker.

In *Robinson v. De Niro*, No. 19-CV-9156 (LJL) (KHP), 2022 U.S. Dist. LEXIS 42101 (S.D.N.Y. Mar. 9, 2022), the court analyzed several issues. Among other things, the court held that: (1) draft state court proceedings deserved work product or privilege protection; (2) "a cover note sharing a draft complaint without any commentary and that is a mere transmittal is not protected"; and (3) plaintiff's resignation letter sent to De Niro did not deserve protection, but later email message traffic about it did deserve such protection. Somewhat surprisingly, the court held that a text message that "merely identifies information (specifically, a website link) on Plaintiff" did not deserve work product protection – because it "neither conveys nor seeks legal advice and does not reflect any attorney mental impressions." *Id.* at *21-23, *26-27. Although transmittal communications generally deserve no protection, many courts would protect as fact (probably not opinion) work product a litigation-motivated text message pointing to some source of information about an adversary.

Proskauer alum Judge Katharine Parker seems to have become the go-to privilege/work product expert on the S.D.N.Y. – after Judge James Francis's 32-year tenure playing that role. So lawyers should pay special attention to her analyses.

- [Privilege Point, 7/20/22]

Hickman Work Product Protection Extends Beyond the Work Product Rule

July 20, 2022

Just about the time that extensive pre-trial discovery started, the Supreme Court recognized a new evidentiary protection – extending beyond the attorney-client privilege, and motivated by the understandable requirement that each litigant should do its own discovery work. Hickman v. Taylor, 329 U.S. 495 (1947). Most lawyers now assess work product protection under the later-adopted Fed. R. Civ. P. 26(b)(3), but Hickman's shadow remains.

In John Gross & Co., Inc. v. Agri Stats, Inc., Case No. 19 C 8318, 2022 U.S. Dist. LEXIS 46510 (N.D. Ill. March 16, 2022), the court recognized work product protection for documents prepared by a law firm that had not yet been retained to handle the litigation it ultimately filed. The defendant correctly noted that Rule 26(b)(3) only protects documents prepared by or for a "party." The court rejected defendant's technical rule-based argument, holding that "enough is left of Hickman to protect against one party discovering opposing counsel's mental impressions" – even if counsel formed those before representing a "party." Id. at *26-27. The court analogized this expanded protection to another Hickman-related doctrine, under which most courts protect "intangible" work product such as oral conversations, despite Rule 26(b)(3)'s application on its face only to "documents and tangible things."

Lawyers analyzing possible work product protection in federal court should understandably look first to Fed R. Civ. P. 26(b)(3). But they must also remember to assess possible protection continuing to emanate from the seventy-five year old Hickman decision.

- Corcoran v. HCA-HealthONE LLC, Civ. A. No. 21-cv-0237-NRN, 2022 U.S. Dist. LEXIS 91486, at *6, *9, *9-10, *10-11, *11 (D. Colo. May 20, 2022) (adopting the Peralta approach to communications with a former employee, but rejecting Peralta's work product analysis – finding that disclosure of work product to a former employee waived that protection because the former employee could disclose it to third parties; “One case where the facts closely mirror those presented by the instant Parties is Peralta v. Cendant Corp., 190 F.R.D. 38 (D. Conn. 1999).”; “This approach seems reasonable and consistent with the objectives of preserving the corporate entity's privilege, while recognizing that the adversary has a right to know if the witnesses' testimony has been influenced in any way.”; “For these reasons, I accept Ms. Corcoran's arguments from her brief and adopt the Peralta opinion with respect to issues of attorney-client privilege only. With respect to attorney-client privilege, the Peralta decision should guide any future deposition questions and answers to and from former Rose employees.” (internal citation omitted); “The Peralta decision goes on and reaches certain conclusions about the work product doctrine and how a lawyer can have a discussion about legal theories and opinions with a former employee and such discussion might be protected as work product. See Peralta, 190 F.R.D. at 42 (suggesting that the work product doctrine would prevent deposition questions about legal theories or opinions that the corporate lawyer may have discussed with the former employee). I disagree with the Peralta opinion on this point. The authority it cites, C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2024, does not support the position stated. A review of the most recent edition of the Wright and Miller treatise indicates that this section is referring to whether showing a work product document to a third party waives completely the work product privilege. Obviously, the fact that work product might have been shown by a lawyer to a third party does not mean that it can then be obtained directly from the lawyer. Thus, the showing of the document to a third party does not waive the work product protection. See C. Wright, A. Miller and R. Marcus, Federal Practice and Procedure § 2024 at 531-32 (2010).”; “But a third party has no duty maintain such post-employment communications of trial strategy as confidential. If a lawyer is dumb enough to tell her trial strategy to a former employee of the client, and the former employee has no ongoing duty of confidentiality with respect to information learned post-employment, then opposing counsel is free to inquire about it and the former employee can answer questions in deposition without infringing on the attorney work product doctrine. Thus, the Court does not adopt Peralta's discussion of the work product doctrine.”)

- [Privilege Point, 9/21/22]

Northern District of Illinois Helpfully Explains The Work Product Doctrine Protection's Contextual Basis

September 21, 2022

As these Privilege Points have repeatedly emphasized, privilege protection depends on communications' content — which must be primarily motivated by a client's request for legal advice, or the lawyer's responsive provision of legal advice.

As in so many other ways, different principles apply to work product. In Trustees of the Chicago Regional Council of Carpenters Pension Fund v. Drive Construction, Inc., the court handling an ERISA case addressed work product protection for questionnaires and responses that plaintiffs' lawyers "used . . . to determine whether the person who had filled it out 'would make a good witness.'" No. 1:19-cv-2965, 2022 U.S. Dist. LEXIS 114941, at *4 (N.D. Ill. June 29, 2022) (internal citation omitted). The court first properly noted that "even a document that contains 'purely factual information' may be considered work product." Id. at *8 (citation omitted). The court then rejected defendant's argument that the work product doctrine did not apply because a non-lawyer participated in creating the questionnaires template and instructing folks on how to complete it — properly acknowledging that the work product rule on its face covers documents created by non-lawyers. In protecting the questionnaires as work product, the court correctly explained that "[t]he relevant question, then, is not what information the questionnaires contain or who created them, but whether they were created in anticipation of litigation." Id. at *9.

Lawyers should remember this distinction between attorney-client privilege and work product doctrine protection. With the attorney-client privilege, content is king — with work product, context is king.

- [Privilege Point, 10/19/22]

Courts Address Work Product Protection for Non-Testifying Consulting Experts: Part I

October 19, 2022

Many courts address the discovery available from a litigant's testifying experts. Fewer courts assess discovery of a litigant's consultant retained to provide background expertise rather than testifying.

In Haile v. Detmer Sons Inc., 194 N.E.3d 883 (Ohio Ct. App. 2022), a plaintiff sued the company which serviced his mother's gas furnace, after she died of carbon monoxide poisoning. The lower court ordered production of the plaintiff's non-testifying consultant's post-accident inspection of the gas furnace. The appellate court reversed, bluntly noting "[t]he general rule . . . that the work of a [party's] consulting, non-testifying expert is protected from discovery requests of the opposing party." Id. at 887. The court specifically pointed to Ohio's rule that parallels Fed. R. Civ. P. 26(b)(4)(B) – allowing discovery of a non-testifying consulting expert only upon a showing of "exceptional circumstances under which, it is impractical for the party to obtain facts or opinions on the same subject or other means" – as when the consulting expert conducts destructive testing, changes the site conditions, etc. Id. (citation omitted). The appellate court noted that the trial court had erred by allowing discovery "without conducting an evidentiary hearing or an in camera review of the consulting expert's file and work product." Id. at 888. Most importantly, the appellate court emphasized that the consultant's inspection was "non-destructive in nature" and instead involved only a "visual and photographic inspection." Id. at 886.

Fed. R. Civ. P. 26(b)(4)(B) and parallel state rules provide consulting experts nearly complete immunity from discovery. Many courts bar discovery of such consultants' identities or even of their existence. Next week's Privilege Point will address what are called "dual hat" experts.

- [Privilege Point, 10/26/22]

Courts Address Work Product Protection for Non-Testifying Consulting Experts: Part II

October 26, 2022

Last week's Privilege Point summarized a case confirming non-testifying experts' general immunity from discovery — absent "exceptional circumstances" such as destructive testing. Ten days later, another court addressed discovery of what are called "dual hat" experts — providing both consulting advice and testimony.

In Clark v. Quiros, prison officials sued by an inmate for allegedly depriving her of medically necessary treatment retained a doctor as a testifying expert, and also as a consulting expert "to advise defendants on their prospective management and treatment of plaintiff." Case No. 3:19-cv-575 (VLB), 2022 U.S. Dist. LEXIS 154800, at *2-3 (D. Conn. Aug. 29, 2022). The court first acknowledged that non-testifying consulting experts are "generally immune from discovery." Id. at *7 (citation omitted). The court then noted that "for dual-hat experts, the privileges that apply to consultant communications and work product only apply when there is no overlap between the expert's consulting and testifying roles." Id. at *25. Such experts thus may claim work product protection "only over those materials generated or considered uniquely in the expert's role as consultant." Id. at *22-23 (citation omitted). After reviewing the "dual hat" expert's documents in camera, the court found the necessary separation — and protected the consultant-role documents.

It can be difficult enough to apply a non-testifying consulting expert's "exceptional circumstances" standard, let alone deal with the added complication of "dual hat" experts. Litigants considering such a risky "dual hat" expert should carefully document the entirely separate nature of the two roles.

- [Privilege Point, 4/5/23]

Delaware Federal and State Courts Disagree About a Key Privilege Waiver Issue

April 5, 2023

Under some arrangements, major shareholders appoint directors to companies those shareholders partially own. Does such a company waive its privilege by disclosing its privileged documents to a designating shareholder's employees (other than its designated board members)? In In re Sanchez Energy Corp., Case No. 19-34508, Jointly Administered, Ch. 11, 2022 Bankr LEXIS 3507, at *8 (Bankr. S.D. Tex. Dec. 12, 2022), a Texas federal court analyzed under Delaware law whether a company waived its privilege by disclosing privileged communications to employees of two large shareholders who were "entitled to designate two of the three members of [the company's] board."

The court first noted that a Delaware bankruptcy court dealing with waiver in the other direction "recently held that a designating shareholder may waive privilege upon sharing information with its designee." Id. at *9. That decision disagreed with a 2013 Delaware Chancery Court decision holding that a "designating stockholder is entitled to the privileged communications to which its designee directors is entitled" without waiving the company's privilege. Id. at *10.

The court applied federal common law in adopting the Delaware bankruptcy court's reasoning — "ha[ving] no reason to believe that a designating shareholder is entitled to the privileged information of its designated board member." The court thus ordered the company's designated board members to produce privileged documents that they had shared with their fellow designating shareholder's employees (who were unaffiliated with, and thus "third parties," to the company).

- [Privilege Point, 5/3/23]

Pennsylvania Federal Court Helpfully Distinguishes Between Privilege and Work Product Protection

May 3, 2023

The last several Privilege Points have emphasized the different waiver implications of disclosing privileged communications and protected work product. For the most part, the distinctions rest on the very different societal benefits and costs of the ancient attorney-client privilege and the relatively new work product doctrine.

In Stevens v. Sullum, the court explained that the “attorney-client privilege serves laudable purposes and thus is ‘[w]orthy of maximum protection’” — but “obstructs the truth-finding process and is to be construed narrowly.” Civ. A. No. 3:20-CV-01911, 2023 U.S. Dist. LEXIS 31485, at *13-14 (M.D. Pa. Feb. 24, 2023) (alteration in original) (citation omitted). So “[t]he privilege ‘protects only those disclosures — necessary to obtain informed legal advice — which might not have been made absent the privilege.’” Id. at *14 (citation omitted). In contrast, “the work product doctrine promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation.” Id. at *15.

Lawyers should remember these two contrasting societal interests, which underlie important distinctions in the evidentiary protections’ creation and (especially) the waiver implications of disclosing protected communications or documents to third parties.

- [Privilege Point, 6/7/23]

State Supreme Court Seems to Ignore Its Own Work Product Rule

June 7, 2023

Because what is called “opinion work product” deserves higher protection than fact work product (and in many courts enjoys “absolute or nearly absolute” protection), litigants understandably seek to withhold documents on that basis. Fed. R. Civ. P 26(b)(3) explains that such highly protected opinion work product can be created by “a party’s attorney **or other representative.**” (Emphasis added.) SDNY privilege guru Judge Parker recognized this expansive possibility in Abrahami v. Meister Seelig & Fein LLP, No. 21-CIV-10203 (JFK) (KHP), 2023 U.S. Dist. LEXIS 40884, at *3 (S.D.N.Y. Mar. 10, 2023) (noting that “[o]pinion work product consists of the mental impressions, conclusions, opinions and legal theories of an attorney or other representative of a party”).

Just a few days later, the Missouri Supreme Court in Hill v. Wallach, explained that “[o]pinion work product ‘encompasses a **lawyer’s** opinions, conclusions, mental impressions and legal theories.’” 661 N.W.3d 786, 790 (Mo. 2023) (citing an Eighth Circuit opinion (emphasis added)). The Supreme Court inexplicably did not quote its own Missouri Rule 56.01(b)(5) which clearly recognizes that work product can be created by “an attorney or other representative of a party.”

Lawyers litigating in state or federal court should remember that the applicable opinion work product rule provision usually provides a far broader protection than many court opinions articulate. Interestingly, few courts have addressed an interesting issue — whether a party itself (who clearly can create protected fact work product) may also create the more highly protected type of opinion work product.

B. Litigation and Anticipation Elements, Spoliation Risk

- Anderson v. Sotheby's Inc. Severance Plan, No. 04 Civ. 8180 (SAS), 2005 U.S. Dist. LEXIS 23517, at *4, *11, *15-17 (S.D.N.Y. Oct. 11, 2005) (assessing a former Sotheby employee's ERISA claim, and his argument that "he is entitled to an adverse inference vote regarding the existence of an actual conflict of interest in the Plan Administrator's deliberations" because the Plan Administrator "intentionally destroyed evidence"; explaining that "[a] duty to preserve evidence arises when the party in possession of the evidence is notified of its relevance. A party is on notice once it receives a discovery request or the complaint alerts the party that certain information will likely be sought in discovery. However, 'the obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced.'" (footnotes omitted); "Plaintiff asserts that the duty to preserve evidence arose as of July 6, 2004, the date the Interview Notes were written because the Administrator claimed that those Notes were entitled to protection as work product. The work product doctrine provides protection for 'documents . . . prepared in anticipation of litigation' The Administrator contends that it cannot have reasonably anticipated litigation as of July 6, 2004. Furthermore, Magistrate Judge Eaton found that the Notes were not entitled to work product protection because they were prepared by the Administrator 'in the ordinary course of assessing an employee's beneficiary's claim for a large severance benefit.' Nonetheless, because the Administrator claimed that it reasonably anticipated litigation as of July 6, 2004, the Administrator's duty to preserve the documents arose as of that date." (footnote omitted; emphasis in original); concluding the plaintiff was not entitled to an adverse inference instruction because he could not prove that the destroyed notes were relevant to the issues being litigated, and because the notes were "negligently destroyed," but did not prove that the Plan Administrator "intentionally destroyed" the notes (noting that the Committee Secretary "testified that she routinely destroyed her handwritten meeting notes after she prepared a typewritten report"))).

- Resurrection Healthcare v. GE Health Care, No. 07 C 5980, 2009 U.S. Dist. LEXIS 20562, at *4, *5 (N.D. Ill. Mar. 16, 2009) (analyzing work product protection for documents created during an investigation of a mercury spill at a hospital; "[T]o be subject to work product immunity, the documents at issue must have been created in response to 'a substantial and significant threat' of litigation, which can be shown by 'objective facts establishing an identifiable resolve to litigate.'" (citations omitted); "The Court finds that the documents at issue are not protected work product because GEHC has failed to show that they were created in response to a substantial and significant threat of litigation. GEHC's claim that '[d]ue to the extensive nature of the contamination . . . GE Health Care reasonably anticipated . . . that litigation was likely,' . . . is not sufficient by itself.").

- Crown Castle USA Inc. v. Fred A. Nudd Corp., No. 05-CV-6163T, 2010 U.S. Dist. LEXIS 32982, at *30 (W.D.N.Y. Mar. 31, 2010) (analyzing what the court called the "Trigger Date" for the duty to preserve documents; "Of course, Crown's obligation to preserve evidence arose no later than April 8, 2005, the date on which Crown commenced this lawsuit. . . . Based upon the emails produced in discovery, however, I find that the duty actually arose as early as August 2004 -- when several Crown employees, including in house counsel, considered filing a notice of claim with Nudd's insurance carrier and instituted a practice of labeling Nudd related communications as privileged under the work product doctrine -- and no later than October 2004 -- when Crown retained outside counsel 'for purposes of litigation.'").

- [Privilege Point, 2/9/11]

State Court Analyzes the "Anticipation" and "Trigger" Elements of the Work Product Protection: Part I

February 9, 2011

The work product doctrine can protect documents (and sometimes intangible information) prepared in reasonable "anticipation" of litigation. However, courts' articulation of the requisite "anticipation" ranges from "imminent" to "some possibility" of litigation.

In In re Energy XXI Gulf Coast, Inc., No. 01-10-00371-CV, 2010 Tex. App. LEXIS 10117, at *8 (Tex. App. Dec. 23, 2010), the court articulated a standard that falls between the two extremes – concluding that a company could claim work product protection as soon as its employee "subjectively believed in good faith that there was a substantial chance that litigation would ensue."

Lawyers must always determine the relevant court's standard for analyzing the "anticipation" required for the work product protection. Next week's Privilege Point will discuss the Texas court's identification of the exact minute at which the work product protection became available.

- [Privilege Point, 2/16/11]

State Court Analyzes the "Anticipation" and "Trigger" Elements of the Work Product Protection: Part II

February 16, 2011

Last week's Privilege Point discussed courts' varying standards for determining when a litigant reasonably "anticipated" litigation. Regardless of the standard, litigants must be prepared to identify the exact minute at which they sufficiently "anticipated" litigation.

In In re Energy XXI Gulf Coast, Inc., No. 01-10-00371-CV, 2010 Tex. App. LEXIS 10117 (Tex. App. Dec. 23, 2010), the trial court found that the work product began to protect a company's internal communications on November 19, 2007 – which the court identified as the day that the company could have reasonably anticipated litigation with its insurance broker. However, the appellate court disagreed – pointing to an e-mail the insurance broker sent to the company at 3:13 p.m. on October 11, 2007. The court explained that as of that moment, the insurance broker and the company "were taking directly adverse positions as to which party stood at fault" for failing to secure additional insurance. Id. at *19. As the court put it: "The stakes were high. The positions were clear. A reasonable person would have to conclude from the totality of the circumstances that there was a substantial chance that litigation would ensue" Id.

Although not always called upon to do so, every litigant claiming work product must be able to identify the exact second at which the litigant first reasonably "anticipated" litigation (by whatever standard the court applies).

- Zirkelbach Constr., Inc. v. Rajan, 93 So. 3d 1124, 1128, 1128-29, 1129 (Fla. Dist. Ct. App. 2012) (noting the difference between Florida appellate court on the work product anticipation element; "[T]he district courts differ concerning the meaning of 'prepared in anticipation of litigation.' In the Fourth District, materials do not constitute protected work product unless they were prepared when the probability of litigation was 'substantial and imminent.'" (citation omitted); "However, the Second District applies a less stringent foreseeability standard: '[M]aterials such as these may qualify as work product even if, as here, no specific litigation was pending at the time the materials were compiled. Even preliminary investigative materials are privileged if compiled in response to some event which foreseeably could be made the basis of a claim.'" (citation omitted); "Unfortunately, in reaching its ruling, the circuit court relied primarily on the cases from the Fourth District cited by Mr. Rajan. The circuit court should have applied the controlling precedent from this court instead of cases from the Fourth District.").

- [Privilege Point, 3/26/14]

Courts Confirm Basic Work Product Principles

March 26, 2014

The work product doctrine does not automatically apply just because a party anticipates litigation. A number of other principles limit the protection's applicability.

In Telamon Corp. v. Charter Oak Fire Insurance Co., Case No. 1:13-cv-00382-RLY-DML, 2014 U.S. Dist. LEXIS 6583 (S.D. Ind. Jan. 17, 2014), the court found that neither the attorney-client privilege nor the work product doctrine protected materials created during a Barnes & Thornburg [plaintiff's outside lawyers] internal investigation. Among other things, the court rejected the significance of the company's post-investigation meeting with the FBI – noting that the company "does not counter the fact that it was the results of its investigation that led [the investigator] and the lawyers to reach out to the FBI." Id. at *7. In other words, the company did not anticipate litigation at the beginning of the investigation, but rather at the end. Four days later, the Eastern District of New York affirmed a Magistrate Judge's earlier decision (reported in an earlier Privilege Point) denying privilege and work product protection for communications between a Duane Morris lawyer and her client's human resources employee. Koumoulis v. Indep. Fin. Mktg. Grp., Inc., No. 10-CV-0887 (PKC) (VMS), 2014 U.S. Dist. LEXIS 7695 (E.D.N.Y. Jan. 21, 2014). Among other things, the court noted that "Defendants acknowledge that this advice was intended, in part, to prevent Plaintiff from bringing claims of retaliation." Id. at *18. The court then stated another basic work product principle: "Legal advice given for the purpose of preventing litigation is different than advice given in an anticipation of litigation." Id.

Corporate clients and their lawyers should familiarize themselves with the work product doctrine's nuances. They cannot change the underlying facts, but in some situations they can forfeit possible work product protection by inarticulately stating their positions.

- Koumoulis v. Independent Financial Marketing Group, Inc., 29 F. Supp. 3d 142, 147-48, 149, 149-50, 149 n.4, 150 (E.D.N.Y. 2014) (upholding a Magistrate Judge's opinion that neither the attorney-client privilege nor the work product doctrine protected communications between a Duane Morris lawyer and a corporate client's human resource executive; finding the attorney-client privilege inapplicable because the advice was primarily business-related and not legal; "This document contains an e-mail from Defendants' outside counsel, Ann Bradley, Esq. [Duane Morris lawyer], setting forth more than a full page of detailed, multi-part instructions on how to deal with Mr. Komoulis's personnel issues, including a recommendation that Defendants call Mr. Komoulis 'to express concern and disappointment, identify the fundamental problem and find out who he trusts to advise him,' and goes so far as to prescribe detailed instructions to be given to Plaintiff on how he should conduct himself with Defendants' customers. . . . This advice plainly is not legal advice, but rather human resources advice on personnel management and customer relations." (emphasis added); finding the work product doctrine inapplicable for a number of reasons; "Based on its review of the Submitted Documents, the Court concurs with Judge Scanlon's assessment that the communications between Defendants and outside counsel related to human resources issues, e.g., the internal investigation related to Mr. Komoulis and responding to his complaints. Such advice would have been provided even absent the specter of litigation, and therefore do [sic] not constitute litigation-related work product."; "Defendants concede that 'LPL [defendant] ha[d] an obligation to investigate' Koumoulis's complaints about alleged discrimination and retaliation,' regardless of the potential for litigation. . . . The alleged motivation for which these documents were sought is not enough to overcome what appears on the face of the documents themselves." (second alteration in original) (footnote omitted); "[E]ven assuming the internal investigation was conducted in anticipation of litigation, otherwise work-product privileged communications relating to the investigation would still be discoverable once Defendants assert a Faragher/Ellerth [Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998)] defense. Indeed, Defendants acknowledged as much when they disclosed their in-house attorneys' notes and correspondence regarding the investigation. Defendants offer no justification for treating their outside counsel's communications regarding the investigation differently than their in-house counsel's communications on that topic."; "Defendants acknowledge that this advice was intended, in part, to prevent Plaintiff from bringing claims of retaliation. . . . Legal advice given for the purpose of preventing litigation is different than advice given in an anticipation of litigation." (emphasis added); "[S]imply declaring that something is prepared in 'anticipation of litigation' does not necessarily make it so. . . . [T]he

contents of the communications directly contradict Defendants' privilege claim. These communications, on their face, relate to advice given by Ms. Bradley on how to prevent a lawsuit, not on how to defend one."
(emphasis added)).

- [Privilege Point, 4/23/14]

Courts Disagree About Basic Work Product Principles: Part II

April 23, 2014

Last week's Privilege Point described three different levels of protection three courts provided to opinion work product in about a three-week period. Courts also disagree about many other work product doctrine elements.

In U.S. Nutraceuticals LLC v. Cyanotech Corp., the court noted that federal courts defining the required "anticipation" element hold "that litigation need not be imminent, but rather a 'real possibility' at the time the documents in question are prepared." Case No. 5:12-cv-366-Oc-10PRL, 2014 U.S. Dist. LEXIS 22739, at *6 (M.D. Fla. Feb. 19, 2014) (citation omitted). Nine days later, another court articulated two different and internally inconsistent standards in the same paragraph: (1) "there was real and substantial probability that litigation will occur at the time of the document's creation," and (2) "the threat of litigation must be 'real' and 'imminent.'" Black & Veatch Corp. v. Aspen Ins. (UK) Ltd., 29 F.R.D. 611, 617-18 (D. Kan. 2014) (citation omitted).

In addition to understanding the substantively different standards, lawyers should also recognize the risks of articulating the wrong standard. Clients contemporaneously noting in a document that they are facing the "real possibility" of litigation may have to explain that, at some later time, the litigation threat became "imminent."

- In re Baytown Nissan Inc. v. Gray, 451 S.W.3d 140, 148 (Tex. App. 2014) ("The 'anticipation of litigation' test is met when a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue and the party asserting the work product privilege subjectively believed in good faith that there was a substantial chance that litigation would ensue.").
- Sanofi Aventis Deutschland GMBH v. Glenmark Pharms. Inc., 748 F.3d 1354, 1361, 1362, 1363 (Fed. Cir. 2014) (affirming a jury damage award of over \$16 million following an adverse inference instruction based on defendant's spoliation; finding that defendant's duty to preserve pertinent documents begin on the date first mentioned in its privilege log; "The district court concluded that Glenmark had violated its duty to preserve relevant evidence when litigation is planned or reasonably foreseen. The court denied the Plaintiffs' motion for default, but instructed the jury that it was permitted to draw an adverse inference that the electronic documents that Glenmark deleted in 2005 and 2006 would have been unfavorable."; "The district court found that litigation became 'reasonably foreseeable' to Glenmark no later than the date asserted for 'work product' in its privilege log. . . . The privilege log contained entries for 'work product' as early as February 2006."; noting that the trial court had given the jury an adverse inference instruction; "The district court exercised its discretion, and gave the jury a permissive instruction, as follows: 'You may make an adverse inference in this case against Glenmark. In this case, I have determined that Glenmark systematically overwrote the emails on its email server between February 23, 2006 and mid-2007 and that some of these documents were relevant to the claims in suit. An adverse inference permits you, the jury, to infer that the destroyed emails and attached documents might or would have been unfavorable to the position of Glenmark. However, you are not required to draw such an inference, and the weight to be given such an inference is your decision.'" (internal citation omitted); "Although the district court declined to impose the sanction of forfeiture as requested by Plaintiffs, the court was well within its discretion in informing the jury that it may draw an inference that the destroyed documents may have been unfavorable to Glenmark. The courts are not required to tolerate acts in derogation of the integrity of judicial process. . . . The destruction of documents in the course of preparation for litigation has no entitlement to judicial protection, and need not be concealed from the jury. A new trial on this ground is not warranted.").

- Kettler Int'l, Inc. v. Starbucks Corp., 81 F. Supp. 3d 495, 501 (E.D. Va. 2015) (although not deciding on the appropriate sanction, holding that Starbucks was obligated to preserve pertinent documents relating to testing of allegedly defective chairs, because Starbucks had claimed work product protection for its analysis of the chairs; "The Court found that the duty to preserve started in October 2013, when Starbucks contracted with SGS to test the Carlo chair for defects. Starbucks asserted the work product doctrine as a defense to production of the test results. Federal Rule of Civil Procedure 26(b)(3) limits application of the work product doctrine to documents 'prepared in anticipation of litigation[.]'" (alteration in original)).

- [Privilege Point, 4/22/15]

District of Columbia Circuit Provides Good News and Bad News in a Work Product Case

April 22, 2015

Ironically, federal courts applying the federal work product rule take widely varying positions on a number of key elements, including the protection's duration; its applicability to litigation-related business documents; and the standard under which adversaries can overcome a work product claim.

In FTC v. Boehringer Ingelheim Pharmaceuticals, Inc., 778 F.3d 142 (D.C. Cir. 2015), the D.C. Circuit held that: (1) work product "prepared. . . for one lawsuit will retain its protected status even in subsequent, unrelated litigation" (id. at 149); (2) the work product doctrine could protect documents memorializing a business arrangement included as part of adverse companies' litigation settlement agreement, even if the arrangement "has some independent economic value to both parties" — if it was "nonetheless crafted for the purpose of settling litigation" (id. at 150); and (3) an adversary can satisfy the "substantial need" element for overcoming a litigant's work product by demonstrating that the withheld materials "are relevant to the case" and "have a unique value apart from those already in the [adversary's] possession" — without showing "that the requested documents are critical to, or dispositive of, the issues to be litigated." (Id. at 155-56.) The first two holdings represent a broad view of the work product protection, but the third holding makes it easier for adversaries to overcome a company's work product protection.

Other courts take different approaches to all of these issues. Unfortunately, defendant companies often do not know where they will be sued, and therefore will not know in advance what work product standards will apply to documents they may have already created.

- Kettler Int'l, Inc. v. Starbucks Corp., 97 F.3d 563, 567, 570, 572 (E.D. Va. 2015) (sanctioning Starbucks for destroying several thousand chairs manufactured by plaintiff Kettler, despite claiming work product protection for its investigation of possible design or manufacturing defects in the chairs, and despite Kettler's warning that Starbucks should preserve the chairs; noting that Starbucks had purchased 13,870 chairs from Kettler, and had tested the chairs after several reported accidents; explaining that Starbucks' law department arranged for a consultant's investigation of the chairs, and ultimately asked the consultant to preserve 200 of the chairs, although there were over 7,000 left when the incidents occurred; explaining that on May 2, 2014, Kettler responded to Starbucks' warranty claim (based on its purchase of all of the chairs) with a reminder of Starbucks' obligation to save "every chair upon which a claim is being made"; further explaining that on the same day Kettler filed a declaratory judgment action against Starbucks; "According to Plaintiff, 'Starbucks destroyed 1,584 chairs after KETTLER demanded Starbucks preserve them and 489 chairs after KETTLER served this lawsuit on Starbucks.'" (emphasis deleted); "This Court found that Starbucks' 'duty to preserve started in October 2013,' yet from that point forward Starbucks Legal directed the destruction of over 7,000 Carlo chairs. . . . This action is compounded by the fact that on April 10, 2014, Kettler demanded Starbucks' [sic] preserve any chairs it claimed were defective, but Starbucks destroyed an additional 1,584 chairs between April 10, 2014 and May 7, 2014 when the complaint was served, . . . and then another 489 chairs after it was served with the present lawsuit. . . . Such conduct was not the result of mere negligence."; "Starbucks is seeking damages as to 'all Carlo chairs' purchased within the course of its business relationship with Kettler, but it has destroyed almost ninety-nine (99) percent of them."; "The only relevant alternative remedy to dismissing the action is the remedy Plaintiff has requested, which is limiting Starbucks' damages to the remaining 200 chair sample. This would severely limit the amount of damages Starbucks can potentially recover if it succeeds on the merits; therefore, the Court will exercise its discretion and not award Kettler its reasonable attorney's fees and expenses incurred in the prosecution of its spoliation motion.").

- [Privilege Point, 10/7/15]

What Level of Litigation "Anticipation" Triggers Work Product Protection?

October 7, 2015

One of the great ironies of work product protection involves federal courts' widely varying interpretation of the single sentence codifying the Federal Rules' work product protection. Fed. R. Civ. P. 26(b)(3)(A). Among many other things, federal courts disagree about the required level of litigation "anticipation" that can trigger protection.

In Tate & Lyle Americas, LLC v. Glatt Air Techniques, Inc., Case No. 13-2037, 2015 U.S. Dist. LEXIS 104265, at *6 (C.D. Ill. July 31, 2015), the court held that the protection can apply only when "some articulable claim, likely to lead to litigation, [has] arisen." (Alteration in original; emphasis added; citation omitted.) Three days later, the District of New Jersey acknowledged that "litigation need not be imminent" for the work product doctrine to kick in, but that "there must be an identifiable specific claim of impending litigation." Shipyard Assocs., L.P. v. City of Hoboken, Civ. A. No. 14-1145 (CCC), 2015 U.S. Dist. LEXIS 100927, at *15 (D.N.J. Aug. 3, 2015). In that case, the court did not articulate exactly where along the "anticipation" spectrum the work product doctrine could apply. This ambiguity is unfortunate, because federal courts' standards range from "imminent" to "some possibility" of litigation.

In their roles as defendants, corporations usually do not know where they will be sued — so they normally will not know in advance what degree of anticipation will satisfy the work product standard of the court in which they will find themselves litigating.

- **[Privilege Point, 8/24/16]**

What Is "Litigation" for Work Product Protection Purposes?

August 24, 2016

Fed. R. Civ. P. 26(b)(3) and its state counterparts protect from discovery "documents and tangible things that are prepared in anticipation of litigation." This obviously includes civil litigation. But what about other forms of adversarial dispute resolution?

In Ellingson v. Piercy, Case No. 2:14-cv-04316-NKL, 2016 U.S. Dist. LEXIS 78803, at *12 (W.D. Mo. June 16, 2016), the court held that the work product doctrine extended to emails related to a "coroner's inquest [which] was a quasi-judicial proceeding." Other courts have extended work product protection to documents motivated by adversarial regulatory proceedings, arbitrations (rather than mediations), and other public and private processes analogous to side-versus-side litigation.

Of course, the attorney-client privilege protection can protect communications in any setting, regardless of litigation or anticipated litigation. As in so many other ways, the work product doctrine involves more subtle and varied issues than the attorney-client privilege.

- Meyer v. NCL (Bah.), Ltd., Case No. 16-23238-CIV-WILLIAMS/SIMONTON, 2017 U.S. Dist. LEXIS 125045, at *13-14 (S.D. Fla. Aug. 8, 2017) (holding that an investigation following a physical assault on a cruise ship deserved work product protection; also holding that the cruise line did not waive that work product protection by providing witness statements to the FBI; "[T]here is nothing in the record to demonstrate that the Defendant and the FBI were in an adversarial posture, or that the Defendant produced the witness statements for any other reason besides cooperation. Apart from whether the disclosure was required under CVSSA, the undersigned finds that the Defendant did not waive the work-product protection of the witness statements by providing them to the FBI." (emphasis added)).

- Exxon Mobil Corp. v. Nw. Corp., Case No. 1:16-cv-00005-BLG-BMM, 2017 U.S. Dist. LEXIS 159143, at *3, *5, *5-6, *6 (D. Mont. Sept. 27, 2017) ("The documents XOM [Exxon Mobil] claimed were privileged were generally related to a 'hindsight investigation,' which it claimed was instigated in anticipation of litigation and is therefore not discoverable under Fed. R. Civ. P. 26(b)(3). XOM also withheld certain documents under the attorney-client privilege based on communications between several employees and corporate counsel. XOM fully complied with the Court's order on September 6, 2017."; "According to the privilege log, XOM had submitted a draft of the outline for the hindsight investigation by at least February 22, 2014. In this document, XOM listed its 'objectives' for the hindsight investigation which did not include a section on legal recourse or reference potential litigation. This evidences to the Court that the hindsight investigation was conducted for business reasons unrelated to future litigation. Moreover, XOM states in a letter to the Court: '[i]n late February, it was unclear whether the hindsight investigation would be conducted in an open, non-privileged format, or in a closed, privileged and work product context.' As of February 23, 2017, XOM's corporate counsel had still not 'decided' whether the investigation should be privileged. ('. . . the final decision about whether to privilege or not is still to be made')." (alterations in original) (emphasis added) (internal citations omitted); "These circumstances lead the Court to believe that XOM had decided to conduct the hindsight investigation for business reasons on or before February 22, 2014-before XOM's counsel stepped in and attempted to protect it under the work product doctrine. The hindsight investigation therefore would have been conducted 'regardless of the litigation,' and was not prepared in anticipation of litigation." (emphasis added); "Based on the circumstances surrounding the hindsight investigation, XOM has not met its high burden of showing that these documents were created in anticipation of litigation. Accordingly, the documents related to the hindsight investigation are not protected by the work product doctrine and must be produced." (emphasis added); "Several of the documents produced by XOM, however, do contain communications to and from XOM's corporate attorney. Such communications are protected by attorney-client privilege and are protected from disclosure to NWE. The Court orders the documents be produced with the communications to and from XOM's corporate counsel redacted.").

- In re Premera Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230, 1244-45, 1245, 1245-46, 1246-47, 1247 (D. Or. Oct. 27, 2017) (holding that most documents related to Premera's data breach investigation did not deserve privilege or work product protection; among other things, holding that: (1) nearly all communications among Premera's nonlawyers were primarily motivated by business rather than legal concerns, although lawyer changes to drafts and documents prepared for litigation purposes might deserve privilege protection; (2) nearly all documents prepared by Premera employees and third party vendors (including a public relations firm) were primarily motivated by business rather than legal concerns, and therefore did not deserve privilege protection (although communications seeking legal advice about proposed public statements might be privileged), and did not deserve work product protection because they would have been prepared in the same form absent anticipated litigation; (3) documents relating to data breach consultant Mandiant did not deserve privilege protection, because (unlike the Target and Experian case) Mandiant's scope of work did not change when Mandiant switched from reporting to the client to reporting to outside counsel, and did not deserve work product protection because they served a business rather than litigation-related purpose; noting that some other third party vendors' documents might have been specifically motivated by legal concerns or litigation preparation and therefore protected; (4) the common interest doctrine did not protect communications between Premera and other Blue Cross plans that had experienced only similar but not identical data breaches, although disclosing privileged communications to them did not trigger a subject matter waiver; (5) the fiduciary exception did not apply, because most withheld communications related to Premera's defending itself; "*Documents that relate to Mandiant's work for Premera, including the Mandiant Remediation Report, and other third-party vendors' technical and public relations aspects of the investigation and analysis (Category 3).*" a. *Mandiant*. The facts surrounding the Mandiant report(s) are not particularly clear to the Court. Plaintiffs move to have Premera produce the Mandiant 'Remediation Report.' Premera states that it already has produced the Mandiant 'Intrusion Report,' subject to an agreement that such production does not constitute a waiver of privilege, but adds that drafts and other documents relating to that report are privileged and protected by the work-product doctrine. It is not clear to the Court whether the 'Intrusion Report' and 'Remediation Report' are two different documents."; "Mandiant was hired by Premera in October 2014 to review Premera's data management system. On January 29, 2015, Mandiant discovered the existence of malware in Premera's system. On February 20, 2015, Premera hired outside counsel in anticipation of litigation as a result of the recently discovered data breach. On February 21, 2015, Premera and Mandiant

entered into an amended statement of work that shifted supervision of Mandiant's work to outside counsel. The amended statement of work, however, did not otherwise change the scope of Mandiant's work from what was described in the Master Services Agreement between Mandiant and Premera entered into on October 10, 2014. Several weeks after the February 21st agreement, Mandiant issued a report." (underscored emphasis added); "Premera argues that Mandiant is the equivalent of a private investigator or other investigative resource hired by an attorney to conduct an investigation on behalf of an attorney, and thus that Mandiant's work is privileged and protected as work-product. The flaw in Premera's argument, however, is that Mandiant was hired in 2014 to perform a scope of work for Premera, not outside counsel. That scope of work did not change after outside counsel was retained. The only thing that changed was that Mandiant was now directed to report directly to outside counsel and to label all of Mandiant's communications as 'privileged,' 'work-product,' or 'at the request of counsel.' Premera argues that, with respect to Mandiant, after the breach was discovered and outside counsel was hired it became an entirely different situation. The amended statement of work, however, does not support that assertion. The only thing that appears to have changed involving Mandiant was the identity of its direct supervisor, from Premera to outside counsel. The amended statement of work confirms that the scope of the work remained the same. Thus, Premera's argument that Mandiant's focus shifted in February 25, 2015, and that Mandiant then became more like an investigator working on behalf of outside counsel instead of performing its original role on behalf of Premera, is not supported by the amended statement of work." (underscored emphases added); "This situation is unlike the Target data breach case relied upon by Premera. In Target, the company performed its own independent data breach investigation that was produced in discovery and the attorneys performed a separate investigation through a retained expert company that was privileged and protected from discovery. In re Target Corp. Customer Data Sec. Breach Litig., 2015 U.S. Dist. LEXIS 151974, 2015 WL 6777384, at *2 (D. Minn[.] Oct. 23, 2015). With Premera, however, there was only one investigation, performed by Mandiant, which began at Premera's request. When the supervisory responsibility later shifted to outside counsel, the scope of the work performed did not change. Thus, the change of supervision, by itself, is not sufficient to render all of the later communications and underlying documents privileged or immune from discovery as work product."; "This situation also is unlike the Experian case relied on by Premera. In re Experian Data Breach Litig., Case No. 8:15-cv-01592-AG-DFM, 2017 U.S. Dist. LEXIS 162891 (C.D. Cal.). In that case, outside counsel was hired by the company and outside counsel then hired Mandiant. Id. ECF 239 at 3. Here, Premera had already hired Mandiant,

which was performing an ongoing investigation under Premera's supervision before outside counsel became involved. Premera has the burden of showing that Mandiant changed the nature of its investigation at the instruction of outside counsel and that Mandiant's scope of work and purpose became different in anticipation of litigation versus the business purpose Mandiant was performing when it was engaged by Premera before the involvement of outside counsel. Premera has not made that showing."; *"Third-party vendors.* The analysis for these Category 3 documents is the same as for the documents in Categories 1 and 2. These are the documents created by the third-party vendors hired by outside counsel. Many of these documents appear to be related to business functions delegated to counsel. There appear to be some documents, however, that are or may be related to legal functions and are thus properly protected by the attorney-client privilege or work-product doctrine. The documents relating to Epiq appear to be legal in nature and thus not a business function; they may be withheld. There also appear to be several electronic discovery vendors for whom it is unclear whether the work performed is of a legal or business nature. Premera provided the Court with the written agreement between Alteq, Inc. and Premera, which references a statement of work, but Premera did not provide a copy of the statement of work. Without reviewing the statement of work, it is not clear whether Alteq was performing litigation discovery services for counsel or computer technical assistance services for Premera. If it was the former, then Alteq would not be performing a business function and the information would be privileged or protected by the work-product doctrine. Similarly, e-Discovery, iDiscover, LLC, and Navigant are vendors that appear to be providing services relating to electronic discovery or discovery-related computer forensic assistance. If those services are being performed for counsel as litigation-support for discovery, they would not constitute non-legal business functions and would be privileged or protected by the work-product doctrine. If, however, they are services being performed for the benefit of Premera as part of the investigation or remediation of the breach, they likely would be a business function and thus discoverable. The other third-party vendors appear to be performing business functions and thus their documents and communications would not be protected by privilege or work-product."; "Premera's attempt to label all communications on these subjects as necessary investigative steps required to give information to Premera's counsel in connection with legal advice is not persuasive.").

- In re Abilify (Aripiprazole) Prods. Liab. Litig., Case No. 3:16-md-2734, 2017 U.S. Dist. LEXIS 213493, at *12 (N.D. Fla. Dec. 29, 2017) (in an opinion by Judge Jones, holding that the work product doctrine applied to “closely related” litigation; “Relying upon cases like Burlington Industries, Inc. v. Rossville Yarn, Inc., case no. CIV.A-495-CV-0401-H, 1997 U.S. Dist. LEXIS 10347, 1997 WL 404319 (N.D. Ga. June 3, 1997), Plaintiffs advance the argument that work product only applies to litigation that is ‘closely related.’ This view is the minority view and is not in keeping with the more accepted view that ‘[d]ocuments produced in anticipation of litigating one case remain protected in a subsequent case [] if they were created by or for a party to the subsequent litigation.’ Doe v. United States, 2015 U.S. Dist. LEXIS 87203, 2015 WL 4077440, at *6 (S.D. Fla. July 6, 2015); Bituminous Cas. Corp. v. Tonka Corp., 140 F.R.D. 381, 388 (D. Minn. 1992) (‘It is the law of this Circuit that the work product doctrine extends to documents prepared in anticipation of or for previous litigation, regardless of whether the previous litigation was related or unrelated to the case in which discovery is sought.’); U.S. v. Leggett & Platt, Inc., 542 F. 2d 655, 660 (6th Cir. 1976) (The work product doctrine protects material produced in anticipation of other litigation.); In re Grand Jury Proceedings, 43 F. 3d 966 (5th Cir. 1994).” (alterations in original))

- [Privilege Point, 2/21/18]

Courts Assessing Privilege and Work Product Claims in an Investigation Context Examine Several Factors

February 21, 2018

Courts assessing privilege and work product claims for corporate investigations usually focus on (1) the investigation's initiation (analyzing what motivated the investigation), and (2) the investigation's course (usually looking for lawyers' involvement). Less frequently, courts also focus on (3) the corporation's use of the investigation results. That post-investigation factor can shed light on the investigation's initial motivation.

In Carr v. Lake Cumberland Regional Hospital, Civ. A. No. 15-138-DLB-HAI, 2017 U.S. Dist. LEXIS 188865 (E.D. Ky. Nov. 15, 2017), the court overruled defendant hospital's privilege and work product claims for documents the hospital created while investigating an allegedly botched surgery. Analyzing one withheld email, the court rejected the hospital Risk Manager's affidavit claiming work product protection – noting that her statement "indicating that she would let the 'administrative team' know about the conversation . . . as opposed to in-house counsel or outside counsel – suggests that at the time of the creation of the emails, neither party crafted their emails 'in anticipation of litigation.'" Id. at *13.

Corporations and their lawyers must remember that courts examining privilege and work product protection for investigation-related documents focus on the investigation's initiation, course, and even how the client used investigation-related documents.

- Albin Family Revocable Living Trust v. Halliburton Energy Servs., Inc., Case No. CIV-16-910-M, 2018 U.S. Dist. LEXIS 5192, at *11-12 (W.D. Okla. Jan. 11, 2018) (finding that an Oklahoma Department of Environmental Quality proceeding did not count as "litigation" for work product protection purposes; "[T]he Court finds that defendant has not established that the ODEQ proceedings for which these documents were prepared are adversarial proceedings. The ODEQ proceedings consist of defendant submitting a self-disclosure letter, the negotiation and execution of a Consent Order between ODEQ and defendant to investigate and remediate potential environmental impacts from the site, and defendant's investigation and remediation of the site under the terms of the Consent Order. The Court finds these proceedings have none of the hallmarks of adversarial proceedings but are more in the nature of ex parte proceedings. Further, the Court finds defendant's contention that the ODEQ proceedings are adversarial because ODEQ has the ability to impose monetary sanctions and penalties and to enforce the Consent Order in a state district court in Oklahoma or in an administrative tribunal should defendant violate the Consent Order is too broad. Defendant's contention relies on the assumption that defendant knew that it would (or that it intended to) fail in its efforts under the Consent Order; that is, that it would ultimately be in violation of the terms of the Consent Order or some environmental act or policy, which would allow the ODEQ to pursue them. The Court finds the documents at issue were created to avoid litigation, not in anticipation of litigation." (emphasis added)).

- [Privilege Point, 6/20/18]

What Can Trigger a Reasonable Anticipation of Litigation Sufficient to Support a Work Product Claim? Part II

June 20, 2018

Last week's Privilege Point described two of three possible "trigger" events that can create an objectively and subjectively reasonable "anticipation" of litigation: (1) an outside event certain to generate litigation; and (2) the adversary's explicit threat.

Third, in rare situations, the litigant's own internal actions can support a work product "anticipation" argument. Courts are understandably suspicious of such arguments, but sometimes they succeed. In Jeddo Coal Co. v. Rio Tinto Procurement (Sing.) PTE Ltd., plaintiff "Jeddo insists that Rio Tinto could not possibly have reasonably anticipated litigation prior to February 18, 2016, since it was only then that Jeddo had raised the prospect of litigation." Civ. No. 3:-16-CV-621, 2018 U.S. Dist. LEXIS 57803, at *17 (M.D. Pa. Apr. 5, 2018). Of course, that was the classic example of an adversary's action triggering anticipated litigation. But Rio Tinto "disagrees, noting that in the months leading up to February 18, 2016, Rio Tinto's business team and lawyers were engaged in strategic planning regarding not merely business matters, but what they anticipated – correctly – was likely to be litigation if Rio Tinto rejected [Jeddo's] proposal." Id. at *18. The court agreed with Rio Tinto. Although acknowledging that "Jeddo is right that litigation was plainly foreseeable as of February 18, 2016" when Jeddo threatened litigation, the court explained that "this does not mean that Rio Tinto was unreasonable in anticipating litigation that could arise prior to that time given the decisions it was facing." Id. at *19.

Corporations should not count on such a favorable view, but in some circumstances might successfully claim work product protection based on their own internal steps.

- Collardey v. Alliance for Sustainable Energy, LLC, 406 F. Supp. 3d 977, 982-83 (D. Colo. 2019) (concluding that anonymous complaints satisfied the “anticipation” work product element; “Plaintiff argues that there was insufficient evidence to support the magistrate judge’s finding that the interviews were conducted in anticipation of litigation because the anonymous complaint on which the magistrate judge relied to make his finding did not make any mention of a ‘specific legal action’ or ‘actual legal claim he/she might have against Alliance.’ Docket No. 29 at 7-8. Contrary to plaintiff’s suggestion, however, the work product doctrine is not confined to situations in which litigation is certain. The test is whether, ‘in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.’ Martin, 150 F.R.D. at 173 (quoting 8 Charles Alan Wright et al., Federal Practice & Procedure § 2024)); see also Mattenson v. Baxter Healthcare Corp., 438 F.3d 763, 768 (7th Cir. 2006) (‘[P]rovided the prospect of litigation was not remote . . . , the fact that the case hadn’t begun and might never be brought did not disqualify [attorney’s] jottings from the shelter of the work-product doctrine.’); Agility Public Warehousing Company K.S.C. v. Dep’t of Defense, 110 F. Supp. 3d 215, 228 (D.D.C. 2015) (‘The work-product doctrine is not limited to those cases where litigation is a foregone conclusion.’); Masters v. Gilmore, No. 08-cv-02278-LTB-KLM, 2009 U.S. Dist. LEXIS 113059, 2009 WL 4016003, at *3 (D. Colo. Nov. 17, 2009) (‘Litigation need not be imminent for the attorney work-product privilege to apply; rather, it must only be reasonably foreseeable.’). Under this standard, both the anonymous complaints and the timing of Ms. Pate’s investigation – approximately five months after plaintiff filed his charge of discrimination with the EEOC, Docket No. 25 at 1 (noting Pate investigation took place ‘in and around May 2017’); Docket No. 25-2 (EEOC charge filed December 12, 2016) – were adequate to support a finding that Alliance had reasonable grounds to anticipate litigation. As the magistrate noted in his ruling, Alliance received multiple, anonymous complaints during a similar time frame, one of which specifically threatened legal action in the event that Alliance did not take steps to address employees’ concerns about Mr. Thill. See Docket No. 29-2 at 1. Given this evidence, the magistrate judge did not clearly err in holding that the investigation documents were created in anticipation of litigation.” (alterations in original))

- [Privilege Point, 2/12/20]

Do Litigation Threats Always Support A Work Product Claim?

February 12, 2020

Work product protection depends on the creator's involvement in or anticipation of litigation. Courts generally look at what might be called "trigger events" – events that satisfy the work product doctrine's "anticipation" element. An adversary's threat to litigate against the creator seems like the most obvious "trigger event" that can support a work product claim.

But not always. In Lawson v. Spirit AeroSystems, Inc., 410 F. Supp. 3d 1195 (D. Kan. 2019), defendant Spirit's retired CEO Lawson considered and then entered into a consulting arrangement with an investor in Spirit's competitor. Lawson claimed work product protection starting on January 26, 2017 – the day "that Spirit threatened litigation against Lawson if he breached his Retirement [non-compete] Agreement and against any entity . . . that tortiously interfered with Lawson's contractual obligations." Id. at 1207. But the court rejected Lawson's argument, noting that: (1) Lawson and the investor had not as of that date "decided to move forward with their business arrangement . . . thus making litigation real and imminent"; and (2) over the next several days Spirit and the investor "continued to communicate about a potential amicable resolution." Id. As the court put it, "[w]here parties continue to negotiate to resolve disagreements amicably, litigation is 'not a substantial and significant threat.'" Id. (citation omitted). The court ultimately determined that Lawson could reasonably have anticipated litigation when he actually began working for the investor – January 31, 2017.

Some courts go even further – pointing to almost certainly disingenuously friendly language in otherwise threatening correspondence as inconsistent with imminent litigation. Companies actively planning to pursue or defend anticipated litigation may want to internally memorialize that anticipation, or at the least avoid statements such as "I am sure we can work this out" when communicating with their soon-to-be adversary.

- **[Privilege Point, 12/4/19]**

Privilege, Work Product and Litigation Holds: Part II

December 4, 2019

Last week's Privilege Point described a court's understandable decision not to address an attorney-client privilege claim when a defendant had successfully claimed work product protection that the plaintiff could not overcome.

The work product doctrine can protect documents created when the holder is in or reasonably anticipates litigation. Some courts reason that the mental state providing that protection also triggers the requirement to preserve pertinent documents. Litigants' failure to have preserved pertinent documents starting as of the date they claim work product protection has occasionally resulted in spoliation issues. But defendants who have issued "litigation holds" can point to those in arguing that they reasonably anticipated litigation as of that date. In Johnson v. Air Liquide Large Industries U.S. L.P., Case No. 2:18-CV-259-WCB, 2019 U.S. Dist. LEXIS 152963, at *14 (E.D. Tex. Sept. 9, 2019), the court understandably noted that defendant's "proposed measures for preserving evidence strongly suggest an awareness of the likelihood of litigation and an intention to take steps in anticipation of that litigation."

Litigants' failure to have imposed litigation holds can hamper a work product claim and create other potentially troublesome issues -- but their issuance of such holds can buttress a work product protection claim.

- Taylor v. LM Insurance Corp., Case No. 19-1030-JWB, 2019 U.S. Dist. LEXIS 191038, at *8-9 (D. Kan. Nov. 4, 2019) (adopting a “real and imminent” work product anticipation standard; “Under the first component, work prepared in the ordinary course of business is not protected. Under the second component, ‘the threat of litigation must be real and imminent. The inchoate possibility, or even the likely chance of litigation, does not give rise to the privilege.’” (footnote omitted))

- [Privilege Point, 5/6/20]

Federal and State Courts Wrestle with Work Production Doctrine Variations

May 6, 2020

Ironically, federal courts interpreting a single sentence from a federal rule take dramatically differing approaches to the work product doctrine. And a handful of states have not adopted that federal work product rule.

In Marquette Transportation Co. Gulf Inland LLC, the court highlighted some of these federal variations -- holding that the work product doctrine: (1) can apply even if "litigation is not imminent"; but (2) only protects documents whose primary purpose "was to aid in possible future litigation." Some federal courts take a narrower approach on the first issue -- only protecting documents prepared when litigation is "imminent." Case No. 6:18-CV-01222 LEAD, 2020 U.S. Dist. LEXIS 21399, at *7-8 (W.D. La. Feb. 3, 2020) (citation omitted). Most federal courts take a broader approach on the second issue -- not requiring that the documents' primary purpose was to "aid" (use) in the upcoming litigation. A few weeks later, a Pennsylvania state court in Ford-Bey v. Professional Anesthesia Services of North America, LLC, quoted Pennsylvania's state court work product rule -- which recognizes only the narrow "opinion" work product doctrine (which is just a subset of the federal protection). 229 A.3d 984, 992-93 (Pa. Super. Ct. 2020).

Because work product protection is based on a rule, there is no choice of laws analysis -- courts just apply their own rules. And because defendants often do not know where they will be sued, they usually cannot know in advance what work product rule will apply.

- [Privilege Point, 5/26/21]

Florida Federal Court Mentions Two Ways the Work Product Doctrine Differs From the Attorney-Client Privilege

May 26, 2021

The ancient attorney-client privilege: (1) protects communications primarily motivated by clients' request for legal advice, regardless of any litigation on the horizon; and (2) protects such communications absolutely. The relatively new work product doctrine differs dramatically from the attorney-client privilege in those two ways (among many others).

In Molbogot v. MarineMax East, Inc., Civ. No. 20-cv-81254-MATTHEWMAN, 2021 U.S. Dist. LEXIS 45149 (S.D. Fla. Mar. 10, 2021), the purchaser of an expensive boat sued the seller for alleged defects, and then sought discovery from the boat's manufacturer Sea Ray (to which the seller had returned the boat after the purchaser's complaints). Sea Ray claimed work product for several "communications between Sea Ray and . . . an electrical engineer/surveyor, discussing his findings upon inspection of Plaintiff's vessel." Id. at *2. The court first held that the work product doctrine applied as of March 2, 2020 – "when Plaintiff's current legal counsel sent correspondence to Sea Ray providing a list of issues regarding the vessel Plaintiff had purchased." Id. at *6. This type of implicit threat constitutes one of what can be called "trigger events" justifying work product protection, which unlike the attorney-client privilege protects communications only when the creator reasonably anticipates or is in litigation. Second, the court concluded that Plaintiff could overcome Sea Ray's work product claim for the engineer's inspection findings, because "Plaintiff cannot obtain the photographs or the findings in the [engineer's] report from any other source because the vessel went to the factory and was altered immediately after [the Sea Ray engineer]'s inspection." Id. at *7.

Unlike the attorney-client privilege, the work product doctrine: (1) applies only at certain times; and (2) is not absolute. For these and other reasons, corporations and their lawyers should always consider both protections.

- [Privilege Point, 11/17/21]

Courts Differ on the Meaning of the Work Product Rule's "Anticipation" and "Litigation" Elements: Part I

November 17, 2021

Fed. R. Civ. P. 26(b)(3)'s and parallel state work product rules apply to documents and tangible things prepared "in anticipation of litigation or for trial." But the Rule does not specify the degree of required "anticipation."

In Penn Engineering & Manufacturing Corp. v. Peninsula Components, Inc., the court ruled that work product protection only applied if "there existed an identifiable specific claim of impending litigation" – explaining that "even [a] 'likely' prospect of litigation is insufficient." Civ. A. No. 19-cv-513, 2021 U.S. Dist. LEXIS 153047, at *7 (E.D. Pa. Aug. 12, 2021) (citations omitted). Six days later, the court in Verret v. Acadiana Criminalistics Laboratory Commission held that the work product doctrine "can apply where litigation is not imminent." Case No. 6:20-CV-01302, 2021 U.S. Dist. LEXIS 156381, at *3 (W.D. La. Aug. 18, 2021) (emphasis added) (citation omitted). Eight days after that, the state supreme court in University of Louisville v. Eckerle held that "[l]itigation must be imminent or pending" and that "the mere potential for litigation is not sufficient." No. 2020-SC-0216-MR, 2021 Ky. Unpub. LEXIS 49, at *11 (Ky. Aug. 26, 2021) (emphasis added) (citation omitted).

Corporations and their lawyers must determine the pertinent court's standard when assessing a work product claim, and the likelihood of success in satisfying that standard. Of course, this can be difficult if the corporation does not know where it might be sued. Next week's Privilege Point will address a court's interpretation of the word "litigation."

- [Privilege Point, 11/24/21]

Courts Differ on the Meaning of the Work Product Rule's "Anticipation" and "Litigation" Elements: Part II

November 24, 2021

Last week's Privilege Point addressed courts' differing interpretations of the work product rule's "anticipation" element. Fed. R. Civ. P. (26)(b)(3)'s and parallel state rules' "litigation" element also requires courts' interpretation.

Of course, regular civil and criminal litigation satisfies the "litigation" standard. But other similar proceedings might not. In University of Louisville v. Eckerle, the Kentucky Supreme Court held that "the university's employee grievance process . . . does not constitute litigation." No. 2020-SC-0216-MR, 2021 Ky. Unpub. LEXIS 49, at *10 (Ky. Aug. 26, 2021). The court explained that "[a]lthough the parties in the employee grievance process are typically represented by attorneys, the mere presence of counsel does not magically transform an internal, non-binding process regarding employment disputes among colleagues and coworkers into a judicial or even quasi-judicial action." Id. The court snarkily mentioned "U of L's untimely epiphany" – noting that the University had earlier argued that "the 'non-legal' nature of grievance process created no obligation to preserve documents in anticipation of litigation." Id. at *10, *9.

Courts' varying interpretations of the work product rule's "anticipation" and "litigation" elements can create uncertainty for plaintiffs and defendants.

- [Privilege Point, 1/26/22]

Courts Address Work Product Issues: Part I

January 26, 2022

Because work product protection applies only when the creator is in or reasonably anticipates litigation, a litigant asserting that protection must know exactly when that occurred. In other words, as of one moment the litigant may not successfully assert work product protection and as of the next moment the litigant may. This normally involves identifying what might be called "trigger events": (1) some extraordinary event that inevitably will result in litigation; (2) an adversary's action, such as a threatening email or even a surprise lawsuit; or (3) occasionally, the litigant's own action, such as hiring an outside lawyer because of expected litigation.

Courts ultimately assess the legitimacy of such an identified moment, and sometimes seem too restrictive. In Thompson v. Dennis Widmer Construction, Inc., Case No. 3:20-cv-01145-IM, 2021 U.S. Dist. LEXIS 218471, at *13 (D. Or. Nov. 10, 2021), the court in a construction lawsuit "found that a failed mediation on January 22, 2020 triggered [Defendant]'s anticipation of litigation." Of course, this meant that "anything prepared before January 22, 2020 . . . is not entitled to work product protection." So defendant's mediation-related documents prepared before that date were unprotected from discovery, unless they deserved attorney-client privilege protection. Id. at *14.

Perhaps the facts of this case supported the court's date selection, but it is easy to imagine that a construction company preparing for mediation might reasonably anticipate that the mediation would fail – thus justifying an earlier date for work product protection. Next week's Privilege Point will address another work product issue.

- Koelemay v. Kroger Co., Civ. A. No. 21-cv-1970, 2022 U.S. Dist. LEXIS 52152, at *2-3, *2 (W.D. La. Mar. 18, 2022) (explaining that plaintiff suffered injuries when falling boxes knocked her to the floor; concluding that the store reasonably anticipated litigation because plaintiff's son had warned the store that it had "not heard the last of this," and had immediately called a Claims Service; holding that the work product doctrine protected a statement the store took from a witness twenty-one days after the accident; noting that this litigation-motivated statement contrasted with an unprotected "incident report" that the store created on the day of the accident "as part of [the store]'s 'standard operating procedures'")
- City of Fort Collins v. Open Int'l, LLC, Civ. A. No. 21-cv-02063-CNS-MEH, 2022 U.S. Dist. LEXIS 154564, at *10-11 (D. Colo. Aug. 16, 2022) (assessing the requirement for asserting work product protection; "To demonstrate that documents are protected under the work-product doctrine, the party asserting the privilege must demonstrate that 'the document was prepared or obtained in contemplation of specific litigation'; '[t]o make this showing, [the party] must generally show that litigation was "commenced, threatened or contemplated" at the time the relevant documents and communications were made.' Veroblue Farms USA, Inc. v. Wulf, No. 1:21-mc-00016-CMA, 2021 U.S. Dist. LEXIS 94029, 2021 WL 1979047, at *3 (D. Colo. May 18, 2021) (quoting Weitzman v. Blazing Pedals, Inc., 151 F.R.D. 125, 126 (D. Colo. 1993) and Reiss v. Brit. Gen. Ins. Co., 9 F.R.D. 610, 611 (S.D.N.Y. 1949)). Thus, the fact that Vanir prepared documents concerning litigation risk factors or legal claims generally is insufficient to make the requisite showing." (alterations in original))

- [Privilege Point, 8/9/23]

Do Arbitrations Count as “Litigation” for Work Product Purposes?

August 9, 2023

Fed. R. Civ. P. 26(b)(3) extends protection to documents prepared “in anticipation of litigation or for trial.” An obvious question presents itself — what counts as “litigation”?

In Farrell v. United States Olympic & Paralympic Committee, No. 1:20-CV-01178 (FSJ/CFH), 2023 U.S. Dist. LEXIS 103978 (N.D.N.Y. June 15, 2023), defendant US Speedskating (“USS”) claimed work product protection for materials Sidley Austin had prepared during its investigation of alleged sexual abuse of young speed skaters. Because litigation would have been time-barred by the time Sidley Austin conducted its investigation, USS argued that its investigation was prompted by its receipt of administrative-type complaints and “member grievances . . . which constitute administrative proceedings and/or arbitration proceedings” and thus satisfied the work product doctrine’s “litigation” standard. Id. at *10. The court agreed that “in some circumstances, arbitration and adversarial administrative proceedings can be considered ‘litigation,’” if they “include a ‘significant’ adversarial aspect.” Id. at *48. But the court ultimately “conclude[d] that member grievances filed pursuant to USS Bylaws do not rise to the level of ‘litigation’ within the meaning of Rule 26(b)(3).” Id. at *53.

Determining whether arbitrations or other internal dispute-resolution processes satisfy the work product doctrine’s “litigation” standard essentially focuses on whether they are sufficiently “adversarial,” and whether they look like litigation.

- **[Privilege Point, 11/1/23]**

Texas Court Applies Several Basic Work Product Principles

November 1, 2023

Because work product protection only applies at certain times, clients must be able to identify the exact moment that they first anticipated litigation. And not surprisingly, they must also explain why they first anticipated litigation at that moment.

In In re Hyde Park Baptist Church, No. 03-23-00049-CV, 2023 Tex. App. LEXIS 6383 (Tex. App. Aug. 22, 2023), a church resisted discovery by former members seeking the return of a donation because the church's executive pastor had acted improperly. The church claimed work product for its investigation into the pastor's conduct — relying on an unsworn declaration that another minister had "feared a lawsuit" by a school allegedly bullied by the misbehaving executive pastor. Id. at *3, 13. The court upheld the church's work product claim — explaining that assessing the necessary "anticipation element" was "a judgment-call ultimately made by the court." Id. at *16 (citation omitted). That objective standard could apply whether or not litigation actually ensues.

The church's successful work product assertion rested on the most difficult type of what might be called the three "trigger" events that can support a work product claim — the client's own belief or actions. The other two "trigger" events are easier to demonstrate: (1) an incident such as a horrible car accident that inevitably will result in litigation, or (2) the adversary's action (such as a threat to sue).

- Pace-O-Matic, Inc. v. Eckert Seamans Cherin & Mellott, LLC, Civ. A. No. 1:20-cv-00292, 2023 U.S. Dist. LEXIS 214655, at *17 (M.D. Pa. Dec. 1, 2023) (in an opinion by Judge Saporito, Jr., explaining that Pennsylvania’s work-product doctrine protection differs from the Federal work-product doctrine protection; “Whereas the federal work-product rule shields materials from disclosure only if they are prepared in anticipation of litigation, the Pennsylvania state work-product rule provides significantly broader protection from disclosure, protecting ‘the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation.’ BouSamra v. Excela Health, 653 Pa. 365, 210 A.3d 967, 976 (Pa. 2019) (emphasis added); see also id. at 976 n.6 (discussing distinctions between the language of Pa. R. Civ. P. 4003.3 and the language of Fed. R. Civ. P. 26(b)(3)(A)). As we have noted above, it is the federal work-product standard—not the state rule—that controls the proper scope of discovery in a federal diversity case such as this.”)

C. Motivation Element

- [Privilege Point, 1/5/11]

Court Takes a Broad View of Work Product Protection for Post-Accident Investigation Materials

January 5, 2011

Most courts hold that the work product doctrine protects post-accident investigation materials only if their creation was "primarily" motivated by anticipated litigation rather than by some external or internal requirement. However, every so often a court takes a broader view.

In Gruenbaum v. Werner Enterprises, Inc., 270 F.R.D. 298 (S.D. Ohio 2010), the court analyzed materials a trucking company prepared after an accident. The plaintiff pointed to the trucking company's Safety Director's testimony that the company "prepared its investigation reports in 'substantially the same manner' when dealing with routine or catastrophic incidents." Id. at 305. The plaintiff also argued that the trucking company "was required by federal law to compile this information, precluding application of the work product doctrine." Id. After an in camera review of the documents, the court rejected plaintiff's arguments. The court held that "the 'driving force' behind the creation of the information was the anticipation of litigation," and that the "fact that the information, created because of litigation, may also serve other purposes does not deprive that information of its character as work product." Id.

Most courts would not take such an expansive approach, but lawyers should be looking for a chance to cite such cases.

- [Privilege Point, 10/9/13]

How Can Companies Satisfy the Work Product Doctrine's "Motivation" Element?: Part I

October 9, 2013

Many lawyers focus on the first two elements of the work product doctrine - which require (1) "litigation" that the client (2) reasonably "anticipates." But documents that clients or their lawyers prepare in anticipation or even during litigation deserve work product protection only if they satisfy the third element - that the documents were (3) "motivated" by the litigation, and not by something else.

The work product doctrine generally does not protect documents that companies prepare in the ordinary course of their business, or because of some external or internal requirements. In Blais v. A.R. Cheramie Marine Management, Inc., Civ. A. No. 12-2736 SECTION "R" (2), 2013 U.S. Dist. LEXIS 111307 (E.D. La. Aug. 7, 2013), the defendant investigated a former employee the company had recently rehired. Company policy required creation of a "nonconformity report." Id. at *6. The court acknowledged that this report "was required to be prepared in defendant's ordinary course of business," and also noted that "defendant has already produced [the report] to plaintiff." Id. In contrast, the court upheld the company's work product claim for statements and investigative reports "which clearly went beyond ordinary company policy and procedure." Id. at *6-7.

The work product "motivation" element requires companies to demonstrate that any withheld work product was motivated by anticipated litigation rather than prepared in the ordinary course of business or required by some external or internal mandate.

- [Privilege Point, 10/16/13]

How Can Companies Satisfy the Work Product Doctrine's "Motivation" Element?: Part II

October 16, 2013

Last week's Privilege Point explained that companies claiming work product protection must meet the "litigation" and "anticipation" elements, and then satisfy the separate "motivation" element. That prerequisite for work product protection requires companies to demonstrate that the withheld documents were motivated by the anticipated litigation rather than by something else.

In DiMaria v. Concorde Entertainment, Inc., Civ. No. 12-11139-FDS, 2013 U.S. Dist. LEXIS 112533 (D. Mass. Aug. 9, 2013), defendant tavern investigated a patron's death during an altercation. The tavern's Security Manual required preparation of an "incident report" the night of such a serious event. Id. at *2. The tavern's employees did not prepare the required report that night, but a few days later its lawyers took statements from several employees. The decedent's administrator argued that the tavern took those statements "'in the ordinary course of business' pursuant to the Safety Manual." Id. at *6 (internal citation omitted). The court disagreed - noting that the statements "constitute departures from the routine policy described in the Safety Manual," and that "the nature of the incident and its effects and counsel's immediate involvement further removed the situation from 'the ordinary course' of the defendant's business." Id. at *6-7.

As companies face an increasing number of external requirements, and laudably adopt safety-conscious internal requirements, they face a greater burden in satisfying the work product "motivation" element. In essence, companies must prove that they did something different or special because they anticipated litigation

- [Privilege Point, 3/26/14]

Courts Confirm Basic Work Product Principles

March 26, 2014

The work product doctrine does not automatically apply just because a party anticipates litigation. A number of other principles limit the protection's applicability.

In Telamon Corp. v. Charter Oak Fire Insurance Co., Case No. 1:13-cv-00382-RLY-DML, 2014 U.S. Dist. LEXIS 6583 (S.D. Ind. Jan. 17, 2014), the court found that neither the attorney-client privilege nor the work product doctrine protected materials created during a Barnes & Thornburg [plaintiff's outside lawyers] internal investigation. Among other things, the court rejected the significance of the company's post-investigation meeting with the FBI – noting that the company "does not counter the fact that it was the results of its investigation that led [the investigator] and the lawyers to reach out to the FBI." Id. at *7. In other words, the company did not anticipate litigation at the beginning of the investigation, but rather at the end. Four days later, the Eastern District of New York affirmed a Magistrate Judge's earlier decision (reported in an earlier Privilege Point) denying privilege and work product protection for communications between a Duane Morris lawyer and her client's human resources employee. Koumoulis v. Indep. Fin. Mktg. Grp., Inc., 29 F. Supp. 3d 142 (E.D.N.Y. 2014). Among other things, the court noted that "Defendants acknowledge that this advice was intended, in part, to prevent Plaintiff from bringing claims of retaliation." Id. at 150. The court then stated another basic work product principle: "Legal advice given for the purpose of preventing litigation is different than advice given in an anticipation of litigation." Id.

Corporate clients and their lawyers should familiarize themselves with the work product doctrine's nuances. They cannot change the underlying facts, but in some situations they can forfeit possible work product protection by inarticulately stating their positions.

- Koumoulis v. Independent Financial Marketing Group, Inc., 29 F. Supp. 3d 142, 149, 149-50, 149 n.4, 150 (E.D.N.Y. 2014) (upholding a Magistrate Judge's opinion that neither the attorney-client privilege nor the work product doctrine protected communications between a Duane Morris lawyer and a corporate client's human resource executive; finding the attorney-client privilege inapplicable because the advice was primarily business-related and not legal; finding the work product doctrine inapplicable for a number of reasons; "Based on its review of the Submitted Documents, the Court concurs with Judge Scanlon's assessment that the communications between Defendants and outside counsel related to human resources issues, e.g., the internal investigation related to Mr. Komoulis and responding to his complaints. Such advice would have been provided even absent the specter of litigation, and therefore do [sic] not constitute litigation-related work product."; "Defendants concede that 'LPL [defendant] ha[d] an obligation to investigate' Koumoulis's complaints about alleged discrimination and retaliation,' regardless of the potential for litigation. . . . The alleged motivation for which these documents were sought is not enough to overcome what appears on the face of the documents themselves." (second alteration in original); "[E]ven assuming the internal investigation was conducted in anticipation of litigation, otherwise work-product privileged communications relating to the investigation would still be discoverable once Defendants assert a Faragher/Ellerth [Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998)] defense. Indeed, Defendants acknowledged as much when they disclosed their in-house attorneys' notes and correspondence regarding the investigation. Defendants offer no justification for treating their outside counsel's communications regarding the investigation differently than their in-house counsel's communications on that topic."; "Defendants acknowledge that this advice was intended, in part, to prevent Plaintiff from bringing claims of retaliation. . . . Legal advice given for the purpose of preventing litigation is different than advice given in an anticipation of litigation." (emphasis added); "[S]imply declaring that something is prepared in 'anticipation of litigation' does not necessarily make it so. . . . [T]he contents of the communications directly contradict Defendants' privilege claim. These communications, on their face, relate to advice given by Ms. Bradley on how to prevent a lawsuit, not on how to defend one." (emphasis added))

- [Privilege Point, 4/22/15]

District of Columbia Circuit Provides Good News and Bad News in a Work Product Case

April 22, 2015

Ironically, federal courts applying the federal work product rule take widely varying positions on a number of key elements, including the protection's duration; its applicability to litigation-related business documents; and the standard under which adversaries can overcome a work product claim.

In FTC v. Boehringer Ingelheim Pharmaceuticals, Inc., 778 F.3d 142 (D.C. Cir. 2015), the D.C. Circuit held that: (1) work product "prepared. . . for one lawsuit will retain its protected status even in subsequent, unrelated litigation" (*id.* at 149); (2) the work product doctrine could protect documents memorializing a business arrangement included as part of adverse companies' litigation settlement agreement, even if the arrangement "has some independent economic value to both parties" — if it was "nonetheless crafted for the purpose of settling litigation" (*id.* at 150); and (3) an adversary can satisfy the "substantial need" element for overcoming a litigant's work product by demonstrating that the withheld materials "are relevant to the case" and "have a unique value apart from those already in the [adversary's] possession" — without showing "that the requested documents are critical to, or dispositive of, the issues to be litigated." (*Id.* at 155-56.) The first two holdings represent a broad view of the work product protection, but the third holding makes it easier for adversaries to overcome a company's work product protection.

Other courts take different approaches to all of these issues. Unfortunately, defendant companies often do not know where they will be sued, and therefore will not know in advance what work product standards will apply to documents they may have already created.

- **[Privilege Point, 6/10/15]**

Courts Disagree About Basic Work Product Doctrine Elements: Part I

June 10, 2015

The Federal Rules of Civil Procedure and most state court rules memorialize their basic work product doctrine in just one sentence. But courts take divergent views on what that sentence means.

Some courts apply work product protection only to documents that litigants will use to "assist" in litigation. Other courts protect documents created "because of" the litigation, even though they will not be used to "assist" in that litigation. In Deutsche Bank National Trust Co. v. WMC Mortgage, LLC, the court noted that under Second Circuit precedent "the phrase 'because of' trumps 'assist in' as the talisman by which a document's eligibility for attorney work product protection will be evaluated." Nos. 3:12-CV-933, -969, -1699, & 3:13-CV-1347 (CSH), 2015 U.S. Dist. LEXIS 49158, at *37-38 (D. Conn. Apr. 14, 2015). Three days later, in Byman v. Angelica Textile Services, Inc. (In re Sadler Clinic, PLLC), the court took the same approach — noting that "[n]umerous courts of appeals have specifically adopted the 'because of' test." Ch. 7 Case No. 12-34546, Adv. No. 14-03231, 2015 Bankr. LEXIS 1369, at *10 (Bankr. S.D. Tex. Apr. 17, 2015). But a month earlier, a Maine state court applying that state's work product rule (essentially identical to the federal rule) held that a party seeking work product doctrine protection "must demonstrate that the documents were prepared exclusively to assist in anticipated or ongoing litigation." Irving Oil Ltd. v. ACE INA Ins., No. BCD-CV-09-35, 2015 Me. Bus. & Consumer LEXIS 4, at *7 (Bus. & Consumer Ct. Mar. 17, 2015, Murphy, J.).

The "because of" standard casts a far wider protective net than the "assist" standard. For instance, corporations communicating about how they might pay for an adverse judgment might create documents satisfying the former standard but not the latter. Next week's Privilege Point will address other work product variations.

- [Privilege Point, 11/18/15]

Courts Reject Protection for Corporate Investigations, but Offer Helpful Guidance: Part I

November 18, 2015

Companies' internal investigations can deserve (1) privilege protection, if primarily motivated by the need for legal advice; and (2) work product protection, if primarily motivated by anticipated litigation. In both contexts, companies must do something different or special -- not in the ordinary course of their business. Careful companies sometimes fail both standards, because they ordinarily investigate suspicious events, serious accidents, etc.

In Boone v. TFI Family Services, Inc., Case No. 14-2548-JTM, 2015 U.S. Dist. LEXIS 126673 (D. Kan. Sept. 22, 2015), the Kansas Department for Children and Families investigated a minor's death. The court found unpersuasive an agency lawyer's affidavit that the investigation was "'done in anticipation of litigation and under my direction.'" Id. at *5 (internal citation omitted). Relying on the majority view applicable to companies and other institutions, the court rejected work product protection for the investigation - - noting that the agency's "policy and procedure manual indicates that an attorney would oversee an investigation involving any situation similar to [the child's] death, regardless of whether litigation was imminent." Id. at *5-6. Two days later, in Gillespie v. Charter Communications, the court similarly rejected defendant's privilege and work product claim for a racial discrimination "Incident Investigation Report." Case No. 4:14CV00207 AGF, 2015 U.S. Dist. LEXIS 128185, at *3 (E.D. Mo. Sept. 24, 2015). In denying the work product claim, the court concluded that Charter "generated [the incident report] in the ordinary course of [its] business" -- describing Charter's "ongoing compliance program" as involving a "reporting system, and the process of investigating claims made within this system." Id. at *13.

How can companies successfully claim privilege and work product protection if they establish laudable processes to conduct internal investigations as part of their ordinary course of business? Several days after these decisions, another court provided some guidance.

- Hunton & Williams LLP v. U.S. Env'tl. Prot. Agency, 248 F. Supp. 3d 220, 252 (D.D.C. 2017) (in a 3/31/17 opinion, analyzing the work product doctrine; The 'because of' test demonstrates the flaw in the Corps' reasoning. Drafts of the AJD were not prepared *because of* possible litigation. The Corps was required to prepare the AJD, and thus drafts of the AJD, even if it knew that no litigation would ever result. Similarly, the Corps' replies to Congress about the AJD process were not created 'because of' the possibility of future litigation -- unless the Corps would have ignored Congressional inquiries into a less controversial case. The Corps does not attempt to explain how drafts of the AJD constitute attorney work-product." (emphasis added)).

- [Privilege Point, 11/29/17]

S.D.N.Y. Magistrate Judge Francis Analyzes the Work Product Doctrine's "Motivational" Element

November 29, 2017

Many lawyers mistakenly focus only on the first two of three work product elements: (1) whether their clients faced "litigation," which can also include adversarial arbitrations, government proceedings, etc.; and (2) whether their clients sufficiently "anticipated" litigation when creating the withheld documents. But frequently the most important obstacle to claiming work product protection is (3) whether the anticipated litigation "motivated" the documents' creation (and thus whether the documents would not have existed in the same form but for that anticipated litigation).

In Johnson v. J. Walter Thompson U.S.A., LLC, No. 16 Civ. 1805 (JPO) (JCF), 2017 U.S. Dist. LEXIS 126185 (S.D.N.Y. Aug. 9, 2017), Southern District of New York Magistrate Judge Francis found that the Proskauer law firm's Title VII investigation report for its client deserved work product protection. He acknowledged that the firm's client had a written policy for investigating discrimination complaints. That conclusion normally would doom a work product claim - as evidence that the investigation report was not motivated by litigation, but rather compelled by internal requirements. But Judge Francis then noted that Proskauer's report was "unique in several ways": (1) the litigation had already begun; (2) the client "did not rely on its human resources personnel or even in-house counsel to conduct the investigation, but instead engaged outside counsel"; and (3) Proskauer's report "does not appear to be in a form consistent with routine investigations of discrimination complaints." Id. at *19.

Judge Francis's wise analysis provides a lesson for all corporations. To deserve work product protection, documents generally must be different from those prepared in the ordinary course of business, or compelled by external or internal requirements.

- Exxon Mobil Corp. v. Nw. Corp., Case No. 1:16-cv-00005-BLG-BMM, 2017 U.S. Dist. LEXIS 159143, at *3, *5, *5-6, *6 (D. Mont. Sept. 27, 2017) ("The documents XOM [Exxon Mobil] claimed were privileged were generally related to a 'hindsight investigation,' which it claimed was instigated in anticipation of litigation and is therefore not discoverable under Fed. R. Civ. P. 26(b)(3). XOM also withheld certain documents under the attorney-client privilege based on communications between several employees and corporate counsel. XOM fully complied with the Court's order on September 6, 2017."; "According to the privilege log, XOM had submitted a draft of the outline for the hindsight investigation by at least February 22, 2014. In this document, XOM listed its 'objectives' for the hindsight investigation which did not include a section on legal recourse or reference potential litigation. This evidences to the Court that the hindsight investigation was conducted for business reasons unrelated to future litigation. Moreover, XOM states in a letter to the Court: '[i]n late February, it was unclear whether the hindsight investigation would be conducted in an open, non-privileged format, or in a closed, privileged and work product context.' As of February 23, 2017, XOM's corporate counsel had still not 'decided' whether the investigation should be privileged. ('. . . the final decision about whether to privilege or not is still to be made')." (alterations in original) (internal citations omitted) (emphasis added); "These circumstances lead the Court to believe that XOM had decided to conduct the hindsight investigation for business reasons on or before February 22, 2014-before XOM's counsel stepped in and attempted to protect it under the work product doctrine. The hindsight investigation therefore would have been conducted 'regardless of the litigation,' and was not prepared in anticipation of litigation." (emphasis added); "Based on the circumstances surrounding the hindsight investigation, XOM has not met its high burden of showing that these documents were created in anticipation of litigation. Accordingly, the documents related to the hindsight investigation are not protected by the work product doctrine and must be produced." (emphasis added); "Several of the documents produced by XOM, however, do contain communications to and from XOM's corporate attorney. Such communications are protected by attorney-client privilege and are protected from disclosure to NWE. The Court orders the documents be produced with the communications to and from XOM's corporate counsel redacted.").

- In re Premera Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230, 1244-45, 1245, 1245-46, 1246-47, 1247 (D. Or. Oct. 27, 2017) (holding that most documents related to Premera's data breach investigation did not deserve privilege or work product protection; among other things, holding that: (1) nearly all communications among Premera's nonlawyers were primarily motivated by business rather than legal concerns, although lawyer changes to drafts and documents prepared for litigation purposes might deserve privilege protection; (2) nearly all documents prepared by Premera employees and third party vendors (including a public relations firm) were primarily motivated by business rather than legal concerns, and therefore did not deserve privilege protection (although communications seeking legal advice about proposed public statements might be privileged), and did not deserve work product protection because they would have been prepared in the same form absent anticipated litigation; (3) documents relating to data breach consultant Mandiant did not deserve privilege protection, because (unlike the Target and Experian case) Mandiant's scope of work did not change when Mandiant switched from reporting to the client to reporting to outside counsel, and did not deserve work product protection because they served a business rather than litigation-related purpose; noting that some other third party vendors' documents might have been specifically motivated by legal concerns or litigation preparation and therefore protected; (4) the common interest doctrine did not protect communications between Premera and other Blue Cross plans that had experienced only similar but not identical data breaches, although disclosing privileged communications to them did not trigger a subject matter waiver; (5) the fiduciary exception did not apply, because most withheld communications related to Premera's defending itself (emphasis added); *"Documents that relate to Mandiant's work for Premera, including the Mandiant Remediation Report, and other third-party vendors' technical and public relations aspects of the investigation and analysis (Category 3). a. Mandiant.* The facts surrounding the Mandiant report(s) are not particularly clear to the Court. Plaintiffs move to have Premera produce the Mandiant 'Remediation Report.' Premera states that it already has produced the Mandiant 'Intrusion Report,' subject to an agreement that such production does not constitute a waiver of privilege, but adds that drafts and other documents relating to that report are privileged and protected by the work-product doctrine. It is not clear to the Court whether the 'Intrusion Report' and 'Remediation Report' are two different documents."; "Mandiant was hired by Premera in October 2014 to review Premera's data management system. On January 29, 2015, Mandiant discovered the existence of malware in Premera's system. On February 20, 2015, Premera hired outside counsel in anticipation of litigation as a result of the recently discovered data breach. On February 21, 2015,

Premera and Mandiant entered into an amended statement of work that shifted supervision of Mandiant's work to outside counsel. The amended statement of work, however, did not otherwise change the scope of Mandiant's work from what was described in the Master Services Agreement between Mandiant and Premera entered into on October 10, 2014. Several weeks after the February 21st agreement, Mandiant issued a report." (emphasis added); "Premera argues that Mandiant is the equivalent of a private investigator or other investigative resource hired by an attorney to conduct an investigation on behalf of an attorney, and thus that Mandiant's work is privileged and protected as work-product. The flaw in Premera's argument, however, is that Mandiant was hired in 2014 to perform a scope of work for Premera, not outside counsel. That scope of work did not change after outside counsel was retained. The only thing that changed was that Mandiant was now directed to report directly to outside counsel and to label all of Mandiant's communications as 'privileged,' 'work-product,' or 'at the request of counsel.' Premera argues that, with respect to Mandiant, after the breach was discovered and outside counsel was hired it became an entirely different situation. The amended statement of work, however, does not support that assertion. The only thing that appears to have changed involving Mandiant was the identity of its direct supervisor, from Premera to outside counsel. The amended statement of work confirms that the scope of the work remained the same. Thus, Premera's argument that Mandiant's focus shifted in February 25, 2015, and that Mandiant then became more like an investigator working on behalf of outside counsel instead of performing its original role on behalf of Premera, is not supported by the amended statement of work." (emphases added); "This situation is unlike the Target data breach case relied upon by Premera. In Target, the company performed its own independent data breach investigation that was produced in discovery and the attorneys performed a separate investigation through a retained expert company that was privileged and protected from discovery. In re Target Corp. Customer Data Sec. Breach Litig., 2015 U.S. Dist. LEXIS 151974, 2015 WL 6777384, at *2 (D. Minn. Oct. 23, 2015). With Premera, however, there was only one investigation, performed by Mandiant, which began at Premera's request. When the supervisory responsibility later shifted to outside counsel, the scope of the work performed did not change. Thus, the change of supervision, by itself, is not sufficient to render all of the later communications and underlying documents privileged or immune from discovery as work product."; "This situation also is unlike the Experian case relied on by Premera. In re Experian Data Breach Litig., Case No. 8:15-cv-01592-AG-DFM, 2017 U.S. Dist. LEXIS 162891 (C.D. Cal.). In that case, outside counsel was hired by the company and outside counsel then hired Mandiant. Id. ECF 239 at 3. Here, Premera had already hired Mandiant,

which was performing an ongoing investigation under Premera's supervision before outside counsel became involved. Premera has the burden of showing that Mandiant changed the nature of its investigation at the instruction of outside counsel and that Mandiant's scope of work and purpose became different in anticipation of litigation versus the business purpose Mandiant was performing when it was engaged by Premera before the involvement of outside counsel. Premera has not made that showing."; *"Third-party vendors.* The analysis for these Category 3 documents is the same as for the documents in Categories 1 and 2. These are the documents created by the third-party vendors hired by outside counsel. Many of these documents appear to be related to business functions delegated to counsel. There appear to be some documents, however, that are or may be related to legal functions and are thus properly protected by the attorney-client privilege or work-product doctrine. The documents relating to Epiq appear to be legal in nature and thus not a business function; they may be withheld. There also appear to be several electronic discovery vendors for whom it is unclear whether the work performed is of a legal or business nature. Premera provided the Court with the written agreement between Alteq, Inc. and Premera, which references a statement of work, but Premera did not provide a copy of the statement of work. Without reviewing the statement of work, it is not clear whether Alteq was performing litigation discovery services for counsel or computer technical assistance services for Premera. If it was the former, then Alteq would not be performing a business function and the information would be privileged or protected by the work-product doctrine. Similarly, e-Discovery, iDiscover, LLC, and Navigant are vendors that appear to be providing services relating to electronic discovery or discovery-related computer forensic assistance. If those services are being performed for counsel as litigation-support for discovery, they would not constitute non-legal business functions and would be privileged or protected by the work-product doctrine. If, however, they are services being performed for the benefit of Premera as part of the investigation or remediation of the breach, they likely would be a business function and thus discoverable. The other third-party vendors appear to be performing business functions and thus their documents and communications would not be protected by privilege or work-product."; "Premera's attempt to label all communications on these subjects as necessary investigative steps required to give information to Premera's counsel in connection with legal advice is not persuasive.").

- [Privilege Point, 2/21/18]

Courts Assessing Privilege and Work Product Claims in an Investigation Context Examine Several Factors

February 21, 2018

Courts assessing privilege and work product claims for corporate investigations usually focus on (1) the investigation's initiation (analyzing what motivated the investigation), and (2) the investigation's course (usually looking for lawyers' involvement). Less frequently, courts also focus on (3) the corporation's use of the investigation results. That post-investigation factor can shed light on the investigation's initial motivation.

In Carr v. Lake Cumberland Regional Hospital, Civ. A. No. 15-138-DLB-HAI, 2017 U.S. Dist. LEXIS 188865 (E.D. Ky. Nov. 15, 2017), the court overruled defendant hospital's privilege and work product claims for documents the hospital created while investigating an allegedly botched surgery. Analyzing one withheld email, the court rejected the hospital Risk Manager's affidavit claiming work product protection – noting that her statement "indicating that she would let the 'administrative team' know about the conversation . . . as opposed to in-house counsel or outside counsel – suggests that at the time of the creation of the emails, neither party crafted their emails 'in anticipation of litigation.'" Id. at *13.

Corporations and their lawyers must remember that courts examining privilege and work product protection for investigation-related documents focus on the investigation's initiation, course, and even how the client used investigation-related documents.

- Shook v. Love's Travel Stops & Country Stores, Inc., 536 S.W.3d 635, 641 (Ark. Ct. App. 2017) (holding that a post-accident incident report did not deserve work product protection because it was prepared in the ordinary course of defendant's business; "In the present case, this incident report was required by Love's internal practices and procedures, was prepared by a store manager immediately after Shook's fall for the express purpose of informing his superiors of what happened, and was prepared years before any litigation ensued. We hold that the report constituted a document prepared in the regular course of business rather than for purposes of the litigation. The trial court erred in finding that it constituted 'work product' as defined under Arkansas law." (emphasis added))

- [Privilege Point, 5/2/18]

Courts Debate Work Product Issues: Part III

May 2, 2018

The last two Privilege Points have addressed courts' troubling disagreements about the meaning of two federal rule sentences articulating the important work product doctrine protection. Surprisingly, courts cannot even agree on the basic reach of that qualified immunity.

In Acceleration Bay LLC v. Activision Blizzard, Inc., the court held that a document can deserve work product protection only if "the court finds that the 'primary' purpose behind its creation was to aid in possible future litigation." Civ. A. Nos. 16-453 to -455-RGA, 2018 U.S. Dist. LEXIS 21506, at *5 (D. Del. Feb. 9, 2018) (emphasis added). Most courts take a broader view – extending the protection to documents which might not be used to "aid" in the litigation, but which a litigant or would-be litigant created "because of" litigation or anticipated litigation. That might seem like a subtle distinction, but can have enormous consequences. For instance, in Acceleration Bay the court found the work product doctrine inapplicable to documents plaintiff had provided to a litigation funder or the funder's law firm Reed Smith. The court explained that "[t]he documents were thus prepared with a 'primary' purpose of obtaining a loan, as opposed to aiding in possible future litigation." Id. at *6. Those documents presumably would have deserved protection under the broader "because of" standard. Under the District of Delaware's restrictive view, work product protection apparently would not extend to litigants' documents reflecting internal discussions about how to pay for a possible adverse judgment.

Most courts follow the more expansive "because of" approach. But as mentioned in an earlier Privilege Point, corporations normally do not know in advance where they might be sued – so they may not know whether that court's minority work product view may strip away protection that other courts would recognize.

- Acceleration Bay LLC v. Activision Blizzard, Inc., Civ. A. Nos. 16-453 to -455-RGA, 2018 U.S. Dist. LEXIS 21506, at *5, *5-6, *6 (D. Del. Feb. 9, 2018) (holding that the work product doctrine did not protect communications to and from a litigation finance company and its lawyer Reed Smith, and that the litigant and its litigation funder did not share a common interest sufficient to avoid waiving privilege protection; "A document will be granted protection from disclosure if the court finds that the 'primary' purpose behind its creation was to aid in possible future litigation. [U.S. v. Rockwell Int'l, 897 F.2d 1265, 1266 (3d Cir. 1990)]."; "Here, Plaintiff has characterized the communications as being created 'for the purpose of obtaining funding to assert [the] patents.' (D.I. 379 at 3). The communications were exchanged before Hamilton Capital had agreed to fund Plaintiffs litigation, and before Plaintiff filed any litigation." (alteration in original); "The documents were thus prepared with a 'primary' purpose of obtaining a loan, as opposed to aiding in possible future litigation. For that reason alone, the communications are not work product."; "Furthermore, if a document sought 'is prepared for a nonparty to the litigation, work product protection does not apply, even if the nonparty is a party to closely related litigation.' 6 James Wm. Moore et al., Moore's Federal Practice § 26.70 (3d ed. 2015); see also In re Cal. Pub. Utils. Comm'n, 892 F.2d 778, 781 (9th Cir. 1989). Here, Hamilton Capital is not a party to the litigation. For that separate reason, the communications are not work product.").

- In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., No. 05-MD-1720 (MKB), 2018 U.S. Dist. LEXIS 34113, at *107-08 (E.D.N.Y. Feb. 26, 2018) (holding that a business person's documents deserved work product protection because they reflected communications with a lawyer; also finding that the opinion work product doctrine could protect opinions from a corporate employee, who counts as a party's "representative"; "Although the connection of some of the remaining documents to this litigation is not apparent from the face of the documents, the Court determines the documents' entitlement to work product protection 'in light of the nature of the document and the factual situation in the particular case.' Adlman II, 134 F.3d at 1202. Here, Bank of America's outside counsel, hired specifically for this litigation, has submitted a declaration stating that these documents were prepared for the litigation at the request of counsel in the context of [TEXT REDACTED BY THE COURT]. . . . Bank of America also states that the recalled portions of the Fellman Documents were not used for business purposes independent of the litigation, and they have not been located in any other Bank of America business-person's files. . . . In addition, Mr. Fellman testified at the deposition that the documents were prepared at the instruction of counsel hired for the purposes of this litigation. . . . Thus, Judge Orenstein correctly found that Bank of America met its burden of demonstrating that the documents were prepared because of the litigation." (first alteration in original) (emphasis added))

- [Privilege Point, 10/17/18]

Court Analyzing the Work Product Doctrine Explains the "Ordinary Course of Business" Concept

October 17, 2018

Corporations creating documents in the "ordinary course of business" normally cannot claim work product protection, because they were not motivated by anticipated litigation. But the work product doctrine actually requires a more subtle analysis.

In Montagano v. Safeco Insurance Co. of America, the court correctly recognized that defendant "misses the point" by arguing that the work product doctrine applied because "the disputed documents were not created in the ordinary course of business." Civ. A. No. 16-9375, 2018 U.S. Dist. LEXIS 137044, at *6 (D.N.J. Aug. 14, 2018). As the court explained, "[t]he critical inquiry here is not whether the materials at issue were created in the ordinary course of Defendant's business, it is whether Defendant prepared the materials in anticipation of litigation." Id. The court found that defendant had not.

To be sure, documents created in the "ordinary course of business" generally do not deserve work product protection. But even documents created in extraordinary circumstances do not deserve work product protection -- unless they were motivated by litigation or anticipated litigation. For instance, the Southern District of New York rejected a lender's work product claim for documents it created after the unique September 11 World Trade Center attack – holding that business rather than litigation concerns motivated the documents' creation.

- [Privilege Point, 1/23/19]

Courts Issue Conflicting Work Product Doctrine Opinions: Part I

January 23, 2019

Ironically, federal and state courts applying their succinct work product rules exhibit more diversity than when construing the more complex and mostly common law attorney-client privilege. One difference focuses on whether the work product doctrine protects: (1) only documents created solely for litigation purposes; or (2) documents created "because of" the litigation, even if they were also motivated by other factors.

In United States ex rel. Rubar v. Hayner Hoyt Corp., No. 5:14-CV-830 (GLS/CFH), 2018 U.S. Dist. LEXIS 189274 (N.D.N.Y. Nov. 5, 2018), a New York federal court upheld defendants' work product claim for a report analyzing possible civil or criminal claims against another party. The court explained that defendants "have demonstrated that [litigation] was one of the purposes of the Report" – and emphasized that "defendants are not required to prove that their sole or primary purpose in obtaining the Report was litigation." Id. at *11 (footnote omitted). Four days later, in Noven Pharmaceuticals, Inc. v. Novartis Pharmaceuticals Corp., No. 654740/2016, 2018 NY Slip Op 32851(U) (N.Y. Sup. Ct. Nov. 9, 2018), a New York state court took the opposite approach. The court held that defendant's valuation of joint venture assets did not deserve work product protection under New York state courts' different work product rule, because defendant "did not demonstrate that the report was created solely and exclusively in anticipation of litigation." Id. at *7.

Because the work product doctrine rests on court rules (which sometimes differ among federal and state courts in the same state), courts do not conduct a choice of laws analysis. Instead, they simply apply their own rule, and their own interpretation of that rule. Because corporate defendants usually do not know where they will be sued, they cannot fully analyze their available work product protection until litigation begins. Next week's Privilege Point will discuss another variation.

- [Privilege Point, 9/11/19]

Court Adopts A Favorable Privilege Standard But Unfavorable Work Product Standard: Part II

September 11, 2019

Last week's Privilege Point described a Northern District of Illinois decision which applied the favorable "one of the significant purposes" privilege standard for assessing mixed business-legal communications, instead of the majority "primary" or "predominant" purpose standard. Smith-Brown v. Ulta Beauty, Inc., No. 18 C 610, 2019 U.S. Dist. LEXIS 108021, at *8-10 (N.D. Ill. June 27, 2019).

However, the same decision applied the most narrow work product standard, which some circuits (including the Seventh Circuit) follow. The broader majority approach extends work product protection to documents created "because of" litigation or anticipated litigation – even if those documents will not be used in the litigation itself. The Smith-Brown decision cited Seventh Circuit law in holding that "a dual purpose document, one prepared in anticipation of litigation and for another purpose as well, is work product only if 'the primary motivating purpose behind [its] creation' is 'to aid in possible future litigation.'" Id. at *5 (alteration in original) (emphasis added). This seemingly innocuous language difference could have an enormous practical impact. For instance, documents relating to ways a defendant might satisfy a possible litigation judgment normally would be protected under the broad "because of" work product standard, but perhaps not under the narrow "aid" standard. Such documents exist only because of the litigation, but will not be used in the litigation.

Corporations' lawyers should cheer the gradual expansion of the KBR "one of the significant purposes" privilege standard, while continuing to hope that more courts move toward the broader "because of" work product standard.

- Taylor v. LM Insurance Corp., Case No. 19-1030-JWB, 2019 U.S. Dist. LEXIS 191038, at *8-9 (D. Kan. Nov. 4, 2019) (adopting a “real and imminent” work product anticipation standard; “Under the first component, work prepared in the ordinary course of business is not protected. Under the second component, ‘the threat of litigation must be real and imminent. The inchoate possibility, or even the likely chance of litigation, does not give rise to the privilege.’” (footnote omitted))
- In re Motion to Compel Compliance with Subpoena Directed to Cooke Legal Group, PLLC, 333 F.R.D. 291, 295-96 (D.D.C. 2019) (rejecting defendant’s work product claim after reading the withheld documents; “Third, Cooke objects that plaintiffs’ requests ‘call[] for production of documents subject to the attorney-client privilege, attorney work product doctrine, and any other applicable privileges.’ Cooke’s Resp. ¶¶ 1-7. But Cooke fails to satisfy its burden of ‘present[ing] to the court sufficient facts to establish the [claimed] privilege[s],’ which it must do ‘with reasonable certainty.’ Sealed Case, 737 F.2d at 99. It is not obvious that most, if any, of the documents that plaintiffs seek qualify under either the attorney-client privilege or the work-product privilege. The latter privilege applies to ‘work performed in anticipation of litigation or for trial,’ Boehringer Ingelheim, 778 F.3d at 149, but the documents in question pertain to Cooke’s work related to debt restructuring, Ex. 2 to Pls.’ Mot. (‘FARA Registration’) [ECF No. 1-5] at 4. This Court’s review of the record reveals no mention of litigation on that matter.” (alterations in original))

- [Privilege Point, 1/15/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part I**

January 15, 2020

The Southern District of New York (Magistrate Judge Gorenstein) issued an extensive privilege decision with several favorable analyses in a high-profile corporate sexual harassment case. In *Parneros v. Barnes & Noble, Inc.*, 332 F.R.D. 482 (S.D.N.Y. 2019), Barnes & Noble's General Counsel Bradley Feuer investigated alleged sexual harassment misconduct by then CEO Demos Parneros. Feuer hired Paul Weiss to represent the company in investigating the allegations, and also enlisted the company's Senior VP of Corporate Communications and Public Affairs Mary Ellen Keating to assist with the investigation. The company eventually fired Parneros and refused to pay him severance. Parneros sued the company for defamation and breach of contract. The Southern District of New York dealt with several privilege issues implicated by Parneros's discovery requests.

First, the court found that General Counsel Feuer's investigation was primarily motivated by his need for legal advice. The court first pointed to the potentially serious misconduct by "the company's top executive" as "provid[ing] some circumstantial evidence" supporting the primary purpose assertion. *Id.* at 494. The court also emphasized that Feuer's retention of Paul Weiss as "litigation counsel the same day that he learned of the allegations" bolstered the privilege assertion – recognizing courts' frequent conclusion that "the retention of outside litigation counsel to advise an internal investigation [is] an important factor in determining whether an internal investigation is being conducted for the purpose of obtaining legal advice for the company." *Id.* Second, although acknowledging that Senior VP Keating "does not appear to have any particular expertise that would enable her to conduct the investigation in a more skilled manner than [the Company's General Counsel] himself," the court explained that there was no case law "suggesting that a corporate employee who conducts an investigation for an attorney must have a particular skill to qualify as the attorney's agent." *Id.* Thus, Senior VP Keating's involvement was inside privilege protection. In-house lawyers often "deputize" employees to assist in such investigations – and Judge Gorenstein's analysis will be very helpful in asserting privilege for their involvement.

The next three Privilege Points will describe other favorable language from this significant case.

- [Privilege Point, 5/6/20]

Federal and State Courts Wrestle with Work Production Doctrine Variations

May 6, 2020

Ironically, federal courts interpreting a single sentence from a federal rule take dramatically differing approaches to the work product doctrine. And a handful of states have not adopted that federal work product rule.

In Marquette Transportation Co. Gulf Inland LLC, the court highlighted some of these federal variations -- holding that the work product doctrine: (1) can apply even if "litigation is not imminent"; but (2) only protects documents whose primary purpose "was to aid in possible future litigation." Some federal courts take a narrower approach on the first issue -- only protecting documents prepared when litigation is "imminent." Case No. 6:18-CV-01222 LEAD, 2020 U.S. Dist. LEXIS 21399, at *7-8 (W.D. La. Feb. 3, 2020) (citation omitted). Most federal courts take a broader approach on the second issue -- not requiring that the documents' primary purpose was to "aid" (use) in the upcoming litigation. A few weeks later, a Pennsylvania state court in Ford-Bey v. Professional Anesthesia Services of North America, LLC, quoted Pennsylvania's state court work product rule -- which recognizes only the narrow "opinion" work product doctrine (which is just a subset of the federal protection). 229 A.3d 984, 992-93 (Pa. Super. Ct. 2020).

Because work product protection is based on a rule, there is no choice of laws analysis -- courts just apply their own rules. And because defendants often do not know where they will be sued, they usually cannot know in advance what work product rule will apply.

- In re Capital One Consumer Data Security Breach Litig., MDL No. 1:19md2915 (AJT/JFA), 2020 U.S. Dist. LEXIS 112177, at *3-4, *4, *5, *14, *15, *17, *18 (E.D.Va. June 25, 2020) (finding that Capital One's forensic investigation conducted by Mandiant into a cybersecurity incident did not deserve work product protection; noting that in 2015 Capital One entered into a Master Services Agreement with Mandiant; explaining that following a data breach, on July 20, 2019, Capital One retained Debevoise, which joined Capital One 4 days later in signing a Letter Agreement with Mandiant for an investigation "directed by counsel," but with the same scope of work as the earlier agreement; two days after that, Debevoise and Capital One entered into a new agreement with Mandiant that expanded the engagement, and provided that all work "was to be conducted at the direction of Debevoise . . . and that any deliverables were to be produced directly to Debevoise"; on September 4, 2019, Mandiant delivered its report to Debevoise, and Debevoise's direction then sent it to "Capital One's legal department, its Board of Directors, its financial regulators, its outside auditor, and dozens of Capital One employees" (emphasis added); Mandiant was later paid from leftover money from its 2019 retainer, and from Capital One's "Cyber budget, which payments were later re-designated as legal expenses" (emphasis added); noting that Mandiant's scope of work was the same under the Debevoise-involved Letter Agreement and the earlier 2015 arrangement; "no difference between what Mandiant produced and what it would have produced in the ordinary course of business absent Debevoise's involvement can be reasonably inferred from any differences in substance between the 2019 SOW and Letter Agreement, and Capital One failed to produce evidence sufficient to establish any such likely differences" (emphasis added); "Capital One failed to establish, like the companies in Premera [In re Premara Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230 (D. Or. 2017)] and Dominion Dental [In re Dominion Dental Servs. U.S., 429 F. Supp. 3d 190 (E.D. Va. 2019)], that the report Mandiant would have created for Capital One pursuant to its pre-data breach SOW would not have been substantially the same in substance or scope as the report Mandiant prepared for Debevoise." (emphasis added); "Nor did the Magistrate Judge improperly rely on the Mandiant Report's post-production distribution. As courts have recognized, post-production disclosures are appropriately probative of the purposes for which the work product was initially produced." (footnote omitted) (emphasis added); "In sum, Capital One had determined that it had a business critical need for certain information in connection with a data breach incident, it had contracted with Mandiant to provide that information directly to it in the event of a data breach incident, and after the data breach incident at issue in this action, Capital One then arranged to receive through Debevoise the information it already had contracted to receive directly from Mandiant.")

- [Privilege Point, 12/9/20]

Courts Disagree About the Key Work Product Doctrine's Motivation Element

December 9, 2020

The work product doctrine requires: (1) litigation; (2) anticipation; and (3) motivation. And even though the work product doctrine rests on a single sentence in the Federal Rules, federal courts ironically take more varied approaches to the motivation element than they do toward the usually common law-based privilege protection.

In Hempel v. Cydan Development, Inc., Case No. PX-18-3040, 2020 U.S. Dist. LEXIS 153208 (D. Md. Aug. 24, 2020), the court adopted the narrow “assist” standard in analyzing the work product motivation element. The court bluntly held that “[o]nly documents created in service of anticipated litigation can be said to have been ‘prepared’ for litigation under Rule 20(b)(3).” Id. at *15 (emphasis added). The court explicitly rejected a broader motivation standard, under which an email among friends “about the litigation and their frustration with Defendants would qualify for the work product protection, even [if] it was not written with any purpose of actually assisting Plaintiffs or their counsel in any anticipated litigation.” Id. (emphasis added). Just four days later, the court in Profit Point Tax Technologies, Inc. v. DPAD Group, LLP, 336 F.R.D. 177 (W.D. Wisc. 2020), applied the much broader “because of” work product doctrine motivation standard. The court held that the work product doctrine protected from discovery “drafts of various fee-splitting agreements [which] were prepared because of the prospect of litigation.” Id. at 182. The court concluded that “[t]he overall record indicates that these documents were prepared because of disputes that would otherwise have been litigated” Id. at 182-83 (emphasis added). Presumably the draft fee-splitting agreements would not have been “created in service of anticipated litigation” or written for the purpose of “actually assisting” in the litigation.

Federal courts line up on one side or the other of this dramatic “assist” versus “because of” work product motivation standard disagreement. For corporate defendants who might not know where they will be sued until they are sued, this difference creates a worrisome uncertainty.

- **[Privilege Point, 2/17/21]**

Slip and Fall Case Provides Useful Guidance for More Serious Scenarios: Part II

February 17, 2021

Last week's Privilege Point described a Louisville, Kentucky, restaurant's loss of privilege protection because it could not prove that the managers providing information after a slip and fall knew the "investigation notes" purpose. Bobalik v. BJ's Restaurants, Inc., Case No. 3:19-CV-0661-RGJ-LLK, 2020 U.S. Dist. LEXIS 231289 (W.D. Ky. Dec. 9, 2020). The court then turned to the restaurant's work product assertion.

The court first noted that "[t]here is not a reasonable expectation of litigation from each and every incident that may occur at [the] restaurant." Id. at *18. And because the work product doctrine only protects documents primarily motivated by anticipated litigation, the court pointed to another gap in the restaurant's proof — "there is nothing provided by the BJ's Defendants that would indicate the investigation notes form is filled out by the . . . managers only in situations where there is a reasonable expectation of litigation." Id. at *18-19.

Like last week's Privilege Point's lesson, this work product principle normally applies in all situations — from restaurant slips and falls to multi-million dollar internal corporate investigations. To maximize the odds of successfully claiming work product protection, companies should be ready to prove that the withheld documents would not exist in the same form but for anticipated litigation.

- Wengui v. Clark Hill, PLC, 338 F.R.D. 7, 11, 12, 13, 13-14, 14 (D.D.C. 2021) (finding that law firm Clark Hill’s outside lawyer-directed forensic investigation into a cyber attack did not deserve work product or attorney-client privilege protection; explaining that Clark Hill’s former client Wengui sued the law firm after a cyber attack on the firm resulted in disclosure of his confidential information; noting that Clark Hill had retained an outside law firm to represent it, which in turn had retained forensic investigation firm Duff & Phelps; adopting the broad “because of” work product standard, but finding the protection inapplicable; “From the Court’s in camera review, it is clear that the Duff & Phelps Report summarizes the findings of such an investigation, and that ‘substantially the same [document]’ would have been prepared in any event . . . as part of the ordinary course of [Defendant’s] business.” (alterations in original) (emphases added) (citation omitted); rejecting Clark Hill’s argument that Duff & Phelps’s investigation was one of two investigations it conducted—the first being conducted by its “usual cybersecurity vendor”; noting Clark Hill’s position that Duff & Phelps’s investigation “was the result of only one half of a ‘two-tracked investigation of the incident.’” Opp. at 2. On one track, Clark Hill’s usual cybersecurity vendor, called eSentire, worked ‘to investigate and remediate the attack’ so as to preserve ‘business continuity.’ Id.; see also id. at 5 (‘Over the . . . several weeks [after the attack], Clark Hill engaged with . . . eSentire . . . to ascertain the nature and remediate the effects of the attack.’). Clark Hill points out that it has disclosed documents related to eSentire’s work,’ Id. at 2. On a ‘separate track from the eSentire work,’ Defendant insists, was Duff & Phelps, retained by MPG ‘for the sole purpose of assisting [the firm] in gathering information necessary to render timely legal advice.’ ECF No. 29-17 (Engagement Letter from MPG) at 1; see also ECF No. 29-16 (Engagement Letter from Duff & Phelps) at ECF p.1.” (alterations in original); “The problem for the defense here is that its two-track story finds little support in the record. The firm offers no sworn statement averring that eSentire conducted a separate ‘investigation’ with the purpose of ‘learn[ing] how the breach happened’ or facilitating an appropriate[] response.” (alterations in original) (emphasis added); emphasizing that Clark Hill pointed to Duff & Phelps’s investigation for its understanding of the cyber attack; “Defendant’s own interrogatory answers state that ‘its understanding of the progression of the September 12, 2017 cyber-incident is based solely on the advice of outside counsel and consultants retained by outside counsel.’” (emphasis added); “The record instead suggests that on September 14, 2017, two days after the cyberattack began, Clark Hill turned to Duff & Phelps *instead of*, rather than *separate from or in addition to*, eSentire, to do the necessary investigative work.” (underscored emphasis added); emphasizing that Clark Hill used Duff & Phelps’s report for non-litigation purposes; “The fact that ‘the [R]eport

was used for a range of non-litigation purposes’ reinforces the notion that it cannot be fairly described as prepared in anticipation of litigation.” (alteration in original) (emphasis added) (citations omitted); “In sum, although engagement letters dated September 14 state that Clark hired MPG in anticipation of litigation and that, on the same day, MPG in turn retained Duff & Phelps, Duff & Phelps’s role seems to have been far broader than merely assisting outside counsel in preparation for litigation. Although Clark Hill papered the arrangement using its attorneys, that approach ‘appears to [have been] designed to help shield material from disclosure’ and is not sufficient in itself to provide work-product protection.” (alteration in original) (emphasis added); “At a minimum, it is Clark Hill’s burden to demonstrate that a substantially similar document to the Duff & Phelps Report would not have been produced in the absence of litigation, and it has fallen well short of doing so. Both the report and related materials (referred to by Defendant as ‘Expert Materials,’ Opp. at 11) are accordingly not protected work product.” (emphasis added); also finding that Duff & Phelps’s report did not deserve privilege protection; “From the factual record discussed above and the Report itself, the Court concludes that Clark Hill’s true objective was gleaning Duff & Phelps’s expertise in cybersecurity, not in ‘obtaining legal advice from [its] lawyer.’ Linde Thomson, 5 F.3d at 1514 (quoting TRW, 628 F.2d at 212). At a minimum, Defendant has not demonstrated that the opposite is true. Duff & Phelps undertook a full investigation – the only one apparently commissioned by Clark Hill – with the goal of determining how the attack happened and what information was exfiltrated. The Report provides not only a summary of the firm’s findings, but also pages of specific recommendations on how Clark Hill should tighten its cybersecurity. And it was shared with both Clark Hill IT staff and the FBI, presumably with an eye toward facilitating both entities’ further efforts at investigation and remediation. (Because the Court finds the Report not subject to attorney-client privilege, it does not address Plaintiff’s separate argument that Defendant waived the privilege by disclosing the report to the FBI. See Reply at 17-21.)” (alteration in original) (emphases added); rejecting Clark Hill’s reliance on the Target decision; “The firm points to only one case, the Target decision, that has applied the attorney-client privilege to a similar forensic report, and that non-binding decision (even assuming it is correct) is distinguishable in at least three ways. First, as discussed above, Target had a two-track approach, with one track a concededly ‘non-privileged investigation set up so that Target . . . could learn how the breach happened and . . . respond to it appropriately.’ 2015 U.S. Dist. LEXIS 151974, 2015 WL 6777384, at *2. Assuming that investigation was sufficient for Target’s business purposes, it is much easier to view the other as aimed at facilitating effective legal representation. Second, and relatedly, there is no indication that the Target report was shared as widely for non-legal

purposes as the Duff & Phelps Report. Third, the Target court specifically noted that the relevant investigation and report were not ‘focused . . . on remediation of the breach.’ 2015 U.S. Dist. LEXIS 151974, [WL] at *3. Here Duff & Phelps was apparently engaged for immediate ‘incident response’ and began its work as the attack was thought to still be ongoing. Its Report, moreover, includes pages of specific remediation advice.” (alterations in original) (emphases added)).

- **[Privilege Point, 8/25/21]**

Paralegal's Deposition Testimony Dooms a Work Product Claim

August 25, 2021

An employer's post-accident investigation deserves work product protection only if it was primarily motivated by anticipated litigation. Thus, such investigations normally do not deserve work product protection if: (1) they were externally or internally required; or (2) they were undertaken in the employer's ordinary course of business.

In Dawson v. Ohio Gratings, Inc., 5th Dist. Stark No. 2020CA00179, 2021-Ohio-2028, 2021 Ohio App. LEXIS 1999, at ¶ 2 (Ohio Ct. App. June 15, 2021), plaintiff sustained "serious injuries" while operating a press that his employer OGI owned and maintained. The employer claimed work product protection for a post-accident investigation report. But in her deposition, OGI's in-house paralegal (1) agreed with the plaintiff's lawyer that "when someone gets injured on a job . . . there's an accident report that's filled out by the injured worker and by their supervisor"; (2) admitted that OGI has a "policy" requiring such reports; (3) did not recall whether someone filled out such a post-accident form after the plaintiff's accident, but that "[w]e should have"; (4) testified that "[o]ur standard accident report I believe is approximately seven pages" and agreed that it is on a "preprinted form." Id. ¶ 12. Not surprisingly, the court concluded that the OGI paralegal's "deposition testimony is sufficient to support a determination the accident investigation report was prepared in the ordinary course of OGI's business." Id. ¶ 14.

There may have been nothing that this employer's paralegal could have done about the employer's policy, but defendant companies in this situation should be looking for any opportunity to argue that a post-accident investigation was different from the ordinary course of business, or was special in some way – because the company anticipated litigation.

- [Privilege Point, 9/15/21]

Failing to Mention Litigation Weakens Work Product Claim

September 15, 2021

The work product doctrine protects documents primarily motivated by litigation or anticipated litigation. It does not protect documents created in the ordinary course of a company's business, or required by an external or internal mandate. If a company is already in litigation, failing to acknowledge that fact can weaken a work product claim.

In In re Valeant Pharmaceuticals International, Inc. Securities Litigation, Master No. 3:15-cv-07658-MAS-LHG, 2021 U.S. Dist. LEXIS 118140 (D.N.J. June 24, 2021), securities violation defendant Valeant claimed work product protection for documents created by its consultant FTI after litigation against Valeant had begun. The court rejected Valeant's work product claim – concluding that Valeant "cannot demonstrate that the primary motivating purpose underlying the FTI documents was a response to pending or anticipated litigation." Id. at *34. Among other things, the court noted that FTI's engagement letter contains "no mention of legal advice [or] pending investigations, government or criminal [or] pending civil suits, class actions or otherwise." Id. at *49. The court similarly emphasized that "neither the [Valeant] Board meeting minutes nor the Board's official resolution establishing [an Ad Hoc Committee] even mention litigation, although lawsuits existed at that time." Id. at *62. The court concluded that "irrespective of pending litigation against the Company, Valeant . . . would have taken – and was obligated to take – exactly the same steps." Id. at *57-58.

Although Valeant presumably would have lost its work product claim in any event, its argument would have been stronger if its consultant FTI and its board had mentioned the ongoing government and civil litigation against the company. But companies must be careful – mentioning anticipated litigation before it begins carries the risk of supporting an adversary's argument that the company should have started preserving pertinent documents at that time.

- United States v. Coburn, Civ. No. 2:19-cr-00120 (KM), 2022 U.S. Dist. LEXIS 21429, at *15-16 (D.N.J. Feb. 1, 2022) (analyzing privilege and work product issues involving defendant's third party subpoena on another company (Cognizant); "The first category in dispute consists of Cognizant's draft press releases and public disclosures. I agree with Defendants that these materials were not created for the predominant purpose of obtaining legal advice, or in order to prepare for litigation. See In re Grand Jury Investigation, 599 F.2d at 1233. Instead, they fall squarely within the type of non-legal, business or public relations advice that are not privileged. See Fisher, 425 U.S. at 403; Westinghouse, 951 F.2d at 1423-24. Similarly, Cognizant's communications with public relations firms Finsbury and CLS Strategies concerning 'public disclosure, communications, potential litigation and related legal strategy' relevant to Cognizant's internal investigation, (Mot. To Compel Cognizant, Cat. A at 76-77, [sic]) are not protected by either privilege because they bear too tenuous a connection to the provision of legal advice or confidential preparations for litigation. See[,] e.g., Dejewski, No. 19-CV-14532-ES-ESK, 2021 WL 118929, at *1-2; Louisiana Mun. Police Emps. Ret. Sys., 253 F.R.D. at 305-06.")

- [Privilege Point, 9/28/22]

Courts Apply The "Intensely Practical" Work Product Doctrine: Part I

September 28, 2022

The work product doctrine has been described by many courts as "intensely practical." Several decisions highlight this understandable adjective, and explicitly provide useful guidance for lawyers representing litigants and clients who anticipate litigation.

In Dietzel v. Costco Wholesale, Civ. A. No. 22-cv-0035, 2022 U.S. Dist. LEXIS 122558 (E.D. Pa. July 12, 2022), the plaintiff suffered injuries when he fell on an uneven sidewalk near a Costco tire center. He sought the "warehouse incident report" Costco employees prepared after the accident. Costco claimed work product protection, noting that the report explicitly stated that it "is to be prepared for the company's legal counsel." Id. at *18. But the court rejected Costco's work product claim, and ordered the incident report's production. Among other things, the court noted that: (1) the incident report "is a preprinted form with blank spaces to enter information"; (2) "the form itself appears to have its own form number"; (3) despite the printed language explaining that the report was to be prepared for a lawyer, Costco does "not contend that any attorney ordered its preparation or that the employee who prepared it communicated with any attorney before doing so"; (4) Costco did not identify any lawyer who ever received a copy of the report; and (5) the report apparently did not "make any 'reference to any claim of current or anticipated litigation.'" Id. at *18-19.

Courts applying the "intensely practical" work product doctrine examine the bona fides of withheld documents. Costco might have won its work product claim if employees working with Costco lawyers prepared a custom-made litigation-motivated post-accident report – in addition to the bare-bones "just the facts" required preprinted incident report. Next week's Privilege Point will focus on courts' "intensely practical" assessment of the "substantial need" standard.

- [Privilege Point, 11/2/22]

Defendant's Sloppy Language and Log Doom Work Product Claim

November 2, 2022

Fed. R. Civ. 26(b)(3)(A) protects from discovery documents and tangible things that are prepared in anticipation of litigation or for trial. Litigants asserting work product protection must (if called upon to do so) identify the exact moment when they first anticipated litigation, and consistently apply that date when withholding and logging documents.

In City of Fort Collins v. Open International, LLC, Civ. A. No. 21-cv-02063-CNS-MEH, 2022 U.S. Dist. LEXIS 154564 (D. Colo. Aug. 16, 2022), plaintiff City asserted work product protection for documents prepared by its billing system consultant. The City argued that the consultant's "work was at the direction and supervision of the City's counsel . . . concern[ing] 'the City's risk factors under the project and potential legal claims.'" Id. at *10 (internal citation omitted). The court bluntly rejected the City's work product assertion: (1) noting that "a directive from counsel alone [does not] establish[] the underlying purpose of the subject documents"; and (2) pointing to defendant's reference to "risk factors" and "potential legal claims" as insufficiently specific. Id. The court explained that the work product doctrine requires "contemplation of specific litigation" — and thus requires the litigant to "show that litigation was 'commenced, threatened or contemplated' at the time the relevant documents and communications were made." Id. at *11 (citation omitted). The court also "note[d] that some of the documents over which the City appears to assert the work product privilege were created before — according to the City's counsel and declaration made under penalty of perjury — the City began anticipating litigation." Id. Oops.

Some corporations try to support a work product claim by essentially arguing that they are always being sued for something or other. Courts require more specific anticipation of identifiable litigation, and expect a consistent logging of withheld documents.

- Blackmore v. Union Pac. R.R., No. 8:21CV318, 2022 U.S. Dist. LEXIS 155249, at *17, *20 (D. Neb. Aug. 29, 2022) (assessing work product protection in a Rule 30(b)(6) context; “The lawyer’s thought processes and organization of evidence for trial is work product—whether requested directly from UP’s lawyer or through the conduit of a 30(b)(6) witness. When asked to explain all facts supporting a defense or claim, the 30(b)(6) designee’s deposition testimony reveals which facts opposing counsel found important, counsel’s mental impressions, and counsel’s conclusions or opinions about those facts. In other words, a deponent’s answers to 30(b)(6) requests for all facts supporting a claim or defense impermissibly discloses counsel’s work product. Fairview Health Services v. Quest Software Inc., 2021 U.S. Dist. LEXIS 215816, 2021 WL 5087564, at *7[] (D. Minn. 2021).”; “Courts have concluded that a Rule 30(b)(6) deposition is burdensome, poses serious work product issues, and is not the proper vehicle for obtaining a summary of the opposing parties’ allegations, noting and holding that discovery under other rules is more appropriate.”)

D. Opinion Work Product

- [Privilege Point, 5/1/13]

In Some Situations, Facts Can Deserve Work Product Protection

May 1, 2013

The attorney-client privilege protects only communications, not historical facts. But as in so many other areas, the work product doctrine presents a more complicated picture.

In United States v. J-M Manufacturing Co., Civ. A. No. 11-cv-01691-MSK-MJW, 2013 U.S. Dist. LEXIS 14800 (D. Colo. Feb. 4, 2013), the court dealt with the results of defendant's tests conducted on PVC plastic pipe. The court acknowledged that "[t]est results, of themselves, simply reflect matters of historical fact." Id. at *11-12. However, the court also explained that "[t]he selection of a particular test methodology or testing sample or set of samples to test could . . . permit one to draw inferences as to the reasons why one option was selected over another; those inferences, in turn, could reveal attorney opinions, theories, or strategies." Id. at *12. The court further explained that "[t]his, in turn, throws new light on the purely 'factual' test results" – thus justifying withholding of the results as work product. Id.

Unlike the attorney-client privilege, the work product can protect such disparate things as attorney-client communications, accident scene photographs, transcripts of public meetings, a pile of newspaper clippings, and even facts.

- [Privilege Point, 5/15/13]

What Level of Protection Does "Opinion" Work Product Deserve?

May 15, 2013

Under Fed. R. Civ. P. 26(b)(3)(B), a court concluding that an adversary can overcome a litigant's work product protection "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Some lawyers mistakenly believe that only a lawyer's opinion deserves this protection, despite the rule's literal language to the contrary.

Perhaps more importantly, courts disagree about the level of protection such opinion work product deserves. Many courts find opinion work product absolutely protected. Fisher v. Kohl's Dep't Stores, Inc., No. 2:11-cv-3396 JAM GGH, 2012 U.S. Dist. LEXIS 86989 (E.D. Cal. June 22, 2012). Other courts provide a lesser level of protection. In Smith v. Coulombe, Case No. 2:11-cv-531-SU, 2013 U.S. Dist. LEXIS 14783, at *10 (D. Or. Feb. 4, 2013), the court used the phrase "special protections." A few weeks later, the District of New Hampshire indicated that opinion work product only "qualifies for 'greater protection' than so-called fact work-product." Walker v. N.H. Admin. Office of Courts, Civ. No. 11-cv-421-PB, 2013 U.S. Dist. LEXIS 24506, at *9-10 (D.N.H. Feb. 22, 2013) (citation omitted).

In practice, these differing approaches often make no difference – because opinion work product that is communicated to the client probably also deserves the separate (and absolute) attorney-client privilege protection.

- [Privilege Point, 5/29/13]

**Does the Work Product Doctrine Protect the Identity of Documents a
Witness Reviews Before Testifying?**

May 29, 2013

Under what is commonly called the Sporck doctrine, the opinion work product doctrine can sometimes protect the identity of certain documents that do not themselves deserve intrinsic privilege or work product protection, as long as the adversary also has the documents and the identity could reflect a lawyer's opinion. Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985).

Courts disagree about the Sporck doctrine's application to documents a witness reviews before testifying at a deposition. Some courts find that those documents' identity deserves work product protection, while other courts reject that concept. In In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation, No. 3:12-md-02385-DRH-SCW, 2013 U.S. Dist. LEXIS 59164 (S.D. Ill. Apr. 25, 2013) (not for publication), the court tried to thread the needle. The court held that deposition witnesses had to disclose which documents they reviewed before testifying, but did not have to disclose which documents their lawyers had selected.

Lawyers trying to maximize opinion work product protection should see if the pertinent court applies the Sporck doctrine in this setting.

- **[Privilege Point, 4/16/14]**

Courts Disagree About Basic Work Product Principles: Part I

April 16, 2014

Ironically, federal courts disagree more about work product principles enunciated in a single federal rule than they do about the organically developed attorney-client privilege protection. This can create enormous uncertainty for litigants, who usually do not know in advance where they might face litigation, and therefore will not know what work product approach will apply.

Under Fed. R. Civ. P. 26(b)(3)(B), a court ordering disclosure of work product "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" (emphasis added). In Republic of Ecuador v. MacKay, the court described opinion work product as "'virtually undiscoverable.'" 742 F.3d 860, 869 n.3 (9th Cir. 2014) (citation omitted). Less than two weeks later, the Tenth Circuit applied a greater degree of protection -- bluntly stating that "[o]pinion work product is absolutely privileged." Nevada v. J-M Mfg. Co., 555 F. App'x 782, 785 n.2 (10th Cir. 2014). Less than two weeks after that, a district court applied a "near absolute protection" standard. Roa v. Tetrick, Case No. 1:13-cv-379, 2014 U.S. Dist. LEXIS 24619, at *6 (S.D. Ohio Feb. 24, 2014).

Perhaps there is little practical difference between a "virtually undiscoverable," "near absolute" and "absolutely privileged" standard, but one might expect courts to articulate the same approach. Next week's Privilege Point will provide another example of courts' disagreement about how to apply a single sentence in the federal rules.

- [Privilege Point, 8/27/14]

Courts Analyze Work Product Protection for Final and Draft Affidavits

August 27, 2014

Analyzing work product protection for party or witness affidavits can involve several factors.

In Colon v. City of New York, No. 12-CV-9205 (JMF), 2014 U.S. Dist. LEXIS 92483 (S.D.N.Y. July 8, 2014), the court assessed affidavits that a malicious prosecution plaintiff finalized, but had never filed, in his earlier criminal case. The court concluded that the work product doctrine applied — because the plaintiff had prepared the affidavits "in connection with his post-conviction litigation." Id. at *9. However, the court held that the defendant City could overcome the protection, because the 1999 affidavits contained "factual assertions made by the Plaintiff regarding events that occurred in 1989 and 1990." Id. The court pointed to "the length of time that has passed" since the events, and the City's possible use of the affidavits to impeach the plaintiff. Id. Two days later, another court dealt with draft affidavits. In Total E&P USA, Inc. v. Kerr-McGee Oil & Gas Corp., the defendants fought to discover drafts of the "near-identical" affidavits filed by several individual gas and oil royalty claimants. Civ. A. No. 09-6644, 2014 U.S. Dist. LEXIS 93881, at *8 (E.D. La. July 10, 2014). The court noted that a defense lawyer "admitted at the oral hearing that he seeks to review the 'back and forth process' between" the plaintiffs and their lawyer "while drafting the affidavits." Id. at *16. The court held that disclosing those drafts would "reveal the mental impressions and strategies of counsel for claimants," and thus found the draft affidavits immune from discovery as opinion work product. Id.

Lawyers assessing protections for party or witness affidavits must consider, among other things, the affiant's role (communications between a client affiant and her lawyer might deserve privilege as well as work product protection); the affidavit's status (some courts might find that the final version loses any privilege or work product protection); and lawyers' role in preparing draft affidavits (the more extensive the role, the more likely the privilege or the opinion work product doctrine is to apply).

- Wultz v. Bank of China Ltd., 304 F.R.D. 384, 395, 396, 396-97 (S.D.N.Y. 2015) (in an opinion by Magistrate Judge Gorenstein, finding that a compliance-initiated investigation into a defendant's possible tie with terrorists did not deserve privilege or work product protection; "To start off, we accept BOC's [defendant] contention that BOC's receipt of the Demand Letter triggered the investigation and that BOC anticipated the potential for litigation as a result of the threat in the Demand Letter. BOC goes on to argue that had it not been for the Demand Letter, BOC 'would have undertaken no investigation at all.' . . . Notably, there is no record citation for this contention. In any event, it is unclear what BOC means by this assertion. If BOC means to say merely that the Demand Letter was a 'but for' cause of the investigation, this does not address the issue of whether it has shown the materials were prepared 'because' of its anticipation of litigation -- that is, that the materials would not have been created 'in essentially similar form irrespective of the litigation.'" (citation omitted); "The question is essentially a factual one: would BOC have generated the materials listed on the privilege log in similar form had it not anticipated litigation? Answering this question 'requires us to consider what 'would have' happened had there been no litigation threat -- that is, whether [BOC] 'would have' generated these documents if it were acting solely for its' non-litigation purposes. Allied Irish Banks [v. Bank of Am. N.A.], 240 F.R.D. 96, 106 (S.D.N.Y. 2007)]. We note that this hypothetical circumstance does not involve imagining what BOC would have done had no one told it that the Shurafa accounts merited scrutiny. Rather, we imagine a hypothetical situation where BOC is made aware of all facts contained in the Demand Letter but sees no threat of actual litigation itself -- for example, if BOC were to learn of the facts surrounding the Shurafa accounts from its own internal mechanisms for detecting counter-terrorism and anti-money laundering, or from an outside source unlikely to institute litigation such as a foreign law enforcement agency or a newspaper reporter. In other words, we look at the question as follows: had BOC been presented with the identical facts about Shurafa in circumstances in which it did not foresee litigation, would it have generated essentially the same documents sought by plaintiffs on this motion?" (footnote omitted); "For its part, BOC has provided virtually no evidence on the question of what BOC 'would have' done had it learned of the Shurafa allegations under circumstances where the knowledge was not coupled with the threat of litigation. It has not even made this showing for materials generated after the filing of the complaint. For this reason alone, BOC has not met its burden of showing that the materials are protectable as work product."; "BOC had good reason to investigate the allegations about improprieties in the Shurafa accounts absent the threat of litigation. Of course, it is BOC's burden to prove that it would not have undertaken this investigation and, more specifically, that it would not have

generated the documents on the privilege log had they not anticipated litigation. As already stated, BOC has provided essentially no evidence to support this conclusion.").

- [Privilege Point, 3/18/15]

Do Witness Interview Memoranda Deserve Opinion or Merely Fact Work Product Protection?: Part I

March 18, 2015

Unlike the absolute attorney-client privilege, the work product doctrine offers two possible levels of protection. Lawyers' (and other client representatives') opinions deserve absolute or nearly absolute protection in most courts. In contrast, non-opinion fact work product provides only a qualified privilege - which an adversary can overcome by proving "substantial need" for the documents, and the inability to obtain their "substantial equivalent" without "undue hardship." Fed. R. Civ. P. 26(b)(3)(A)(ii).

In United States ex rel. Landis v. Tailwind Sports Corp., 303 F.R.D. 429 (D.D.C. 2015), the court addressed the work product protection level for litigation- related witness interview memoranda. In bicyclist Floyd Landis's qui tam action, Lance Armstrong sought to discover government agents' witness interview memoranda. The court first dealt with memoranda government agents prepared in their civil investigation of Armstrong. The court noted that even the memorandas' factual portions reciting the witnesses' statements had been "'sharply focused or weeded'" by lawyers (quoting In re Sealed Case, 124 F.3d 230, 236 (D.C. Cir. 1997)). Id. at 431. The court therefore held that all the memoranda in question deserved opinion work product protection - because government lawyers "'shape[d] the topics that were covered' and 'frame[d] the questions that were asked.'" Id. at 432 (alteration in original) (citation omitted). The court rejected Armstrong's discovery efforts, because the D.C. Circuit considers opinion work product "virtually never discoverable." Id. at 430-31.

The court then turned to witness memoranda government agents prepared during their now-closed criminal investigation of Armstrong - which the court described as "a different kettle of fish." Id. at 432.

- [Privilege Point, 3/25/15]

Do Witness Interview Memoranda Deserve Opinion or Merely Fact Work Product Protection?: Part II

March 25, 2015

Last week's Privilege Point discussed Lance Armstrong's unsuccessful attempt to discover witness interview memoranda government agents prepared during their civil investigation of Armstrong's misdeeds. United States ex rel. Landis v. Tailwind Sports Corp., 303 F.R.D. 429 (D.D.C. 2015).

Armstrong also sought witness memoranda from the government's now-closed criminal investigation. The court acknowledged the government's affidavits, stating that lawyers "set the general direction of the [criminal] investigation and the interviews." Id. at 432. But after an in camera review, the court concluded that "it does not appear that these attorneys focused the content of the memoranda themselves or participated in drafting them." Id. Instead, the memoranda "appear to be substantially verbatim agent summaries of open-ended discussions of issues relevant to the criminal investigation." Id. This meant that the memoranda only deserved fact work product protection, which Armstrong could overcome. However, the court allowed the government to "redact any portions of the memoranda that reflect opinion work product, such as attorney notes or highlighting." Id. at 433.

Lawyers seeking the higher level of opinion work product protection for their witness interview memoranda should (1) explicitly articulate any of their opinions in the memoranda, and (2) be prepared to prove that they "shaped" the interview topics and "framed" the questions whose answers the memoranda memorialized.

- [Privilege Point, 6/17/15]

Courts Disagree About Basic Work Product Doctrine Elements: Part II

June 17, 2015

Last week's Privilege Point discussed an important variation in courts' interpretation of the same sentence in their work product rule. Two other cases highlight additional disagreements: (1) the standard for overcoming opinion work product protection; and (2) the work product protection's duration.

In Byman v. Angelica Textile Services, Inc. (In re Sadler Clinic, PLLC), the court described courts' varied opinion work product protection levels — including the Fourth Circuit's absolute protection for such work product. Ch. 7 Case No. 12-34546, Adv. No. 14-03231, 2015 Bankr. LEXIS 1369, at *16 (Bankr. S.D. Tex. Apr. 17, 2015). But the court rejected that approach — instead applying a "compelling or extraordinary need" standard for overcoming opinion work product protection. Id. at *18-19. A few weeks earlier, a Delaware state court adopted a similar standard — finding that an adversary could overcome a litigant's opinion work product protection if the document "is directed to the pivotal issue in the litigation and the need for the information is compelling." Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co., C.A. No. 07C-12-134-JRJ, 2015 Del. Super. LEXIS 166, at *10 (Del. Super. Ct. Mar. 31, 2015). The Angelica Textile Services court also dealt with another variation — work product protection's duration. The court noted that some courts protect work product created in one litigation only in "closely related" later litigation. 2015 Bankr. LEXIS 1369, at *12. The court found that approach too narrow — instead extending work product protection "to all subsequent litigation, related or not." Id. at *13.

Because corporations normally find themselves litigation defendants, they usually do not know where they will be sued — and therefore will not know until that time which work product doctrine variation(s) the court will apply.

- United States v. All Assets Held at Bank Julius Baer & Co., 270 F. Supp. 3d 220, 223, 224, 225 (D.D.C. 2017) (in a 9/13/17 opinion, holding that the opinion work product doctrine protected the identity of witnesses that the defendant had interviewed; "Despite the wide latitude given to courts in interpreting and applying the work-product doctrine, the question of whether it 'protects the identities of those persons interviewed by an attorney or his agent in anticipation of litigation' remains unsettled. . . . Indeed, in this Court alone, there is a partial split among its members over whether the names of individuals that a party has interviewed in preparation for litigation is protected under work-product privilege." (emphasis added); "This split in reasoning is not endemic to this Court."; "The undersigned believes that the better-reasoned cases, especially given the facts presented here, 'are those that draw a distinction between discovery requests that seek the identification of persons with knowledge about the claims or defenses (or other relevant issues)' -- requests, like Interrogatory 9, that are plainly permissible -- 'and those that seek the identification of persons who have been contacted or interviewed by counsel concerning the case.' . . . After all, to grant such a request would be to reveal to Plaintiff, Claimant's adversary in this litigation, how Claimant and his counsel 'choose to prepare their case, the efforts they undertake, and the people they interview' -- all information that falls within the scope of the work-product doctrine."; "Accordingly, the undersigned will deny Plaintiff's request for an Order compelling Claimant to disclose the identities of the individuals that Claimant's counsel interviewed in this matter." (emphasis added)).

- **[Privilege Point, 3/1/17]**

Court Applies the Sporck Doctrine

March 1, 2017

The work product doctrine involves many more varied and practical aspects than the attorney-client privilege. Among other things, heightened opinion work product protection can sometimes protect lawyers' selection of intrinsically unprotected documents, witnesses, etc. -- if the adversary has equal access to them, and if the selection would reveal the lawyers' litigation strategies. Many courts call this the Sporck doctrine. Sporck v. Peil, 759 F.2d 312, 315 (3d Cir. 1985).

In Boston Scientific Corp. v. Edwards Lifesciences Corp., Civ. A. No. 16-275-SLR-SRF, 2016 U.S. Dist. LEXIS 178515 (D. Del. Dec. 27, 2016), defendant proposed a protective order provision requiring the parties to identify any documents they planned to share with foreign lawyers. The court denied defendant's proposal, citing Sporck in concluding that "[t]he procedure described in [defendant's protective order provision] would reveal which documents are important to Plaintiffs, and therefore disclose information that is considered work product." Id. at *5-6.

Lawyers should be on the lookout for their adversaries' seemingly innocuous discovery of, or other references to, intrinsically unprotected documents, witnesses, etc. – if the discovery or other reference might reveal the lawyers' opinions or litigation strategies.

- [Privilege Point, 10/18/17]

Courts Use Rule Language and Common Sense to Expand Work Product Protection: Part I

October 18, 2017

Unlike the common law-dominated attorney-client privilege which developed organically in each state, work product protection comes from court rules. One might think that this would simplify courts' application of that protection, but it does not. Courts taking an expansive view sometimes rely on little-noticed rule language and sometimes essentially ignore rule language.

In Hobart Corp. v. Dayton Power & Light Co., Case No. 3:13-cv-115, 2017 U.S. Dist. LEXIS 136682 (S.D. Ohio Aug. 24, 2017), the court extended the heightened opinion work product protection to a paralegal's witness interview notes. This correctly applied the opinion work product provision of Fed. R. Civ. P. 26(b)(3)(B) – which flatly indicates that courts "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" (emphases added). On its face, the rule thus provides such heightened protection to the opinions of nonlawyer client representatives such as paralegals, accountants, consultants, etc.

Although the work product rule broadly defines opinion work product protection, courts disagree about that protection's strength. Some courts absolutely protect such opinion work product, while some provide only a somewhat higher level of protection than they give fact work product. Next week's Privilege Point will discuss another court's expansive work product doctrine interpretation – which ignored rather than relied on Rule 26's language.

- [Privilege Point, 12/13/17]

Does the Work Product Doctrine Protect the Identity of Witnesses a Lawyer Chooses to Interview?

December 13, 2017

Litigants obviously must identify all witnesses with potentially relevant knowledge about litigated issues. But can litigants claim work product protection for the identity of the subset of those witnesses that their lawyers choose to interview?

As with so many other work product issues, courts disagree. In United States v. All Assets Held at Bank Julius Baer & Co., the court ultimately held that the work product doctrine protected such interviewees' identities, because forcing disclosure of their identities would reveal how the litigant and his lawyer "choose to prepare their case." 270 F. Supp. 3d 220, 225 (D.D.C. 2017) (citation omitted). The court acknowledged that the question "remains unsettled." Id. at 223. And in a refreshing moment of candor, the court explained that "[i]ndeed, in this Court alone, there is a partial split among its members over whether the names of individuals that a party has interviewed in preparation for litigation [are] protected under work-product privilege." Id.

Corporate litigants may not know how the work product doctrine will apply to their lawyers' activities until they know what court will handle their case – and even what judge will hear their case.

- In re Abilify (Aripiprazole) Prods. Liab. Litig., Case No. 3:16-md-2734, 2017 U.S. Dist. LEXIS 213493, at *18, *18-19 (N.D. Fla. Dec. 29, 2017) ("[S]everal of the documents submitted for in camera review reflect that certain documents or information is being transmitted to counsel at counsel's request. The document standing alone is not privileged but the fact that a particular document has been requested by an attorney or that a particular document is being transmitted to an attorney at his or her request is subject to the work product privilege. On the other hand, there may be a document that is an attachment but the document was specifically prepared at the request of an attorney and therefore the document is independently subject to the work product privilege, assuming the document was created in anticipation of or incident to on going [sic] legal proceedings."; "The difference between these two types of scenarios has now been resolved. With regard to documents for which Defendants are not asserting independently a privilege, Defendants have certified that those documents have been or will be produced to Plaintiffs. With regard to the remaining attachments, where disclosure of the attachment would invade the work product privilege (and in some cases the attorney client privilege) the Court has examined these attachments as part of the in camera inspection and determined whether disclosure of the attachment would itself invade the work product privilege. The Court's ruling on attachments therefore has taken this into account." (emphasis added)).

- [Privilege Point, 4/25/18]

Courts Debate Work Product Issues: Part II

April 25, 2018

Last week's Privilege Point addressed courts' varying views on whether work product protection can extend to a non-party's documents. Courts also disagree about the heightened opinion work product protection, under which a court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning a litigation." Fed. R. Civ. P. 26(b)(3)(B) (emphasis added).

In Beltran v. InterExchange, Inc., Civ. A. No. 14-cv-03074-CMA-CBS, 2018 U.S. Dist. LEXIS 22564, at *24 (D. Colo. Feb. 12, 2018), the court inexplicably held that "[t]he Tenth Circuit is clear that work product privilege concerns the mental impressions of counsel," and therefore cannot extend to nonlawyers' opinions. Other courts take the same narrow approach – which ignores the Rule's clear language. A more subtle disagreement focuses on whether a corporate litigant's employee's litigation-related documents can deserve opinion work product protection. The fact work product rule clearly covers a "party," but the opinion work product doctrine on its face protects only opinions "of a party's attorney or other representative." Rule 26(b)(3)(B). Some courts hold that a corporate litigant's employee counts as a "party" and therefore cannot claim the heightened opinion work product protection, while other courts hold that such employees are a party's "representative" and therefore can assert opinion work product protection.

Next week's Privilege Point addresses another key judicial disagreement about the work product doctrine, which involves the protection's basic reach rather than specific rule language.

- In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., No. 05-MD-1720 (MKB), 2018 U.S. Dist. LEXIS 34113, at *111, *114, *114-15, *115, *116, *118 (E.D.N.Y. Feb. 26, 2018) (holding that a business person's documents deserved work product protection because they reflected communications with a lawyer; also finding that the opinion work product doctrine could protect opinions from a corporate employee, who counts as a party's "representative"; "Judge Orenstein did not err in finding that the documents reflect Mr. Fellman's opinion. There is no dispute that the Fellman Documents were authored by Mr. Fellman, a business executive employed by Bank of America. At his deposition, [TEXT REDACTED BY THE COURT]. . . . Bank of America asserts that there was 'back and forth' and 'give and take' but points to no specific portions of the documents that are likely to reveal mental impressions or thoughts of in-house or outside counsel." (first alteration in original); "Judge Orenstein does not appear to have considered whether the fact that Mr. Fellman's opinion was that of a businessperson and an employee of Bank of America, rather than an attorney, was relevant in determining the level of work product protection to be afforded to the documents. . . . Because Rules 26(b)(3)(A) and 26(b)(3)(B) afford different levels of protection and each enumerate different authors to whom work product is attributed, the Court will review whether Judge Orenstein's determination that the opinion of Mr. Fellman was entitled to heightened work product protection is contrary to law."; "Bank of America contends that Judge Orenstein's ruling was correct because heightened protection is afforded to 'attorney and other representative' and Mr. Fellman qualifies as 'other representative.' . . . In support of this argument, Bank of America relies on cases from other Circuit Courts where heightened work product protection was afforded to non-attorneys to argue that Mr. Fellman's opinions are entitled to heightened work product protection."; "7-Eleven argues that as an employee of Bank of America, Mr. Fellman is not a 'representative' within the meaning of Rule 26(b)(3), and instead is a party, whose work product is entitled to ordinary protection under Rule 26(b)(3)(A)." (emphasis added); "The Court finds it instructive that Rule 26 (b)(3) subsections (A) and (B), grant different levels of protection, and list different sets of authors for the documents that are afforded protection -- subsection (A), ordinary protection, includes documents 'by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent),' and subsection (B), heightened protection, only includes documents by 'attorney or other representative.' Fed. R. Civ. P.26 (b)(3) (emphasis added)."; "Although 7-Eleven is correct that none of the cases cited by Bank of America afforded heightened work product protection to non-attorney employees, 7-Eleven has not cited any Second Circuit or Supreme Court authority, and the Court has found none, ruling that company employees cannot be considered a 'representative'

within the meaning of Rule 26(b)(3) or that an employee can only be considered a 'party' within the meaning of Rule 26(b)(3)(A). Therefore, although the Court may have rendered a different result, had it been conducting a *de novo* review of whether an employee is a representative within the meaning of Rule 26(b)(3), in the absence of controlling Second Circuit authority stating otherwise, a magistrate judge's finding that an employee's opinion is afforded a heightened work product protection cannot be set aside as contrary to law.” (first emphasis added))

- [Privilege Point, 12/5/18]

Court Applies a Key Sporck Doctrine Element

December 5, 2018

Most courts recognize a doctrine first articulated in Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985), which protects as opinion work product lawyers' selection of intrinsically unprotected documents, witnesses, etc. – if that selection reflects the lawyers' opinion or strategy. The Sporck doctrine can protect the identity of intrinsically unprotected documents lawyers consider significant enough to show a deposition witness or witnesses important enough to interview.

But the Sporck doctrine only applies if both parties have the same access to the intrinsically unprotected documents or witnesses. In United States v. Adams, the court acknowledged that the work product doctrine protected communications between Adams (criminal defendant/lawyer) and his paralegal that "involve[d] the gathering of information in anticipation of litigation." Case No. 0:17-cr-00064-DWF-KMM, 2018 U.S. Dist. LEXIS 184490, at *21 (D. Minn. Oct. 27, 2018). The court then correctly noted that "[i]n an ordinary civil case, the underlying documents would have been independently produced in discovery." Id. at *22. But because Adams had withheld the underlying documents, the court did not know whether the government had "obtained the underlying documents through investigative tool other than the execution of the search warrant." Id. at *22-23. The court concluded that "[i]f Mr. Adams can confirm that the government has access to these underlying documents, then no production of them is necessary." Id. at *23. Otherwise, the parties would have to "meet and confer regarding the proper means by which production of them should be accomplished." Id.

In a footnote, the court offered an intriguing possible solution – "for the documents at issue to be produced with new document identifiers so that the government could not readily infer which documents were believed to be important for which pieces of litigation and for what purposes." Id. at *23 n.4. As with other work product issues, the Sporck doctrine can involve tricky logistics – because it protects only the identity of lawyer-selected intrinsically unprotected documents to which both parties must have equal access.

- [Privilege Point, 12/12/18]

Privilege and Work Protection For Lawyers' Communications With Third Parties and Reports of Those Communications: Part I

December 12, 2018

Lawyers' communications with the third parties generally cannot deserve privilege protection, but what about work product protection?

In Booth v. Galveston Cnty., Civ. A. No. 3:18-CV-00104, 2018 U.S. Dist. LEXIS 181063 (S.D. Tex. Oct. 10, 2018), the court addressed work product protection for emails between plaintiffs' lawyer and two fact witnesses. The court acknowledged that "[a]t first blush, it might be inconceivable how documents exchanged with a third-party can fall within the sphere of privileged status." But then the court explained that "[i]f a written statement made by a third-party witness is covered by the work-product privilege, it is hard to imagine why an email exchange between counsel and a third-party witness providing the same information would not be protected by the same privilege." The court therefore protected the emails as work product, because they were "created for litigation purposes."

Most courts would also protect the "intangible" work product reflected in any similar oral communications between lawyers and fact witnesses. Next week's Privilege Point will address possible privilege and work product protection for lawyers' reports to their clients about such third party communications.

- [Privilege Point, 7/10/19]

Lawyers' Witness Interview Notes Can Deserve Opinion Work Product Protection

July 10, 2019

Litigants often seek to assert opinion work product protection for their litigation-related documents – because the opinion work product doctrine gives the documents absolute or nearly absolute protection. This contrasts with regular work product protection, which adversaries can overcome in certain circumstances.

In Stevens v. Brigham Young University-Idaho, Case No. 4:15-cv-00530-BLW, 2019 U.S. Dist. LEXIS 59435 (D. Idaho Apr. 4, 2019), plaintiff suing BYU sought an in-house lawyer's notes of an important witness interview. The court found that the interview notes deserved opinion work product protection, because "[b]y choosing what details to record and what details to omit, [BYU's lawyer] implanted her mental impressions in her notes, thereby making them opinion work product." Id. at *5. The court emphasized that the notes "are not a verbatim transcript of [the lawyer's] interview. Id. Several days later, the court in Cicil (Beijing) Science & Technology Co. v. Misonix, Inc., came to the same conclusion about Morgan Lewis lawyers' notes – which were not "recordings, transcripts, or other verbatim recitations of the interviews," but instead "reflect the questions counsel chose to ask and [their] mental impressions and opinions." 331 F.R.D. 218, 224 (E.D.N.Y. 2019) (alteration in original) (internal citations omitted).

While this widely accepted view makes sense, these and other courts' implicit rejection of opinion work product protection for verbatim transcripts does not. Such verbatim transcripts should deserve opinion work product protection if they memorialize lawyers' specific and opinion-laden questions and witnesses' responses.

- [Privilege Point, 12/18/19]

Can The Opinion Work Product Doctrine Allow Withholding of Intrinsically Unprotected Documents?

December 18, 2019

Unlike the attorney-client privilege, the work product doctrine comes in two varieties. Fact work product protection can cover purely factual documents, photographs, test results, etc. Opinion work product can protect documents that contain or reflect lawyers' or other client representatives' opinions. Litigants always seek that protection, because courts absolutely or nearly absolutely protect opinion work product.

In M.H. v. Akron City School District Board of Education, defendant claimed opinion work product protection for its general counsel's "file materials." Case No. 5:18-cv-870, 2019 U.S. Dist. LEXIS 156053, at *20 (N.D. Ohio Sept. 12, 2019). After reviewing the 281 pages in camera, the court concluded that while "certain documents, when viewed in isolation, would be discoverable," the "compilation of documents is rife with [the general counsel's] and outside counsel's, mental impressions, including thought processes, opinions, conclusions, and legal theories." Id. The court quoted an Eighth Circuit decision recognizing this type of absolute opinion work product protection – although most courts cite the Third Circuit's decision in Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985).

The absolute or nearly absolute opinion work product doctrine can extend to a lawyer's compilation of intrinsically unprotected documents. In selecting such documents, lawyers would be wise to memorialize the role of their opinion in deciding what to include.

- Blackmon v. Bracken Constr. Co., 338 F.R.D. 91, 94 n.1 (M.D. La. 2021) (noting the mixed caselaw on common interest agreements; “The Court has reviewed the Joint Defense Agreement along with the cases cited by both sides. But while each side provided caselaw from district courts throughout the country supporting its position, the Court is not bound by any of them. Beyond that, caselaw in this area is not entirely helpful. As other courts have noted, ‘cases addressing the question of whether JDAs are privileged fall, quite frankly, all over the lot.’” Wausau Underwriters Ins. Co. v. Reliable Transportation Specialists, Inc., 2018 U.S. Dist. LEXIS 151745, 2018 WL 4235077, at *1 n.1 (E.D. Mich. Sept. 6, 2018) (quoting Steuben Foods, Inc. v. GEA Process Eng’g, Inc., 2016 U.S. Dist. LEXIS 42538, 2016 WL 1238785, at *1 (W.D.N.Y. Mar. 30, 2016)).” (internal citations omitted))
- Rodriguez v. Seabreeze Jetlev LLC, 620 F. Supp. 3d 1009, 1018 (N.D. Cal. 2022) (analyzing privilege and work product issues in a wrongful death case; concluding that the common interest doctrine protected communications among estate beneficiaries and the plaintiff eligible under maritime law to pursue the litigation, but that non-beneficiaries did not have such a common interest even though they had a financial interest in maximizing the recovery; “For example, a witness may decline to answer questions such as: ‘How many meetings were there with [your counsel] or any one from his office to form the [limited partnership]?’” United States v. Landon, No. C 06-3734 JF (PVT), 2006 U.S. Dist. LEXIS 96667, 2006 WL 3377894, at *4 (N.D. Cal. Oct. 30, 2006). This question is inappropriate because the answer would confirm the specific nature of the legal advice received. Id.” (alterations in original))

- Greenthread, LLC v. Intel Corp., Civ. No. 6:22-CV-00105-ADA, 2022 U.S. Dist. LEXIS 161966, at *13 (W.D. Tex. Sept. 1, 2022) (citing earlier cases in holding that the work product doctrine protected the identity of witnesses a lawyer chooses to interview; “Both Hardwood [In re Hardwood P—G, Inc.], 403 B.R. 445 (Bankr. W.D. Tex. 2009)] and Benevis [Benevis, LLC v. Mauze & Bagby, PLLC], 2015 U.S. Dist. LEXIS 192268, 2015 WL 12763537 (S.D. Tex. Dec. 14, 2015)] explain that the identities of individuals with relevant knowledge are discoverable, but that the identities of all individuals interviewed in an investigation is protected work product. Greenthread seeks discovery into the latter category, which impermissibly invades upon the work product protection.”)

- Under Seal 1 v. United States (In re Grand Jury 2021 Subpoenas), 87 F.4th 229, 254 (4th Cir. 2023) (explaining the rare possibility of interlocutory appeal possibilities; “Under Rule 26(b)(3)(B), a district court ordering discovery ‘must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.’ Notably, this Court recognizes that opinion work product ‘enjoys a nearly absolute immunity and can be discovered by adverse parties only in very rare and extraordinary circumstances.’ In re Search Warrant Issued June 13, 2019, 942 F.3d 159, 174 (4th Cir. 2019) (simplified).”)

- [Privilege Point, 8/23/23]

Can an Interviewee Witness List Ever Deserve Work Product Protection?

August 23, 2023

Facts and events normally do not deserve work product protection. But a lawyer's careful selection of such facts or important events sometimes may reflect his or her strategic assessment or litigation planning. For example, litigants obviously must identify witnesses with pertinent knowledge. But can an adversary ask which of such witnesses a litigant's lawyer thought important enough to interview?

In Glenn v. City of Hammond, Cause No. 2:18-CV-150-TLS-JEM, 2023 U.S. Dist. LEXIS 107642 (N.D. Ind. June 21, 2023), defendant sought a list of the witnesses plaintiffs and their lawyer had interviewed. Citing an earlier case, the court understandably explained that the identity of such witnesses would "inevitably teach the requesting party which individuals opposing counsel considers more or less valuable as witnesses and how he or she is preparing for trial." Id. at *11 (citation omitted). With this common sense notion in mind, the court wisely ordered plaintiffs to provide "a list of only the witnesses the Plaintiffs themselves specifically interviewed with respect to the instant lawsuit." Id. at *16. In other words, that list would not include just the witnesses plaintiffs' lawyer chose to interview.

This type of pragmatic analysis highlights what courts often call the work product doctrine's "intensely practical" nature.

- Platinum Supply Corp. v. Turner Constr. Co., Index No. 157835/2020, 2023 NY Slip Op 34060(U), at *3 (N.Y. Sup. Ct. Nov. 15, 2023) (“There is no dispute that the only potentially discoverable information are the notes prepared by the attorneys in connection with the interviews of certain employees for defendant. An attorney’s notes, which may include his or her impressions and thoughts about those interviews, are clearly protected under the attorney-client privilege and the work product doctrine as defendant wanted an assessment of potential wrongdoing and whether it needed to pursue legal remedies.”)

E. Overcoming Work Product Protection

- [Privilege Point, 5/8/13]

Unlike the Attorney-Client Privilege, Work Product Doctrine Protection Can Be Overcome

May 8, 2013

Unlike the absolute attorney-client privilege, the work product doctrine provides only qualified protection to non-opinion work product. Fed. R. Civ. P. 26(b)(3)(A)(ii) indicates that an adversary can overcome the protection if it "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."

In Smith v. Coulombe, Case No. 2:11-cv-531-SU, 2013 U.S. Dist. LEXIS 14783 (D. Or. Feb. 4, 2013), the court found that plaintiffs could overcome the defendants' work product claim for materials generated during an investigation. The court held that the withheld documents "contain potentially critical evidence or information that could lead to critical evidence" – supporting the "substantial need" element. Id. at *17. A couple of weeks later, a court held that plaintiffs involved in an automobile accident could not overcome the work product protection for photographs taken by the trucking company's investigator. Laws v. Stevens Transport, Inc., Case No. 2:12-cv-544, 2013 U.S. Dist. LEXIS 22159 (S.D. Ohio Feb. 19, 2013). The court concluded that plaintiffs "have not argued that without the pictures, they are unable to present a case of either liability or damages." Id. at *10. Although the photographs were undeniably "helpful to their case, . . . they have not shown that they are 'essential' or 'integral.'" Id. The court also questioned whether plaintiff could not obtain substantially equivalent evidence elsewhere. The court explained that "plaintiffs can still take pictures of the accident location," and also noted that "there is no allegation or proof that [plaintiff] has no recollection, or only a vague one, of the accident." Id. at *11-12.

Because the attorney-client privilege provides absolute protection, courts analyzing that doctrine never engage in analyses like these.

- [Privilege Point, 1/15/14]

Rhode Island State Court Sorts Through Work Product Issues

January 15, 2014

Some factual settings give courts the opportunity to carefully and logically apply work product principles. A Rhode Island court confronted such a situation in Cary v. 3M Co., C.A. No. PC 10-3263, 2013 R.I. Super. LEXIS 188 (R.I. Super. Ct. Nov. 6, 2013).

An asbestos plaintiff's lawyer and the defendants' lawyers jointly toured the site where plaintiff's late husband had worked. All the lawyers came equipped with cameras, but the plaintiff's lawyer's camera stopped working – so he took pictures on his cell phone. Defendants refused to turn over their pictures and video footage. The court held as follows: (1) defendants' pictures and videos deserved fact work product protection; (2) defendants could not successfully claim that their pictures and videos deserved the higher opinion work product protection, although the defense lawyers specifically directed their photographer and videographer to record specific items – because plaintiff's lawyer "could have gleaned the same information by listening to the instructions given to the photographer and videographer"; (3) plaintiff could establish "substantial need" for pictures of the worksite, because the "depiction of [the] photos of the asbestos-containing items . . . is key to one of the essential elements of Plaintiff's prima facie case"; (4) plaintiff could not obtain the "substantial equivalent" of the defense lawyers' pictures, because the cell phone picture's quality was "so poor that it is impossible to read some of the labels on the items photographed"; (5) plaintiff would face an "undue hardship" in attempting to obtain the "substantial equivalent" – because the property had been sold after the tour, and "many of the items the parties photographed are no longer there." Id. at *9, *11, *14, *13.

Courts describe the work product doctrine protection as "intensely practical," and decisions like this highlight that principle.

- [Privilege Point, 8/27/14]

Courts Analyze Work Product Protection for Final and Draft Affidavits

August 27, 2014

Analyzing work product protection for party or witness affidavits can involve several factors.

In Colon v. City of New York, No. 12-CV-9205 (JMF), 2014 U.S. Dist. LEXIS 92483 (S.D.N.Y. July 8, 2014), the court assessed affidavits that a malicious prosecution plaintiff finalized, but had never filed, in his earlier criminal case. The court concluded that the work product doctrine applied — because the plaintiff had prepared the affidavits "in connection with his post-conviction litigation." Id. at *9. However, the court held that the defendant City could overcome the protection, because the 1999 affidavits contained "factual assertions made by the Plaintiff regarding events that occurred in 1989 and 1990." Id. The court pointed to "the length of time that has passed" since the events, and the City's possible use of the affidavits to impeach the plaintiff. Id. Two days later, another court dealt with draft affidavits. In Total E&P USA, Inc. v. Kerr-McGee Oil & Gas Corp., the defendants fought to discover drafts of the "near-identical" affidavits filed by several individual gas and oil royalty claimants. Civ. A. No. 09-6644, 2014 U.S. Dist. LEXIS 93881, at *8 (E.D. La. July 10, 2014). The court noted that a defense lawyer "admitted at the oral hearing that he seeks to review the 'back and forth process' between" the plaintiffs and their lawyer "while drafting the affidavits." Id. at *16. The court held that disclosing those drafts would "reveal the mental impressions and strategies of counsel for claimants," and thus found the draft affidavits immune from discovery as opinion work product. Id.

Lawyers assessing protections for party or witness affidavits must consider, among other things, the affiant's role (communications between a client affiant and her lawyer might deserve privilege as well as work product protection); the affidavit's status (some courts might find that the final version loses any privilege or work product protection); and lawyers' role in preparing draft affidavits (the more extensive the role, the more likely the privilege or the opinion work product doctrine is to apply).

- [Privilege Point, 4/22/15]

District of Columbia Circuit Provides Good News and Bad News in a Work Product Case

April 22, 2015

Ironically, federal courts applying the federal work product rule take widely varying positions on a number of key elements, including the protection's duration; its applicability to litigation-related business documents; and the standard under which adversaries can overcome a work product claim.

In FTC v. Boehringer Ingelheim Pharmaceuticals, Inc., 778 F.3d 142 (D.C. Cir. 2015), the D.C. Circuit held that: (1) work product "prepared. . . for one lawsuit will retain its protected status even in subsequent, unrelated litigation" (id. at 149); (2) the work product doctrine could protect documents memorializing a business arrangement included as part of adverse companies' litigation settlement agreement, even if the arrangement "has some independent economic value to both parties" — if it was "nonetheless crafted for the purpose of settling litigation" (Id. at 150); and (3) an adversary can satisfy the "substantial need" element for overcoming a litigant's work product by demonstrating that the withheld materials "are relevant to the case" and "have a unique value apart from those already in the [adversary's] possession" — without showing "that the requested documents are critical to, or dispositive of, the issues to be litigated." (Id. at 155-56.) The first two holdings represent a broad view of the work product protection, but the third holding makes it easier for adversaries to overcome a company's work product protection.

Other courts take different approaches to all of these issues. Unfortunately, defendant companies often do not know where they will be sued, and therefore will not know in advance what work product standards will apply to documents they may have already created.

- [Privilege Point, 9/5/18]

Court Rejects a Personal Injury Plaintiff's Effort to Overcome Defendant's Work Product Protection for Accident Scene Photographs

September 5, 2018

Defendants' accident scene photographs usually deserve work product protection if the defendants reasonably anticipated litigation. But plaintiffs frequently can overcome that protection for photographs defendants took immediately after the accident – if the scene changed by the time the plaintiffs arranged for their own photographs.

In Fint v. Brayman Construction Corp., Case No. 5:17-cv-04043, 2018 U.S. Dist. LEXIS 103772 (S.D.W. Va. June 21, 2018), plaintiff fell into a construction hole on January 31, 2017. Because of his hospitalization, he did not retain a lawyer until April. Plaintiff sought defendant's accident scene photographs, arguing that "by the time he was able to obtain photographs, the site had changed dramatically." Id. at *15. But the court rejected plaintiff's argument -- noting that defendant's photographs "establish that the work site had already been altered to prevent other similar accidents." Id. In other words, defendant's post-accident photographs were no more valuable than plaintiff's later photographs, because neither one showed the January 31 conditions.

Litigants' efforts to overcome adversaries' work product protection involve timing and other nuances that generally do not arise with the more abstract and absolute attorney-client privilege.

- [Privilege Point, 10/23/19]

When Can An Adversary Overcome A Litigant's Work Product Protection?

October 23, 2019

Unlike the absolute attorney-client privilege, adversaries can obtain a litigant's work product if they have "substantial need" for the work product, and cannot obtain its "substantial equivalent" without "undue hardship." All courts offer a higher protection for opinion work product, and many courts absolutely protect opinion work product.

In Chadwell v. Lone Star Railroad Contractors, Inc., No. 3:17CV00053 JLH, 2019 U.S. Dist. LEXIS 133423 (E.D. Ark. Aug. 8, 2019), a deceased railroad worker's personal representative sought defendant railroad's incident scene photographs, witness statements and incident reports. The court denied all three efforts, holding: (1) the representative "already has contemporaneous photographs" taken by the nearby plant, the coroner's office and an OSHA investigator (id. at *6); (2) she "has had the opportunity to depose any potential witness . . . including one of the witnesses whose statement is being withheld" (id. at *8); (3) she "cannot show that she has a substantial need for the incident report . . . [because she] has had the opportunity through discovery to find out details about the accident," including interviewing and deposing "any person with knowledge of the incident." Id. at *10.

Given the fact-intensive analysis courts must undertake when an adversary seeks a litigant's work product, corporations should never count on winning that dispute.

- [Privilege Point, 4/21/21]

The Fascinating Work Product Implications of Surveillance Videos

April 21, 2021

Lawyers representing insurance companies and others sometimes seek evidence that plaintiffs claiming injuries, disability, etc., are faking it. And of course nothing could be as dramatic as a surveillance video of a plaintiff — who claims he can hardly walk — briskly climbing a ladder to clean his gutters.

Courts dealing with discovery of such surveillance videos face three bedrock principles: (1) such surveillance videos obviously deserve work product protection; (2) plaintiffs normally cannot seek to overcome defendant's work product protection by arguing "substantial need" for the videos — they already know whether they can climb a ladder or not; and (3) a defendant intending to use such a surveillance video at trial must produce it in discovery.

So what do courts do? In Lively v. Reed, the court noted that it "has previously ordered that [the surveillance video] be produced to Plaintiffs following their depositions." No. 1:20 CV 119 MOC WCM, 2021 U.S. Dist. LEXIS 31703, at *6 (W.D.N.C. Feb. 19, 2021) (emphasis added). So savvy courts allow defendants to lock in plaintiffs' sworn testimony about what they can and cannot do — before those defendants must produce any surveillance videotapes. Bingo.

- [Privilege Point, 5/26/21]

Florida Federal Court Mentions Two Ways the Work Product Doctrine Differs From the Attorney-Client Privilege

May 26, 2021

The ancient attorney-client privilege: (1) protects communications primarily motivated by clients' request for legal advice, regardless of any litigation on the horizon; and (2) protects such communications absolutely. The relatively new work product doctrine differs dramatically from the attorney-client privilege in those two ways (among many others).

In Molbogot v. MarineMax East, Inc., Civ. No. 20-cv-81254-MATTHEWMAN 2021 U.S. Dist. LEXIS 45149 (S.D. Fla. Mar. 10, 2021), the purchaser of an expensive boat sued the seller for alleged defects, and then sought discovery from the boat's manufacturer Sea Ray (to which the seller had returned the boat after the purchaser's complaints). Sea Ray claimed work product for several "communications between Sea Ray and . . . an electrical engineer/surveyor, discussing his findings upon inspection of Plaintiff's vessel." Id. at *2. The court first held that the work product doctrine applied as of March 2, 2020 – "when Plaintiff's current legal counsel sent correspondence to Sea Ray providing a list of issues regarding the vessel Plaintiff had purchased." Id. at *6. This type of implicit threat constitutes one of what can be called "trigger events" justifying work product protection, which unlike the attorney-client privilege protects communications only when the creator reasonably anticipates or is in litigation. Second, the court concluded that Plaintiff could overcome Sea Ray's work product claim for the engineer's inspection findings, because "Plaintiff cannot obtain the photographs or the findings in the [engineer's] report from any other source because the vessel went to the factory and was altered immediately after [the Sea Ray engineer's] inspection." Id. at *7.

Unlike the attorney-client privilege, the work product doctrine: (1) applies only at certain times; and (2) is not absolute. For these and other reasons, corporations and their lawyers should always consider both protections.

- [Privilege Point, 2/2/22]

Courts Address Work Product Issues: Part II

February 2, 2022

Last week's Privilege Point addressed litigants' need to identify the exact moment when they first anticipated litigation. Another work product issue involves the degree of protection afforded opinion work product.

Under Fed. R. Civ. P. 26(b)(3)(B), courts concluding that an adversary may overcome a litigant's work product claim "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Courts disagree about that protection level. Some courts provide absolute protection, while other courts explain that work product "'is afforded almost absolute protection' and . . . 'is discoverable'" only upon a showing of rare and exceptional circumstances." Pace-O-Matic, Inc. v. Eckert Seamans Cherin & Mellott, LLC, Civ. A. No. 1:20-cv-00292, 2021 U.S. Dist. LEXIS 221183, at * 12 (M.D. Pa. Nov. 16, 2021) (citation omitted). In Doe v. George Washington University, 573 F. Supp. 3d 88, 100 (D.D.C. 2021), the court first stated that "[a]s the plaintiffs correctly note, 'pure opinion work product [] is undiscoverable.'" (second alteration in original) (emphasis added). But just a few sentences later, the court explained that "opinion work product[] 'is virtually undiscoverable.'" Id. (alteration in original) (emphasis added) (citation omitted). Of course, those are two very different standards.

It is difficult enough for litigants to determine which standard the pertinent court applies, but the analysis becomes more difficult when a court as prestigious as the District of Columbia District Court articulates contradictory standards in the same paragraph.

- [Privilege Point, 10/5/22]

Courts Apply the "Intensely Practical" Work Product Doctrine: Part II

October 5, 2022

Last week's Privilege Point described a court's rejection of work product protection for a preprinted post-accident form with seemingly helpful boilerplate language about its purpose and a lawyer's involvement — but without any follow through. Courts take a similar "intensely practical" view of an adversary's attempt to overcome a litigant's work product protection by arguing that the adversary had "substantial need" for the work product and the inability to obtain the "substantial equivalent" without "undue hardship."

In Whitmore v. CBK Resort Holdings, LLC, Civ. A. No. 3:21-cv-01606, 2022 U.S. Dist. LEXIS 124360 (M.D. Pa. July 13, 2022), plaintiff suffered injuries while using a simulated wave amusement ride at an indoor water park. Plaintiff sought a park employee's recorded statement about the accident — noting that there was no video of what happened, the employee was the "only eye-witness to this incident," and that the employee refused to speak with plaintiff's agent about what had happened. Id. at *8-9. The court rejected plaintiff's motion, noting (among other things) that plaintiff had not yet deposed the employee. Five days later, the court in Havener v. Gabby G. Fisheries, Inc., 615 F. Supp. 3d 1(D. Mass. 2022), reached the identical result after plaintiff suffered injuries while working on defendant's boat. Because "plaintiff has not yet deposed the witnesses whose statements [defendant's insurance investigator] recorded it is premature to find that plaintiff has demonstrated a substantial need for or lack of a substantial equivalent for the interview materials." Id. at 8-9.

In assessing both litigants' creation of purportedly protected work product material and adversaries' attempt to overcome that protection, courts take a common-sense "intensely practical" approach — frequently letting discovery play out before ordering production of withheld documents.

F. Waiver

- In re Royal Ahold N.V. Securities & ERISA Litigation, 230 F.R.D. 433, 435, 436, 437, 437-38, 438 (D. Md. 2005) (addressing work product protection and waiver Issues relating to White & Case's investigation into accounting irregularities, and preparation of 827 interview memoranda; holding that the work product doctrine did not protect White & Case's investigation, because the client was required to conduct the investigation to satisfy its outside auditor, so it would have undertaken the investigation even without anticipating litigation: "Lead plaintiffs argue persuasively that the principal reason was to satisfy the requirement of Royal Ahold's outside accountants, who would not otherwise complete the work necessary to issue the company's audited 2002 financial statements. In turn, completion of the 2002 audit was critical to Royal Ahold's receipt of [euro] 3.1 billion in financing. Undoubtedly the company was also preparing for litigation, as the first class action was filed February 24, 2003, but the investigation would have been undertaken even without the prospect of preparing a defense to a civil suit." (alteration in original) (footnote omitted); "Accordingly, at least for memoranda of interviews conducted for the purposes described above, Royal Ahold has not met its burden of demonstrating that the work product protection applies."; also holding that Royal Ahold had waived its work product protection by: (1) publicly disclosing the investigation results; and (2) by disclosing 269 of the 827 witness interview memoranda to the federal government; "The plaintiffs present two grounds for finding waiver. First is the public disclosure of the results of the investigations; second is the actual production of the witness material to the Department of Justice ('DOJ') and the Securities and Exchange Commission ('SEC')."; "The public disclosure argument is consistent with the position that the driving force behind the internal investigations was not this litigation but rather the need to satisfy Royal Ahold's accountants, and thereby the SEC, financial institutions, and the investing public, that the identified 'accounting' issues were being addressed and remedied. To this end, the information obtained from the witness interviews, and the conclusions expressed in the internal investigative reports, have largely been made public in the Form 20-F filed with the SEC by Royal Ahold on October 16, 2003. (See Royal Ahold and USF Mem. In Opp'n, Baumstein Decl., Ex 2.) This document discusses in some detail the findings of fraud at USF, the improper consolidation of joint ventures, other accounting irregularities, and the steps the company has taken to address these issues. In addition, several of the key investigative reports have been turned over to the lead plaintiffs. Those reports rely heavily on and indeed in some instances quote from the witness interview memoranda. (See July 22, 2005 Entwistle Aff., Exs. B and C.) Accordingly, testimonial use has been made of material that

might otherwise be protected as work product." (emphases added); "By its public disclosures in the Form 20-F and the production of several of the internal reports to the plaintiffs, Royal Ahold has therefore waived the attorney-client privilege and non-opinion work product protection as to the subject matters discussed in the 20-F and the reports. The remaining question is whether the interview memoranda constitute opinion work product which may yet be protected."; allowing Royal Ahold to redact demonstrable opinion work product from materials related to the public disclosure; "[R]elevant interview memoranda reflecting facts within the subject matter of the 20-F disclosures and the internal investigation reports are not necessarily protected. They must be produced to plaintiffs' counsel, except as to those portions Royal Ahold can specifically demonstrate would reveal counsel's mental impressions and legal theories concerning this litigation."; explaining that Royal Ahold's confidentiality agreement with the federal government did not preclude a work product waiver (even for opinion work product), and ominously pointing to the company's public disclosures intended to "improve its position with investors, financial institutions, and the regulatory agencies"; "While in some circumstances, a confidentiality agreement might be sufficient to protect opinion work product, in this case Royal Ahold already has disclosed information obtained from the witness interviews to the public in its Form 20-F filing with the SEC, and to the plaintiffs through the internal investigation reports. Likewise, to the extent that Royal Ahold offensively has disclosed information pertaining to its internal investigation in order to improve its position with investors, financial institutions, and the regulatory agencies, it also implicitly has waived its right to assert work product privilege as to the underlying memoranda supporting its disclosures. Finally, the language of the confidentiality agreements allows substantial discretion to the SEC and to the U.S. Attorney's office in disclosing any of the interview memoranda to other persons. Under all the circumstances, Royal Ahold has not taken steps to preserve the confidentiality of its opinion work product sufficient to protect the interview memoranda it already has disclosed to the government. These memoranda, if relevant to the claims in the amended consolidated complaint, must be turned over to plaintiffs in their entirety." (emphasis added) (footnote omitted); ordering Royal Ahold to produce "(a) a list of all interview memoranda disclosed to the Department of Justice or the Securities and Exchange Commission; (b) all portions of the interview memoranda disclosed to the Department of Justice or the Securities and Exchange Commission that are relevant to the claims in the consolidated complaint, other than those containing statements of the 36 'blocked witnesses' as to which the government has sought a stay; (c) a list of the other 558 interview memoranda; (d) all portions of the other interview memoranda containing factual information underlying the public disclosures, including the 20-F and the investigative

reports provided to plaintiffs, that are relevant to the claims in the consolidated complaint, unless a specific showing of opinion work product can be made to the court.")

- Egiazaryan v. Zalmayev, 290 F.R.D. 421, 434 (S.D.N.Y. 2013) (analyzing a situation in which a defamation plaintiff's law firm had first worked with and later represented the plaintiff's public relations firm; holding that the PR agency was not within the privilege as the client's agent, and did not have a common interest with the plaintiff client; also holding that the PR agency could not create work product for the non-party, but that disclosing work product to the PR agency did not waive that protection; "Egiazaryan argues that he and BGR [public relations agency] had a common interest in 'protecting [his] legal interests' and 'formulating a legal strategy on [his] behalf' Opp. at 13. But the doctrine does not contemplate that an agent's desire for its principal to win a lawsuit is an interest sufficient to prevent waiver of privilege inasmuch as it does not reflect a common defense or legal strategy. . . . BGR is not a party to any of Egiazaryan's various lawsuits and thus has no need to develop a common litigation strategy in defending those lawsuits. Indeed, it makes no suggestion that it had a need to do so.")

- SEC v. Schroeder, No. C07-03798 JW (HRL), 2009 WL 1125579, at *7, *9, *8, *10, *12 (N.D. Cal. Apr. 27, 2009) (addressing Skadden's representation of a Special Committee in investigating KLA-Tencor Corp.'s options backdating; explaining that the SEC had sued one of KLA's executives, who in turn sought several categories of Skadden's communications and documents; ordering production of Skadden's final interview memoranda that had been given to the SEC, but not its raw material that had never been disclosed outside the law firm; pointing to Skadden affidavits that the raw material represented opinion work product; "[E]ach of the individual Skadden attorneys who participated in the interviews has submitted a declaration attesting that they did not merely record verbatim (or substantially verbatim) the witnesses' statements. Rather, they used their knowledge about the facts and theories of the case to identify and filter which facts and comments by the witnesses were important to the investigation."; explaining that Skadden had only provided an oral report to KLA's outside auditors and that disclosure to the auditor did not waive work product protection -- noting that "disclosures to outside auditors do not have the 'tangible adversarial relationship' requisite for waiver" (emphasis added); "Schroeder seeks the production of documents and communications between the Special Committee and KLA's outside auditors. The only auditor that has been identified here is PwC. Reportedly, PwC has been KLA's auditor since at least 1994 and was KLA's auditor with respect to the restatement of the options in question. (Miller Decl., ¶¶ 23-24). Skadden says that, in connection with that restatement, PwC requested information about the Special Committee's investigation. On October 18, 2006, Skadden made an oral presentation to PwC, including a PowerPoint presentation. No documents were provided to PwC at that time. (Id. ¶ 25). According to Skadden, at PwC's request, Skadden attorneys also later discussed information learned from certain witness interviews, using the Final Interview Memoranda to refresh their recollection. The Final Memoranda were not provided to PwC. (Id.[] Skadden's opposition brief states that Skadden and the Special Committee disclosed certain documents to PwC to assist in the audit of KLA and the restatement of the company's historical financial statements. (Skadden Opp. at 18). On the record presented, it is not clear precisely what those documents are, save the PowerPoint presentation that was made. (See Miller Decl. ¶¶ 23-26)." (emphases added); contrasting the KLA scenario with the Royal Ahold case; "Schroeder's other cited cases do not support the broad waiver he seeks here. In Royal Ahold N.V. Securities Litig., F.R.D. 433 (D. Md. 2005), a securities class action, the defendant company disclosed the details of its internal investigation in a public SEC filing and produced investigative reports (which quoted from witness interview memoranda) to the lead plaintiffs, but nonetheless withheld the majority of the underlying interview memoranda. The court

found that because the company publicly disclosed details of its internal investigation 'in order to improve its position with investors, financial institutions, and the regulatory agencies, it also implicitly has waived its right to assert work product privilege as to the underlying memoranda supporting its disclosures.' Id. at 437. Here, by contrast, Schroeder already has the interview memoranda underlying the Special Committee's disclosure to the SEC."; rejecting the executive's effort to obtain communications between Skadden and its forensic accounting investigation consultant; "Communications between Skadden and its consultant, LECG, need not be produced. The withheld communications reportedly contain 'documents related to methods for document review and retention, discussions regarding how to locate and interpret metadata, a collection of documents that LECG deemed important related to a particular witness, and emails discussing special projects that LECG completed during the investigation.' (Miller Decl. ¶ 34). It is not apparent that any of those communications were disclosed beyond Skadden and LECG. Further, it appears that these communications comprise opinion work product, and Schroeder has not demonstrated a substantial need for any facts that might be contained in them. Schroeder's motion as to these documents is denied." (emphases added); ordering Skadden to produce the factual portion of documents provided to KLA and its law firm Morgan Lewis, but not Skadden's drafts or other documents "that contain or reflect" opinion work product; "With respect to the communications between and among Skadden/the Special Committee and KLA/Morgan Lewis, it is not clear exactly what this universe of documents includes. However, the withheld communications reportedly comprise 'documents reflecting numerous requests for information from the Company and discussions of what Skadden did during the investigation.' (Miller Decl. ¶ 35). This court finds that any factual information contained in these documents should be produced. However, drafts and other documents that contain or reflect an attorney's mental impressions (if any) need not be produced (or, if feasible, such information may be redacted). See Roberts, 254 F.R.D. at 383 (ordering production of attorney notes reflecting communications with the company's board of directors, with opinion work product redacted)." (emphases added); "As for the KLA opinion grant binders, on the record presented, it appears that the option summaries and legal memoranda comprise facts that are inextricably intertwined with opinion work product." (emphasis added)

- [Privilege Point, 8/28/13]

Court Handling the September 11 Terrorist Attack Case Addresses Work Product Waiver

August 28, 2013

One dramatic difference between the work product doctrine and the attorney-client privilege involves the former's more robust protection -- which normally survives disclosure to friendly third parties. Numerous cases hold that disclosure to accountants, investment bankers, consultants, family members, etc. normally waives privilege protection -- but not work product protection.

However, even disclosure to a friendly third party can sometimes waive work product protection - if the disclosure increases the likelihood that an adversary can obtain it. In Ashton v. Al Qaeda Islamic (In re Terrorist Attacks on September 11, 2001), the court acknowledged that plaintiffs' FOIA requests were "clearly" work product, because plaintiffs and their lawyers prepared them in connection with the litigation. 293 F.R.D. 539, 543 (S.D.N.Y. 2013). Plaintiffs also argued that "their sharing of work product information with various government agencies should not lead to any waiver because the government is not their adversary in this or any related proceeding." Id. at 544. The court nevertheless found a waiver - noting that defendants could themselves file FOIA requests, and that "even disclosure to non-adversaries waives work product protection if it materially increases the likelihood that an adversary can gain access to that information." Id.

Although most work product waiver cases involve disclosure to adversaries, even disclosure to non-adversaries can trigger a waiver in certain circumstances.

- [Privilege Point, 1/29/14]

Northern District of California Decision Highlights Wisdom of Analyzing Both Privilege and Work Product Protection

January 29, 2014

The attorney-client privilege provides absolute protection, but can be very difficult to create and easily lost. In contrast, work product protection can be overcome, but survives disclosure to friendly third parties.

In Skynet Electronic Co. v. Flextronics International, Ltd., No. C 12-06317 WHA, 2013 U.S. Dist. LEXIS 176372 (N.D. Cal. Dec. 16, 2013), Skynet disclosed a memorandum prepared by Andrews Kurth to a Taiwanese patent "attorney." Defendants claimed that Skynet waived any privilege protection, because Taiwanese patent "attorneys" are not actually lawyers. Id. at *4. The court found it unnecessary to deal with the privilege issue, because it concluded that the memorandum also deserved work product protection, which survived the disclosure. The court acknowledged that privilege protection "ordinarily ceases to exist if confidentiality is destroyed by voluntary disclosure to a third person." Id. at *9. However, disclosing work product to a third party "does not waive work-product immunity, unless it has substantially increased the opportunity for the adverse party to obtain the information." Id. The court found that disclosure to the Taiwanese patent "attorney did not make it substantially more likely that defendants would discover it." Id. at *10.

Although the attorney-client privilege provides absolute protection, its fragility makes it more vulnerable to waiver. For this and other reasons, clients and their lawyers should also consider the possible applicability of the very different but sometimes more advantageous work product protection.

- Koumoulis v. Independent Financial Marketing Group, Inc., 29 F. Supp. 3d 142, 147-48, 149, 149-50, 149 n.4, 150 (E.D.N.Y. 2014) (upholding a Magistrate Judge's opinion that neither the attorney-client privilege nor the work product doctrine protected communications between a Duane Morris lawyer and a corporate client's human resource executive; finding the attorney-client privilege inapplicable because the advice was primarily business-related and not legal; "This document contains an e-mail from Defendants' outside counsel, Ann Bradley, Esq. [Duane Morris lawyer], setting forth more than a full page of detailed, multi-part instructions on how to deal with Mr. Komoulis's personnel issues, including a recommendation that Defendants call Mr. Komoulis 'to express concern and disappointment, identify the fundamental problem and find out who he trusts to advise him,' and goes so far as to prescribe detailed instructions to be given to Plaintiff on how he should conduct himself with Defendants' customers. . . . This advice plainly is not legal advice, but rather human resources advice on personnel management and customer relations." (emphasis added); finding the work product doctrine inapplicable for a number of reasons; "Based on its review of the Submitted Documents, the Court concurs with Judge Scanlon's assessment that the communications between Defendants and outside counsel related to human resources issues, e.g., the internal investigation related to Mr. Komoulis and responding to his complaints. Such advice would have been provided even absent the specter of litigation, and therefore do [sic] not constitute litigation-related work product."; "Defendants concede that 'LPL [defendant] ha[d] an obligation to investigate' Koumoulis's complaints about alleged discrimination and retaliation,' regardless of the potential for litigation. . . . The alleged motivation for which these documents were sought is not enough to overcome what appears on the face of the documents themselves." (second alteration in original) (footnote omitted); "[E]ven assuming the internal investigation was conducted in anticipation of litigation, otherwise work-product privileged communications relating to the investigation would still be discoverable once Defendants assert a Faragher/ Ellerth [Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998)] defense. Indeed, Defendants acknowledged as much when they disclosed their in-house attorneys' notes and correspondence regarding the investigation. Defendants offer no justification for treating their outside counsel's communications regarding the investigation differently than their in-house counsel's communications on that topic."; "Defendants acknowledge that this advice was intended, in part, to prevent Plaintiff from bringing claims of retaliation. . . . Legal advice given for the purpose of preventing litigation is different than advice given in an anticipation of litigation." (emphasis added); "[S]imply declaring that something is prepared in 'anticipation of litigation' does not necessarily make it so. . . . [T]he

contents of the communications directly contradict Defendants' privilege claim. These communications, on their face, relate to advice given by Ms. Bradley on how to prevent a lawsuit, not on how to defend one."
(emphasis added)).

- United States v. Baker, Cause No. A-13-CR-346-SS, 2014 U.S. Dist. LEXIS 22528, at *5 (W.D. Tex. Feb. 21, 2014) (holding that disclosing work product to auditor PWC did not waive the work product protection; "ArthroCare's [non-party] attorneys have apparently communicated some substance from some interviews to outside auditors at PricewaterhouseCoopers, but such disclosure 'does not necessarily undercut the adversary process' and therefore does not waive the protections of the work-product doctrine." (citation omitted)).

- [Privilege Point, 7/29/15]

Does Sharing Work Product with the Government Always Waive that Protection?

July 29, 2015

For decades, companies trying to cooperate with the government have hoped for a change in the general rule that disclosing privileged communications and/or work product to the government waives those protections. In nearly every case, disclosing attorney-client privileged communications to the government waives that fragile protection. But in the work product context, courts sometimes take a more forgiving view.

In RMS of Wisconsin, Inc. v. Shea-Kiewit Joint Venture, Case No. 13-CV-1071, 2015 U.S. Dist. LEXIS 74425, at *3 (E.D. Wis. June 9, 2015), plaintiff RMS disclosed work product to the FBI, "in cooperation with the FBI's investigation of the defendants." The court contrasted this situation with settings where such a disclosure generally waives work product protection: when the disclosing company and the government "are adversaries," and when the company "voluntarily submitted the information to a government agency to incite it to attack the [company's] adversary." Id. The court found that RMS did not waive its work product protection - because the company's "interests were aligned" with the FBI, which was "pursuing an investigation of the defendants on the same issue that RMS is now litigating in this suit." Id. at *4.

In most situations, corporations dealing with the government must treat it as an adversary. But in certain very limited circumstances, corporations and the government share a sufficiently common interest that the former can disclose work product to the latter without waiving that robust protection.

- [Privilege Point, 11/23/16]

Plaintiff's Live-In Boyfriend was Outside Privilege Protection, but Inside Work Product Protection: Part I

November 23, 2016

Nearly every court finds that the only client agents/consultants inside privilege protection are those necessary for the communications between the client and her lawyer. But the work product doctrine casts a wider protective net.

In Harrington v. Bergen County, A. No. 2:14-cv-05764-SRC-CLW, 2016 U.S. Dist. LEXIS 124727 (D.N.J. Sept. 13, 2016), a civil rights plaintiff suing her former employer claimed that her live-in boyfriend was inside privilege protection – so that his presence during her communications with her lawyer did not destroy the privilege. The court acknowledged that plaintiff had been involuntarily committed to a mental hospital at the pertinent time, and that her boyfriend "has provided meaningful assistance" to her. Id. at *11. But the court was "not convinced that disclosure to [her boyfriend] was necessary or essential for Plaintiff to obtain informed legal advice." Id. The court noted that the "Plaintiff offers no medical or other expert opinion" about her inability to communicate with her lawyer without her boyfriend present. Id. at *11-12. The court stripped away privilege protection from communications in her boyfriend's presence, or later shared with her boyfriend.

Most clients (both individual and corporate) do not appreciate the miniscule range for their agents/consultants to be within privilege protection. Next week's Privilege Point will address the court's work product analysis.

- [Privilege Point, 11/30/16]

Plaintiff's Live-In Boyfriend was Outside Privilege Protection, but Inside Work Product Protection: Part II

November 30, 2016

Last week's Privilege Point described a court's acknowledgment that a mentally ill plaintiff's live-in boyfriend had provided "meaningful assistance" to the plaintiff in dealing with her lawyer, but was not "necessary or essential" for the plaintiff to obtain her lawyer's advice. Harrington v. Bergen Cnty., A. No. 2:14-cv-05764-SRC-CLW, 2016 U.S. Dist. LEXIS 124727, at *11 (D.N.J. Sept. 13, 2016). This meant that communications in her boyfriend's presence were not privileged, and that any privileged communication later shared with her boyfriend lost privilege protection.

The court then turned to the work product analysis – and dealt with two related issues. First, the court correctly held that any work product that was "transmitted to or shared with" the boyfriend did not lose that separate protection. Id. at *15. As the court explained, "there is no indication of disclosure to adversaries," so work product protection remained. Id. Second, the court incorrectly held that "the work product doctrine does not protect documents, emails, or other items created by" the boyfriend – because "Plaintiff contends that [her boyfriend] served as her agent or representative, as opposed to" her lawyer's agent. Id. at *13, *15. It is impossible to square this conclusion with the work product rule itself – which on its face protects documents (motivated by litigation) created "by or for another party or its representative." Id. at *7 (quoting Fed. R. Civ. P. 26(b)(3)(A)). The boyfriend's documents should have deserved work product protection either because (1) the documents were prepared "for" the plaintiff, or (2) "by" her "representative."

Lawyers and their clients should keep in mind the dramatic differences between the attorney-client privilege and the work product doctrine. In this case, the court correctly applied one privilege principle (under the majority approach) and one work product principle — but incorrectly applied another work product principle (which varied from the rule language itself). Perhaps the plaintiff can take solace in the words of Meatloaf's song: "Now don't be sad, 'cause two out of three ain't bad."

- [Privilege Point, 3/29/17]

Circuit Court Affirms Key Difference Between Privilege and Work Product Protections

March 29, 2017

Disclosing privileged communications to third parties generally waives that fragile protection, even if the third parties are friendly. In contrast, disclosing work product to third parties waives that more robust protection only if it increases the chance of the disclosed documents "falling into enemy hands."

In In re Grand Jury Matter #3, 847 F.3d 157 (3d Cir. 2017) (per curiam), the Third Circuit affirmed these key principles in a common context – disclosure to an accountant. The court held that although the subject of a criminal investigation "waived the attorney-client privilege by forwarding [a privileged and work product-protected] email to his accountant, the document still retained its work-product status." Id. at 165.

These dramatically different waiver implications apply when clients disclose documents deserving both protections to other friendly third parties -- such as public relations consultants, banks, business advisors, family members, etc.

- [Privilege Point, 8/2/17]

Court Addresses Waiver Implications of a Target's Due Diligence Disclosures to its Ultimate Acquirer

August 2, 2017

Acquiring companies predictably seek information from their acquisition targets, such as descriptions of the targets' ongoing litigation. During their due diligence, the acquirer may demand the target's documents or communications protected by the attorney-client privilege, the work product doctrine, or both.

In RKF Retail Holdings, LLC v. Tropicana Las Vegas, Inc., Case Nos. 2:14-cv-01232- & 2:15-cv-01446-APG-GWF, 2017 U.S. Dist. LEXIS 80436 (D. Nev. May 25, 2017), plaintiff RKF sued Tropicana in 2014, alleging that Tropicana wrongfully terminated an exclusive agency contract. In 2015, Penn Gambling acquired Tropicana. RKF then sought discovery of "information about [its] lawsuits" that Tropicana disclosed to Penn Gaming before the acquisition. Id. at *5. The court found that Tropicana's due diligence disclosures waived privilege protection but not work product protection. In finding a privilege waiver, the court rejected Tropicana's argument that it shared a "common interest" with acquirer Penn Gaming -- noting that the "majority of courts have rejected application of the [common interest] doctrine where the disclosure was made for business purposes rather than for the purpose of pursuing a common legal effort." Id. at *10. The court concluded that "Tropicana provided information about the lawsuit so that Penn Gaming could make a business decision whether to proceed with the acquisition." Id. at *14. In contrast, the court found that Tropicana did not waive its work product protection by disclosing work product to Penn Gaming during the due diligence process. The court correctly noted that unlike the fragile privilege protection, work product protection "is not waived if the disclosing party has a reasonable basis to believe that the recipient will keep the disclosed materials confidential and not reveal them to the disclosing party's adversary." Id. at *17. The court concluded that Penn Gaming had a vital interest in preserving as confidential Tropicana's disclosure about RKF's suit because Penn Gaming "would, directly or indirectly, assume Tropicana's potential liability if the merger went through." Id. at *18.

Other courts have reached the identical two-part conclusion in addressing pre-acquisition due diligence disclosures – which dramatically highlights the contrast between the fragile privilege protection and the robust work product protection.

- In re Application of Financialright GmbH, No. 17-mc-105 (DAB), 2017 U.S. Dist. LEXIS 107778, at *4-5, *15, *15-16, *16, *16-17 (S.D.N.Y. June 23, 2017) (addressing plaintiffs' efforts to discover documents related to Jones Day's investigation into the Volkswagen "emissions scandal"; finding that attorney-client privilege and the work product doctrine protected documents related to the investigation, and that Jones Day did not waive either protection by disclosing protected documents to the government, pursuant to an agreement of which DOJ agreed to keep the documents confidential except if it decided in its "sole discretion" that it could disclose the documents to discharge its duties; "One issue here is whether Volkswagen waived any privilege covering the documents in question. Jones Day says that it 'has never submitted its interview notes to VW or to the DoJ, or shared the content with the public, and it has not even commented publicly on its representation of [Volkswagen]'. . . In the course of cooperating with the DOJ criminal investigation, Jones Day entered into an agreement with the DOJ 'to preserve VW's claims of attorney-client privilege and work product protection for information disclosed to DOJ in the course of that cooperation.'. . . The agreement states that 'VW, through its counsel Jones Day, intends to provide DOJ oral briefings regarding its investigation, and may furnish additional documents or other information to DOJ in connection with such oral briefings.'. . . The agreement further says that 'to the extent any [privileged materials] are provided to DOJ pursuant to this agreement, VW does not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege.' (Id.) Under the agreement, DOJ was to keep any privileged materials confidential 'except to the extent that [it] determine[d] in its sole discretion that disclosure would be in furtherance of [its] discharge of its duties and responsibilities or is otherwise required by law.'. . . Applicants point to a press release which states that the Volkswagen 'Supervisory Board directed the law firm Jones Day to share all findings of its independent investigation of the diesel matter with the DOJ. The Statement of Facts draws upon Day's extensive work, as well as on evidence developed by the DOJ.'" (alterations in original) (emphases added); "The Second Circuit, however, has declined to adopt a 'rigid rule' in 'situations in which [a government agency] and the disclosing party have entered into an explicit agreement that the [agency] will maintain the confidentiality of the disclosed materials.' Courts in this Circuit have varied in their approaches to such a situation and have held that waiver should be determined on a case-by-case basis." (alterations in original) (emphasis added); "Jones Day, in assisting Volkswagen's cooperation with authorities, entered into a non-waiver agreement regarding privileged documents. The agreement states that while Jones Day will provide oral briefings and additional documents in connection with its VW investigation, 'to the extent any [privileged

materials] are provided to DOJ pursuant to this agreement, VW does not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege." (alteration in original); "The Court here is swayed by the cases holding that disclosures made pursuant to non-waiver agreements do not waive the protections of the work-product doctrine or attorney-client privilege, recognizing, among other factors the 'strong public interest in encouraging disclosure and cooperation with law enforcement agencies; [and that] violating a cooperating party's confidentiality expectations jeopardizes this public interest." (alteration in original) (emphasis added); "Applicants point to the provision stating that DOJ was to keep any privileged materials confidential 'except to the extent that [it] determine[d] in its sole discretion that disclosure would be in furtherance of [its] discretion of its duties and responsibilities or is otherwise required by law.' . . . That the DOJ has such discretion does not change the Court's determination. While the agreement gives DOJ discretion, that discretion is cabined by the requirement that any disclosure would be in furtherance of it duties or otherwise required by law. Furthermore, courts making a selective-waiver determination have still held that there was no waiver when nearly identical discretionary provisions were at issue. E.g., In re Symbol Techs., 2016 U.S. Dist. LEXIS 139200, 2016 WL 8377036, at *14." (alterations in original) (emphases added)).

- U.S. SEC v. Herrera, 324 F.R.D. 258, 265 (S.D. Fla. 2017) (analyzing the work product waiver impact of Morgan Lewis's PowerPoint presentation and “oral downloads” to the SEC of the results of its investigation into inventory accounting errors in a client's Brazilian subsidiary; concluding that Morgan Lewis's oral download to the SEC of witness interview content waived work product protection, and triggered a subject matter waiver as to those witnesses; also concluding that Morgan Lewis's PowerPoint presentation to the SEC only disclosed historical facts, and therefore did not deserve work product protection – so its disclosure to the government did not trigger a waiver; “Defendants contend that ML made other oral disclosures of work-product information to the SEC, above and beyond the oral downloads of the 12 interviews. The Undersigned cannot reach any conclusions about further disclosures unless and until ML provides additional clarification about what was disclosed. Defendants contend that the ML attorneys took notes of the discussions they had with the SEC and perhaps with the Department of Justice. Defendants request that the Undersigned review in camera ML's attorneys' notes of an October 29, 2013 meeting. ML does not oppose this request. . . . But the Undersigned is unsure about whether ML attorneys met with the SEC and/or the Department of Justice on days other than [sic] October 29, 2013.”; “Therefore, ML shall, within seven days from this Order, file under seal a copy of all attorney notes discussing or reflecting what information was disclosed to the SEC or the Department of Justice during meetings (or otherwise).”)

- In re GM LLC Ignition Switch Litig., No. 14-MD-2543 (JMF), 2018 U.S. Dist. LEXIS 14851, at *70-71 (S.D.N.Y. Jan. 29, 2018) (holding that a plaintiff lawyer's questionnaire and prospective clients' responses did not deserve privilege protection, but that emails about the lawyer's advertisements deserved work product protection; "Lead Counsel argue that the E-mails [e-mails between Lead Counsel and TCA (its website host) regarding the advertising campaign ('the 'E-mails') are protected by the work-product doctrine, which 'provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial.' . . . New GM only half-heartedly argues otherwise . . . which is wise as the communications were created by Hagens Berman or TCA (at Hagens Berman's request) as part of counsel's efforts to find named plaintiffs 'in anticipation of litigation'. Instead, New GM's principal argument is that the protections of the doctrine were waived because there were ninety-four e-mails between TCA and Lead Counsel and TCA disclosed ninety of them to New GM in responding to an earlier subpoena (a response that was allegedly made '[i]n coordination with Lead Counsel'). That may well be so, but it is ultimately beside the point because disclosure of some materials results in a subject matter waiver of 'related, protected' materials 'only in those "unusual situations in which fairness requires a further disclosure . . . in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. "' In re Gen. Motors LLC Ignition Switch Litig., 80 F. Supp. 3d 521, 533 (S.D.N.Y. 2015) (quoting Fed. R. Evid. 502, Committee Notes). Here, there is no suggestion, let alone evidence, that the partial disclosure — which was made by a third party, not by Plaintiffs or Lead Counsel — was done selectively or strategically so that Plaintiffs might gain an unfair advantage over New GM. The Court therefore finds that TCA's earlier disclosure does not call for production of the remaining four E-mails." (alteration in original) (internal citations omitted) (emphases added)).

- [Privilege Point, 1/16/19]

State Courts Address Outsiders' Privilege Impact: Part III

January 16, 2019

Last week's Privilege Point discussed a somewhat surprising Colorado Supreme Court decision holding that a stroke victim's parents' presence during a meeting with her lawyer aborted privilege protection. Fox v. Alfini, 432 P.3d 596 (Colo. 2018). Significantly, plaintiff's lawyer initially missed three arguments supporting protection claims -- two of which would almost surely have been winners.

After the lower court denied her privilege claim, plaintiff Fox moved for reconsideration. In seeking reconsideration, her lawyer argued "for the first time" that: (1) Fox's "parents were prospective clients" and therefore inside privilege protection; (2) Fox's "parents were her agents and shared common legal interests with her"; and (3) "the [initial consultation] recording was protected under the work-product doctrine and that defendants had not demonstrated substantial need to discover that recording." Id. at 599. The lower court rejected these additional arguments, noting that they had not been raised in earlier pleadings or at the initial hearing. The Colorado Supreme Court upheld the lower court's refusal "to consider arguments that Fox had raised for the first time in her motion for reconsideration." Id. at 603-04.

This unfortunate result highlights the need to assess all privilege protection grounds, and especially consider the dramatically different work product doctrine protection. In this case: (1) if the lawyer had jointly represented (or was considering jointly representing) Fox and her parents, the privilege would have protected their communications; and (2) even if not, the parents' presence presumably would not have destroyed the robust work product protection -- and they probably could even have created protected work product.

- [Privilege Point, 8/28/19]

How Does The Subject Matter Waiver Doctrine Apply In The Work Product Context?

August 28, 2019

Many lawyers fear that disclosing attorney-client privileged communications might trigger a subject matter waiver – requiring disclosure of additional related privileged communications. Fortunately, that risk has diminished through common law developments and Federal Rule of Evidence 502. The former generally limits subject matter waiver to disclosures in a judicial setting, and the latter similarly limits subject matter waiver to the intentional use of privileged communications in litigation to paint a misleading picture.

The subject matter waiver doctrine has always applied differently in the work product context. Litigants prepare much of their work product intending to ultimately disclose it in discovery or at trial. Such disclosures obviously do not trigger a subject matter waiver requiring additional disclosures. In Doe v. Baylor University, the court adopted the majority view that "[w]aiver is more narrow in the context of work product than in the context of attorney-client privilege." No. 6:16-CV-173-RP, 6:17-CV-228-RP, 6:17-CV-236-RP, 2019 U.S. Dist. LEXIS 99362, at *34 (W.D. Tex. June 7, 2019). The court wisely explained that "[d]isclosure typically only waives work product protection with respect to any document actually disclosed" and that "[s]ubject matter waiver is generally limited to instances where the quality and substance of an attorney's work product have been directly placed at issue in the litigation by the party asserting the privilege." Id. at *35-36.

Litigants normally should not worry about subject matter waiver risks when disclosing work product, in contrast to the diminishing but still frightening aspect of subject matter waiver in the attorney-client privilege context.

- Bousamra v. Excela Health, 210 A.3d 967, 969, 985 (Pa. 2019) (holding that a public relations consultant was not within the Kovel Doctrine, and was therefore outside privilege protection; "In this appeal by allowance, we consider whether Excela Health waived the attorney work product doctrine or the attorney-client privilege by forwarding an email from outside counsel to its public relations and crisis management consultant, Jarrard, Phillips, Cate & Hancock. We conclude that the attorney work product doctrine is not waived by disclosure unless the alleged work product is disclosed to an adversary or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it. Accordingly, we remand this matter to the trial court for fact finding and application of the newly articulated work product waiver analysis. Further, we affirm the Superior Court's finding that Excela waived the attorney-client privilege"; "We find this reasoning unpersuasive. In both Kovel and Noll, the respective third parties--an accountant and an accident reconstruction expert--were privy to confidential information as a necessary means of improving the comprehension between the lawyer and client which facilitated the lawyer's ability to provide legal advice. In Kovel, the accountant's presence and opinion were necessary for the lawyer to understand the client's tax story, a prerequisite to furnishing legal advice"; "In both cases, the critical fact is that the third-party's presence was either indispensable to the lawyer giving legal advice or facilitated the lawyer's ability to give legal advice to the client. That is not the case here. Fedele sending the email in question to Cate, after it was sent to him, did not retroactively assist either outside counsel or Fedele in providing legal advice to Excela. In fact, the email did not solicit advice or input from Cate, nor did the attorney send it to Cate. Thus, this case is not akin to Kovel or Noll, where the third-party's receipt of information facilitated or improved the lawyer's ability to provide legal advice.")

- **[Privilege Point, 9/18/19]**

Court Addresses Work Product Waiver Issue Few Have Tackled: Part I

September 18, 2019

All or nearly all courts agree that disclosing work product to a non-adverse third party does not waive that robust protection – in contrast to the fragile attorney-client privilege. But what if that third party discloses the work product to the adversary? Should that disclosure: (1) be treated as an unauthorized disclosure, which does not waive the original protection (such as the improper disclosure of purloined privileged communications); or (2) reflect back on the original holder's disclosure to the once-friendly third party (which might cause a waiver)? Remarkably few courts have dealt with this issue.

In City of Almaty v. Ablyazov, the court held that disclosing work product to a non-party witness waived the work product protection because the witness had "never agreed to maintain any information as confidential," so the holder never had any assurance that the information it shared would not be disclosed to adversaries. No. 15-CV-05345 (AJN) (KHP), 2019 U.S. Dist. LEXIS 111607, at *25 (S.D.N.Y. July 3, 2019). The court quoted an earlier opinion focusing on the original disclosure: "[T]he question is not whether the non-adversary has actually revealed the materials to an adversary . . . , but whether, at the time of the disclosure, the disclosing party had reason to believe that further disclosure, to its party-opponent, would be 'likely.'" Hedgeserv Ltd. v. SunGard Sys. Int'l Inc., No. 16-cv-5617 (LGS) (BCM), 2018 U.S. Dist. LEXIS 202535, at *6 (S.D.N.Y. Nov. 20, 2018). Id. at *27-28 (alterations in original) (citation omitted). Given the lack of any confidentiality agreement or assurance from the non-party witness, the City of Almaty court found a waiver.

The City of Almaty case did not deal with the more interesting question – whether the same result would have been appropriate if the non-party witness had agreed upon but later reneged on a confidentiality agreement. Next week's Privilege Point addresses that issue.

- **[Privilege Point, 9/25/19]**

Court Addresses Work Product Waiver Issue Few Have Tackled: Part II

September 25, 2019

Last week's Privilege Point described a decision holding that a litigant waived its work product protection by disclosing work product to a third party witness who had not agreed to keep it confidential. City of Almaty v. Ablyazov, No. 15-CV-05345 (AJN) (KHP), 2019 U.S. Dist. LEXIS 111607 (S.D.N.Y. July 3, 2019). That opinion cited a 2018 Southern District of New York case that assessed whether the original disclosing party had "reason to believe" that the recipient would be "likely" to disclose work product to an adversary, even if the recipient did not do so. Hedgeserv Ltd. v. SunGard Sys. Int'l Inc., No. 16-cv-5617 (LGS) (BCM), 2018 U.S. Dist. LEXIS 202535, at *6 (S.D.N.Y. Nov. 20, 2018).

An even earlier Southern District of New York case seemed to take the appropriate approach. In United States v. Ghavami, 882 F. Supp. 2d 532 (S.D.N.Y. 2012), prosecutors wanted to access a government cooperator's tape recordings of others in a criminal bid-rigging case. The taped conversation included the other participants' work product. The court explained that the risk of the work product falling into the adversary's hands "must be evaluated from the viewpoint of the party seeking to take advantage of the doctrine." Id. at 541. The court acknowledged that there "is always some danger that the recipient of work product is, or will later become, an informant." But the court wisely held that such a possibility "cannot constitute a 'substantial risk' that the work product would be disclosed to the adversary." Id. The court denied the government's motion to access the work product-protected portion of the recordings.

It would seem that the correct analysis should examine the work product holder's original disclosure to a third party the holder reasonably believed to be friendly. If the friendly third party later turns on the holder and further discloses the work product to an adversary, it should be treated the same way courts treat a theft and later disclosure of fragile privileged communications. Although sometimes there is no way to "put the toothpaste back in the tube," courts should find there has not been a waiver – and prohibit use of the improperly disclosed work product as evidence.

- [Privilege Point, 11/4/20]

Court Applies the General Rule Finding a Privilege Waiver When Clients Disclose Privileged Communications to Public Relations Consultants

November 4, 2020

One of the most dangerous misperceptions among corporate clients is that disclosing privileged communications to such friendly outsiders as public relations consultants does not waive privilege protection as long as there is a confidentiality agreement in place. A steady stream of cases have rejected that approach, yet large corporate clients and sophisticated law firms continue to rely on that mistaken view.

In United States ex rel. Wollman v. Massachusetts General Hospital, Inc., 475 F. Supp. 3d 45 (D. Mass. 2020), Mass. General Hospital hired a former U.S. Attorney and his law firm Cooley, LLP, to investigate allegations that Mass. General fraudulently billed Medicare and Medicaid. The government sought the investigation report, and Mass. General predictably resisted. Unsurprisingly, Mass. General first claimed work product, but the court rejected that assertion: “there is no indication in the engagement letter, the Report itself, or the employee interviews that the Investigation was intended to relate to the [eventual litigation].” Id. at 60-61. The court then turned to Mass. General’s privilege claim – noting that Mass. General had disclosed the Report to public relations consultant Rasky “to assist in responding to an investigation by the [newspaper] Boston Globe Spotlight Team into the practice of overlapping surgeries.” Id. at 65-66. The court bluntly concluded that “the production of the Report to Rasky waived the attorney-client privilege.” Id. at 68. But the court found that because Mass. General and other defendants “have not sought to use the . . . Report in any fashion, much less to gain an adversarial advantage,” the waiver did not trigger a subject matter waiver. Id. at 69. The court explained that “[w]hile an argument can be made that they used the Report as a ‘sword and shield’ in their dealings with the press, the distinction between use in a judicial and nonjudicial setting is significant.” Id.

All of these conclusions follow generally accepted principles. It is remarkable that one of America’s great hospitals, a former U.S. Attorney, and a prestigious law firm would be involved in such a disclosure.

- [Privilege Point, 6/16/21]

Court Addresses Privilege and Work Product Implications of Due Diligence in Corporate Acquisition – and Probably Gets It Wrong

June 16, 2021

An acquiring corporation normally conducts due diligence before acquiring an acquisition target. Not surprisingly, the acquiring corporation might seek privileged or work product protected documents or communications during such due diligence. At this due diligence stage, the acquiring company and the target are adversaries – so how do they avoid waiving those protections?

In Finjan, LLC v. ESET, LLC, Case No. 17-cv-183-CAB-BGS, 2021 U.S. Dist. LEXIS 75954 (S.D. Cal. Apr. 20, 2021), the court dealt with plaintiff Finjan's patent infringement case against the defendant. The defendant sought patent-related documents Finjan had earlier disclosed to its acquirer Fortress during Fortress' due diligence. Finjan resisted the discovery, noting that as part of "Fortress' due diligence for this acquisition . . . Fortress and Finjan executed a non-disclosure agreement ('NDA') and common interest agreement" — thus precluding a waiver and allowing Finjan to successfully resist defendant's discovery. *Id.* at *3. The court dodged the issue, explaining that it could not decide the waiver issue without knowing what documents and communications Finjan had disclosed to Fortress during the due diligence.

We may never know what happens, but the court seems to be heading in the wrong direction. Only a handful of courts recognize the common interest doctrine's applicability in the absence of anticipated litigation. The majority of courts addressing disclosures during due diligence: (1) find a waiver of any attorney-client privilege protection (despite an NDA or a common interest agreement); and (2) find that a target's due diligence disclosure of work product to the acquirer does not waive that more robust work product protection, because the acquirer and the target share a common interest in keeping any disclosed documents away from the adversary in litigation or anticipated litigation that the acquirer might inherit. Transactional lawyers should not be lulled into believing that they can contractually avoid the harsh waiver principles applicable to privileged communications that do not also deserve the less fragile work product protection.

- [Privilege Point, 12/15/21]

Bad News and Good News About Communicating With Outside Auditors

December 15, 2021

One key distinction between attorney-client privilege protection and work product doctrine protection is their fragility. Disclosure to non-adverse third parties normally waives the former, but not the latter.

In Breuder v. Board of Trustees, No. 15 CV 9323, 2021 U.S. Dist. LEXIS 179680 (N.D. Ill. Sept. 21, 2021), the court addressed (among other things) a college's disclosure of protected communications to its outside auditor. After noting that the college's "Board itself concedes [that] disclosure of privileged information to an independent auditor typically results in a waiver of the attorney-client privilege," the court applied the universally-accepted principle that "this disclosure does not waive the [college's] work-product privilege unless the disclosure was made 'in a manner which substantially increases the opportunity for potential adversaries to obtain the information.'" Id. at *25-26. The court pointed to the plaintiff's failure to argue that the college's disclosure to its independent auditor, "was made in such a manner," or "object to the [college's] work product designations." Id. at *26.

This basic principle applies to other non-adverse third parties, such as public relations consultants and other third parties assisting corporations. An explicit confidentiality agreement is always best. But the robust work product protection normally survives disclosure even without that – if the disclosing owner reasonably expects that the recipient will keep it confidential.

- United States ex rel. Mitchell v. CIT Bank, N.A., Civ. A. No. 4:14-CV-00833, 2021 U.S. Dist. LEXIS 185751, at *19-20 (E.D. Tex. Sept. 28, 2021) (holding that CIT did not waive work product protection by disclosing work product to an independent contractor; “Here, Mitchell has the burden of proving waiver, yet he has shown neither that Navigant was an adversary of CIT nor that sharing documents with Navigant increased the likelihood that an adversary would come into possession of the material. Indeed, Mitchell hardly addresses waiver in this context. Even so, according to the Statement of Work, Navigant was an independent contractor—not a litigation adversary—hired to identify any instances of improper foreclosures. Further, Navigant was required to keep CIT's information confidential. This confidentiality provision precluded any significant risk of disclosure to a potential litigation adversary. While the confidentiality provision included exceptions for disclosures required by the OCC and necessary for Navigant to perform its role, Mitchell has not shown how these exceptions increased the likelihood that a litigation adversary would come into possession of the material.” (internal citations omitted))

- [Privilege Point, 2/16/22]

Does Disclosing Work Product Trigger a Subject Matter Waiver?

February 16, 2022

Disclosing attorney-client privileged communications can trigger a subject matter waiver if made in a judicial setting to gain some advantage. This subject matter waiver danger reflects the classic "sword-shield" analogy with which lawyers are familiar.

But disclosing protected work product involves an entirely different analysis. After all, litigants prepare work product intending to eventually disclose much of it: interrogatory answers; witness lists; opening statements; etc. All courts agree that disclosing work product does not automatically trigger a broad subject matter waiver. In Brasfield & Gorrie, LLC v. Hirschfeld Steel Group LP, No. 2:20-cv-00984-LSC, 2021 U.S. Dist. LEXIS 224903 (N.D. Ala. Nov. 22, 2021), the court cited an earlier decision in explaining that "[d]ue to the sensitive nature of work-product materials and the policy behind maintaining their secrecy, generally speaking, when the work product protection has been waived, it is 'limited to the information actually disclosed, not subject matter waiver.'" Id. at *10 (citation omitted). The court also quoted Professor James Wm. Moore: "[a] waiver of work-product protection encompasses only the items actually disclosed." Id. at *10-11 (citing 6 James. W. Moore, et al., Moore's Federal Practice § 26.70[6][c]). The court also articulated even more forcefully this basic doctrine as it applies to opinion work product: "subject-matter waiver simply does not apply to opinion work product documents." Id. at *12.

Lawyers should keep in mind this critical and favorable distinction between the robust work product doctrine protection and the more fragile attorney-client privilege protection.

- Sweet v. City of Mesa, No. CV-17-001520-PHX-GMS, 2022 U.S. Dist. LEXIS 19848, at *16-17 (D. Ariz. Feb. 3, 2022) (holding that plaintiff waived her privilege protection but not her work product protection by disclosing communications to her mother, who assisted plaintiff in her lawsuit; “Since, unlike the attorney-client privilege, disclosure to a third party only waives the protections of the work product doctrine when the third party is either an adversary or when disclosure substantially increases the likelihood that an adversary will obtain the information, disclosure to Marcie Sweet does not amount to waiver. Sanmina, 968 F.3d at 1121. The communications reviewed by the Court make clear that Marcie is committed to vindicating her daughter's rights. Therefore, she is not adverse to Plaintiff in this litigation. Nor was disclosure to Marcie likely to substantially increase the opportunities for adversaries to obtain the information. Marcie's deep involvement with the preparation of Plaintiff's case and status as Plaintiff's mother suggests that Plaintiff and her attorneys had a reasonable expectation that Marcie would keep their communications and documents confidential. See id. (finding a disclosing party's ‘reasonable expectation of confidentiality’ to be ‘highly relevant and often dispositive’ in finding waiver of the work product doctrine); United States v. Stewart, 287 F. Supp. 2d 461, 469 (S.D.N.Y. 2003) (finding disclosure of protected work product to criminal defendant's daughter did not amount to waiver because defendant did not ‘substantially increase the risk that the Government would gain access to materials prepared in anticipation of litigation’). Finding no waiver, the Court will address each of the nine emails in turn.” (footnote omitted))

- [Privilege Point, 8/10/22]

If a Court Finds Attorney-Client Privilege Waiver, Must It Also Consider Work Product Waiver?

August 10, 2022

The attorney-client privilege provides absolute protection, but is very fragile. Work product doctrine protection does not provide absolute protection (fact work product protection can be overcome), but is robust. Of course, documents and communications can be protected by both protections, one but not the other, or neither. Courts normally must assess each asserted protection's applicability, and (if the circumstances require it) each protection's separate waiver implications.

In Sure Fit Home Products, LLC v. Maytex Mills, Inc., No. 21 Civ. 2169 (LGS) (GWG), 2022 U.S. Dist. LEXIS 90833, at *1 (S.D.N.Y. May 20, 2022) (as corrected July 24, 2022), the Southern District of New York (Judge Gorenstein) explained that "[b]ecause we conclude that plaintiffs waived any claim to privilege over these documents . . . we need not reach the question of whether the exhibits would otherwise enjoy work product protection." The court's conclusion made sense in this case, because plaintiffs "produced [the protected documents] to their adversaries in two separate matters." Id. at *5. But different circumstances would have required a different analysis. If plaintiffs had disclosed the documents to friendly third parties rather than to adversaries, that disclosure might have waived the fragile privilege protection but not the more robust work product protection. In that situation, the court must assess possible work product protection, which might have survived the disclosure.

Lawyers should always consider both privilege and work product protection when analyzing withholding documents during discovery and when assessing waiver implications.

- Rodriguez v. Seabreeze Jetlev LLC, 620 F. Supp. 3d 1009, 10213 (N.D. Cal. 2022) (analyzing privilege and work product issues in a wrongful death case; concluding that the common interest doctrine protected communications among estate beneficiaries and the plaintiff who was entitled under maritime law to pursue the litigation, but that non-beneficiaries did not have such a common interest even though they had a financial interest in maximizing the recovery; “Regarding material protected under the work-product doctrine that was shared with the non-party witnesses, the protection over this material was not waived when the material was communicated to any of the non-party witnesses because they are not adversaries of the plaintiff. Pulse Eng'g, Inc., 2009 U.S. Dist. LEXIS 92971, 2009 WL 3234177, at *4 ([T]he courts generally find a waiver of the work product privilege only if the disclosure substantially increases the opportunity for potential adversaries to obtain the information.’) (cleaned up). Thus, communications discussing the legal theories or legal strategy between the non-party witnesses and the plaintiff, plaintiff’s counsel, or Mr. Pillsbury remain protected.” (alteration in original)).

- [Privilege Point, 2/8/23]

What Is the Scope of a Work Product Waiver in a Willful Patent Infringement Context?

February 8, 2023

Litigants accused of willful patent infringement sometimes rely on an "advice of counsel" defense. Interestingly, courts have recognized a distinction between such a defense in the privilege and the work product contexts.

In SB IP Holdings LLC v. Vivint, Inc., the court applied the majority view of the defense on the attorney-client privilege side: the "waiver extends to all communications relating to the same subject matter – that is, all communications relating to [the pertinent] Application." Civ. A. No. 4:20-CV-00886, 2022 U.S. Dist. LEXIS 206220, at *24 (E.D. Tex. Nov. 14, 2022). The court then turned to the work product waiver scope. Noting that "work-product waiver is narrower than attorney-client privilege waiver," the court stressed that an "advice of counsel" defense necessarily focuses on the accused "'infringer's state of mind.'" Id. at *25-26 (citation omitted). The court thus pointed to a Federal Circuit case in concluding that "work product that was never communicated to [the accused infringer] is not discoverable" – because it did not affect the accused infringers' state of mind. Id. at *26.

Lawyers considering any "advice of counsel" defenses in patent or other cases should first carefully analyze the scope of the resulting waiver.

- **[Privilege Point, 4/19/23]**

Some Courts Understand Work Product Waiver, and Some Don't

April 19, 2023

Unlike the very fragile attorney-client privilege (which can be waived even by disclosure to family members), the more robust work product doctrine protection survives disclosure to friendly third parties.

Most courts understand this. In Pfizer Inc. v. Regor Therapeutics Inc., the court correctly understood that “[t]he work product doctrine has a different rationale [from the privilege], and therefore presents different waiver considerations.... A party therefore waives work product protection when it discloses those thought processes to its adversary, and when it discloses them to a non-adversary in a way ‘that substantially or materially increases the likelihood that adversary will obtain the information.’” Civ. No. 3:22-cv-00190 (JAM), 2023 U.S. Dist. LEXIS 18898, at *14 (D. Conn. Feb. 3, 2023) (citation omitted). But some courts don’t get it — demanding that those sharing work product satisfy the rigorous common interest doctrine prerequisites. For instance, in Cotter v. Eighth Judicial District Court, the Nevada Supreme Court insisted that “[f]or the common interest rule to apply, the ‘transferor and transferee [of work product] [must] anticipate litigation against a common adversary on the same issue or issues’ and ‘have strong common interest in sharing the fruit of the trial preparation efforts.’” 416 P.3d 228, 232 (Nev. 2018) (en banc) (second alteration in original) (citation omitted).

The very demanding common interest doctrine prerequisites to avoid waiver apply only to the fragile privilege protection — not to the work product doctrine protection. Lawyers must be prepared to explain this key distinction to courts that improperly equate the two evidentiary protections.

- [Privilege Point, 5/31/23]

Another Difference Between the Attorney-Client Privilege and the Work Product Doctrine

May 31, 2023

The ancient attorney-client privilege protection provides absolute but fragile immunity from discovery. The relatively new litigation-related work product doctrine provides limited but robust immunity from discovery. Lawyers should always be on the lookout for both types of protection.

Another more subtle distinction plays a role in litigation over these protections. In Luckenbach Texas, Inc. v. Skloss, No. 1:21-CV-00871-RP, 2023 U.S. Dist. LEXIS 36506, at *6-7 (W.D. Tex. Mar. 6, 2023), the court recognized that “[t]he burden of proving waiver of the work product privilege falls on the party asserting waiver” (quoting an earlier case). Four days later, the court in Boines v. JARS Cannabis, LLC, articulated the universal rule that “[t]he burden of establishing the attorney-client privilege rests with the party asserting it” — “unless the protection is waived.” Case No. 2:21-cv-13010, 2023 U.S. Dist. LEXIS 41070, at *5 (E.D. Mich. Mar. 10, 2023) (citations omitted).

Most courts similarly: (1) require a litigant challenging an adversary’s work product claim to prove waiver while (2) requiring a litigant asserting attorney-client privilege protection to prove **lack** of waiver. This conceptual distinction could have practical consequences in discovery disputes.

- **[Privilege Point, 9/6/23]**

**Federal and State Courts Issue Helpful Investigation-Related Decisions:
Part II**

September 6, 2023

Last week's Privilege Point described a federal court case holding that explicit reliance on a consultant's investigation waived fact work product protection related to the investigation — but not opinion work product protection.

About two weeks later, in University of Texas System v. Franklin Center for Government & Public Integrity, the Texas Supreme Court issued a very favorable investigation-related decision, finding that Kroll investigators were protected as a "lawyer's representative" because they acted under the direction of UT's General Counsel; Kroll's investigation into allegations of undue influence in the University's admissions process deserved privilege protection, as shown by affidavits "prepared after the fact, as are most affidavits prepared in the litigation context." 675 S.W.3d 273, 286-87 (Tex. 2023). The Court then found that the publication of Kroll's report did not waive privilege as to "all the privilege-log documents" (as the lower court had ruled), but instead only triggered a subject matter waiver requiring production of: (1) internal UT privileged emails, but only to the extent that Kroll's published report "contains quotes or very specific paraphrases of the emails"; (2) Kroll's interview notes, but only to the extent that the Kroll report "amounted to disclosure of a 'significant part' of the [interview] communication." Id. at 279, 288, 289.

Lawyers arranging for internal corporate investigations should take heart in the federal court's affirmation of continuing protection for opinion work product despite a waiver of fact work product protection. And the Texas Supreme Court's favorable investigation-related ruling may serve as a model for lawyers' investigation and later publications of the results.

- Pace-O-Matic, Inc. v. Eckert Seamans Cherin & Mellott, LLC, Civ. A. No. 1:20-cv-00292, 2023 U.S. Dist. LEXIS 214655, at *14 (M.D. Pa. Dec. 1, 2023) (in an opinion by Judge Saporito, Jr., explaining that the work product doctrine provides a more robust protection than the attorney-client privilege; “Waiver of the work-product doctrine also works differently than waiver of the attorney-client privilege. Unlike the attorney-client privilege, where disclosure to a third party waives the privilege unless the disclosure is necessary to further the legal representation, ‘the work-product doctrine serves instead to protect an attorney’s work product from falling into the hands of an adversary,’ and thus ‘disclosure must enable an adversary to gain access to the information’ for it to constitute waiver of work-product protection. Westinghouse, 951 F.2d at 1428; see also Miller, 104 F.R.D. at 445-46.”)

X. CORPORATE INVESTIGATIONS

A. Identifying the Client in a Corporate Investigation

- Ryan v. Gifford, Civ. A. No. 2213-CC, 2008 Del. Ch. LEXIS 2, at *3, *10, *10-11, *11, *12, *12 n.9, *16, *17-18 (Del. Ch. Jan. 2, 2008) (unpublished opinion) (addressing a situation in which the law firm of Orrick Herrington and forensic accounting firm LECG conducted an investigation into possible options backdating by executives and directors of Maxim; noting that Maxim's board established a Special Committee composed of a single director, which was not an "independent Special Litigation Committee" under Delaware law; explaining that the single-member Special Committee retained Orrick, who did not provide a written report but instead presented an oral report to a Maxim board meeting attended by three directors represented by the law firm of Quinn Emanuel in the derivative action that prompted Orrick Herrington's investigation; noting that Maxim's board found that some directors received backdated options, but did not take any action to recover any damages; further explaining that Maxim "provided details of this work to third-parties, including NASDAQ and publicly to investors (through the SEC Form 8-K). Moreover, the Special Committee itself provided a number of documents to the SEC, the United States Attorney's Office, and Maxim's current and former auditors."; also noting that "the director defendants in this case have specifically made use of the Special Committee's findings and conclusions for their personal benefit and have argued to this Court that the Special Committee's exoneration of them should be accorded deference. The director defendants have made these arguments in a brief, opposing plaintiffs' motion to amend the complaint, in which coincidentally Maxim has expressly joined. Further, the director defendants have extensively relied upon the Special Committee's findings both in opposing plaintiffs' motion for summary judgment and in support of their own motion for summary judgment. At the time of the November 30 decision, in their unamended summary judgment brief, the director defendants explicitly rely upon the unwritten 'findings' of the Special Committee that purport to absolve the director defendants of liability." (footnote omitted); "[T]he director defendants have submitted an amended brief in support of their motion for summary judgment that purports to disavow reliance on the Special Committee's findings, despite their explicit reliance thereon in the first brief in support of their motion."; noting that in an earlier opinion "the Court ruled that Maxim, its Special Committee and Orrick must produce all material[s] related to the Special Committee's investigation that were withheld on grounds of attorney-client privilege."; "The Court also directed Orrick to turn over its work-product, including its interview notes, for in

camera review. Orrick does not seek to appeal any aspect of this Court's ruling, including the ruling that plaintiffs have made a showing of good cause to obtain its non-opinion work product."; noting that Maxim did not appeal the court's earlier decision that the Garner doctrine overcame any privilege claim; after explaining that the court's Garner determination "provides an independent basis" for its conclusion requiring Maxim to disclose the documents; also noting the directors' essentially inaccurate description about whether they were relying on Orrick Herrington's report; "At the time of the November 30 decision, however, the director defendants explicitly asserted that the findings of the Special Committee were entitled to deference from this Court. Moreover, even if this Court ignores the suspicious timing of the director defendants' purported disavowal of reliance on the investigation, Maxim seeks to further avail itself of the Special Committee's report, which will redound to the benefit of the director defendants."; declining to certify an appeal. (emphasis added)).

- SEC v. Roberts, 254 F.R.D. 371, 378 n.4, 378 (N.D. Cal. 2008) (assessing privilege issues in connection with an internal corporate investigation of possible options backdating at McAfee, conducted by the Howrey law firm; concluding that the McAfee Board and the Special Committee did not share a common interest; "The court notes that not only is the Board not Howrey's client such that the attorney client privilege does not attach, the Board also does not have a common interest with the Special Committee since it was the Special Committee's mandate to ascertain whether members of the Board . . . may have engaged in wrongdoing. In this respect, this court disagrees with the conclusion reached in In Re BCE West, L.P., No. M-8-85, 2000 U.S. Dist. LEXIS 12590, 2000 WL 1239117 (S.D.N.Y. Aug. 31, 2000)."; finding that Howrey's disclosure to the Board triggered a waiver; "Certain instances of waiver are straightforward. When Howrey 'detailed for the Board the various stock option issues, improprieties and erroneous option grant dates that were discovered in the investigation,' . . . it waived the work product privilege with respect to its conclusions regarding which option grant dates were improper or erroneous."; ultimately finding a broad scope of waiver, although applied on an interviewee by interviewee basis so that Howrey's disclosure of its opinions about the interview or the interviewee triggered a subject matter waiver covering materials that the law firm created during that interview).

- [Privilege Point, 2/2/11]

Can the Privilege Ever Protect Communications with a Hostile Company Employee?

February 2, 2011

The attorney-client privilege can protect communications between a company's lawyer and company employees providing facts that the lawyer needs to give legal advice to the company. But what happens if the lawyer communicates with hostile employees, who later become members of a class suing the company?

In Winans v. Starbucks Corp., No. 08 Civ. 3734 (LTS) (JCF), 2010 U.S. Dist. LEXIS 134136 (S.D.N.Y. Dec. 15, 2010), Magistrate Judge Francis addressed communications between Starbucks' lawyers and Assistant Store Managers who claim that they should have shared in each store's tip pool. In opposing certification of a store manager class, Starbucks submitted declarations from several managers – and then instructed the managers not to answer any questions during their depositions about their conversations with Starbucks' lawyers. Judge Francis upheld the instruction. Noting that Starbucks' lawyers could communicate ex parte with the managers (before class certification), Judge Francis emphasized that the privilege belonged to Starbucks and not the managers. Therefore, the store managers "are forever precluded from revealing the content of their communications with counsel absent a waiver by Starbucks." Id. at *9.

A corporation's ownership of the privilege normally means that no employee can waive that privilege, even if the employee later sues the company.

- Gary Friedrich Enterprises, LLC v. Marvel Enterprises, Inc., No. 08 Civ. 1533 (BSJ) (JCF), 2011 U.S. Dist. LEXIS 54154, at *11-12 (S.D.N.Y. May 20, 2011) ("In situations such as this where a former employee is represented by counsel for a defendant corporation for the purpose 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.").

- Kirschner v. K&L Gates LLP, 46 A.3d 737, 742, 743, 744, 749, 749 n.3, 749, 749-50, 750, 751, 753, 753 n.6, 754 (Pa. Super. Ct. 2012) (holding that a liquidation trustee can pursue malpractice, breach of fiduciary duty, and other claims against K&L Gates on behalf of a bankrupt company, despite a retainer letter explicitly indicating that K&L Gates did not represent the company, but instead represented only the special committee of a board of directors; explaining that after several of its senior financial executives resigned after accusing CEO Podlucky of financial improprieties, Le-Nature's board of directors determined that it was "in the best interest of the Company" to appoint a special committee of independent directors" to investigate matters; noting that the Special Committee determined that "it was critical to retain on behalf of the company, legal counsel with experience in conducting such investigations; noting that K&L Gates's retainer letter contained the following provision: "We understand that we are being engaged to act as counsel for the special committee and for no other individual or entity, including the Company or any affiliated entity, shareholder, director, officer or employee of the Company not specifically identified herein. We further understand that we are to assist the Committee in investigating the facts and circumstances surrounding the aforementioned resignations and assist the Special Committee in developing any findings and recommendations to be made to the full Board of the Company with respect thereto. The attorney-client relationship with respect to our work, including our work product, shall belong to the Committee. Only the Committee can waive any privilege relating to such work."; noting that K&L Gates hired P&W as a financial expert pursuant to a retainer letter that contained the following sentence: "P&W shall provide general consulting, financial accounting, and investigative or other advice as requested by K&L [Gates] to assist it in rendering legal advice to Le[-]Nature's." (alterations in original); explaining that K&L gave a draft of its investigation report to Podlucky, even though he was not a member of the Special Committee; reciting the report as finding no evidence that Podlucky had engaged in impropriety; pointing out that Podlucky later hired K&L Gates on behalf of the company to prepare an initial public offering, but that eventually a custodian found "massive fraud" at the company, which caused it to declare bankruptcy; acknowledging that the trial court had dismissed the liquidation trustee's legal malpractice/negligence claim against the firm, because the firm had been retained to protect the interests of the shareholders rather than the company itself; reversing the trial court's finding, concluding "[t]he averments of the Amended Complaint, taken as true, establish that Le-Nature's, acting through its Board and the Board's Special Committee, sought the legal advice and assistance of K&L Gates's. Specifically, Le-Nature's sought K&L Gates's legal advice and assistance in investigating allegations of fraud, and in preparing findings and

recommendations for action to be taken by Le-Nature's."; "As a committee of the Board, the Special Committee had the fiduciary duty to act in the best interests of not only the shareholders, but also the corporation."; "Contrary to the arguments of K&L Gates and Ferguson, no conflict of interest existed between Le-Nature's and the Special Committee as the Special Committee owed a fiduciary duty to act in the best interests of the company."; "By its Resolution, the Board authorized the Special Committee to retain counsel to conduct an investigation 'on behalf of the company.'"; "Under Delaware law, the Board could not authorize the Special Committee to act solely on behalf of investors. Such authorization would violate the Board's fiduciary duty to Le-Nature's. . . . [U]nder Delaware law, the Special Committee only could act in the best interests of Le-Nature's and its shareholders."; "K&L Gates retained P&W to provide, inter alia, consulting, financial and investigative advice to K&L Gates 'to assist it in rendering legal advice to Le[-]Nature's.'" (alteration in original); "In addition to the foregoing, the Amended Complaint asserts that K&L Gates provided a draft of its Report not only to the Special Committee, but also to Podlucky. . . . Podlucky was not a member of the Special Committee."; also reversing the trial court's finding that the liquidation trustee could not seek damages because the company was already insolvent when K&L Gates prepared its report; the "trial court rejected Trustee's claim for damages because Le-Nature's was insolvent at the time K&L Gates prepared its Report in December 2003"; "[W]e conclude that Trustee seeks traditional tort damages. The fact of Le-Nature's insolvency does not negate the harm allegedly resulting from K&L Gates's professional negligence."; "Despite the fact that other courts may have determined that similar complaints involving Le-Nature's have alleged deepening insolvency as damages, we conclude that the Complaint before this Court does not, under Pennsylvania law."; "According to the Amended Complaint, these damages were reasonably foreseeable and K&L Gates's malpractice enabled Podlucky and the interested directors to continue their fraudulent activity." (emphases added)).

- Krys v. Paul, Weiss, Rifkind, Wharton, & Garrison LLP (In re China Med. Techs., Inc.), 539 B.R. 643, 654, 655, 656, 658 (S.D.N.Y. 2015) (holding that a bankruptcy liquidator could waive the attorney-client privilege that belonged to a company's Audit Committee, but could not waive the Audit Committee's work product protection, which belonged solely or jointly to the Audit Committee's lawyer's at Paul Weiss; "The issue now before the Court is whether the capacity of the Audit Committee to retain independent counsel and to conduct unfettered internal investigations that implicate corporate management should thwart the statutory obligation of a trustee in bankruptcy to maximize the value of the estate by conducting investigations into a corporation's prebankruptcy affairs."; "Weintraub [CFTC v. Weintraub, 471 U.S. 343 (1985)] did not squarely address the circumstances here. Its analysis was limited to whether privileges asserted by a corporation's counsel were waivable by that corporation's trustee in bankruptcy. The asserted privileges here relate to an investigation by Appellees on behalf of a corporation's audit committee, and the precise relationship between that committee and the corporation is disputed. Despite these factual distinctions, however, the same considerations that weighed in favor of the trustee in Weintraub weigh in favor of Appellant here."; "It is true that the Audit Committee was 'independent' in some sense. It could retain counsel, and it legitimately expected that its communications with counsel would be protected against intrusion by management. But the Audit Committee is not an individual, nor is its status analogous to that of an individual. Instead, it was a committee constituted by CMED's Board of Directors, and thus a critical component of CMED's management infrastructure."; "[T]he justifications for protected attorney-client communications dissipate in bankruptcy. Prebankruptcy, audit committees 'play a critical role in monitoring corporate management and a corporation's auditor.' . . . Without the prebankruptcy protection of attorney-client privilege, audit committees could not provide 'independent review and oversight of a company's financial reporting processes, internal controls and independent auditors,' nor could they offer a 'forum separate from management in which auditors and other interested parties [could] candidly discuss concerns.' SEC Release No. 8220, 'Standards Relating to Listed Company Audit Committees,' File No. 87-02-03, 79 SEC Docket 2876, 2003 WL 1833875, at *19 (Apr. 9, 2003). But as the Bankruptcy Court noted in its Opinion, 'any miscreants have left the company' in bankruptcy, . . . ; corporate management is deposed in favor of the trustee, and there is no longer a need to insulate committee-counsel communications from managerial intrusion. Without a legitimate fear of managerial intrusion or retaliation in bankruptcy, Appellees' assertions as to a potential chilling effect ring hollow."; "Although the Court recognizes that this is a difficult issue in a largely ill-defined area of the law, it nevertheless respectfully disagrees

with the legal determination of the Bankruptcy Court below. The Court finds that Appellant, as CMED's Liquidator, now owns and can thus waive the Audit Committee's attorney-client privilege, regardless of the Committee's prebankruptcy independence. The Bankruptcy Court's ruling to the contrary is hereby reversed."; "The Court's ruling as to attorney-client privilege does not extend, however, to Appellees' assertion of work product protections, which the Bankruptcy Court Opinion only peripherally addressed. . . . Importantly, because 'work product protection belongs to the Audit Committee's counsel and cannot be waived by the client' . . . it does not fall within the ambit of Weintraub. . . . Thus, even assuming that the Liquidator owns those documents for which Appellees have asserted work-product protection, he cannot waive this protection unilaterally. Appellant, at the very least, has not cited any cases suggesting otherwise.").

- Clemens v. NCAA (In re Estate of Paterno), 168 A.3d 187, 196-97, 197 (Pa. Super. Ct. 2017) ("In summary, the Engagement Letter consistently draws a distinction between Penn State's board of trustees and the Task Force. The letter consistently identifies the Task Force as the party for whom FSS was performing services. Appellants do not cite any legal authority precluding an entity such as Penn State from hiring and paying a law firm to represent a task force of the entity's creation. Nor do Appellants cite any authority precluding the parties from limiting the attorney-client relationship to the law firm and the task force, if desired. Furthermore, Appellants cite no authority to support their contention that the Task Force, in order to become a client of FSS, needed to be a distinct legal entity. The signature on the Engagement Letter Steve A. Garban, chair of Penn State's board of trustees was necessary, given that the trustees were paying FSS's bills. We therefore do not view Garban's signature as 'fatally inconsistent' with a conclusion that the Task Force was the client, as Appellants claim." (footnote omitted) (emphasis added); "In summary, Appellants have failed to offer any authority upon which we can conclude that the trial court erred, as a matter of law, in finding that FSS confined its representation to the Task Force. We will not disturb the trial court's finding, supported by the record, that Penn State cannot assert attorney-client privilege because it was not the client of FSS." (footnote omitted) (emphasis added)).

- In re National Prescription Opiate Litig., Case No. 17-MD-2804, 2018 U.S. Dist. LEXIS 142270, at *59, *59-60, *68-69, *69, *70-71 (N.D. Ohio Aug. 1, 2018) (holding that the release of a Wilson Sonsini-prepared report to a Special Committee following a law firm’s investigation did not trigger a subject matter waiver; “The [Special Review] Committee retained the law firm of Wilson Sonsini Goodrich & Rosati to assist with the investigation. Wilson Sonsini interviewed forty-six witnesses and collected and reviewed numerous documents and reported its findings to the Committee. The Committee ultimately produced the Board Response, which concluded that McKesson’s oversight procedures could be improved but that the McKesson Board and senior management had not engaged in any serious wrongdoing.”; “Plaintiffs in this case have obtained McKesson’s 40-page Board Response, but now seek production of the following related materials: (1) a list of the forty-six individuals interviewed; (2) any statements collected from the forty-six individuals interviewed; (3) the search terms applied to collect documents for review in creating the Board Response; and (4) the actual documents collected by applying these search terms, if not already produced in discovery. McKesson opposes production of these materials, asserting attorney-client privilege and the work product doctrine. Plaintiffs respond that the materials are not privileged or, if they are, McKesson waived privilege by publishing the Board Response.”; “Finally, plaintiffs argue that, by publishing the Teamsters Report, McKesson waived any attorney-client or work-product privileges as to the attorney interview notes, the search terms, and documents reviewed by Wilson Sonsini. Plaintiffs assert the Teamsters Report disclosed much of the substance of interviews conducted and documents collected in conducting the investigation, so any privilege is waived. See In re Grand Jury, 78 F.3d 251, 254-55 (6th Cir. 1996) (attorney-client privilege waived as to specific communications disclosed and other communications related to the same subject matter, where party disclosed to third parties the legal conclusions and facts upon which those conclusions were based, but did not reveal the attorney’s advice); see also In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2nd Cir. 1993) (finding waiver of work product privilege by party’s decision to selectively disclose confidential materials in order to achieve other beneficial purposes).”; “McKesson counters it did not waive any privilege. It correctly points out the Board Response did not disclose the specific contents of any of the attorney interview notes or the search terms used in the investigation. Further, the few documents identified in the Board Response either have been or will be produced in this litigation.”; “The undersigned agrees there has been no waiver in the circumstances of this case, because the Board Response did not disclose privileged communications or work product relating to the investigation.”; “In sum, the undersigned agrees with McKesson that mere release of the Board Report did not waive any

privilege. Therefore, at this time, plaintiffs are not entitled to discovery of attorney notes or memoranda of interviews, the search terms counsel used to find documents, or which documents they chose for review based on those search terms. Plaintiffs also assert, however, that, if McKesson seeks to introduce evidence of Wilson Sonsini's investigation outlined in the Board Response (for example, to show McKesson's due diligence), then doing so would waive any asserted privilege. See In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 471 (S.D.N.Y. 1996) (holding it is unfair for a party to assert privilege to shield a report and then use the same report as sword). McKesson has not (yet) attempted to use the Board Response offensively in this litigation. But if it seeks to do so, the Court will reconsider whether plaintiffs are entitled to discover the information they have asked for but which this Ruling denies. See In re Vioxx, 2007 U.S. Dist. LEXIS 23164, 2007 WL 854251 at *5. ('If things change, however, and the Martin Report is sought to be used offensively in this litigation, or if Mr. Martin seeks to testify, the Court will have to reconsider whether the Plaintiffs are entitled to discover the materials underlying the investigation.')." (footnote omitted)).

- Gilmore v. Turvo, Inc., C.A. No. 2019-0472-JRS, 2019 Del. Ch. LEXIS 316, at *3, *7 (Del. Ch. Aug. 19, 2019) (unpublished opinion) (addressing a situation in which several Turvo directors met on May 21, 2019 to investigate another director's (also the CEO) expense account misconduct; noting that those directors retained Latham & Watkins to advise them and adopted a resolution retaining Latham & Watkins "effective as of May 10, 2019" – explaining that "the resolution's retroactive language was intended to allow Turvo to pay [Latham's] legal fees"; explaining that the ousted director/CEO pointed to Delaware law in seeking privileged communications between the other directors and Latham between May 10 and May 21; denying the effort, and explaining that "it was entirely within [the board's] business judgment to determine that the company should pay the Preferred Directors' fees by deeming Latham to have been working on behalf of the company prior to May 21").

B. No Protection for Required or Ordinary Course Investigations

- [Privilege Point, 2/13/02]

Sloppy Investigation Practices Can Forfeit Important Protections

February 13, 2002

Corporations often ask investigators and lawyers to conduct internal investigations. Investigators' notes normally deserve attorney-client privilege protection if the investigator is gathering facts to assist the lawyer in rendering legal advice to the company.

In Welland v. Trainer, No. 00 Civ. 0738 (JSM) 2001 U.S. Dist. LEXIS 15556 (S.D.N.Y. Sept. 28, 2001), a court found that investigators' notes prepared before a lawyer was involved in the investigation did not deserve privilege protection, while those prepared after the lawyer's involvement started would receive privilege protection.

Decisions like that in Welland highlight the wisdom of involving a lawyer in even the earliest stages of a corporate investigation. Waiting until later can forfeit important protections.

- [Privilege Point, 7/31/02]

Troubling Decision Highlights the Importance of Involving Lawyers in Corporate Investigations

July 31, 2002

A large accounting firm recently lost a fight over the applicability of the attorney-client privilege and the work-product doctrine to materials generated during an internal corporate investigation.

In Seibu Corp. v. KPMG LLP, No. 3-00-CV-1639-X, 2002 U.S. Dist. LEXIS 906 (N.D. Tex. Jan. 18, 2002), KPMG conducted an internal investigation after one of its audit clients declared bankruptcy. However, the Court rejected both KPMG's attorney-client privilege and the work-product doctrine claims, finding that the "primary purpose" of the investigation was to determine whether to retain one of the firm's partners—not to obtain legal advice or prepare for litigation. In this troubling decision, the Court noted that "[s]ignificantly, there is no evidence that either in-house or outside counsel saw many of the documents generated as part of this investigation." Id. at *10 n.4.

Lawyers hoping to protect materials generated during internal corporate investigations must keep in mind the very narrow view of the protections that some courts take. Among other things, in-house or outside counsel should be intimately involved in such corporate investigations.

- Fulmore v. Howell, 657 S.E.2d 437, 443, 444 (N.C. Ct. App. 2008) (analyzing a lawsuit by plaintiff against a trucking company in reference to a fatal accident; analyzing an "internal investigation/accident report" generated by the truck driver and by the defendant company's Safety Director; "[T]he facts tend to show that the attorney, Ullrich [company's outside lawyer], did not contact Lawrimore and Howell until they had already begun the accident report, and the procedural manual directs that the preparation of the accident report was for safety purposes, not for the purpose of seeking legal advice, as required for the attachment of attorney-client privilege. Moreover, the accident report was created in the ordinary course of the business of Pilgrim's Pride [defendant's employer], pursuant to their safety manual, which negates the possibility of the protection of the report under the doctrine of work product."; also noting deposition testimony by the defendant company's Safety Director that "'I do this every time there is a DOT recordable accident,'" and his agreement with plaintiff's lawyer's assertion that the report "'is generated by you in the normal course of business whenever there is an accident'" (citation omitted); also noting the defendant company's Statement of Safety Policy provisions indicating that "'[a]ll accidents involving a Company vehicle will be reviewed by the Accident Review Board'"; finding that the trial court had not abused its discretion in concluding that the company's post-accident investigation report did not deserve privilege or work product protection), review denied, 666 S.E.2d 119 (N.C. 2008), cert. denied, 129 S. Ct. 1318 (2009).

- SEC v. Roberts, 254 F.R.D. 371, 378 n.4, 378 (N.D. Cal. 2008) (assessing privilege issues in connection with an internal corporate investigation of possible options backdating at McAfee, conducted by the Howrey law firm; concluding that the McAfee Board and the Special Committee did not share a common interest; "The court notes that not only is the Board not Howrey's client such that the attorney-client privilege does not attach, the Board also does not have a common interest with the Special Committee since it was the Special Committee's mandate to ascertain whether members of the Board . . . may have engaged in wrongdoing. In this respect, this court disagrees with the conclusion reached in In Re BCE West, L.P., No. M-8-85, 2000 U.S. Dist. LEXIS 12590, 2000 WL 1239117 (S.D.N.Y. Aug. 31, 2000)."; finding that Howrey's disclosure to the Board triggered a waiver; "Certain instances of waiver are straightforward. When Howrey 'detailed for the Board the various stock option issues, improprieties and erroneous option grant dates that were discovered in the investigation,' . . . it waived the work product privilege with respect to its conclusions regarding which option grant dates were improper or erroneous."; ultimately finding a broad scope of waiver, although applied on an interviewee-by-interviewee basis -- so that Howrey's disclosure of its opinions about the interview or the interviewee triggered a subject matter waiver covering materials that the law firm created during that interview; allowing discovery by McAfee's former executive, who was defending against an SEC action).

- [Privilege Point, 8/26/09]

Court Analyzes Protections for Materials Generated During an Internal Corporate Investigation: Part I

August 26, 2009

Most clients (and many lawyers) would assume that the attorney-client privilege and the work product doctrine protect communications involving, and materials generated during, a lawyer-conducted investigation into a company's possible options backdating. However, neither protection applies automatically -- they must be supported by evidence that the investigation was primarily motivated (1) by the need for legal advice (to deserve privilege protection) and (2) by anticipated litigation (to deserve work product protection).

In SEC v. Microtune, Inc., 258 F.R.D. 310, 314 (N.D. Tex. 2009), Microtune's Audit Committee retained the law firm of Andrews Kurth to conduct an internal corporate investigation of the company's stock option practices -- "amid extensive press coverage" of alleged stock option backdating, and evidence of such improper backdating at Microtune itself. Andrews Kurth and its forensic accountant Grant Thornton claimed privilege protection when two former Microtune executives attempting to defend themselves from SEC charges sought the materials generated during the internal investigation. In defending its attorney-client privilege claim, the company supplied declarations from an Andrews Kurth lawyer and the head of Microtune's Audit Committee. However, the court held that neither declaration explained "how any particular document falls within the ambit" of the privilege because they were made "for the primary purpose of securing either a legal opinion, legal services, or assistance in the legal proceeding." Id. at 316. The court pointed to "this stunning lack of evidence" in the declarations of the lawyer and the Audit Committee head in rejecting Microtune's privilege claim. Id.

Even communications occurring during a lawyer-driven internal corporate investigation will deserve privilege protection only if supported by evidence that the "primary purpose" of the communication involved legal advice. Next week's "Privilege Point" will discuss this court's analysis of Microtune's work product claim.

- [Privilege Point, 9/2/09]

Court Analyzes Protections for Materials Generated During an Internal Corporate Investigation: Part II

September 2, 2009

Last week's "Privilege Point" explained that a court rejected Microtune's attorney-client privilege claim for materials generated during an internal corporate investigation conducted by Andrews Kurth and its forensic accountant Grant Thornton. SEC v. Microtune, Inc., 258 F.R.D. 310 (N.D. Tex. June 4, 2009). In denying the privilege claim, the court pointed to what it called a "stunning lack of evidence" in declarations by an Andrews Kurth lawyer and the Audit Committee's head. Id. at 316.

The court then turned to Microtune's work product claim. The court first held that the work product doctrine only protected documents prepared "to aid in possible future litigation." Id. at 318. An increasing number of courts take a broader view, protecting documents prepared "because of" the litigation even if they would not be used to "aid" in that litigation. In analyzing Microtune's work product claim, the court quoted from a declaration filed by the head of Microtune's Audit Committee -- who claimed that the company anticipated government investigations and possible civil litigation when it hired Andrews Kurth to conduct the internal corporate investigation. But the court rejected what it called "this self-serving testimony," and instead pointed to deposition testimony by the Andrews Kurth lawyer who conducted the investigation. Id. at 318-19. The court noted that "[w]hen asked at his deposition to explain the purpose of the investigation" the Andrews Kurth lawyer "never mentioned that preparing for litigation was a purpose of the investigation, much less the primary motivating purpose." Id. at 319. Instead, the Andrews Kurth lawyer mentioned several other essentially business reasons why the company conducted the internal investigation. The court rejected Microtune's work product claim.

Companies and their lawyers hoping to protect as privileged and as work product communications and materials relating to internal corporate investigations must lay the groundwork for both protections at the beginning, and be prepared to provide evidence that the investigation was primarily motivated by the need for legal advice, and primarily motivated by anticipated litigation.

- Warner v. United States, C.A. No. 09-036ML, 2009 U.S. Dist. LEXIS 101688, at *2, *6-8 (D.R.I. Nov. 2, 2009) (analyzing a claim of work product protection for a postal service accident investigation worksheet, from which the United States redacted "suggested 'preventive action'" that the investigator recommended to prevent future accidents; "In this case, Defendant has not met its burden of establishing that the PS Forms in question were completed in anticipation of litigation. In fact, Defendant has offered absolutely no evidence or information regarding the authority or circumstances under which the Forms in question were completed. PS Form 1700 indicates that the information collected 'will be used to record and resolve the circumstances relating to the accident and to evaluate your driving skills,' and notes that, '[a]s a routine use, this information may be disclosed . . . where pertinent, in a legal proceeding to which the Postal Service is a party.' . . . PS Form 1769 does not include a statement of purpose but the Postal Service has represented in other litigation that its 'policy requires that any accident involving a motor vehicle, no matter how minor, must documented by the supervisor in an accident report on Form 1769.' . . . [T]here is absolutely no rationale [sic] basis upon which to argue that the 'preventive action' Section PS Form 1769 was prepared in anticipation of litigation when its stated purpose is to prevent similar accidents in the future.").

- Alta Refrigeration, Inc. v. AmeriCold Logistics, LLC, 688 S.E.2d 658, 667, 668 (Ga. Ct. App. 2009) (holding the post-accident investigation report did not deserve work product protection; explaining that the party asserting the work product protection filed an affidavit contending that the investigation was motivated by a serious accident, but that the report was actually conducted pursuant to company policy; "In granting Alta's motion to compel, the trial court found that the Keithley Report 'was prepared according to AmeriCold's standard operating procedure,' and 'was not prepared in anticipation of litigation.' The trial court based on this finding on the fact that both AmeriCold's own safety manuals and relevant OSHA regulations 'required AmeriCold to conduct an investigation after the release of ammonia into the workplace.'"; "This argument, however, fails to recognize that while the affidavits may have been only testimonial evidence on this issue, they were not the only factual evidence regarding the same. The other evidence included copies of AmeriCold's own 'Incident Investigation Policy,' which outlined the procedures to be followed after a 'catastrophic release of ammonia.' That policy dictated that, following such an incident, the General Manager/Chief Engineer of the facility would select members of an 'Incident Investigation Team,' and stated that '[t]he exact membership of the Team will be dependent upon the severity and circumstances surrounding the incident.' The Incident Investigation Team would be responsible for conducting an investigation to ascertain the facts surrounding the incident, to determine the cause of the incident, and to recommend corrective and preventative measures. The team would then make a written report of the foregoing, and attach the same to an 'Incident Investigation Form.'"; "Notably, the foregoing policy specifically stated that the Incident Investigation Team must be appointed within 48 hours of the incident, to comply with the relevant OSHA regulation."; denying work product protection).

- [Privilege Point, 1/5/2011]

Court Takes a Broad View of Work Product Protection for Post-Accident Investigation Materials

January 5, 2011

Most courts hold that the work product doctrine protects post-accident investigation materials only if their creation was "primarily" motivated by anticipated litigation rather than by some external or internal requirement. However, every so often a court takes a broader view.

In Gruenbaum v. Werner Enterprises, Inc., 270 F.R.D. 298 (S.D. Ohio 2010), the court analyzed materials a trucking company prepared after an accident. The plaintiff pointed to the trucking company's Safety Director's testimony that the company "prepared its investigation reports in 'substantially the same manner' when dealing with routine or catastrophic incidents." Id. at 305 (internal citation omitted). The plaintiff also argued that the trucking company "was required by federal law to compile this information, precluding application of the work product doctrine." Id. After an in camera review of the documents, the court rejected plaintiff's arguments. The court held that "the 'driving force' behind the creation of the information was the anticipation of litigation," and that the "fact that the information, created because of litigation, may also serve other purposes does not deprive that information of its character as work product." Id. (citation omitted).

Most courts would not take such an expansive approach, but lawyers should be looking for a chance to cite such cases.

- Danza v. Costco Wholesale Corp., No. CV-11-4306 (JG) (VVP), 2012 U.S. Dist. LEXIS 32939, at *4, *3, *4-5 (E.D.N.Y. Mar. 12, 2012) (finding that defendant's post-accident report did not deserve privilege or work product protection, despite being labeled "Privileged and Confidential" in "large, bold, uppercase letters at the very top of the first page," and despite containing the following instructions: "'This report is to be prepared for the company's legal counsel. Do not give a copy of this report to or discuss its contents with any person except as instructed below.'"; "The extent to which work product protection is afforded to accident reports arises predominantly in cases involving a liability insurer's investigation of the circumstances surrounding an accident for which they may be required to provide coverage. A party asserting work-product to bar discovery of reports prepared in such circumstances must be able to point to a definite shift from acting in its ordinary course of business to acting in anticipation of litigation."; "It is clear from the nature of the document that it was prepared as part of the regular procedure of the defendant when incidents such as the one here occur. Although the heading and instructions on the document indicate that the document was to be prepared for use by its attorneys in connection with possible litigation, there is nothing to indicate that it was immediately forwarded to any attorney. Rather, it was to be maintained at the store and at the regional office, presumably for use when and if a claim by the injured person was made. Nor does it contain any information reflecting any attorney's thoughts or mental impressions.").

- Tellabs Operations, Inc. v. Fujitsu Ltd., 283 F.R.D. 374, 389-90, 390 (N.D. Ill. 2012) (rejecting a litigant's argument that there had been two separate investigations, one of which deserved work product protection; "Now, Fujitsu claims there were two separate inspections involving two separate teams. If there were, in fact, two separate investigations -- and Fujitsu has offered no convincing evidence that there were truly separate endeavors motivated by separate concerns -- it is inaccurate to say there were two separate teams, with different personnel. The teams were not so separate that Mr. Itou wasn't thought necessary to both of them. And that duality is fatal to the claim of confidentiality being advanced by Fujitsu. Mr. Itou simply cannot simultaneously be a general employee tasked to inspect Tellabs amplifiers for competitive reasons and an expert specially employed to inspect the same amplifiers 'in anticipation of litigation' and successfully contend that the latter efforts are immune from discovery."; "In sum, the record shows that the impetus for the inspection was commercial, not legal. It may have later morphed into something in addition -- if Fujitsu's affidavits are taken at face value which, I do not -- but it can't be said that the primary motivating purpose was imminent litigation."; "Rather than offering definitive proof of an early inspection done for infringement analysis designed to deal with an articulable concern about litigation with Tellabs and unrelated to analysis for competitive for business purposes, Fujitsu's evidence has left the matter, at best, in a state of ambiguity. Since 'any ambiguity as to the role played by the expert when reviewing or generating documents should be resolved in favor of the party seeking discovery,' . . . it loses on this point.").

- [Privilege Point, 4/4/12]

Federal Court Examines Privilege and Work Product Protection for Internal Corporate Investigation

April 4, 2012

Many corporations and their lawyers assume that both the attorney-client privilege and the work product doctrine will protect communications and documents created during an internal corporate investigation, as long as a lawyer directs and supervises the investigation. However, courts usually reject blanket privilege and work product claims, and undertake a more detailed analysis.

In Woodmen of the World Life Insurance Society v. U.S. Bank National Ass'n, No. 8:09CV407, 2012 U.S. Dist. LEXIS 12462 (D. Neb. Feb. 2, 2012), the Boston law firm of Goodwin Procter and accounting firm Deloitte undertook an investigation into a bank employee's possible misrepresentations about mortgage-backed securities. Despite the bank's and Goodwin Procter's arguments to the contrary, the court found that the attorney-client privilege did not protect documents created during the investigation, because the bank had "fail[ed] to make a sufficient showing that the investigation was committed to Goodwin Procter . . . for legal advice" rather than to aid in business decisions. Id. at *20. The court also rejected the bank's work product claim. Among other things, the court noted that the bank followed Goodwin Procter's and Deloitte's recommendations by reimbursing investors identified as being harmed by the possible misrepresentation, thus "presumably decreasing the likelihood of litigation." Id. at *28. Significantly, the court rejected conclusory statements in what it labeled as a "self-serving" declaration the bank filed in support of its privilege and work product claims. Id. at *27.

The court's rejection of the bank's privilege and work product claims highlights some courts' skepticism about global privilege and work product protection for internal corporate investigations.

- [Privilege Point, 10/9/13]

How Can Companies Satisfy the Work Product Doctrine's "Motivation" Element?: Part I

October 9, 2013

Many lawyers focus on the first two elements of the work product doctrine - which require (1) "litigation" that the client (2) reasonably "anticipates." But documents that clients or their lawyers prepare in anticipation or even during litigation deserve work product protection only if they satisfy the third element - that the documents were (3) "motivated" by the litigation, and not by something else.

The work product doctrine generally does not protect documents that companies prepare in the ordinary course of their business, or because of some external or internal requirements. In Blais v. A.R. Cheramie Marine Management, Inc., Civ. A. No. 12-2736 SECTION "R" (2), 2013 U.S. Dist. LEXIS 111307 (E.D. La. Aug. 7, 2013), the defendant investigated a former employee the company had recently rehired. Company policy required creation of a "nonconformity report." Id. at *6. The court acknowledged that this report "was required to be prepared in defendant's ordinary course of business," and also noted that "defendant has already produced [the report] to plaintiff." Id. In contrast, the court upheld the company's work product claim for statements and investigative reports "which clearly went beyond ordinary company policy and procedure." Id. at *6-7.

The work product "motivation" element requires companies to demonstrate that any withheld work product was motivated by anticipated litigation rather than prepared in the ordinary course of business or required by some external or internal mandate.

- **[Privilege Point, 12/18/13]**

Courts Deny Privilege Protection for Compliance-Related Documents

December 18, 2013

Many corporate clients erroneously assume that the attorney-client privilege or the work product doctrine will protect their compliance-related communications. However, such communications face the same impediments to either protection as other internal corporate communications.

For instance, the attorney-client privilege only protects communication primarily motivated by clients' request for legal advice. In United States ex rel. Gale v. Omnicare, Inc., the court found that the privilege did not protect "Compliance Committee meetings and the documents drafted by [the company's CCO]," – because the company's previous agreement with the government required such meetings. Case No. 1:10-CV-00127, 2013 U.S. Dist. LEXIS 143831, at *4 (N.D. Ohio Oct. 4, 2013). The court concluded that "[t]he meetings and documents sought to comply with its contract with the United States, not to obtain legal advice." Id. The privilege also normally depends on lawyers' involvement. In Wultz v. Bank of China Ltd., 979 F. Supp. 2d 479 (S.D.N.Y. 2013), Judge Scheindlin held that the privilege did not protect documents created during the Bank of China Chief Compliance Officer's investigation into the bank's possible dealings with terrorists. Judge Scheindlin noted that after the Bank's CCO received Plaintiff's demand letter, "he called outside counsel, then set about performing the investigation within the Compliance Department – without the involvement of any counsel." Id. at *35 (citation omitted). Judge Scheindlin cited an earlier case's blunt conclusion that "[p]rivilege does not apply to 'an internal corporate investigation . . . made by management itself.'" Id. at 495-96 (citation omitted).

Companies and their lawyers should not assume that the compliance function automatically, or even usually, deserves privilege protection.

- Mastr Adjustable Rate Mortgs. Trust 2006-OA2 v. UBS Real Estate Sec., Inc., No. 12 Civ. 7322 (HB) (JCF), 2013 U.S. Dist. LEXIS 173162, at *3 (S.D.N.Y. Dec. 6, 2013) ("Because they were created in accordance with a contractual obligation, such analyses are not protected by the work product doctrine unless UBS can show that they were specifically directed to litigation strategy or defenses and were therefore created in a form significantly different than they otherwise would have been.").
- Gruss v. Zwirn, 296 F.R.D. 224, 231 (S.D.N.Y. 2013) (analyzing the ability of Gibson Dunn to withhold its opinion work product prepared during an internal corporate investigation; explaining that Gibson Dunn had undertaken a corporate investigation that essentially blamed a CFO for a company's problems, after which the CFO sued the company for defamation; ordering Gibson Dunn to turn its opinion work product over to its client, the company; "Contrary to Gibson Dunn's argument, this Court is not required to accept the declaration of one of its partners that the notes in question constitute -- in their entirety -- opinion work product."; "While courts in this District have, on occasion, accepted counsel's representations regarding the contents of allegedly privileged materials, they have typically done so where the representations were unchallenged."; "[A]ttorney representations regarding the content of allegedly privileged materials do not preclude a court from conducting an in camera review of such materials. Courts have discretion to determine whether in camera review is appropriate, based in part on the specificity of counsel's representations. . . . Here, Gibson Dunn's representation that every word in the interview memos constitutes 'core opinion work product' is not credible. . . . Under such circumstances, in camera review is appropriate.").

- Koumoulis v. Independent Financial Marketing Group, Inc., 29 F. Supp. 3d 142, 149, 149-50, 149 n.4, 150 (E.D.N.Y. 2014) (upholding a Magistrate Judge's opinion that neither the attorney-client privilege nor the work product doctrine protected communications between a Duane Morris lawyer and a corporate client's human resource executive; finding the attorney-client privilege inapplicable because the advice was primarily business-related and not legal; finding the work product doctrine inapplicable for a number of reasons; "Based on its review of the Submitted Documents, the Court concurs with Judge Scanlon's assessment that the communications between Defendants and outside counsel related to human resources issues, e.g., the internal investigation related to Mr. Komoulis and responding to his complaints. Such advice would have been provided even absent the specter of litigation, and therefore do [sic] not constitute litigation-related work product."; "Defendants concede that 'LPL [defendant] ha[d] an obligation to investigate' Koumoulis's complaints about alleged discrimination and retaliation,' regardless of the potential for litigation. . . . The alleged motivation for which these documents were sought is not enough to overcome what appears on the face of the documents themselves." (second alteration in original); "[E]ven assuming the internal investigation was conducted in anticipation of litigation, otherwise work-product privileged communications relating to the investigation would still be discoverable once Defendants assert a Faragher/Ellerth [Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998)] defense. Indeed, Defendants acknowledged as much when they disclosed their in-house attorneys' notes and correspondence regarding the investigation. Defendants offer no justification for treating their outside counsel's communications regarding the investigation differently than their in-house counsel's communications on that topic."; "Defendants acknowledge that this advice was intended, in part, to prevent Plaintiff from bringing claims of retaliation. . . . Legal advice given for the purpose of preventing litigation is different than advice given in an anticipation of litigation." (emphasis added); "[S]imply declaring that something is prepared in 'anticipation of litigation' does not necessarily make it so. . . . [T]he contents of the communications directly contradict Defendants' privilege claim. These communications, on their face, relate to advice given by Ms. Bradley on how to prevent a lawsuit, not on how to defend one." (emphasis added))

- Bonnell v. Carnival Corp., Case No. 13-22265-CIV-WILLIAMS/GOODMAN, 2014 U.S. Dist. LEXIS 22459, at *16, *5-6 (S.D. Fla. Jan. 31, 2014) (finding that a post-accident investigation deserved work product protection, but that a later different consultant report prepared "in an effort to curb litigation" did not deserve work product protection; "Having heard from the parties and having reviewed the record, including the affidavit of Suzanne Brown Vazquez (Carnival's Director of Guest Claims and Litigation Counsel), I see no reason to reach a different conclusion in this case. As Ms. Vazquez's affidavit states, the incident reports are not prepared for every reported incident occurring on a Carnival vessel. Rather, they are only prepared '[w]hen a passenger reports an incident resulting in injury which requires treatment beyond basic first aid,' because, in Carnival's experience, those incidents typically result in litigation. . . . The incident reports are then provided to Carnival's counsel. . . . In this case, Ms. Vazquez explains, the incident report 'was created to assist Carnival Cruise Lines' claims department and defense counsel in anticipation of litigation,' because Carnival believed that litigation was likely to ensue '[i]n light of how the incident occurred and the nature of the medical care provided.'" (internal citation omitted)).

- Home Equity Mortg. Trust Series 2006-1 v. DLJ Mortg. Capital, Inc., Index Nos. 156016/ & 653787/2012, 2014 N.Y. Misc. LEXIS 3282, at *2, *6, *7 (N.Y. Sup. Ct. July 16, 2014) (unpublished opinion) (holding that an investigation and analysis prepared by the Orrick law firm did not deserve privilege or work product protection, because the analysis was contractually required; "In 2011, DLJ received the first of several letters from plaintiffs requesting that DLJ repurchase loans from the HEMT Trusts. The letter accused DLJ of breaching several representations and warranties with respect to the loans at issue. DLJ retained Orrick, Herrington & Sutcliffe LLP (Orrick) to handle the repurchase demands made by plaintiffs and advise DLJ of any legal liability that may result. Orrick performed a repurchase analysis in relation to plaintiffs' demands in order to advise DLJ whether it should repurchase the loans. After performing the analysis, Orrick advised DLJ that it should not repurchase the loans. DLJ followed Orrick's advice. Shortly after, plaintiffs instituted the above-captioned actions."; "Although DLJ anticipated litigation and retained counsel to perform the repurchase analysis, DLJ was still 'contractually obligated to conduct repurchase reviews' and such analysis 'would have been performed even had there been no threat of litigation.' Immunity does not attach to Orrick's repurchase analysis merely because it anticipated litigation. It attaches only to analyses that were created 'primarily, if not solely, in anticipation of litigation.'" (citation omitted); "[T]he fact that members of defendants' due diligence department, who are not attorneys, were capable of performing repurchase analyses highlights that these analyses are not legal in nature. Such analyses do not become privileged 'merely because an investigation was conducted by an attorney.' Brooklyn Union Gas Co. [v. Am. Home Assurance Co.], 80 N.Y.S.3d 532, 534 (N.Y. App. Div. 2005)]. The court holds that any repurchase analysis conducted by Orrick as a result of the repurchase demand made by plaintiffs is not immune from disclosure.").

- [Privilege Point, 7/30/14]

Do Corporations Enhance Their Work Product Claims by Sending Post-Accident Reports to Outside Counsel?

July 30, 2014

The work product doctrine can protect documents created in anticipation of litigation -- as long as they were motivated by that litigation. The doctrine does not protect documents created in the ordinary course of business, or pursuant to some external or internal requirement. In essence, litigants must prove that they did something different or special because they anticipated litigation.

In Hooke v. Foss Maritime Co., Case No.13-cv-00994-JCS, 2014 U.S. Dist. LEXIS 50741 (N.D. Cal. Apr. 10, 2014), defendant claimed work product protection for documents created after plaintiff suffered job-related injuries. After noting that the defendant's internal processes required investigation reports after nearly every accident, the court turned to the company's argument that "the [post-accident] process is overseen in some way by the General Counsel." Id. at *11. The court surmised that "testimony that Internal Incident Investigation Reports are sent to outside counsel in the event that a litigation threat arises is apparently proffered to show its connection with anticipated litigation." Id. However, the court concluded that the testimony hurt defendant's work product claim -- because it "actually reveals that those reports are created in substantially the same form regardless of the specific threat of litigation, and the reports are only sent to outside counsel if litigation actually becomes likely." Id. (emphasis added).

Some companies eventually regret their attempt to bolster a work product claim by involving lawyers in the post-accident process. Here, the supposedly helpful testimony instead confirmed that the company prepared the post-accident reports sought by plaintiff in the ordinary course of its business. Ironically, sending every post-accident report to a lawyer might have the same adverse effect -- because the company could not prove that it did something different or special because it anticipated litigation.

- **[Privilege Point, 3/4/15]**

Courts Focus on the Work Product Doctrine's "Motivation" Element

March 4, 2015

The work product doctrine protection rests on three elements: (1) litigation; (2) anticipation; (3) motivation. In normal civil or criminal litigation, the first element presents an easy analysis. Most lawyers' attention focuses on the second element — whether their clients reasonably anticipate litigation. But the third element represents the real key to work product protection.

Even if the client is in the midst of litigation, or reasonably anticipates litigation, the work product doctrine only protects documents motivated by that litigation. In Chevron Midstream Pipelines LLC v. Settoon Towing LLC, Civ. A. No. 13-2809c/w13-3197 SECTION: "A"(5), 2014 U.S. Dist. LEXIS 179284 (E.D. La. Jan. 5, 2015), Chevron in-house lawyers initiated and directed what they labeled a "legally chartered" root cause investigation after a fatal pipeline explosion. In analyzing the motivation element the court described as the "salient question" whether "'legally chartered' root cause analyses are different in kind than those 'other' root cause analyses routinely conducted by Chevron." Id. at *28. The court ultimately rejected Chevron's work product claim, pointing to: (1) deposition testimony by a Chevron engineer "who agreed in her deposition that the 'primary purpose of a root cause analysis' is to 'prevent a similar accident from happening again in the future,'" and "that it is 'part of the Chevron ordinary course of business to conduct a root cause analysis' after an incident" (Id. at *25); (2) Chevron Pipeline's President's statement in an employee newsletter that "[w]e are conducting root cause analyses of both incidents and will apply lessons learned. Our ultimate goal remains the same - an incident and injury-free workplace." (Id. at *27); (3) Chevron's failure to provide the court examples of Chevron's ordinary root cause analyses — noting that Chevron's argument that its ordinary "incident reviews" were different from its "legally chartered" investigation "would be more convincing if there was actually another root cause analysis from which to distinguish the legally chartered one." Id. at *29.

To satisfy the work product motivation element, companies must demonstrate that they did something different or special because they anticipated litigation — beyond what they ordinarily would do, or which they were compelled to do by external or internal requirements.

- Wultz v. Bank of China Ltd., 304 F.R.D. 384, 395, 396, 396-97 (S.D.N.Y. 2015) (in an opinion by Magistrate Judge Gorenstein, finding that a compliance-initiated investigation into a defendant's possible tie with terrorists did not deserve privilege or work product protection; "To start off, we accept BOC's [defendant] contention that BOC's receipt of the Demand Letter triggered the investigation and that BOC anticipated the potential for litigation as a result of the threat in the Demand Letter. BOC goes on to argue that had it not been for the Demand Letter, BOC 'would have undertaken no investigation at all.' . . . Notably, there is no record citation for this contention. In any event, it is unclear what BOC means by this assertion. If BOC means to say merely that the Demand Letter was a 'but for' cause of the investigation, this does not address the issue of whether it has shown the materials were prepared 'because' of its anticipation of litigation -- that is, that the materials would not have been created 'in essentially similar form irrespective of the litigation.'" (citation omitted); "The question is essentially a factual one: would BOC have generated the materials listed on the privilege log in similar form had it not anticipated litigation? Answering this question 'requires us to consider what 'would have' happened had there been no litigation threat -- that is, whether [BOC] 'would have' generated these documents if it were acting solely for its' non-litigation purposes. Allied Irish Banks [v. Bank of Am. N.A.], 240 F.R.D. 96, 106 (S.D.N.Y. 2007)]. We note that this hypothetical circumstance does not involve imagining what BOC would have done had no one told it that the Shurafa accounts merited scrutiny. Rather, we imagine a hypothetical situation where BOC is made aware of all facts contained in the Demand Letter but sees no threat of actual litigation itself -- for example, if BOC were to learn of the facts surrounding the Shurafa accounts from its own internal mechanisms for detecting counter-terrorism and anti-money laundering, or from an outside source unlikely to institute litigation such as a foreign law enforcement agency or a newspaper reporter. In other words, we look at the question as follows: had BOC been presented with the identical facts about Shurafa in circumstances in which it did not foresee litigation, would it have generated essentially the same documents sought by plaintiffs on this motion?" (footnote omitted); "For its part, BOC has provided virtually no evidence on the question of what BOC 'would have' done had it learned of the Shurafa allegations under circumstances where the knowledge was not coupled with the threat of litigation. It has not even made this showing for materials generated after the filing of the complaint. For this reason alone, BOC has not met its burden of showing that the materials are protectable as work product."; "BOC had good reason to investigate the allegations about improprieties in the Shurafa accounts absent the threat of litigation. Of course, it is BOC's burden to prove that it would not have undertaken this investigation and, more specifically, that it would not have

generated the documents on the privilege log had they not anticipated litigation. As already stated, BOC has provided essentially no evidence to support this conclusion.").

- Frickey v. Kobelco Stewart Bolling, Inc., Civ. A. No. 14-2 SECTION "I" (2), 2015 U.S. Dist. LEXIS 27264, at *11-12 (E.D. La. March 5, 2015) (finding that Dow's [defendant] post-accident root cause analysis did not deserve privilege protection; noting Dow had already produced all witness statements and factual documents collected during the investigation, despite an in-house lawyer's involvement in the investigation; "Dow admitted that Root Cause Investigations 'are standard business practice' for 'run-of-the-mill matters that occur during the day-to-day operation of facilities,' although Dow states that these investigations are not typically managed by counsel. Dow tries to distinguish the subject Root Cause Investigation from 'run-of-the-mill matters,' based on Eddlemmon's [Dow's in-house lawyer] participation on the investigative team. However, the evidence shows that Root Cause Investigations of serious matters in general and of this particular case, leading to a single -- and the only -- analytical report to determine the root causes of an event and implement appropriate remedial measures, are just as much Dow's standard business practice as investigations of more mundane incidents. Eddlemmon's professed anticipation of litigation, her participation on the team and Dow's policy of keeping the investigation confidential cannot convert a factual report prepared in the ordinary course of business into attorney-client privileged material. Dow cannot convert what is standard business practice performed for a variety of non-legal purposes into privileged material through the simple expedient measure of adding a lawyer into the mix. Dow has failed to show that the report refers to legal, rather than business or technical, advice and recommendations.").

- Fine v. ESPN, Inc., No. 5:12-CV-0836 (LEK/DEP), 2015 U.S. Dist. LEXIS 68704, at *16, *19 (N.D.N.Y. May 28, 2015) (analyzing privilege and work product protection for non-party Syracuse University's investigation into possible child molestation by one of the University's coaches; explaining that the coach's wife had sued ESPN, then sought discovery from the University; concluding that the work product doctrine did not apply; "Even where a party clearly anticipated litigation at the time a document was created, the party asserting privilege still bears the burden of showing that the document would not have been produced in a similar form absent anticipated litigation."; "[W]hile the Jones Affidavit states that the University anticipated litigation at the time of the 2005 investigation . . . , it offers no evidence, nor does the University claim now, that the documents produced during the investigation would not have been prepared in the same form absent the prospect of litigation The Jones Affidavit states that BSK frequently handled investigations into employee conduct for the University . . . , and that this particular investigation dealt with a sensitive matter . . . , but provides no indication that this investigation was conducted differently from other investigations into potential employee misconduct because of the prospect of litigation Therefore, Judge Peebles did not err in concluding that 'documents generated during the course of that investigation would have been prepared in the ordinary course of business irrespective of whether there was the potential for litigation.'" (citation omitted)).
- Moore v. Plains All Am. GP, LLC, Civ. A. No. 14-4666, 2015 U.S. Dist. LEXIS 124794, at *12-13 (E.D. Pa. Sept. 17, 2015) (holding that an EEOC charge did not necessarily trigger a reasonable anticipation of litigation; "My in camera review of the disputed emails does not fully convince me that they were created with the primary aim of aiding future litigation, as opposed to being created in the ordinary course of business. While Defendant was aware of Plaintiff's EEOC charge at the time the emails were written, the emails largely discuss Plaintiff's request for an accommodation for his religious beliefs. This email exchange would have occurred regardless of whether Plaintiff had filed his complaint, and is part of an employer's duty in the regular course of business. . . . Indeed, the contents of these emails do not differ substantially from emails already produced to Plaintiff. While the emails do reference having a discussion with counsel at some point in the future, both Graham and Smith indicated during deposition that they never spoke to counsel about Plaintiff's request for accommodation.").

- In re Symbol Techs., Inc. Secs. Litig., No. CV 05-3923 (DRH) (AKT), 2015 U.S. Dist. LEXIS 131478, at *20, *21 (E.D.N.Y. Sept. 29, 2015) (requiring more facts to determine if an internal corporate investigation into a "revenue misstatement" had changed in some way so that the work product doctrine was applicable; "The circumstances within which the documents at issue were created appear to stem from Symbol's investigation into its overstatement of revenue beginning in November 2004 -- an investigation for which it retained representation by outside counsel. . . . In cases such as this, where an attorney-assisted investigation has been conducted, 'the court must make a "fact specific inquiry" to determine if and when an investigation changed from being within the ordinary course of business to being because of litigation.' Koumoulis v. Indep. Fin. Mktg. Group, Inc., 295 F.R.D. 28, 40 (E.D.N.Y. 2013), aff'd, 29 F. Supp. 3d 142 (E.D.N.Y. 2014); see U.S. Fid. & Guar. Co. v. Braspetro Oil Srvs. Co., No. 97 Civ. 6124, 2000 U.S. Dist. LEXIS 7939, 2000 WL 744369, at *9 (S.D.N.Y. June 8, 2000) ('Although at some point, a company's investigation may shift from the ordinary course of business to an anticipation of litigation, there is no hard and fast rule as to when this occurs; rather, a fact-specific inquiry is required to determine when this shift occurs.'" (footnote omitted); "At this juncture, the Court is hampered by the fact that it does not have sufficient factual information concerning the particular documents at issue in order to make such a factual determination. To date, Symbol has not produced the required privilege log in this case particularizing the documents being withheld based on privilege. Nor has either party requested an in camera review of the documents at issue so that the Court can properly engage in a case-specific assessment whether the work product privilege is applicable here in the first instance.").

- In re Target Corp. Customer Data Sec. Breach Litig., MDL No. 14-2522 (PAM/JJK), 2015 U.S. Dist. LEXIS 151974, at *4, *5, *6, *7, *8, *11, *12 (D. Minn. Oct. 23, 2015) (holding that the attorney-client privilege and the work product doctrine protection covered Target's internal communications and its communications with a team of Verizon employees who conducted an outside lawyer-initiated and directed investigation into Target's data breach, which was separate from the business-motivated investigation conducted by a different team of Verizon employees who did not communicate with the Verizon employees assisting the outside lawyers; explaining Plaintiffs' argument; "Plaintiffs argue that these communications and documents at issue are not protected by the attorney-client privilege and the work-product doctrine because 'Target would have had to investigate and fix the data breach regardless of any litigation, to appease its customers and ensure continued sales, discover its vulnerabilities, and protect itself against future breaches.'" (internal citation omitted); also explaining Target's response; "Target asserts that the Data Breach Task Force was not involved in an ordinary-course-of-business investigation of the data breach. Rather, Target alleges that it established the Data Breach Task Force at the request of Target's in-house lawyers and its retained outside counsel [Ropes & Gray] so that the task force could educate Target's attorneys about aspects of the breach and counsel could provide Target with informed legal advice. . . . Target's Chief Legal Officer, Timothy Baer, Esq., explains that shortly after discovering the possibility that a data breach had occurred, Target retained outside counsel to obtain legal advice about the breach and its possible legal ramifications."; "With respect to Verizon, Target also explains that it has only claimed privilege and work-product protection for documents involving one team from Verizon Business Network Services, which Target's outside counsel engaged to 'enable counsel to provide legal advice to Target, including legal advice in anticipation of litigation and regulatory inquiries.' . . . Meanwhile, another team from Verizon also conducted a separate investigation into the data breach on behalf of several credit card brands."; quoting a declaration that "the Verizon teams did not communicate with each other about the substance of the attorney-directed investigation"; again paraphrasing Target's argument: "Target asserts that following the data breach, there was a two-track investigation. On one track, it conducted its own ordinary-course investigation, and a team from Verizon conducted a non-privileged investigation on behalf of credit card companies. This track was set up so that Target and Verizon could learn how the breach happened and Target (and apparently the credit card brands) could respond to it appropriately. On the other track, Target's lawyers needed to be educated about the breach so that they could provide Target with legal advice and protect the company's interests in litigation that commenced almost immediately after the breach became

publicly known. On this second track, Target established its own task force and engaged a separate team from Verizon to provide counsel with the necessary input, and it is for information generated along this track that Target has claimed attorney-client privilege and work-product protection."; noting that the court had reviewed documents in camera; "Target provided [certain] documents in camera, and the Court has completed its in camera review. Based on that in camera review, the Court concludes that no hearing is required to decide the privilege and work-product issues raised as to the specific examples listed in Plaintiffs' Letter Brief." (footnote omitted); agreeing with Target's position; "Target has demonstrated, through the Declaration of Timothy Baer [Target's Chief Legal Officer], that the work of the Data Breach Task Force was focused not on remediation of the breach, as Plaintiffs contend, but on informing Target's in-house and outside counsel about the breach so that Target's attorneys could provide the company with legal advice and prepare to defend the company in litigation that was already pending and was reasonably expected to follow."; also concluding that Plaintiffs could not overcome Target's work product protection; "Plaintiffs have not demonstrated that without these work-product protected materials they have been deprived of any information about how the breach occurred or how Target conducted its non-privileged or work-product protected investigation. Target has produced documents and other tangible things, including forensic images, from which Plaintiffs can learn how the data breach occurred and about Target's response to the breach. (See Visser Decl. 11, Ex. 7 (report prepared by a separate team from Verizon Business Network Services that was not engaged by Target's counsel and that conducted an investigation on behalf of several credit card issuing companies).)").

- [Privilege Point, 11/18/15]

Courts Reject Protection for Corporate Investigations, but Offer Helpful Guidance: Part I

November 18, 2015

Companies' internal investigations can deserve (1) privilege protection, if primarily motivated by the need for legal advice; and (2) work product protection, if primarily motivated by anticipated litigation. In both contexts, companies must do something different or special -- not in the ordinary course of their business. Careful companies sometimes fail both standards, because they ordinarily investigate suspicious events, serious accidents, etc.

In Boone v. TFI Family Services, Inc., Case No. 14-2548-JTM, 2015 U.S. Dist. LEXIS 126673 (D. Kan. Sept. 22, 2015), the Kansas Department for Children and Families investigated a minor's death. The court found unpersuasive an agency lawyer's affidavit that the investigation was "'done in anticipation of litigation and under my direction.'" Id. at *5 (internal citation omitted). Relying on the majority view applicable to companies and other institutions, the court rejected work product protection for the investigation - - noting that the agency's "policy and procedure manual indicates that an attorney would oversee an investigation involving any situation similar to [the child's] death, regardless of whether litigation was imminent." Id. at *5-6. Two days later, in Gillespie v. Charter Communications, the court similarly rejected defendant's privilege and work product claim for a racial discrimination "Incident Investigation Report." 133 F. Supp. 3d 1195, 1198 (E.D. Mo. 2015). In denying the work product claim, the court concluded that Charter "generated [the incident report] in the ordinary course of [its] business" - - describing Charter's "ongoing compliance program" as involving a "reporting system, and the process of investigating claims made within this system." Id. at 1201.

How can companies successfully claim privilege and work product protection if they establish laudable processes to conduct internal investigations as part of their ordinary course of business? Several days after these decisions, another court provided some guidance.

- [Privilege Point, 4/13/16]

How Does a Company Satisfy the Work Product Motivation Element for Post-Accident Investigations? (Part I)

April 13, 2016

Companies frequently investigate accidents and other unfortunate incidents. If they do so in the ordinary course of their business, the work product doctrine normally does not apply. How do companies establish that a post-accident investigation was motivated by anticipated litigation rather than conducted in the ordinary course of their business?

In Sperber v. Mercy Regional Health Center, Case No. 14-1331-EFM-GEB, 2016 U.S. Dist. LEXIS 22664 (D. Kan. Feb. 24, 2016), the court denied work product protection for defendant's incident report following a slip and fall accident. The court cited the incident report's author, who admitted preparing the report "before talking with a risk manager or attorney" -- thus demonstrating that she "prepared her portion of the report in the usual course of business." Id. at *7. The court also reviewed the incident report in camera before denying defendant's work product assertion.

Courts assessing post-accident investigations usually examine their context (described in testimony or affidavits) -- and sometimes read the withheld documents in camera.

- [Privilege Point, 5/25/16]

Court Finds Bracewell & Guiliani Report Unprotected by the Privilege or the Work Product Doctrine

May 25, 2016

Many clients assume that the attorney-client privilege will almost always automatically protect any law firm's report to them, and that the work product doctrine will also apply whenever they anticipate litigation. Like other common client assumptions, this overly optimistic view is frequently wrong.

In U.S. Bank National Ass'n v. PHL Variable Insurance Co., defendant PHL withheld from production a 39-page report written by three lawyers from the law firm then known as Bracewell & Guiliani -- supporting its privilege and work product claim with a declaration that it retained Bracewell & Guiliani "for the purpose of seeking legal consultation, advice and counsel." Civ. No. 12-877 (JRT/TNL), 2016 U.S. Dist. LEXIS 42670, at *3 (D. Minn. Mar. 30, 2016). But the court rejected both claims. Among other things, the court pointed to non-protected emails, undoubtedly written by the defendant's business folks -- announcing that the company had hired Bracewell & Guiliani "to review our current procedures," because that law firm had provided services to others "serious about ensuring the quality of business." Id. at *6 (internal citations omitted). Other unprotected client documents described the law firm's activities as "consulting," and mentioned the firm's recommendations about the company's "business plan." Id. at *7 (internal citations omitted). The court also reviewed in camera the Bracewell & Guiliani report itself -- noting that "the majority of the Report suggests improvements to PHL's business practices." Id. The court again pointed to its in camera review of the report in also rejecting PHL's work product claim -- noting that the firm's report "was not 'mapping litigation strategy.'" Id. at *10 (citation omitted).

Corporations hiring law firms should remember that a court might review business executives' description of the law firm's role, and also read the law firm's communications.

- [Privilege Point, 7/19/17]

Cadwalader Loses Work Product and Privilege Claims for 51 Internal Investigation Witness Interview Memoranda: Part I

July 19, 2017

Cadwalader Wickersham & Taft lawyers conducted an internal corporate investigation into allegations of self-dealing at Washington Metropolitan Area Transit Authority (WMATA). When a private plaintiff sued WMATA and several individuals, WMATA claimed work product and privilege protection for Cadwalader's 51 witness interview memoranda – but lost both claims. Banneker Ventures, LLC v. Graham, 253 F. Supp. 3d 64 (D.D.C. 2017).

Assessing the work product claim, the court acknowledged a Cadwalader lawyer's declaration that she "was aware of the possibility [of] litigation" and that the memoranda "were 'intended to be internal work product for use by the Cadwalader legal team.'" Id. at 71 (internal citation omitted). However, the court rejected the work product claim, pointing to (1) internal non-privileged WMATA documents about Cadwalader's retention, "explaining [that it] was engaged 'to provide general governance recommendations, and to evaluate the Code of Ethics for Members of the WMATA Board of Directors'" (id. at 72 (internal citation omitted)); (2) internal non-privileged WMATA documents stating that Cadwalader's investigation "'reveal[ed] the need for additional examination, clarifying and strengthening of the Standards of Conduct policies'" (id. (alteration in original; internal citation omitted)); (3) deposition testimony indicating "that the investigation conducted by Cadwalader was for internal WMATA business purposes" (id. at 71); and (4) a two-year lapse between a threatening letter (which the court acknowledged triggered a reasonable anticipation of litigation against WMATA) and Cadwalader's retention. The court ultimately concluded that "the contemporaneous statements made by WMATA regarding the investigation do not indicate that the investigation was conducted as a result of anticipated litigation," and that the "evidence presented supports a finding that absent any anticipated litigation, WMATA would have conducted the same investigation to evaluate its business practices." Id. at 72-73.

Corporations and their lawyers should assure that everyone understands an internal investigation's primary motivating purpose, and reflects that motivating purpose in non-privileged contemporaneous documents. Next week's Privilege Point will focus on the privilege issue.

- [Privilege Point, 7/26/17]

Cadwalader Loses Work Product and Privilege Claims for 51 Internal Investigation Witness Interview Memoranda: Part II

July 26, 2017

Last week's Privilege Point explained that Cadwalader Wickersham & Taft's client Washington Metropolitan Area Transit Authority (WMATA) lost a work product claim for 51 witness interviews the firm prepared during its internal investigation into self-dealing at WMATA. Banneker Ventures, LLC v. Graham, 253 F. Supp. 3d 64 (D.D.C. 2017).

Unlike the court's focus on the investigation's primary business motivation in rejecting the work product claim, the court's privilege analysis found that WMATA waived its privilege protection. The court noted that WMATA publicly released the final Cadwalader report -- which "disclosed counsel's legal and factual conclusions," and "cite[d] extensively to the interview memoranda throughout the entirety of the document." Id. at 74. The court acknowledged a Cadwalader lawyer's declaration that the interview memoranda references "were intended only for use by Cadwalader" -- but noted that "WMATA failed to remove the references . . . from the version of the [Cadwalader] Report that was made available to the public." Id. at 74 n.1. The court also noted that WMATA "has also used the [Cadwalader] Report to its advantage in this litigation" -- by "us[ing] the [Cadwalader] Report and facts disclosed in that report to support its claims and defenses." Id. at 74. The court therefore found a subject matter waiver, and ordered WMATA to produce all of Cadwalader's 51 witness interview memoranda except the portions which (1) "contain subjects not covered by the [Cadwalader] Report," and (2) "material and other comments, if any, as to a lawyer's mental impressions." Id. at 74-75.

- Exxon Mobil Corp. v. Nw. Corp., Case No. 1:16-cv-00005-BLG-BMM, 2017 U.S. Dist. LEXIS 159143, at *3, *5, *5-6, *6 (D. Mont. Sept. 27, 2017) ("The documents XOM [Exxon Mobil] claimed were privileged were generally related to a 'hindsight investigation,' which it claimed was instigated in anticipation of litigation and is therefore not discoverable under Fed. R. Civ. P. 26(b)(3). XOM also withheld certain documents under the attorney-client privilege based on communications between several employees and corporate counsel. XOM fully complied with the Court's order on September 6, 2017."; "According to the privilege log, XOM had submitted a draft of the outline for the hindsight investigation by at least February 22, 2014. In this document, XOM listed its 'objectives' for the hindsight investigation which did not include a section on legal recourse or reference potential litigation. This evidences to the Court that the hindsight investigation was conducted for business reasons unrelated to future litigation. Moreover, XOM states in a letter to the Court: '[i]n late February, it was unclear whether the hindsight investigation would be conducted in an open, non-privileged format, or in a closed, privileged and work product context.' As of February 23, 2017, XOM's corporate counsel had still not 'decided' whether the investigation should be privileged. ('. . . the final decision about whether to privilege or not is still to be made')." (alterations in original) (internal citations omitted) (emphasis added); "These circumstances lead the Court to believe that XOM had decided to conduct the hindsight investigation for business reasons on or before February 22, 2014-before XOM's counsel stepped in and attempted to protect it under the work product doctrine. The hindsight investigation therefore would have been conducted 'regardless of the litigation,' and was not prepared in anticipation of litigation." (emphasis added); "Based on the circumstances surrounding the hindsight investigation, XOM has not met its high burden of showing that these documents were created in anticipation of litigation. Accordingly, the documents related to the hindsight investigation are not protected by the work product doctrine and must be produced." (emphasis added); "Several of the documents produced by XOM, however, do contain communications to and from XOM's corporate attorney. Such communications are protected by attorney-client privilege and are protected from disclosure to NWE. The Court orders the documents be produced with the communications to and from XOM's corporate counsel redacted." (emphases added)).

- In re Premera Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230, 1244-45, 1245, 1245-46, 1246-47, 1247 (D. Or. Oct. 27, 2017) (holding that most documents related to Premera's data breach investigation did not deserve privilege or work product protection; among other things, holding that: (1) nearly all communications among Premera's nonlawyers were primarily motivated by business rather than legal concerns, although lawyer changes to drafts and documents prepared for litigation purposes might deserve privilege protection; (2) nearly all documents prepared by Premera employees and third party vendors (including a public relations firm) were primarily motivated by business rather than legal concerns, and therefore did not deserve privilege protection (although communications seeking legal advice about proposed public statements might be privileged), and did not deserve work product protection because they would have been prepared in the same form absent anticipated litigation; (3) documents relating to data breach consultant Mandiant did not deserve privilege protection, because (unlike the Target and Experian case) Mandiant's scope of work did not change when Mandiant switched from reporting to the client to reporting to outside counsel, and did not deserve work product protection because they served a business rather than litigation-related purpose; noting that some other third party vendors' documents might have been specifically motivated by legal concerns or litigation preparation and therefore protected; (4) the common interest doctrine did not protect communications between Premera and other Blue Cross plans that had experienced only similar but not identical data breaches, although disclosing privileged communications to them did not trigger a subject matter waiver; (5) the fiduciary exception did not apply, because most withheld communications related to Premera's defending itself (emphasis added); "*Documents that relate to Mandiant's work for Premera, including the Mandiant Remediation Report, and other third-party vendors' technical and public relations aspects of the investigation and analysis (Category 3).*" a. *Mandiant*. The facts surrounding the Mandiant report(s) are not particularly clear to the Court. Plaintiffs move to have Premera produce the Mandiant 'Remediation Report.' Premera states that it already has produced the Mandiant 'Intrusion Report,' subject to an agreement that such production does not constitute a waiver of privilege, but adds that drafts and other documents relating to that report are privileged and protected by the work-product doctrine. It is not clear to the Court whether the 'Intrusion Report' and 'Remediation Report' are two different documents."; "Mandiant was hired by Premera in October 2014 to review Premera's data management system. On January 29, 2015, Mandiant discovered the existence of malware in Premera's system. On February 20, 2015, Premera hired outside counsel in anticipation of litigation as a result of the recently discovered data breach. On February 21, 2015,

Premera and Mandiant entered into an amended statement of work that shifted supervision of Mandiant's work to outside counsel. The amended statement of work, however, did not otherwise change the scope of Mandiant's work from what was described in the Master Services Agreement between Mandiant and Premera entered into on October 10, 2014. Several weeks after the February 21st agreement, Mandiant issued a report." (emphasis added); "Premera argues that Mandiant is the equivalent of a private investigator or other investigative resource hired by an attorney to conduct an investigation on behalf of an attorney, and thus that Mandiant's work is privileged and protected as work-product. The flaw in Premera's argument, however, is that Mandiant was hired in 2014 to perform a scope of work for Premera, not outside counsel. That scope of work did not change after outside counsel was retained. The only thing that changed was that Mandiant was now directed to report directly to outside counsel and to label all of Mandiant's communications as 'privileged,' 'work-product,' or 'at the request of counsel.' Premera argues that, with respect to Mandiant, after the breach was discovered and outside counsel was hired it became an entirely different situation. The amended statement of work, however, does not support that assertion. The only thing that appears to have changed involving Mandiant was the identity of its direct supervisor, from Premera to outside counsel. The amended statement of work confirms that the scope of the work remained the same. Thus, Premera's argument that Mandiant's focus shifted in February 25, 2015, and that Mandiant then became more like an investigator working on behalf of outside counsel instead of performing its original role on behalf of Premera, is not supported by the amended statement of work." (underscored emphases added); "This situation is unlike the Target data breach case relied upon by Premera. In Target, the company performed its own independent data breach investigation that was produced in discovery and the attorneys performed a separate investigation through a retained expert company that was privileged and protected from discovery. In re Target Corp. Customer Data Sec. Breach Litig., 2015 U.S. Dist. LEXIS 151974, 2015 WL 6777384, at *2 (D. Minn Oct. 23, 2015). With Premera, however, there was only one investigation, performed by Mandiant, which began at Premera's request. When the supervisory responsibility later shifted to outside counsel, the scope of the work performed did not change. Thus, the change of supervision, by itself, is not sufficient to render all of the later communications and underlying documents privileged or immune from discovery as work product."; "This situation also is unlike the Experian case relied on by Premera. In re Experian Data Breach Litig., Case No. 8:15-cv-01592-AG-DFM, 2017 U.S. Dist. LEXIS 162891 (C.D. Cal.). In that case, outside counsel was hired by the company and outside counsel then hired Mandiant. Id. ECF 239 at 3. Here, Premera had already hired Mandiant,

which was performing an ongoing investigation under Premera's supervision before outside counsel became involved. Premera has the burden of showing that Mandiant changed the nature of its investigation at the instruction of outside counsel and that Mandiant's scope of work and purpose became different in anticipation of litigation versus the business purpose Mandiant was performing when it was engaged by Premera before the involvement of outside counsel. Premera has not made that showing."; *"Third-party vendors.* The analysis for these Category 3 documents is the same as for the documents in Categories 1 and 2. These are the documents created by the third-party vendors hired by outside counsel. Many of these documents appear to be related to business functions delegated to counsel. There appear to be some documents, however, that are or may be related to legal functions and are thus properly protected by the attorney-client privilege or work-product doctrine. The documents relating to Epiq appear to be legal in nature and thus not a business function; they may be withheld. There also appear to be several electronic discovery vendors for whom it is unclear whether the work performed is of a legal or business nature. Premera provided the Court with the written agreement between Alteq, Inc. and Premera, which references a statement of work, but Premera did not provide a copy of the statement of work. Without reviewing the statement of work, it is not clear whether Alteq was performing litigation discovery services for counsel or computer technical assistance services for Premera. If it was the former, then Alteq would not be performing a business function and the information would be privileged or protected by the work-product doctrine. Similarly, e-Discovery, iDiscover, LLC, and Navigant are vendors that appear to be providing services relating to electronic discovery or discovery-related computer forensic assistance. If those services are being performed for counsel as litigation-support for discovery, they would not constitute non-legal business functions and would be privileged or protected by the work-product doctrine. If, however, they are services being performed for the benefit of Premera as part of the investigation or remediation of the breach, they likely would be a business function and thus discoverable. The other third-party vendors appear to be performing business functions and thus their documents and communications would not be protected by privilege or work-product."; "Premera's attempt to label all communications on these subjects as necessary investigative steps required to give information to Premera's counsel in connection with legal advice is not persuasive." (emphases added)).

- Shook v. Love's Travel Stops & Country Stores, Inc., 536 S.W.3d 635, 641 (Ark. Ct. App. 2017) (holding that a post-accident incident report did not deserve work product protection because it was prepared in the ordinary course of defendant's business; "In the present case, this incident report was required by Love's internal practices and procedures, was prepared by a store manager immediately after Shook's fall for the express purpose of informing his superiors of what happened, and was prepared years before any litigation ensued. We hold that the report constituted a document prepared in the regular course of business rather than for purposes of the litigation. The trial court erred in finding that it constituted 'work product' as defined under Arkansas law." (emphasis added))

- [Privilege Point, 2/21/18]

Courts Assessing Privilege and Work Product Claims in an Investigation Context Examine Several Factors

February 21, 2018

Courts assessing privilege and work product claims for corporate investigations usually focus on (1) the investigation's initiation (analyzing what motivated the investigation), and (2) the investigation's course (usually looking for lawyers' involvement). Less frequently, courts also focus on (3) the corporation's use of the investigation results. That post-investigation factor can shed light on the investigation's initial motivation.

In Carr v. Lake Cumberland Regional Hospital, Civ. A. No. 15-138-DLB-HAI, 2017 U.S. Dist. LEXIS 188865 (E.D. Ky. Nov. 15, 2017), the court overruled defendant hospital's privilege and work product claims for documents the hospital created while investigating an allegedly botched surgery. Analyzing one withheld email, the court rejected the hospital Risk Manager's affidavit claiming work product protection – noting that her statement "indicating that she would let the 'administrative team' know about the conversation . . . as opposed to in-house counsel or outside counsel – suggests that at the time of the creation of the emails, neither party crafted their emails 'in anticipation of litigation.'" Id. at *13.

Corporations and their lawyers must remember that courts examining privilege and work product protection for investigation-related documents focus on the investigation's initiation, course, and even how the client used investigation-related documents.

- In re Capital One Consumer Data Security Breach Litig., MDL No. 1:19md2915 (AJT/JFA), 2020 U.S. Dist. LEXIS 112177, at *3-4, *4, *5, *14, *15, *17, *18 (E.D.Va. June 25, 2020) (finding that Capital One's forensic investigation conducted by Mandiant into a cybersecurity incident did not deserve work product protection; noting that in 2015 Capital One entered into a Master Services Agreement with Mandiant; explaining that following a data breach, on July 20, 2019, Capital One retained Debevoise, which joined Capital One 4 days later in signing a Letter Agreement with Mandiant for an investigation "directed by counsel," but with the same scope of work as the earlier agreement; two days after that, Debevoise and Capital One entered into a new agreement with Mandiant that expanded the engagement, and provided that all work "was to be conducted at the direction of Debevoise . . . and that any deliverables were to be produced directly to Debevoise"; on September 4, 2019, Mandiant delivered its report to Debevoise, and Debevoise's direction then sent it to "Capital One's legal department, its Board of Directors, its financial regulators, its outside auditor, and dozens of Capital One employees" (emphasis added); Mandiant was later paid from leftover money from its 2019 retainer, and from Capital One's "Cyber budget, which payments were later re-designated as legal expenses" (emphasis added); noting that Mandiant's scope of work was the same under the Debevoise-involved Letter Agreement and the earlier 2015 arrangement; "no difference between what Mandiant produced and what it would have produced in the ordinary course of business absent Debevoise's involvement can be reasonably inferred from any differences in substance between the 2019 SOW and Letter Agreement, and Capital One failed to produce evidence sufficient to establish any such likely differences" (emphasis added); "Capital One failed to establish, like the companies in Premera [In re Premara Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230 (D. Or. 2017)] and Dominion Dental [In re Dominion Dental Servs. U.S., 429 F. Supp. 3d 190 (E.D. Va. 2019)], that the report Mandiant would have created for Capital One pursuant to its pre-data breach SOW would not have been substantially the same in substance or scope as the report Mandiant prepared for Debevoise." (emphasis added); "Nor did the Magistrate Judge improperly rely on the Mandiant Report's post-production distribution. As courts have recognized, post-production disclosures are appropriately probative of the purposes for which the work product was initially produced." (footnote omitted) (emphasis added); "In sum, Capital One had determined that it had a business critical need for certain information in connection with a data breach incident, it had contracted with Mandiant to provide that information directly to it in the event of a data breach incident, and after the data breach incident at issue in this action, Capital One then arranged to receive through Debevoise the information it already had contracted to receive directly from Mandiant.")

- Buckley LLP v. Series 1 of Oxford Ins. Co. NC LLC, 2020 NCBC 81, ¶¶ 44, 45, 46, 47 (N.C. Super. Ct. Nov. 9, 2020) (holding that the privilege did not protect Latham & Watkin’s investigation into workplace misconduct by a partner at the Buckley law firm; holding that although unprecedented for the Buckley firm, the investigation was mandated by Buckley’s firm policies; also noting during an in camera review that investigation-related documents did not deserve privilege protection, while the privilege protected other documents were created primarily because of Buckley’s request for legal advice from Latham; “Nevertheless, ‘[t]he relevant question is not whether [an attorney] was retained to conduct an investigation, but rather, whether this investigation was related to the rendition of legal services.’” (alterations in original) (citation omitted); “The evidence before the Court shows, as Buckley argues, that the Sandler investigation was an unprecedented event in the life of the Buckley firm. The evidence also makes clear, however, that the investigation Buckley retained Latham to perform was one required under Buckley’s firm policies as part of Buckley’s internal complaint procedure”; “As such, the evidence shows that the investigation was initiated and pursued in the ordinary course of Buckley’s business, and, contrary to Buckley’s contentions, the fact that Buckley hired a prominent outside law firm to conduct the investigation does not change this fact. While a Latham partner involved in the investigation offers affidavit testimony that Latham performed legal functions in connection with the investigation of Sandler, that testimony on its own does not serve to cloak all of Latham’s investigatory work with attorney-client privilege.”; “And while the engagement letter also suggests Latham was to provide legal counsel in connection with the investigation, ‘an engagement letter cannot reclassify nonprivileged communications as “legal services” in order to invoke the attorney-client privilege[.]’ Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 620 (7th Cir. 2009).” (alteration in original)), aff’d per curiam, 876 S.E.2d 248 (N.C. 2022).

- Wengui v. Clark Hill, PLC, 338 F.R.D. 7, 11, 12, 13, 13-14, 14 (D.D.C. 2021)(finding that law firm Clark Hill’s outside lawyer-directed forensic investigation into a cyber attack did not deserve work product or attorney-client privilege protection; explaining that Clark Hill’s former client Wengui sued the law firm after a cyber attack on the firm resulted in disclosure of his confidential information; noting that Clark Hill had retained an outside law firm to represent it, which in turn had retained forensic investigation firm Duff & Phelps; adopting the broad “because of” work product standard, but finding the protection inapplicable; “From the Court’s in camera review, it is clear that the Duff & Phelps Report summarizes the findings of such an investigation, and that ‘substantially the same [document] would have been prepared in any event . . . as part of the ordinary course of [Defendant’s] business.’” (alterations in original) (emphases added) (citation omitted); rejecting Clark Hill’s argument that Duff & Phelps’s investigation was one of two investigations it conducted—the first being conducted by its “usual cybersecurity vendor”; noting Clark Hill’s position that Duff & Phelps’s investigation “was the result of only one half of a ‘two-tracked investigation of the incident.’ Opp. at 2. On one track, Clark Hill’s usual cybersecurity vendor, called eSentire, worked ‘to investigate and remediate the attack’ so as to preserve ‘business continuity.’ Id.; see also id. at 5 (‘Over the . . . several weeks [after the attack], Clark Hill engaged with . . . eSentire . . . to ascertain the nature and remediate the effects of the attack.’). Clark Hill points out that it has disclosed documents related to eSentire’s work.’ Id. at 2. On a ‘separate track from the eSentire work,’ Defendant insists, was Duff & Phelps, retained by MPG ‘for the sole purpose of assisting [the firm] in gathering information necessary to render timely legal advice.’ ECF No. 29-17 (Engagement Letter from MPG) at 1; see also ECF No. 29-16 (Engagement Letter from Duff & Phelps) at ECF p.1.” (alterations in original); “The problem for the defense here is that its two-track story finds little support in the record. The firm offers no sworn statement averring that eSentire conducted a separate ‘investigation’ with the purpose of ‘learn[ing] how the breach happened’ or facilitating an appropriate[] response.” (alterations in original) (emphasis added); emphasizing that Clark Hill pointed to Duff & Phelps’s investigation for its understanding of the cyber attack; “Defendant’s own interrogatory answers state that ‘its understanding of the progression of the September 12, 2017 cyber-incident is based solely on the advice of outside counsel and consultants retained by outside counsel.’” (emphasis added); “The record instead suggests that on September 14, 2017, two days after the cyberattack began, Clark Hill turned to Duff & Phelps instead of, rather than separate from or in addition to, eSentire, to do the necessary investigative work.” (underscored emphasis added); emphasizing that Clark Hill used Duff & Phelps’s report for non-litigation purposes; “The fact that ‘the [R]eport

was used for a range of non-litigation purposes’ reinforces the notion that it cannot be fairly described as prepared in anticipation of litigation.” (alteration in original) (underscored emphasis added) (citations omitted); “In sum, although engagement letters dated September 14 state that Clark hired MPG in anticipation of litigation and that, on the same day, MPG in turn retained Duff & Phelps, Duff & Phelps’s role seems to have been far broader than merely assisting outside counsel in preparation for litigation. Although Clark Hill papered the arrangement using its attorneys, that approach ‘appears to [have been] designed to help shield material from disclosure’ and is not sufficient in itself to provide work-product protection.” (alteration in original) (emphasis added); “At a minimum, it is Clark Hill’s burden to demonstrate that a substantially similar document to the Duff & Phelps Report would not have been produced in the absence of litigation, and it has fallen well short of doing so. Both the report and related materials (referred to by Defendant as ‘Expert Materials,’ Opp. at 11) are accordingly not protected work product.” (emphasis added); also finding that Duff & Phelps’s report did not deserve privilege protection; “From the factual record discussed above and the Report itself, the Court concludes that Clark Hill’s true objective was gleaning Duff & Phelps’s expertise in cybersecurity, not in ‘obtaining legal advice from [its] lawyer.’ Linde Thomson, 5 F.3d at 1514 (quoting TRW, 628 F.2d at 212). At a minimum, Defendant has not demonstrated that the opposite is true. Duff & Phelps undertook a full investigation – the only one apparently commissioned by Clark Hill – with the goal of determining how the attack happened and what information was exfiltrated. The Report provides not only a summary of the firm’s findings, but also pages of specific recommendations on how Clark Hill should tighten its cybersecurity. And it was shared with both Clark Hill IT staff and the FBI, presumably with an eye toward facilitating both entities’ further efforts at investigation and remediation. (Because the Court finds the Report not subject to attorney-client privilege, it does not address Plaintiff’s separate argument that Defendant waived the privilege by disclosing the report to the FBI. See Reply at 17-21.)” (alteration in original) (underscored emphases added); rejecting Clark Hill’s reliance on the Target decision; “The firm points to only one case, the Target decision, that has applied the attorney-client privilege to a similar forensic report, and that non-binding decision (even assuming it is correct) is distinguishable in at least three ways. First, as discussed above, Target had a two-track approach, with one track a concededly ‘non-privileged investigation set up so that Target . . . could learn how the breach happened and . . . respond to it appropriately.’ 2015 U.S. Dist. LEXIS 151974, 2015 WL 6777384, at *2. Assuming that investigation was sufficient for Target’s business purposes, it is much easier to view the other as aimed at facilitating effective legal representation. Second, and relatedly, there is no indication that the Target report was shared as widely

for non-legal purposes as the Duff & Phelps Report. Third, the Target court specifically noted that the relevant investigation and report were not 'focused . . . on remediation of the breach.' 2015 U.S. Dist. LEXIS 151974, [WL] at *3. Here Duff & Phelps was apparently engaged for immediate 'incident response' and began its work as the attack was thought to still be ongoing. Its Report, moreover, includes pages of specific remediation advice." (alterations in original) (emphases added)).

- [Privilege Point, 4/28/21]

**Privilege and Work Product Protection for Corporate Investigations
After Clark Hill: Part I**

April 28, 2021

The large Detroit-based law firm of Clark Hill recently lost its effort to protect as attorney-client privileged and work product doctrine-protected its own investigation into its own data breach. *Wengui v. Clark Hill, PLC*, 338 F.R.D. 7 (D.D.C. 2021). A large law firm's inability to assure such protections for its own data breach investigation highlights the difficulty of any client doing so. What steps can corporate clients take to maximize those protections?

First, to deserve attorney-client privilege protection, corporations (or law firms) must establish that they were primarily motivated by the need to gather facts the lawyer required to provide legal advice. While serving on the D.C. Circuit, Judge Kavanaugh articulated a more corporate-friendly standard that would have protected as privileged an investigation if the need for legal advice was "one of the significant purposes" (even if it was not the "primary" purpose). *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 759-60 (D.C. Cir. 2014). But that standard has not widely taken root. Second, to deserve work product protection, corporations must prove that they were primarily motivated by litigation or anticipated litigation. Corporate investigations have little if any hope of work product protection if they are required by some external or every internal mandate. In those situations, no one can testify that the corporation would not have undertaken the investigation in the same fashion but for the primary purpose of litigation preparation. Ironically, this standard can create great difficulty for corporations that diligently require investigations into every allegation of financial misconduct, every workplace accident, every slip and fall in the produce aisle, etc.

Not surprisingly, courts do not automatically accept such primary purpose assertions in post-investigation affidavits or even statements supporting those purposes prepared during the investigation. Instead, courts frequently review in camera the withheld investigation-related documents. So corporations must not only talk the talk, they must walk the walk. Next week's Privilege Point will address the first focus of most courts' privilege and work product assessments: the investigation's initiation.

- [Privilege Point, 5/5/21]

**Privilege and Work Product Protection for Corporate Investigations
After Clark Hill: Part II**

May 5, 2021

Last week's Privilege Point noted a large law firm's failure to protect its own data breach investigation as privileged or as work product. Wengui v. Clark Hill, PLC, 338 F.R.D. 7 (D.D.C. 2021). Courts assessing such protections normally first examine what initiated the corporate investigation — applying the "primary purpose" tests mentioned last week.

One "initiation" focus that sometimes dooms a privilege or work product claim is the absence of any lawyers during this initiation phase. If non-lawyer executives exchange unprotected email message traffic about starting an investigation for business purposes or for other non-litigation purposes, it is very difficult for the corporation to ever successfully win either a "primary purpose" privilege or work product argument — the initiation train has left the station by the time lawyers arrived on the scene. And corporations normally must present evidence that their investigation was not mandated, and was different from what the corporation would have done absent its need for legal advice (on the privilege side) or its need to prepare for anticipated litigation (on the work product side). One way to maximize both protections is to conduct successive or parallel investigations — one of which is undertaken in the ordinary course, and a different investigation satisfying one or both primary purpose standards. The paradigmatic example of that expensive and therefore often unrealistic approach involved Target — which conducted two separate investigations into its massive data breach. In re Target Corp. Customer Data Sec. Breach Litig., MDL No. 14-2522 (PAM/JJK), 2015 U.S. Dist. LEXIS 151974 (D. Minn. Oct. 23, 2015).

The Clark Hill law firm did not face these "initiation" hurdles. The preliminary internal communications were of course among lawyers — and the firm also quickly hired another law firm to represent it. But many corporations hamper if not doom later privilege or work product claims by delaying lawyers' involvement. Management should immediately reach out to lawyers if there is a data breach, or some other worrisome incident. Those lawyers can memorialize and then follow through on the primary purpose standards. Next week's Privilege Point will focus on the second investigation phase that courts examine: the investigation's course.

- [Privilege Point, 5/12/21]

**Privilege and Work Product Protection for Corporate Investigations
After Clark Hill: Part III**

May 12, 2021

The last two Privilege Points (Part I and Part II) addressed privilege and work product protection for corporate investigations — in light of a large law firm's failure to protect its own internal investigation into its own data breach. Wengui v. Clark Hill, PLC, 338 F.R.D. 7 (D.D.C. 2021).

After considering the initiation phase of corporate investigations, courts usually turn to the investigation's course. Not surprisingly, the greater the lawyer's role on a daily basis (directing the investigation), the higher the odds of success. Corporations usually must prove that they did something special, different, out of the ordinary. Hiring outside counsel might help satisfy that standard. Clark Hill attempted to squeeze its internal data breach investigation into the paradigmatic Target case model mentioned last week. In re Target Corp. Customer Data Breach Litig., MDL No. 14-2522 (PAM/JJK), 2015 U.S. Dist. LEXIS 151974 (D. Minn. Oct. 23, 2015). Clark Hill hired an outside law firm, which in turn hired a new consultant to conduct the data breach investigation (Duff & Phelps -- not Clark Hill's "usual cybersecurity vendor"). Wengui, 338 F.R.D. at 11. But the court found that Clark Hill fell short: "[t]he problem for the defense here is that its two-track story finds little support in the record." Id. The court found that despite Clark Hill's lawyer hiring a new consultant, "[f]rom the Court's in camera review, it is clear that . . . 'substantially the same [document] would have been prepared in any event . . . as part of the ordinary course of [Clark Hill's] business.'" Id. (alterations in original). Courts not only look at documents created during the initiation and the course of an internal investigation, they sometimes point to factors that might not even cross lawyers' minds. In one case, a corporation whose data consultant Mandiant discovered malware quickly hired a law firm to conduct what it claimed was a protected investigation — using Mandiant. In re Premera Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230 (D. Or. 2017). The court rejected the corporation's work product claim, noting that Mandiant's "scope of work" had not changed — Mandiant just started reporting to the law firm rather than to the corporation. Id. at 1245-46. In another case, the court even pointed to a corporation's payment for an internal investigation out of a business rather than a litigation budget.

Having successfully survived judicial scrutiny of its investigation's initiation, Clark Hill stumbled during the court's examination of its investigation's course. After reviewing investigation-related documents in camera, the court

ultimately concluded that Clark Hill had not walked the walk: "[a]lthough Clark Hill papered the arrangement using its attorneys, that approach 'appears to [have been] designed to help shield material from disclosure' and is not sufficient in itself to provide work product protection." Wengui, 338 F.R.D. at 13 (second alteration in original). Next week's Privilege Point will address the third investigation phase courts examine — the investigation's use.

- [Privilege Point, 5/19/21]

**Privilege and Work Product Protection for Corporate Investigations
After Clark Hill: Part IV**

May 19, 2021

The last three Privilege Points (Part I, Part II and Part III) addressed a large law firm's failure to successfully assert privilege or work product protection for its own internal investigation into its own data breach. Wengui v. Clark Hill, PLC, 338 F.R.D. 7 (D.D.C. 2021).

As in many if not most similar cases, the court examined how Clark Hill used the investigation results. Courts review content and assess circulation. The Clark Hill court pointed to consultant Duff & Phelps's Report's "pages of specific remediation advice." Id. at 14. The court bluntly stated that "[t]he fact that the report was used for a range of non-litigation purposes' reinforces the notion that it cannot be fairly described as prepared in anticipation of litigation." Id. at 12 (citation omitted). And not surprisingly, the wider the circulation, the more the investigation seems primarily business-motivated and ordinary. Widespread internal circulation can seriously weaken both a privilege and a work product claim. One court protected a company's data breach investigation after repeatedly noting that its outside law firm only shared its investigation report with in-house lawyers, not the company's "Incident Response Team." In re Experian Data Breach Litig., SACV 15-01592 AG (DFMx), 2017 U.S. Dist. LEXIS 162891, at *22-23, *25 (C.D. Cal. May 18, 2017). Again looking to the paradigmatic Target case, the Clark Hill court noted that "there is no indication that the Target report was shared as widely for non-legal purposes as the Duff & Phelps Report." 338 F.R.D. at 14. Along with the Report's remedial-focused content, this circulation assessment led the court to "conclude[] that Clark Hill's true objective was gleaning Duff & Phelps's expertise in cybersecurity, not in 'obtaining legal advice from [its] lawyer.'" Id. at 13 (second alteration in original) (citation omitted).

Clark Hill is the latest in a worrisome series of cases rejecting privilege and work product protection for internal corporate investigations after assessing those investigations': (1) initiation; (2) course; and (3) use. There is a glimmer of good news – corporations and their lawyers generally can assert privilege and work product protection for communications about the investigation and about the investigation results. But these alarming decisions should remind corporations' management and their lawyers that normally someone will have to testify under oath that the investigation report and related documents would not exist in the same form if the corporation had not required legal advice, and/or had not anticipated litigation. The content and circulation pattern of

every document created before, during, and after an investigation should support these assertions.

- [Privilege Point, 9/22/21]

Another Company Loses a Data Breach Investigation Work Product Claim

September 22, 2021

One might think that any company reasonably anticipates litigation after suffering a data breach, so the work product doctrine would almost inevitably protect its data breach investigation. But only a handful of companies have succeeded in claiming such protection.

In In re Rutter's Data Security Breach Litigation, Civ. A. No. 1:20-CV-382, 2021 U.S. Dist. LEXIS 136220 (M.D. Pa. July 22, 2021), data breach victim Rutter's learned of a possible data breach on May 29, 2019. Later that same day, it hired BakerHostetler "to advise [it] on any potential notification obligations." Id. at *3 (internal citation omitted). The next day BakerHostetler hired consultant Kroll "to conduct forensic analyses on Rutter's card environment and determine the character and scope of the incident." Id. (internal citation omitted). But Rutter's still lost its work product claim. The court pointed to Kroll's scope of work — which was "to determine whether unauthorized activity . . . resulted in the compromise of sensitive data, and to determine the scope of such a compromise if it occurred." Id. at *6 (emphases added) (internal citation omitted). The court noted Kroll's corporate designee's testimony that "he was unaware of anyone else at Rutter's contemplating such lawsuits." Id. at *7. Finally, the court emphasized that "Kroll provided its report to Defendant when it was completed and there was no evidence that it was provided first to BakerHostetler." Id. at *8. The court similarly rejected Rutter's attorney-client privilege claim, noting that Kroll's scope of work made "no mention of attorney involvement" in the investigation, which resulted in a report that "did not include legal input." Id. at *12-13.

Perhaps there is nothing a company can do to assure work product or privilege protection for such data breach investigations. But this most recent losing effort should at least help companies avoid these fatal facts.

- [Privilege Point, 9/28/22]

Courts Apply The "Intensely Practical" Work Product Doctrine: Part I

September 28, 2022

The work product doctrine has been described by many courts as "intensely practical." Several decisions highlight this understandable adjective, and explicitly provide useful guidance for lawyers representing litigants and clients who anticipate litigation.

In Dietzel v. Costco Wholesale, Civ. A. No. 22-cv-0035, 2022 U.S. Dist. LEXIS 122558 (E.D. Pa. July 12, 2022), the plaintiff suffered injuries when he fell on an uneven sidewalk near a Costco tire center. He sought the "warehouse incident report" Costco employees prepared after the accident. Costco claimed work product protection, noting that the report explicitly stated that it "is to be prepared for the company's legal counsel." Id. at *18. But the court rejected Costco's work product claim, and ordered the incident report's production. Among other things, the court noted that: (1) the incident report "is a preprinted form with blank spaces to enter information"; (2) "the form itself appears to have its own form number"; (3) despite the printed language explaining that the report was to be prepared for a lawyer, Costco does "not contend that any attorney ordered its preparation or that the employee who prepared it communicated with any attorney before doing so"; (4) Costco did not identify any lawyer who ever received a copy of the report; and (5) the report apparently did not "make any 'reference to any claim of current or anticipated litigation.'" Id. at *18-19.

Courts applying the "intensely practical" work product doctrine examine the bona fides of withheld documents. Costco might have won its work product claim if employees working with Costco lawyers prepared a custom-made litigation-motivated post-accident report – in addition to the bare-bones "just the facts" required preprinted incident report. Next week's Privilege Point will focus on courts' "intensely practical" assessment of the "substantial need" standard.

- [Privilege Point, 10/11/23]

Must Litigants Identify Their Non-Testifying Experts?

October 11, 2023

Litigants relying on testifying experts can look to federal or state court rules in determining what they must disclose or may withhold. In contrast, courts take widely varying views of those issues in addressing litigants' non-testifying experts.

In Kaleta v. City of Holmes Beach, --- F. Supp. 3d ---, 2023 U.S. Dist. LEXIS 121660 (M.D. Fla. July 14, 2023), the court noted that the Eleventh Circuit had not decided whether litigants must identify their non-testifying experts. Remarkably, the court acknowledged that “[t]here appears to be a split in authority regarding whether the identities of non-testifying experts that are ‘retained or specially employed’ are protected from disclosure by Rule 26(b)(4)(D).” Id. at *9-10. The Tenth Circuit says yes, but the Ninth Circuit says no. The court ultimately found the litigant’s non-testifying experts’ identity discoverable, apparently at least in part because such “disclosure presents little risk of exposing counsel’s mental impressions, conclusions, opinions, or legal theories.” Id. at *15-16 (citation omitted).

Non-testifying experts can play a key role in litigants’ trial preparation. Those litigants’ lawyers should not assume that a local rule with which they are familiar will apply in other courts.

- Leonard v. McMenamins Inc., Case No. C22-0094-KKE, 2023 U.S. Dist. LEXIS 217502, at *6, *6-7, *7-8, *8-9, *9, *9-10 (W.D. Wash. Dec. 6, 2023) (in an opinion by Judge Evanson, analyzing privilege and work-product protection for a consultant's data breach investigation report prepared by the firm of Stroz Friedberg, which was retained by the victim's law firm of Stoel Rives; rejecting victim's work product claim for the investigation report; concluding that the victim's report was analogous to the Clark Hill data breach investigation found not to deserve work product protection, rather than two highly publicized examples of successful work product assertions for such data breach investigations (Target and Experian); "Numerous courts have considered similar disputes over cybersecurity consultant reports in the context of data breach litigation. In evaluating whether the given report should be withheld as protected work product, courts consider factors including whether the report provides factual information to the impacted entity (and others), whether the report constitutes the only investigation and analysis of the data breach, the types of services provided by the consultant, the relationship between the consultant and the impacted entity, and importantly, whether the report would have been prepared in a substantially similar form absent the anticipation of litigation. See, e.g., In re Experian Data Breach Litig., No. SACV 15-01592AG (DFMx), 2017 U.S. Dist. LEXIS 162891, 2017 WL 4325583 (C.D. Cal. May 18, 2017); In re Target Corp. Customer Data Sec. Breach Litig., MDL No. 14-2522, 2015 U.S. Dist. LEXIS 151974, 2015 WL 6777384 (D. Minn. Oct. 23, 2015); Guo Wengui v. Clark Hill, 338 F.R.D. 7 (D.D.C. 2021)."; "McMenamins directs this Court to In re Target Corp. Customer Data Security Breach Litigation, where the court denied a motion to compel production of a cybersecurity consultant's report and related communications on work product grounds. 2015 U.S. Dist. LEXIS 151974, 2015 WL 6777384, at *2-3. However, unlike here, Target had engaged in a two-track investigation of the subject data breach. On one track, it conducted its own business investigation to learn 'how the breach happened and [how] Target could respond to it appropriately.' 2015 U.S. Dist. LEXIS 151974, [WL] at *2. Information arising from this investigation was not privileged and had been disclosed. On the second track, 'Target established its own task force and engaged a separate team from Verizon to provide counsel with the necessary input.' Id. Material generated from this second track was withheld." (alterations in original); "While McMenamins argues that the same is true here, the record demonstrates otherwise. See Dkt. No. 42 at 16 ('McMenamins conducted its own internal investigation, which it has produced information on in discovery.'). McMenamins' discovery responses contain no information about what any other allegedly non-privileged internal investigation entailed, the results of any such investigation, or McMenamins' response thereto. To the contrary, McMenamins withholds nearly all information related to the

breach and its response to it on privilege grounds. See, e.g., Dkt. No. 40 at 77-78 (For example, in response to interrogatory No. 10, asking for factual information about the data breach, McMenamins objects based on privilege and states: ‘All non-privileged information about the Data Breach is included in the December 2021 Notice of Data Breach.’). As such, while it is true that Stroz Friedberg was retained by counsel, the similarities to the Target case end there. It is well-established that mere delegation of business functions to an attorney is insufficient to shield otherwise unprotected factual investigation from discovery. See Guo Wengui, 338 F.R.D. at 13 (collecting cases); see also Allied Irish Banks v. Bank of Am., N.A., 240 F.R.D. 96, 99 (S.D.N.Y. 2007) (‘That [the plaintiff] hired a law firm to “assist” in the investigation is of no moment. . . . A party may not insulate itself from discovery by hiring an attorney to conduct an investigation that otherwise would not be accorded work product protection.’) (cleaned up).” (alterations in original); “McMenamins also relies on In re Experian Data Breach Litig., 2017 U.S. Dist. LEXIS 162891, 2017 WL 4325583. There, Experian retained Jones Day as legal counsel and Jones Day in turn hired the cybersecurity consultant to help ‘provide legal advice to Experian regarding the attack.’ 2017 U.S. Dist. LEXIS 162891, [WL] at *2. The court denied Plaintiff’s motion to compel the consultant’s report, finding the report was relevant to the defense of the litigation and not an internal investigation or remediation because the report was not provided to Experian’s internal incident response team. Id. Here, as noted above, the Stroz Friedberg report is the only internal investigation arising from the data breach at McMenamins and the report itself acknowledges Stroz Friedberg participated in many internal business discussions.” (alteration in original); “The Court finds Guo Wengui more closely resembles the facts of this case. 338 F.R.D. 7. In that case, like here, the hacked entity (a law firm) failed to demonstrate that any meaningful investigation of the data breach occurred apart from the lone consultant report at issue. The court also noted that the report was shared with leadership and IT, just like the report here. The court recognized that the consultant was hired by counsel but found ‘that approach “appears to [have been] designed to help shield material from disclosure.”’ Guo Wengui, 338 F.R.D. at 13 (quoting In re Dominion Dental Servs. USA Data Breach Litig., 429 F. Supp. 3d 190, 195 (E.D. Va. 2019)). Other courts granting motions to compel cybersecurity reports also focus on the description of services in the scope of work and the availability of factual information from other non-privileged sources. See, e.g., In re Premera Blue Cross Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230, 1245-46 (D. Or. 2017); Dominion Dental Servs., 429 F. Supp. 3d 190; In re Cap. One Consumer Data Sec. Breach Litig., MDL No. 1:19md2915 (AJT/JFA), 2020 U.S. Dist. LEXIS 91736, 2020 WL 2731238 (E.D. Va. May 26, 2020).”; “In light of the above persuasive authority and

the Court's in camera review of the report, the Court finds that the Stroz Friedberg report is not protected work product. In short, the report provides only factual information. Stroz Friedberg was hired to determine the timing, means, and extent of the data breach while also participating in containment and restoration processes. The report also notes that Stroz Friedberg contributed to business discussions and provided remediation and investigative services. Further, the supplemental scope of work underscores that Stroz Friedberg was assisting with restoration services, not providing legal advice. Beyond the conclusory and self-serving first sentence of the report that Stroz Friedberg was engaged to assist in providing legal advice, there is no evidence this report was in fact used to provide legal advice. Instead, the report, engagement letter, scopes of work, and all other available evidence demonstrate that Stroz Friedberg drafted this report for a business purpose, unrelated to anticipated or pending litigation. The report is not work product.")

C. Protection for Corporate Investigations Different from Required or Ordinary Course Investigations

- [Privilege Point, 2/6/02]

Corporate Investigations Can Start as the "Ordinary Course Of Business" But Continue in "Anticipation Of Litigation"

February 6, 2002

The work product doctrine protects documents that companies prepare in "anticipation of litigation" and because of the litigation. This second requirement focuses on the motivation for the documents' creation, and denies the protection to documents prepared in the "ordinary course of business" (because those documents would have been created even if there had been no litigation anticipated).

In Welland v. Trainer, No. 00 Civ. 0738 (JSM), 2001 U.S. Dist. LEXIS 15556, at *6 (S.D.N.Y. Sept. 28, 2001), a company relied on its lawyers to investigate the company's senior vice president, who was accused of unethical business practices. The court refused to protect the documents generated during the investigation, ruling that the investigation of any employee accused of unethical practices would occur "in the ordinary course of business to determine whether or not to terminate that employee." The court extended the work product protection to documents prepared after the company terminated the vice president, because at that time the company could anticipate that the vice president would sue the company.

Companies and their lawyers wishing to maximize the work product doctrine protection should articulate the motivation for their investigations. Otherwise, a court might find that an investigation was conducted in the "ordinary course of business" rather than in anticipation of litigation.

- [Privilege Point, 5/12/04]

Court Analyzes a Two-Step Internal Corporate Investigation

May 12, 2004

Defendants in hostile work environment cases impliedly waive the privilege and work product protections covering corporate investigations by raising the affirmative defense that they exercised “reasonable care” to prevent and correct sexually harassing behavior. However, sometimes it can be difficult to determine the scope of the implied waiver.

In EEOC v. Rose Casual Dining, L.P., No. 02-7485, 2004 U.S. Dist. LEXIS 1983 (E.D. Pa. Jan. 23, 2004), the court distinguished between a restaurant’s internal investigation conducted before the plaintiff was terminated, and a later investigation conducted by the restaurant’s outside lawyer after the restaurant received a letter from the fired employee threatening litigation. The court held that the work product doctrine did not cover any documents generated during the former investigation (because of the implied waiver), while the doctrine did protect documents generated during the latter investigation. Because the restaurant only generated witness statements as part of the second investigation, it could withhold them from discovery.

Companies interested in relying on the “reasonable care” affirmative defense in hostile work environment cases should carefully analyze the scope of the resulting implied waiver – and should consider starting a second investigation if circumstances warrant.

- Ryan v. Gifford, Civ. A. No. 2213-CC, 2008 Del. Ch. LEXIS 2, at *3, *10, *10-11, *11, *12, *12 n.9, *16, *17-18 (Del. Ch. Jan. 2, 2008) (unpublished opinion) (addressing a situation in which the law firm of Orrick Herrington and forensic accounting firm LECG conducted an investigation into possible options backdating by executives and directors of Maxim; noting that Maxim's board established a Special Committee composed of a single director, which was not an "independent Special Litigation Committee" under Delaware law; explaining that the single-member Special Committee retained Orrick, who did not provide a written report but instead presented an oral report to a Maxim board meeting attended by three directors represented by the law firm of Quinn Emanuel in the derivative action that prompted Orrick Herrington's investigation; noting that Maxim's board found that some directors received backdated options, but did not take any action to recover any damages; further explaining that Maxim "provided details of this work to third-parties, including NASDAQ and publicly to investors (through the SEC Form 8-K). Moreover, the Special Committee itself provided a number of documents to the SEC, the United States Attorney's Office, and Maxim's current and former auditors."; also noting that "the director defendants in this case have specifically made use of the Special Committee's findings and conclusions for their personal benefit and have argued to this Court that the Special Committee's exoneration of them should be accorded deference. The director defendants have made these arguments in a brief, opposing plaintiffs' motion to amend the complaint, in which coincidentally Maxim has expressly joined. Further, the director defendants have extensively relied upon the Special Committee's findings both in opposing plaintiffs' motion for summary judgment and in support of their own motion for summary judgment. At the time of the November 30 decision, in their unamended summary judgment brief, the director defendants explicitly rely upon the unwritten 'findings' of the Special Committee that purport to absolve the director defendants of liability." (footnote omitted); "[T]he director defendants have submitted an amended brief in support of their motion for summary judgment that purports to disavow reliance on the Special Committee's findings, despite their explicit reliance thereon in the first brief in support of their motion."; noting that in an earlier opinion "the Court ruled that Maxim, its Special Committee and Orrick must produce all material[s] related to the Special Committee's investigation that were withheld on grounds of attorney-client privilege."; "The Court also directed Orrick to turn over its work-product, including its interview notes, for in camera review. Orrick does not seek to appeal any aspect of this Court's ruling, including the ruling that plaintiffs have made a showing of good cause to obtain its non-opinion work product."; "[I]t is worthwhile to repeat that the relevant factual circumstances here include the receipt of purportedly privileged information by the director defendants in their

individual capacities from the Special Committee. The decision would not apply to a situation (unlike that presented in this case) in which board members are found to be acting in their fiduciary capacity, where their personal lawyers are not present, and where the board members do not use the privileged information to exculpate themselves."; noting that Maxim did not appeal the court's earlier decision that the Garner doctrine overcame any privilege claim; after explaining that the court's Garner determination "provides an independent basis" for its conclusion requiring Maxim to disclose the documents; also noting the directors' essentially inaccurate description about whether they were relying on Orrick Herrington's report; "At the time of the November 30 decision, however, the director defendants explicitly asserted that the findings of the Special Committee were entitled to deference from this Court. Moreover, even if this Court ignores the suspicious timing of the director defendants' purported disavowal of reliance on the investigation, Maxim seeks to further avail itself of the Special Committee's report, which will redound to the benefit of the director defendants."; declining to certify an appeal).

- Schlicksup v. Caterpillar, Inc., No. 09-CV-1208, 2011 U.S. Dist. LEXIS 75299, at *5, *12-13, *14 (C.D. Ill. July 13, 2011) (analyzing an internal corporate investigation; finding that both the attorney-client privilege and the work product doctrine applied to documents created during an investigation by Howrey into possible illegal activity and retaliation, harassment and other "improper and illegal conduct by Caterpillar employees"; "It is true that Plaintiff did not file his complaint with the Occupational Safety and Health Administration until November 2008, nearly 16 months after Howrey's 2007 report."; "However, the Court believes that Howrey's work 'can fairly be said to have been prepared or obtained because of the prospect of litigation.' Howrey's work went above and beyond a routine internal investigation. It was an in-depth legal analysis of Caterpillar's legal exposure to claims of illegal eavesdropping, retaliation and other alleged illegal action raised by Plaintiff in his internal complaints. The interviews, research, memoranda and reports focus on determining the existence and viability of those potential claims and defenses."; "[H]ere the factual context and documents prepared by Howrey demonstrate that Howrey's work was done in anticipation of litigation. Both matters were referred to Howrey because of the prospect of litigation by Plaintiff, as is clear from Plaintiff's internal complaints and from the documents themselves.").

- [Privilege Point, 12/28/11]

Court Analyzes an Investigation's Timeline When Determining Available Protections

December 28, 2011

Because the attorney-client privilege depends on the involvement of a lawyer and the work product doctrine protection depends on the anticipation of litigation, the availability of both protections depends on the factual context.

In Geller v. North Shore Long Island Jewish Health System, No. CV 10-170 (ADS)(ETB), 2011 U.S. Dist. LEXIS 129751 (E.D.N.Y. Nov. 9, 2011), the court analyzed both privilege and work product protection for documents created during defendant Health System's investigation of sexual harassment. The court found the defendant's compliance officer investigated the alleged harassment starting on July 28, 2009. The material she created did not deserve any protection until August 18, when defendant received a threatening letter from plaintiff's lawyer. The material she created on that day deserved only work product protection. However, on August 19 the defendant retained Epstein Becker & Green to supervise the investigation. The court therefore found that materials created after August 19 deserved both privilege and work product protection. Significantly, the court found that both protections remained intact, because "defendant's counsel has affirmatively represented to the Court that defendants have no intention of 'using the investigation to avoid liability.'" Id. at *11.

Some courts would not have been as willing to find privilege protection for an ongoing investigation just because a lawyer stepped in to begin supervising it. Still, this case highlights the importance of a lawyer's participation in analyzing privilege protection and anticipated litigation's importance in analyzing work product protection.

- [Privilege Point, 10/9/13]

How Can Companies Satisfy the Work Product Doctrine's "Motivation" Element?: Part I

October 9, 2013

Many lawyers focus on the first two elements of the work product doctrine - which require (1) "litigation" that the client (2) reasonably "anticipates." But documents that clients or their lawyers prepare in anticipation or even during litigation deserve work product protection only if they satisfy the third element - that the documents were (3) "motivated" by the litigation, and not by something else.

The work product doctrine generally does not protect documents that companies prepare in the ordinary course of their business, or because of some external or internal requirements. In Blais v. A.R. Cheramie Marine Management, Inc., Civ. A. No. 12-2736 SECTION "R" (2), 2013 U.S. Dist. LEXIS 111307 (E.D. La. Aug. 7, 2013), the defendant investigated a former employee the company had recently rehired. Company policy required creation of a "nonconformity report." Id. at *6. The court acknowledged that this report "was required to be prepared in defendant's ordinary course of business," and also noted that "defendant has already produced [the report] to plaintiff." Id. In contrast, the court upheld the company's work product claim for statements and investigative reports "which clearly went beyond ordinary company policy and procedure." Id. at *6-7.

The work product "motivation" element requires companies to demonstrate that any withheld work product was motivated by anticipated litigation rather than prepared in the ordinary course of business or required by some external or internal mandate.

- [Privilege Point, 10/16/13]

How Can Companies Satisfy the Work Product Doctrine's "Motivation" Element?: Part II

October 16, 2013

Last week's Privilege Point explained that companies claiming work product protection must meet the "litigation" and "anticipation" elements, and then satisfy the separate "motivation" element. That prerequisite for work product protection requires companies to demonstrate that the withheld documents were motivated by the anticipated litigation rather than by something else.

In DiMaria v. Concorde Entertainment, Inc., Civ. No. 12-11139-FDS, 2013 U.S. Dist. LEXIS 112533 (D. Mass. Aug. 9, 2013), defendant tavern investigated a patron's death during an altercation. The tavern's Security Manual required preparation of an "incident report" the night of such a serious event. Id. at *2. The tavern's employees did not prepare the required report that night, but a few days later its lawyers took statements from several employees. The decedent's administrator argued that the tavern took those statements "'in the ordinary course of business' pursuant to the Safety Manual." Id. at *6 (internal citation omitted). The court disagreed - noting that the statements "constitute departures from the routine policy described in the Safety Manual," and that "the nature of the incident and its effects and counsel's immediate involvement further removed the situation from 'the ordinary course' of the defendant's business." Id. at *6-7.

As companies face an increasing number of external requirements, and laudably adopt safety-conscious internal requirements, they face a greater burden in satisfying the work product "motivation" element. In essence, companies must prove that they did something different or special because they anticipated litigation.

- In re MDM Marina Corp., No. 13-cv-597 (ENV) (VMS), 2013 U.S. Dist. LEXIS 177916, at *12-13 (E.D.N.Y. Dec. 18, 2013) (analyzing protections in a first party insurance context; "MDM has met its burden in this case based on Mr. Resnick's [Great Am. Ins. Co. claims specialist] affidavit. Mr. Resnick stated that it was not the insurer's policy to obtain witness statements for every claim, but he decided to obtain the witness statements in order to assist the attorneys that he would eventually retain. . . . He based his decision on his review of the case, conversations with MDM, the fact that Ms. Cera had already retained counsel, his opinion as to MDM's liability, and his opinion that because this was a maritime claim, the vessel's owner was likely to proactively file an action for exoneration. . . . Importantly, he stated that he decided to obtain the two statements 'purely in anticipation of likely litigation.' . . . (emphasis added). As in Hamilton [v. Great Lakes Dredge & Dock Co.], No. 05 Civ. 3862 (DGT), 2006 U.S. Dist. LEXIS 50760 (E.D.N.Y. July 25, 2006)], Claimant offers no evidence to dispute Mr. Resnick's sworn testimony, and the Court has no reason to doubt his credibility. Thus, MDM has met its burden of establishing that the witness statements are privileged work-product.").
- Bonnell v. Carnival Corp., Case No. 13-22265-CIV-WILLIAMS/GOODMAN, 2014 U.S. Dist. LEXIS 22459, at *16, *5-6 (S.D. Fla. Jan. 31, 2014) (finding that a post-accident investigation deserved work product protection, but that a later different consultant report prepared "in an effort to curb litigation" did not deserve work product protection; "Having heard from the parties and having reviewed the record, including the affidavit of Suzanne Brown Vazquez (Carnival's Director of Guest Claims and Litigation Counsel), I see no reason to reach a different conclusion in this case. As Ms. Vazquez's affidavit states, the incident reports are not prepared for every reported incident occurring on a Carnival vessel. Rather, they are only prepared '[w]hen a passenger reports an incident resulting in injury which requires treatment beyond basic first aid,' because, in Carnival's experience, those incidents typically result in litigation. . . . The incident reports are then provided to Carnival's counsel. . . . In this case, Ms. Vazquez explains, the incident report 'was created to assist Carnival Cruise Lines' claims department and defense counsel in anticipation of litigation,' because Carnival believed that litigation was likely to ensue '[i]n light of how the incident occurred and the nature of the medical care provided.'" (internal citation omitted)).

- Mendez v. St. Alphonsus Reg'l Med. Ctr., Case No. 1:12-cv-26-EJL-CWD, 2014 U.S. Dist. LEXIS 94818, at *5-6, *8-9 (D. Idaho July 10, 2014) (analyzing the privilege and work product implications of a company's investigation of a harassment claim; "In this case, Associate General Counsel for SARMC [defendant], Jacqueline Fearnside, directed the Employee Relations Manager, Dennis Wedman, to investigate Mendez's claims of 'unlawful harassment' and 'hostile work environment' raised by Mendez on his own behalf and that of a co-worker in the email sent to SARMC's Local Integrity Officer on May, 2010. . . . Fearnside 'anticipated that [Mendez's] claims would ultimately result in litigation' because his complaint alleged 'unlawful harassment' and 'hostile work environment.' . . . Fearnside directed Wedman to prepare a report on the investigation in a specific format 'for purposes of preparing for any potential litigation and to enable [Fearnside] to provide SARMC with legal advice.' . . . The Report was communicated in confidence and labeled 'Confidential -- Attorney/Client Privileged.'"; "Due to the nature of these allegations, Fearnside directed Wedman to conduct an investigation regarding Mendez's complaint. . . . This investigation was more extensive than most investigations into OIP complaints, because most OIP complaints are handled by the Local Integrity Officer without any direction from the Office of General Counsel. . . . According to Fearnside's sworn declaration, she anticipated litigation and directed Wedman to conduct the investigation 'for purposes of preparing for any potential litigation and to enable [her] to provide SARMC with legal advice.' . . . Thus, the OIP Report exists because SARMC anticipated a lawsuit and the investigation was undertaken at the specific direction of the Associate General Counsel. Therefore, the OIP report is protected from disclosure by the work product doctrine, absent waiver.").

- In re Target Corp. Customer Data Sec. Breach Litig., MDL No. 14-2522 (PAM/JJK), 2015 U.S. Dist. LEXIS 151974, at *4, *5, *6, *7, *8, *11, *12 (D. Minn. Oct. 23, 2015) (holding that the attorney-client privilege and the work product doctrine protection covered Target's internal communications and its communications with a team of Verizon employees who conducted an outside lawyer-initiated and directed investigation into Target's data breach, which was separate from the business-motivated investigation conducted by a different team of Verizon employees who did not communicate with the Verizon employees assisting the outside lawyers; explaining Plaintiffs' argument; "Plaintiffs argue that these communications and documents at issue are not protected by the attorney-client privilege and the work-product doctrine because 'Target would have had to investigate and fix the data breach regardless of any litigation, to appease its customers and ensure continued sales, discover its vulnerabilities, and protect itself against future breaches.'" (internal citation omitted); also explaining Target's response; "Target asserts that the Data Breach Task Force was not involved in an ordinary-course-of-business investigation of the data breach. Rather, Target alleges that it established the Data Breach Task Force at the request of Target's in-house lawyers and its retained outside counsel [Ropes & Gray] so that the task force could educate Target's attorneys about aspects of the breach and counsel could provide Target with informed legal advice. . . . Target's Chief Legal Officer, Timothy Baer, Esq., explains that shortly after discovering the possibility that a data breach had occurred, Target retained outside counsel to obtain legal advice about the breach and its possible legal ramifications."; "With respect to Verizon, Target also explains that it has only claimed privilege and work-product protection for documents involving one team from Verizon Business Network Services, which Target's outside counsel engaged to 'enable counsel to provide legal advice to Target, including legal advice in anticipation of litigation and regulatory inquiries.' . . . Meanwhile, another team from Verizon also conducted a separate investigation into the data breach on behalf of several credit card brands."; quoting a declaration that "the Verizon teams did not communicate with each other about the substance of the attorney-directed investigation"; again paraphrasing Target's argument: "Target asserts that following the data breach, there was a two-track investigation. On one track, it conducted its own ordinary-course investigation, and a team from Verizon conducted a non-privileged investigation on behalf of credit card companies. This track was set up so that Target and Verizon could learn how the breach happened and Target (and apparently the credit card brands) could respond to it appropriately. On the other track, Target's lawyers needed to be educated about the breach so that they could provide Target with legal advice and protect the company's interests in litigation that commenced almost immediately after the breach became

publicly known. On this second track, Target established its own task force and engaged a separate team from Verizon to provide counsel with the necessary input, and it is for information generated along this track that Target has claimed attorney-client privilege and work-product protection."; noting that the court had reviewed documents in camera; "Target provided [certain] documents in camera, and the Court has completed its in camera review. Based on that in camera review, the Court concludes that no hearing is required to decide the privilege and work-product issues raised as to the specific examples listed in Plaintiffs' Letter Brief." (footnote omitted); agreeing with Target's position; "Target has demonstrated, through the Declaration of Timothy Baer [Target's Chief Legal Officer], that the work of the Data Breach Task Force was focused not on remediation of the breach, as Plaintiffs contend, but on informing Target's in-house and outside counsel about the breach so that Target's attorneys could provide the company with legal advice and prepare to defend the company in litigation that was already pending and was reasonably expected to follow."; also concluding that Plaintiffs could not overcome Target's work product protection; "Plaintiffs have not demonstrated that without these work-product protected materials they have been deprived of any information about how the breach occurred or how Target conducted its non-privileged or work-product protected investigation. Target has produced documents and other tangible things, including forensic images, from which Plaintiffs can learn how the data breach occurred and about Target's response to the breach. (See Visser Decl. 11, Ex. 7 (report prepared by a separate team from Verizon Business Network Services that was not engaged by Target's counsel and that conducted an investigation on behalf of several credit card issuing companies).)").

- Johnson v. Ford Motor Co., Case No. 3:13-cv-06529, 2016 U.S. Dist. LEXIS 44267, at *76-77, *78 (S.D. W. Va. Mar. 28, 2016) ("Mr. Logel [defendant's in-house lawyer] asserts that Ford's OGC enlisted Ford's ASO [Automotive Safety Office] to assist in the review and analysis of NHTSA VOQs (vehicle owner questionnaire) and TREAD Act submissions. . . . Ford's ASO then created documents during its review and analysis that were 'used solely by Ford's attorneys in rendering legal advice to Ford regarding pending and anticipated litigation involving claims of sudden unintended vehicle acceleration.' . . . Mr. Love's [ASO employee] affidavit corroborates Mr. Logel's sworn statements. As a member of Ford's ASO in 2010, Mr. Love recalls creating documents at Ford's OGC's request after reviewing and analyzing NHTSA VOQs and TREAD Act submissions. Mr. Love also states that '[t]he review and analysis requested from Ford's ASO by Mr. Logel was different from other VOQ analysis conducted by Ford's ASO during th[e] same time period.' Similarly, Mr. Nevi testified that Ford's OGC specifically requested a 'different look' at the information reviewed by Ford's ASO during the 2010 investigation." (internal citation omitted); "Second, after reviewing Ford's in camera submission and comparing that submission to the representative documents provided by the parties, the Court concludes that the ASO conducted a separate analysis of the pertinent data from a different perspective for the benefit of the OGC. Third, and relatedly, the contents of Ford's in camera submission demonstrate that Ford was concerned with probable future litigation after the Wall Street Journal article was published.")

- [Privilege Point, 4/20/16]

How Does a Company Satisfy the Work Product Motivation Element for Post-Accident Investigations? (Part II)

April 20, 2016

Last week's Privilege Point discussed a court's rejection of a work product claim for a routine post-accident incident report. That defendant did not establish that the report was different from reports following accidents not likely to result in litigation.

In In re Bard IVC Filters Products Liability Litigation, MDL No. 2641, 2016 U.S. Dist. LEXIS 17583 (D. Ariz. Feb. 11, 2016), a medical device company's lawyer hired a former employee as a consultant to investigate several patient deaths allegedly associated with the company's device. Plaintiffs argued "that the Report was prepared in the ordinary course of business" -- but the court disagreed. Id. at *79. It pointed to the defendant's in-house lawyer's and the consultant's testimony "that the Report was an unusual undertaking," was "a more extensive, detailed analysis than [the company] normally created," and "was substantially different" from other reports. Id. at *80, *86. Although acknowledging that "there are some similarities" between the Report and the defendant's ordinary product investigations (called "health hazard evaluations"), the court cited the consultant's testimony about numerous specific differences between the Report and those ordinary evaluations. Id. at *90, *72. Significantly, the court also reviewed in camera both ordinary evaluations and the withheld Report -- concluding that the court's "close review of the [health hazard evaluations] and the Report confirms these distinctions." Id. at *87.

Companies motivated by anticipated litigation to conduct post-accident investigations normally must establish such investigations' differences from other ordinary and routine incident reports -- remembering that courts may well read both types of documents in camera.

- [Privilege Point, 10/12/16]

Maximizing Work Product Protection After an Ordinary Course Internal Investigation Uncovers Serious Problems that Could Trigger Litigation

October 12, 2016

The work product doctrine only protects internal corporate investigations initiated by the corporation's anticipation of litigation. Thus, the protection normally does not extend to investigations required by some external or internal mandate, or undertaken in the ordinary course of business. But unprotected ordinary course investigations might uncover something that could trigger litigation. What happens then?

In Patel v. L-3 Communications Holdings, Inc., 14-CV-6038 (VEC), 14-CV-6182 (VEC), 14-CV-6939 (VEC), 2016 U.S. Dist. LEXIS 97241 (S.D.N.Y. July 25, 2016), L-3's in-house lawyer initiated an internal corporate investigation into misconduct allegations about one government contract. L-3 later hired Simpson Thacher "to complete the investigation." About five weeks later, Simpson Thacher retained a forensic accounting firm to assist in a broader investigation into other potential accounting misconduct or errors. Because Simpson Thacher's initial contract-specific investigation "was largely complete" by that time, the forensic accounting firm "had no role or involvement" in that earlier narrower investigation. L-3 self-reported on the contract-specific investigation results, but in later litigation claimed work product protection for the broader investigation documents -- arguing that the later investigation was "entirely separate from Simpson's investigation into the [specific] Contract Accounting Irregularities and was focused more broadly." Judge Caproni first held that the work product could apply to internal investigations "conducted in large part [not exclusively] because of expected litigation," because "work product protection applies even when documents are created for multiple purposes." She then found the work product doctrine applicable, noting that: (1) Simpson Thacher had hired the forensic accountant "to conduct a broader review" so "the scope and manner of conducting the investigation was clearly influenced by the expectation and reality of litigation"; and (2) a Simpson Thacher partner's declaration "attested that Simpson and [the forensic accountant] would not have conducted their review in the manner they did in the absence of anticipated litigation."

Companies trying to maximize work product protection in this scenario should ideally: (1) complete -- and disclaim work product protection for -- the ordinary course investigation (keeping in mind that adversaries will thus be able read documents related to that investigation); (2) initiate a new lawyer-driven parallel or successive investigation (which may even involve re-

interviewing witnesses), preferably with new consultants; (3) assure that communications and other documents generated during this separate investigation reflect on their face its different or special litigation-motivated nature; (4) be prepared to present evidence that the litigation-motivated investigation was different from the earlier ordinary course investigation.

- In re Experian Data Breach Litig., SACV 15-01592 AG (DFMx), 2017 U.S. Dist. LEXIS 162891, at *19, *20, *21, *20-21, *22-23, *23-24 (C.D. Cal. May 18, 2017) (finding that the work product doctrine protected materials created by a forensic consultant hired by Jones Day to investigate Experian's data breach, making it unnecessary to analyze possible privilege protection; holding that (1) the work product doctrine protected the documents; (2) plaintiffs could not overcome the work product protection; and (3) Experian did not waive the work product protection by disclosing the forensic consultant's report internally and to fellow common interest participant T-Mobile (Experian's client); explaining that "in this circuit, a 'because-of' test is used to determine whether a document was prepared in anticipation of litigation, which means that a document doesn't need to be prepared exclusively for use in litigation"; in supporting its conclusion (1), explaining as follows: "Some background is helpful for this analysis. In September 2015, Experian learned that one of its systems was breached by an unauthorized third party. Experian immediately retained Jones Day, its outside litigation counsel, for legal advice regarding the attack. Jones Day then hired Mandiant to conduct an expert report analysis of the attack. And according to Experian, the only purpose of that report is to help Jones Day provide legal advice to Experian regarding the attack." (emphasis added); "On October 1, 2015, Experian announced its data breach. One day later, the first complaint was filed alleging claims related to the data breach. That complaint was then consolidated with over forty other consumer complaints, which created the pending litigation. Mandiant finished its report by the end of October 2015 and gave it to Jones Day. Then Jones Day gave the report to Experian's in-house counsel. The report has several components and includes an individual sub-report for each server image that Mandiant investigated. Jones Day and Experian's in-house counsel have used and continue to use the report to develop their legal strategy." (emphases added); acknowledging that "Experian . . . had duties under the law to investigate data breaches and under its contract [with] T-Mobile, Experian had the duty to remedy, investigate, and remediate any data breach. But the record before the Court makes it clear that Mandiant conducted the investigation and prepared its report for Jones Day in anticipation of litigation, even if that wasn't Mandiant's only purpose." (emphasis added); "Mandiant was hired by Jones Day to assist Jones Day in providing legal advice in anticipation of litigation. This is supported by declarations as well as the fact that Mandiant's full report wasn't given to Experian's Incident Response Team. If the report was more relevant to Experian's internal investigation or remediation efforts, as opposed to being relevant to defense of this litigation, then the full report would have been given to that team. The evidence here establish that Jones Day instructed Mandiant to do the investigation and, but for the anticipated litigation, the

report wouldn't have been prepared in substantially the same form or with the same content." (emphasis added); acknowledging that Mandiant had worked previously for Experian, but finding that such earlier work did not destroy work product protection for its post-data breach work; "Plaintiffs argue that since Mandiant had previously worked for Experian, that's proof that Mandiant was just again doing work in the course of ordinary business for Experian when it created the report. But that argument isn't convincing in part because Mandiant's previous work for Experian was separate from the work it did for Experian regarding this particular data breach. . . . [T]he Court is not concluding that Mandiant's 2013 report is privileged. The Court also is not concluding that any work done by Experian or Mandiant regarding the breach before Jones Day was hired is privileged." (emphasis added)).

- In re Application of Financialright GmbH, No. 17-mc-105 (DAB), 2017 U.S. Dist. LEXIS 107778, at *4-5, *15, *15-16, *16, *16-17 (S.D.N.Y. June 23, 2017) (addressing plaintiffs' efforts to discover documents related to Jones Day's investigation into the Volkswagen "emissions scandal"; finding that attorney-client privilege and the work product doctrine protected documents related to the investigation, and that Jones Day did not waive either protection by disclosing protected documents to the government, pursuant to an agreement of which DOJ agreed to keep the documents confidential except if it decided in its "sole discretion" that it could disclose the documents to discharge its duties; "One issue here is whether Volkswagen waived any privilege covering the documents in question. Jones Day says that it 'has never submitted its interview notes to VW or to the DoJ, or shared the content with the public, and it has not even commented publicly on its representation of [Volkswagen]'. . . In the course of cooperating with the DOJ criminal investigation, Jones Day entered into an agreement with the DOJ 'to preserve VW's claims of attorney-client privilege and work product protection for information disclosed to DOJ in the course of that cooperation.'. . . The agreement states that 'VW, through its counsel Jones Day, intends to provide DOJ oral briefings regarding its investigation, and may furnish additional documents or other information to DOJ in connection with such oral briefings.'. . . The agreement further says that 'to the extent any [privileged materials] are provided to DOJ pursuant to this agreement, VW does not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege.' (Id.) Under the agreement, DOJ was to keep any privileged materials confidential 'except to the extent that [it] determine[d] in its sole discretion that disclosure would be in furtherance of [its] discharge of its duties and responsibilities or is otherwise required by law.'. . . Applicants point to a press release which states that the Volkswagen 'Supervisory Board directed the law firm Jones Day to share all findings of its independent investigation of the diesel matter with the DOJ. The Statement of Facts draws upon Day's extensive work, as well as on evidence developed by the DOJ.'" (alterations in original)); "The Second Circuit, however, has declined to adopt a 'rigid rule' in 'situations in which [a government agency] and the disclosing party have entered into an explicit agreement that the [agency] will maintain the confidentiality of the disclosed materials.' Courts in this Circuit have varied in their approaches to such a situation and have held that waiver should be determined on a case-by-case basis." (alterations in original); "Jones Day, in assisting Volkswagen's cooperation with authorities, entered into a non-waiver agreement regarding privileged documents. The agreement states that while Jones Day will provide oral briefings and additional documents in connection with its VW investigation, 'to the extent any [privileged materials] are provided to DOJ pursuant to

this agreement, VW does not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege." (alteration in original); "The Court here is swayed by the cases holding that disclosures made pursuant to non-waiver agreements do not waive the protections of the work-product doctrine or attorney-client privilege, recognizing, among other factors the 'strong public interest in encouraging disclosure and cooperation with law enforcement agencies; [and that] violating a cooperating party's confidentiality expectations jeopardizes this public interest." (alteration in original); "Applicants point to the provision stating that DOJ was to keep any privileged materials confidential 'except to the extent that [it] determine[d] in its sole discretion that disclosure would be in furtherance of [its] discretion of its duties and responsibilities or is otherwise required by law.' . . . That the DOJ has such discretion does not change the Court's determination. While the agreement gives DOJ discretion, that discretion is cabined by the requirement that any disclosure would be in furtherance of it duties or otherwise required by law. Furthermore, courts making a selective-waiver determination have still held that there was no waiver when nearly identical discretionary provisions were at issue. E.g., In re Symbol Techs., 2016 U.S. Dist. LEXIS 139200, 2016 WL 8377036, at *14." (alterations in original) (emphases added)).

- [Privilege Point, 11/29/17]

S.D.N.Y. Magistrate Judge Francis Analyzes the Work Product Doctrine's "Motivational" Element

November 29, 2017

Many lawyers mistakenly focus only on the first two of three work product elements: (1) whether their clients faced "litigation," which can also include adversarial arbitrations, government proceedings, etc.; and (2) whether their clients sufficiently "anticipated" litigation when creating the withheld documents. But frequently the most important obstacle to claiming work product protection is (3) whether the anticipated litigation "motivated" the documents' creation (and thus whether the documents would not have existed in the same form but for that anticipated litigation).

In Johnson v. J. Walter Thompson U.S.A., LLC, No. 16 Civ. 1805 (JPO) (JCF), 2017 U.S. Dist. LEXIS 126185 (S.D.N.Y. Aug. 9, 2017), Southern District of New York Magistrate Judge Francis found that the Proskauer law firm's Title VII investigation report for its client deserved work product protection. He acknowledged that the firm's client had a written policy for investigating discrimination complaints. That conclusion normally would doom a work product claim - as evidence that the investigation report was not motivated by litigation, but rather compelled by internal requirements. But Judge Francis then noted that Proskauer's report was "unique in several ways": (1) the litigation had already begun; (2) the client "did not rely on its human resources personnel or even in-house counsel to conduct the investigation, but instead engaged outside counsel"; and (3) Proskauer's report "does not appear to be in a form consistent with routine investigations of discrimination complaints." Id. at *19.

Judge Francis's wise analysis provides a lesson for all corporations. To deserve work product protection, documents generally must be different from those prepared in the ordinary course of business, or compelled by external or internal requirements.

- Pitkin v. Corizon Health, Inc., Case No. 3:16-cv-02235-AA, 2017 U.S. Dist. LEXIS 208058, at *10, *10-12 (D. Or. Dec. 18, 2017) (finding that the attorney-client privilege protected an investigation undertaken by a jail health services contractor into the death of an inmate; adopting the one “primary purpose” privilege standard from the D.C. circuit court case in Kellogg Brown & Root; “I am persuaded by the Kellogg [In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014)] court's reasoning, and I adopt it here. Because the Ninth Circuit has not adopted a characterization of the 'primary purpose' test that aids in categorizing the kinds of mixed-motive investigations specifically at issue here, I will apply the gloss provided by the D.C. Circuit Court of Appeals in Kellogg.”; “Accordingly, the attorney-client privilege protects the results of the Sentinel Event investigation undertaken by Corizon in the aftermath of Ms. Pitkin's untimely and unfortunate death. Corizon has satisfied each element of the attorney-client privilege standard, showing that it sought factfinding and advice at the direction of Corizon's in-house legal team. Moreover, it showed that at least one primary purpose of the investigation was to 'assess the situation from a legal perspective, provide legal guidance, and prepare for possible litigation and/or administrative proceedings.' . . . That Corizon was fulfilling its obligations under its own corporate policies or its contract with Washington County — or both — is of no moment. As the Kellogg court explained, '[i]t is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B.' . . . Common sense suggests that the death of an inmate would trigger numerous obligations for the organization charged with her care, not the least of which would be an assessment of liability. Accordingly, the attorney-client privilege applies to the Sentinel Event investigation, and Corizon is not required to produce it.”)

- In re National Prescription Opiate Litig., Case No. 17-MD-2804, 2018 U.S. Dist. LEXIS 142270, at *59, *59-60, *68-69, *69, *70-71 (N.D. Ohio Aug. 1, 2018) (holding that the release of a Wilson Sonsini-prepared report to a Special Committee following a law firm’s investigation did not trigger a subject matter waiver; “The [Special Review] Committee retained the law firm of Wilson Sonsini Goodrich & Rosati to assist with the investigation. Wilson Sonsini interviewed forty-six witnesses and collected and reviewed numerous documents and reported its findings to the Committee. The Committee ultimately produced the Board Response, which concluded that McKesson’s oversight procedures could be improved but that the McKesson Board and senior management had not engaged in any serious wrongdoing.”; “Plaintiffs in this case have obtained McKesson’s 40-page Board Response, but now seek production of the following related materials: (1) a list of the forty-six individuals interviewed; (2) any statements collected from the forty-six individuals interviewed; (3) the search terms applied to collect documents for review in creating the Board Response; and (4) the actual documents collected by applying these search terms, if not already produced in discovery. McKesson opposes production of these materials, asserting attorney-client privilege and the work product doctrine. Plaintiffs respond that the materials are not privileged or, if they are, McKesson waived privilege by publishing the Board Response.”; “Finally, plaintiffs argue that, by publishing the Teamsters Report, McKesson waived any attorney-client or work-product privileges as to the attorney interview notes, the search terms, and documents reviewed by Wilson Sonsini. Plaintiffs assert the Teamsters Report disclosed much of the substance of interviews conducted and documents collected in conducting the investigation, so any privilege is waived. See In re Grand Jury, 78 F.3d 251, 254-55 (6th Cir. 1996) (attorney-client privilege waived as to specific communications disclosed and other communications related to the same subject matter, where party disclosed to third parties the legal conclusions and facts upon which those conclusions were based, but did not reveal the attorney’s advice); see also In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2nd Cir. 1993) (finding waiver of work product privilege by party’s decision to selectively disclose confidential materials in order to achieve other beneficial purposes).”; “McKesson counters it did not waive any privilege. It correctly points out the Board Response did not disclose the specific contents of any of the attorney interview notes or the search terms used in the investigation. Further, the few documents identified in the Board Response either have been or will be produced in this litigation.”; “The undersigned agrees there has been no waiver in the circumstances of this case, because the Board Response did not disclose privileged communications or work product relating to the investigation.”; “In sum, the undersigned agrees with McKesson that mere release of the Board Report did not waive any

privilege. Therefore, at this time, plaintiffs are not entitled to discovery of attorney notes or memoranda of interviews, the search terms counsel used to find documents, or which documents they chose for review based on those search terms. Plaintiffs also assert, however, that, if McKesson seeks to introduce evidence of Wilson Sonsini's investigation outlined in the Board Response (for example, to show McKesson's due diligence), then doing so would waive any asserted privilege. See In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 471 (S.D.N.Y. 1996) (holding it is unfair for a party to assert privilege to shield a report and then use the same report as sword). McKesson has not (yet) attempted to use the Board Response offensively in this litigation. But if it seeks to do so, the Court will reconsider whether plaintiffs are entitled to discover the information they have asked for but which this Ruling denies. See In re Vioxx, 2007 U.S. Dist. LEXIS 23164, 2007 WL 854251 at *5. ('If things change, however, and the Martin Report is sought to be used offensively in this litigation, or if Mr. Martin seeks to testify, the Court will have to reconsider whether the Plaintiffs are entitled to discover the materials underlying the investigation.')." (footnote omitted)).

- [Privilege Point, 1/15/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part I**

January 15, 2020

The Southern District of New York (Magistrate Judge Gorenstein) issued an extensive privilege decision with several favorable analyses in a high-profile corporate sexual harassment case. In *Parneros v. Barnes & Noble, Inc.*, 332 F.R.D. 482 (S.D.N.Y. 2019), Barnes & Noble's General Counsel Bradley Feuer investigated alleged sexual harassment misconduct by then CEO Demos Parneros. Feuer hired Paul Weiss to represent the company in investigating the allegations, and also enlisted the company's Senior VP of Corporate Communications and Public Affairs Mary Ellen Keating to assist with the investigation. The company eventually fired Parneros and refused to pay him severance. Parneros sued the company for defamation and breach of contract. The Southern District of New York dealt with several privilege issues implicated by Parneros's discovery requests.

First, the court found that General Counsel Feuer's investigation was primarily motivated by his need for legal advice. The court first pointed to the potentially serious misconduct by "the company's top executive" as "provid[ing] some circumstantial evidence" supporting the primary purpose assertion. *Id.* at 494. The court also emphasized that Feuer's retention of Paul Weiss as "litigation counsel the same day that he learned of the allegations" bolstered the privilege assertion – recognizing courts' frequent conclusion that "the retention of outside litigation counsel to advise an internal investigation [is] an important factor in determining whether an internal investigation is being conducted for the purpose of obtaining legal advice for the company." *Id.* Second, although acknowledging that Senior VP Keating "does not appear to have any particular expertise that would enable her to conduct the investigation in a more skilled manner than [the Company's General Counsel] himself," the court explained that there was no case law "suggesting that a corporate employee who conducts an investigation for an attorney must have a particular skill to qualify as the attorney's agent." *Id.* Thus, Senior VP Keating's involvement was inside privilege protection. In-house lawyers often "deputize" employees to assist in such investigations – and Judge Gorenstein's analysis will be very helpful in asserting privilege for their involvement.

The next three Privilege Points will describe other favorable language from this significant case.

- [Privilege Point, 1/22/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part II**

January 22, 2020

Last week's Privilege Point described two favorable analyses from a Southern District of New York decision (Judge Gorenstein) assessing defendant Barnes & Noble's privilege assertions covering its investigation and later firing of its CEO for sexual harassment. Parneros v. Barnes & Noble, Inc., 382 F.R.D. 482 (S.D.N.Y. 2019).

Third, the court addressed fired CEO Parneros's argument that the investigation-related documents "are not privileged because they were created for business purposes, rather than for legal purposes" – noting that the Barnes & Noble policy "requires that all complaints of alleged sexual harassment be investigated." Id. at 495. The court rejected Parneros's argument, holding that "[t]he mere fact that there was a business benefit obtained from conducting the investigation does not detract from the circumstances here indicating that the predominant purpose of the investigation was to gather facts for the General Counsel so he could give legal advice to the corporation." Id. This is a very favorable standard, perhaps based in part on the high-level nature of the investigation and outside counsel Paul Weiss's involvement. Fourth, the court addressed fired CEO Parneros's complaint that neither he nor his Executive Assistant were given Upjohn warnings before they were interviewed by the company's General Counsel and the Senior VP of Corporate Communications and Public Affairs – thus aborting any privilege protection for the interviewers' notes of that interview. The court rejected Parneros's argument, noting that "courts have found the attorney-client privilege to shield notes of interviews undertaken as part of an internal investigation without discussing whether an Upjohn warning was first given." Id. at 496. Interestingly, the court did not address the privilege's applicability to the interview itself.

The next two Privilege Points will describe other favorable language from this significant case.

- [Privilege Point, 1/29/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part III**

January 29, 2020

The last two Privilege Points described four favorable analyses from a Southern District of New York decision (Judge Gorenstein) assessing defendant Barnes & Noble's privilege assertions covering its investigation and later firing of its CEO for sexual harassment. Parneros v. Barnes & Noble, Inc., 332 F.R.D. 482 (S.D.N.Y. 2019).

Fifth, the court addressed fired CEO Parneros's argument that Barnes & Noble waived its privilege by eliciting at his deposition extensive testimony about a meeting at which Parneros "apologized for his conduct" to the company's Senior VP, and another meeting attended by Barnes & Noble's Founder and Chairman. Id. at 489. The court rejected Parneros's argument – noting that the company had not asserted privilege for either one of the meetings, but rather "taken the position that certain notes taken at the apology meeting as part of the investigation overseen by [General Counsel] Feuer are privileged." Id. at 496. This meant that the deposition testimony about those non-privileged meetings did not waive any privilege. But the privilege still protected the "notes taken by an attorney or his designee at a non-privileged meeting . . . as long as the notes were taken for the purpose of allowing counsel to give legal advice." Id. As with other interview notes prepared by General Counsel Feuer, the court did not address work product protection – which would seem to be a more appropriate protection. Sixth, the court addressed fired CEO Parneros's argument that the privilege did not protect drafts of press releases that were sent to General Counsel Feuer and/or outside counsel at Paul, Weiss. The court rejected Parneros's argument, pointing to Feuer's declaration that the company's Senior VP of Corporate Communications of Public Affairs and VP of Investor Relations sent draft press releases to him and to Paul Weiss "for his 'review and legal advice' and were sent to 'outside counsel concerning the wording of the announcement for their review and legal advice.'" Id. at 498.

The next Privilege Point will describe other favorable language from this significant case.

- [Privilege Point, 4/15/20]

Internal Corporate Investigations May Deserve Work Product Protection If They Differ From The Corporation's Normal Procedures: Part I

April 15, 2020

The work product doctrine can protect documents primarily motivated by a corporation's involvement in or reasonable anticipation of litigation. Documents created in the corporation's ordinary course of business normally will fail to satisfy this standard, as will documents motivated by some external or internal requirement. Thus, corporations asserting work product protection normally must show that the withheld documents are different in some way from what the corporations would normally create.

In Heckman v. TransCanada USA Services, Inc., Civ. A. No. 3:18-CV-00375, 2020 U.S. Dist. LEXIS 7293 (S.D. Tex. Jan. 13, 2020), the court upheld defendant's work product claim for documents generated during its investigation of an employee's gender and age discrimination charge. Plaintiff argued that "these investigatory documents would have been created regardless of whether the prospect of litigation existed." Id. at *6. The court rejected her argument – emphasizing that "[t]he investigation initiated by [defendant] after receiving [plaintiff's] discrimination complaint was far from the type of investigation conducted in the normal course of business." Id. at *6-7. Among other things, defendant's "general counsel herself directed the investigation due to the heightened likelihood of litigation" – in contrast to the "normal practice" of the defendant's HR Governance group investigating a complaint. Id. at *7. The court ultimately concluded that "[b]ecause [defendant's] counsel-directed investigation was neither routine nor ordinary," the work product doctrine protected the investigation-related withheld documents. Id.

This approach might not work if some external or internal requirement mandated the investigation of such complaints, because in those situations corporations arguably might have created the same documents regardless of their litigation expectation. Next week's Privilege Point describes another approach that increases the likelihood of successfully claiming work product protection.

- [Privilege Point, 4/22/20]

Internal Corporate Investigations May Deserve Work Product Protection If They Differ From The Corporation's Normal Procedures: Part II

April 22, 2020

Last week's Privilege Point described a court's finding that the work product doctrine protected a corporation's investigation of a gender and age discrimination claim -- because the investigation was neither "routine nor ordinary." Heckman v. TransCanada USA Services, Inc., Civ. A. No. 3:18-CV-00375, 2020 U.S. Dist. LEXIS 7293 (S.D. Tex. Jan. 13, 2020). There are two other options for maximizing work product protection in such circumstances: (1) arguing that the investigation started in the ordinary course of business, but then "morphed" into a litigation-motivated investigation; or (2) conducting separate investigations -- one of which was conducted in the ordinary course of business, and one of which was primarily motivated by anticipated litigation.

In Holladay v. Royal Caribbean Cruises, Ltd., 334 F.R.D. 628 (S.D. Fla. 2020), defendant conducted two separate investigations into a passenger's on-board injury. The court held that one of the investigation reports (prepared by Celtic Engineering) did not deserve work product protection. Celtic's draft report "mentions nothing about an incident, a fall, injuries, or [plaintiff]." Id. at 633. The court later repeated that the Celtic draft report "does not mention the incident, the injury or any topic relating to litigation." Id. at 635. Celtic also examined another of the defendant's ships -- although "[t]here is no mention of any incident, litigation or threatened litigation" involving that other ship. Id. at 633. The court contrasted the Celtic report with a separate report prepared by consultant SEA. The SEA Report identified the plaintiff as the "injured party." Id. It used the terms "loss," "accident," and "injuries" -- and was "focused on [Plaintiff's] fall and injuries." Id. Unfortunately for the cruise line, the court had earlier ordered production of the SEA Report -- holding that plaintiff established "substantial need for the report," because the cruise line "had dismantled the attraction [on which plaintiff was injured] before Plaintiff or his expert could inspect it." Id. at 630.

Corporations can sometimes establish that the work product doctrine protects documents created during their only investigation. But they have a better chance of successfully asserting work product if they deliberately conduct a simultaneous or a later investigation that differs from the ordinary-course unprotected investigation and which on its face focuses on litigation and strategy.

- McGowan v. JPMorgan Chase Bank, N.A., No. 18 Civ. 8680 (PAC) (GWG), 2020 U.S. Dist. LEXIS 73051, at *1-3, *3-4, *11, *12, *12-13 (S.D.N.Y. Apr. 24, 2020) (holding that an internal investigation that was undertaken by a non-lawyer did not deserve privilege protection, but that once a lawyer became involved it morphed into a privileged investigation; “McGowan works for JPMC, a commercial and investment bank, in its Alternative Investment Services Department (‘AIS’). Complaint, filed Sept. 21, 2018 (Docket # 1) (‘Compl.’) ¶¶ 8, 10, 14. AIS develops software that JPMC’s clients use to process trades. Id. ¶ 15. McGowan started at JPMC in Ireland in 2007 and was transferred to New York in 2014. Id. ¶¶ 14, 19. On January 16, 2018, McGowan was informed that she would not receive a salary increase, despite previous conversations suggesting she would receive one. Id. ¶ 46. The following day, McGowan contacted JPMC’s human resources department complaining of discrimination. Mtn. Ltr. at 1. On some unspecified date between January 17, 2018 and February 13, 2018, an individual named Sharita Dove, who was a Vice President in Employee Relations began investigating McGowan’s claim. Smith Decl. ¶ 7. On February 13, 2018, Cara E. Greene, McGowan’s lawyer, emailed JPMC’s in-house counsel, Jamie Kohen, and informed Kohen that she represented McGowan. Id. ¶ 5. Kohen then requested that Smith, another in-house legal counsel, contact Greene. Id. ¶¶ 2, 6. Smith [in-house lawyer] declines to state whether he in fact contacted Greene. Smith does say, however, that on February 13, 2018, he began a ‘privileged investigation into the allegations of discrimination and unequal treatment raised by Plaintiff for the purpose of rendering legal advice and responding to Plaintiff’s counsel’s email.’ Id. ¶ 8. He ‘decided the investigation would be privileged and conducted in a manner consistent with in-house counsel’s provision of legal advice to JPMC in anticipation of litigation.’ Id. ¶ 9. Ann Cabrera-Vargas was assigned to help conduct the investigation. Id. ¶ 10. Smith states that ‘Ana J. Cabrera-Vargas spoke to JPMC managers to collect facts and information needed for me to render legal advice.’ Id. ¶ 11. Cabrera-Vargas, along with an individual who is not otherwise identified named Gianna DiMaulo, gathered documents and other information at Smith’s direction. Id. ¶ 12. JPMC’s privilege log indicates that Dove, Cabrera-Vargas, and DiMaulo all work for the same unit of JPMC, which is identified only as ‘HRBP.’ See Defendant’s Privilege Log, filed Jan. 28, 2020 (Docket # 85-1) at 2.” (emphases added); “According to Smith, ‘[a]ll of the documents and communications withheld by Defendant are communications that occurred at [Smith’s] direction for the purpose of evaluating Plaintiff’s claims and rendering legal advice.’ Id. ¶ 14. Some of the documents also include his ‘mental impressions and conclusions as to the ongoing privileged investigation, or the outcome thereof. Id. ¶ 15.” (alterations in original); noting that JPMorgan did not claim privilege protection for the investigation conducted

before its lawyer's involvement; "JPMC has voluntarily turned over a document that postdated February 13, 2018, previously withheld on the basis of privilege because it determined that the communication was not conducted at the direction of JPMC's counsel." (emphasis added); "But case law recognizes that 'an employer's investigation may shift from an internal investigation in response to plaintiff's claims to an investigation for the purposes of mounting a legal defense against any such claims.' Babbitt v. Koepfel Nissan, Inc., 2019 [WL 3296984], at *3 (E.D.N.Y. July 23, 2019) (internal quotation marks, alterations, and citation omitted)."; "[T]he fact that Dove was no longer in charge of the investigation after Smith became involved, and the fact that new individuals became involved in the investigation — coupled with Smith's uncontradicted statement that his purpose in directing the investigation was to provide legal advice, id. ¶ 9, are sufficient to allow us to conclude that the character of the investigation changed after February 13 and that it in fact was being conducted for the purpose of allowing Smith to provide legal advice to the corporation." (emphasis added))

- Att'y Gen. v. Facebook, Inc., 164 N.E.3d 873, 880, 891 (Mass. 2021) (holding that the attorney-client privilege protected communications undertaken in connection with Gibson Dunn's investigation; "Facebook launched the ADI investigation soon after the reporting on Cambridge Analytica in March 2018. According to Facebook, the purpose of the ADI is to 'gather the facts necessary for providing legal advice to Facebook about litigation, compliance, regulatory inquiries, and other legal risks facing the company resulting from potential data misuse and activities by third-party app developers operating on the prior version of the Platform.' The goal of the ADI, therefore, is to identify any other apps that misused user data on the prior version of the Platform and assess Facebook's potential legal liability as a result of any uncovered misuse. Facebook states that the ADI has been 'designed, managed, and overseen' by Gibson Dunn and Facebook's in-house counsel, and these attorneys 'devised and tailored the ADI's methods, protocols, and strategies to address the specific risks posed by these legal challenges.' Gibson Dunn recruited and retained the outside technical experts and investigators involved in the ADI."; "[S]imply funneling an organization's investigation through outside counsel does not bring with it the protection of the work product doctrine if the organization would have conducted these activities irrespective of anticipated litigation."; "Here, however, the ADI is meaningfully distinct from Facebook's ongoing enforcement program. It is staffed by outside counsel and outside forensic consultants, and it has its own distinct methodology. It is focused on past violations, not ongoing operations, and it serves a very different purpose: defending Facebook against the vast litigation it is facing, rather than just improving its ongoing operations. The record here does not support the contention that Facebook's compliance and enforcement team could have or would have conducted a massive investigation into potential past misconduct in the ordinary course of business. This was not business as usual for Facebook." (footnote omitted))

- O’Gorman v. Mercer Kitchen, No. 20-cv-1404 (LJL), 2021 U.S. Dist. LEXIS 67625, at *10-11 (S.D.N.Y. Apr. 7, 2021) (holding that a Pillsbury lawyer’s investigation deserved privilege protection, and that the Pillsbury lawyer did not waive that protection by disclosing just the investigation results to a third party human resource company assisting the client; “To the extent that Ms. Rizzo [Pillsbury lawyer] shared the results of her investigation with AHRA [Third party human resources company], Plaintiff’s claim of waiver confuses disclosure of the conclusion of an investigation with disclosure of communications that resulted in that conclusion. See In re Gen. Motors, 80 F. Supp. 3d at 528. Reading Plaintiff’s allegations and evidence generously, Ms. Rizzo disclosed some findings of the Pillsbury investigation—there was no corroboration for Plaintiff’s claims and Plaintiff harbored animosity for the accused hotel employee. She did not share with AHRA client communications (or documents containing client communications) or the contents of the interviews that resulted in that conclusion. She did not tell AHRA what she told the client or what the client had told her. Accordingly, there was no waiver. See id.”)

- [Privilege Point, 11/8/23]

South Dakota Court Refreshingly Acknowledges Rule 30(b)(6) Confusion

November 8, 2023

As noted in several previous Privilege Points, courts have great difficulty assessing privilege protection for communications relating to a Rule 30(b)(6) deposition — in which a corporation or other institution designates a deponent to testify about listed matters. Everyone knows that a lawyer entirely or at least in part gathers the necessary information and prepares the witness — who must testify about those facts, but who may decline to disclose protected communications with that lawyer.

In Hendrickson v. Rapid City, Pierre & Eastern Railroad, the court frankly acknowledged that “[a] quick review of the district courts around the nation would dispel plaintiff’s assertion that there is any one rule for how the work-doctrine is applied to 30(b)(6) depositions for good reason. . . . [Courts’] discretion results in many different Rule 30(b)(6) outcomes.” No. 5:22-CV-05063-LLP, 2023 U.S. Dist. LEXIS 151190, at *21 (D.S.D. Aug. 24, 2023). The court settled on what sounds like a nearly impossible needle to thread: “the . . . corporate representative can and should speak up as to the facts known to the business, and the position of the corporation, but not how those facts apply to the affirmative defenses.” Id. at *23.

It is a wonder that every Rule 30(b)(6) deposition does not spawn a judicial decision.

D. Waiver

- In re Royal Ahold N.V. Securities & ERISA Litigation, 230 F.R.D. 433, 435, 436, 437, 437-38, 438 (D. Md. 2005) (addressing work product protection and waiver Issues relating to White & Case's investigation into accounting irregularities, and preparation of 827 interview memoranda; holding that the work product doctrine did not protect White & Case's investigation, because the client was required to conduct the investigation to satisfy its outside auditor, so it would have undertaken the investigation even without anticipating litigation: "Lead plaintiffs argue persuasively that the principal reason was to satisfy the requirement of Royal Ahold's outside accountants, who would not otherwise complete the work necessary to issue the company's audited 2002 financial statements. In turn, completion of the 2002 audit was critical to Royal Ahold's receipt of [euro] 3.1 billion in financing. Undoubtedly the company was also preparing for litigation, as the first class action was filed February 24, 2003, but the investigation would have been undertaken even without the prospect of preparing a defense to a civil suit." (alteration in original) (footnote omitted); "Accordingly, at least for memoranda of interviews conducted for the purposes described above, Royal Ahold has not met its burden of demonstrating that the work product protection applies."; also holding that Royal Ahold had waived its work product protection by: (1) publicly disclosing the investigation results; and (2) by disclosing 269 of the 827 witness interview memoranda to the federal government; "The plaintiffs present two grounds for finding waiver. First is the public disclosure of the results of the investigations; second is the actual production of the witness material to the Department of Justice ('DOJ') and the Securities and Exchange Commission ('SEC')."; "The public disclosure argument is consistent with the position that the driving force behind the internal investigations was not this litigation but rather the need to satisfy Royal Ahold's accountants, and thereby the SEC, financial institutions, and the investing public, that the identified 'accounting' issues were being addressed and remedied. To this end, the information obtained from the witness interviews, and the conclusions expressed in the internal investigative reports, have largely been made public in the Form 20-F filed with the SEC by Royal Ahold on October 16, 2003. (See Royal Ahold and USF Mem. In Opp'n, Baumstein Decl., Ex 2.) This document discusses in some detail the findings of fraud at USF, the improper consolidation of joint ventures, other accounting irregularities, and the steps the company has taken to address these issues. In addition, several of the key investigative reports have been turned over to the lead plaintiffs. Those reports rely heavily on and indeed in some instances quote from the witness interview memoranda. (See July 22, 2005 Entwistle Aff., Exs. B and C.) Accordingly, testimonial use has been made of material that

might otherwise be protected as work product." (emphases added); "By its public disclosures in the Form 20-F and the production of several of the internal reports to the plaintiffs, Royal Ahold has therefore waived the attorney-client privilege and non-opinion work product protection as to the subject matters discussed in the 20-F and the reports. The remaining question is whether the interview memoranda constitute opinion work product which may yet be protected."; allowing Royal Ahold to redact demonstrable opinion work product from materials related to the public disclosure; "[R]elevant interview memoranda reflecting facts within the subject matter of the 20-F disclosures and the internal investigation reports are not necessarily protected. They must be produced to plaintiffs' counsel, except as to those portions Royal Ahold can specifically demonstrate would reveal counsel's mental impressions and legal theories concerning this litigation."; explaining that Royal Ahold's confidentiality agreement with the federal government did not preclude a work product waiver (even for opinion work product), and ominously pointing to the company's public disclosures intended to "improve its position with investors, financial institutions, and the regulatory agencies"; "While in some circumstances, a confidentiality agreement might be sufficient to protect opinion work product, in this case Royal Ahold already has disclosed information obtained from the witness interviews to the public in its Form 20-F filing with the SEC, and to the plaintiffs through the internal investigation reports. Likewise, to the extent that Royal Ahold offensively has disclosed information pertaining to its internal investigation in order to improve its position with investors, financial institutions, and the regulatory agencies, it also implicitly has waived its right to assert work product privilege as to the underlying memoranda supporting its disclosures. Finally, the language of the confidentiality agreements allows substantial discretion to the SEC and to the U.S. Attorney's office in disclosing any of the interview memoranda to other persons. Under all the circumstances, Royal Ahold has not taken steps to preserve the confidentiality of its opinion work product sufficient to protect the interview memoranda it already has disclosed to the government. These memoranda, if relevant to the claims in the amended consolidated complaint, must be turned over to plaintiffs in their entirety." (emphasis added) (footnote omitted); ordering Royal Ahold to produce "(a) a list of all interview memoranda disclosed to the Department of Justice or the Securities and Exchange Commission; (b) all portions of the interview memoranda disclosed to the Department of Justice or the Securities and Exchange Commission that are relevant to the claims in the consolidated complaint, other than those containing statements of the 36 'blocked witnesses' as to which the government has sought a stay; (c) a list of the other 558 interview memoranda; (d) all portions of the other interview memoranda containing factual information underlying the public disclosures, including the 20-F and the investigative

reports provided to plaintiffs, that are relevant to the claims in the consolidated complaint, unless a specific showing of opinion work product can be made to the court.")

- Ryan v. Gifford, Civ. A. No. 2213-CC, 2008 Del. Ch. LEXIS 2, at *3, *10, *10-11, *11, *12, *12 n.9, *16, *17-18 (Del. Ch. Jan. 2, 2008) (unpublished opinion) (addressing a situation in which the law firm of Orrick Herrington and forensic accounting firm LECG conducted an investigation into possible options backdating by executives and directors of Maxim; noting that Maxim's board established a Special Committee composed of a single director, which was not an "independent Special Litigation Committee" under Delaware law; explaining that the single-member Special Committee retained Orrick, who did not provide a written report but instead presented an oral report to a Maxim board meeting attended by three directors represented by the law firm of Quinn Emanuel in the derivative action that prompted Orrick Herrington's investigation; noting that Maxim's board found that some directors received backdated options, but did not take any action to recover any damages; further explaining that Maxim "provided details of this work to third-parties, including NASDAQ and publicly to investors (through the SEC Form 8-K). Moreover, the Special Committee itself provided a number of documents to the SEC, the United States Attorney's Office, and Maxim's current and former auditors."; also noting that "the director defendants in this case have specifically made use of the Special Committee's findings and conclusions for their personal benefit and have argued to this Court that the Special Committee's exoneration of them should be accorded deference. The director defendants have made these arguments in a brief, opposing plaintiffs' motion to amend the complaint, in which coincidentally Maxim has expressly joined. Further, the director defendants have extensively relied upon the Special Committee's findings both in opposing plaintiffs' motion for summary judgment and in support of their own motion for summary judgment. At the time of the November 30 decision, in their unamended summary judgment brief, the director defendants explicitly rely upon the unwritten 'findings' of the Special Committee that purport to absolve the director defendants of liability." (footnote omitted); "[T]he director defendants have submitted an amended brief in support of their motion for summary judgment that purports to disavow reliance on the Special Committee's findings, despite their explicit reliance thereon in the first brief in support of their motion."; noting that in an earlier opinion "the Court ruled that Maxim, its Special Committee and Orrick must produce all material[s] related to the Special Committee's investigation that were withheld on grounds of attorney-client privilege."; "The Court also directed Orrick to turn over its work-product, including its interview notes, for in camera review. Orrick does not seek to appeal any aspect of this Court's ruling, including the ruling that plaintiffs have made a showing of good cause to obtain its non-opinion work product."; "[I]t is worthwhile to repeat that the relevant factual circumstances here include the receipt of purportedly privileged information by the director defendants in their

individual capacities from the Special Committee. The decision would not apply to a situation (unlike that presented in this case) in which board members are found to be acting in their fiduciary capacity, where their personal lawyers are not present, and where the board members do not use the privileged information to exculpate themselves."; noting that Maxim did not appeal the court's earlier decision that the Garner doctrine overcame any privilege claim; after explaining that the court's Garner determination "provides an independent basis" for its conclusion requiring Maxim to disclose the documents; also noting the directors' essentially inaccurate description about whether they were relying on Orrick Herrington's report; "At the time of the November 30 decision, however, the director defendants explicitly asserted that the findings of the Special Committee were entitled to deference from this Court. Moreover, even if this Court ignores the suspicious timing of the director defendants' purported disavowal of reliance on the investigation, Maxim seeks to further avail itself of the Special Committee's report, which will redound to the benefit of the director defendants."; declining to certify an appeal).

- SEC v. Roberts, 254 F.R.D. 371, 378 n.4, 378 (N.D. Cal. 2008) (assessing privilege issues in connection with an internal corporate investigation of possible options backdating at McAfee, conducted by the Howrey law firm; concluding that the McAfee Board and the Special Committee did not share a common interest; "The court notes that not only is the Board not Howrey's client such that the attorney-client privilege does not attach, the Board also does not have a common interest with the Special Committee since it was the Special Committee's mandate to ascertain whether members of the Board . . . may have engaged in wrongdoing. In this respect, this court disagrees with the conclusion reached in In Re BCE West, L.P., No. M-8-85, 2000 U.S. Dist. LEXIS 12590, 2000 WL 1239117 (S.D.N.Y. Aug. 31, 2000)."; finding that Howrey's disclosure to the Board triggered a waiver; "Certain instances of waiver are straightforward. When Howrey 'detailed for the Board the various stock option issues, improprieties and erroneous option grant dates that were discovered in the investigation,' . . . it waived the work product privilege with respect to its conclusions regarding which option grant dates were improper or erroneous."; ultimately finding a broad scope of waiver, although applied on an interviewee-by-interviewee basis -- so that Howrey's disclosure of its opinions about the interview or the interviewee triggered a subject matter waiver covering materials that the law firm created during that interview; allowing discovery by McAfee's former executive, who was defending against an SEC action).

- SEC v. Schroeder, No. C07-03798 JW (HRL), 2009 WL 1125579, at *7, *9, *8, *10, *12 (N.D. Cal. Apr. 27, 2009) (addressing Skadden's representation of a Special Committee in investigating KLA-Tencor Corp.'s options backdating; explaining that the SEC had sued one of KLA's executives, who in turn sought several categories of Skadden's communications and documents; ordering production of Skadden's final interview memoranda that had been given to the SEC, but not its raw material that had never been disclosed outside the law firm; pointing to Skadden affidavits that the raw material represented opinion work product; "[E]ach of the individual Skadden attorneys who participated in the interviews has submitted a declaration attesting that they did not merely record verbatim (or substantially verbatim) the witnesses' statements. Rather, they used their knowledge about the facts and theories of the case to identify and filter which facts and comments by the witnesses were important to the investigation."; explaining that Skadden had only provided an oral report to KLA's outside auditors and that disclosure to the auditor did not waive work product protection -- noting that "disclosures to outside auditors do not have the 'tangible adversarial relationship' requisite for waiver" (emphasis added); "Schroeder seeks the production of documents and communications between the Special Committee and KLA's outside auditors. The only auditor that has been identified here is PwC. Reportedly, PwC has been KLA's auditor since at least 1994 and was KLA's auditor with respect to the restatement of the options in question. (Miller Decl., ¶¶ 23-24). Skadden says that, in connection with that restatement, PwC requested information about the Special Committee's investigation. On October 18, 2006, Skadden made an oral presentation to PwC, including a PowerPoint presentation. No documents were provided to PwC at that time. (Id. ¶ 25). According to Skadden, at PwC's request, Skadden attorneys also later discussed information learned from certain witness interviews, using the Final Interview Memoranda to refresh their recollection. The Final Memoranda were not provided to PwC. (Id.[] Skadden's opposition brief states that Skadden and the Special Committee disclosed certain documents to PwC to assist in the audit of KLA and the restatement of the company's historical financial statements. (Skadden Opp. at 18). On the record presented, it is not clear precisely what those documents are, save the PowerPoint presentation that was made. (See Miller Decl. ¶¶ 23-26)." (emphases added); contrasting the KLA scenario with the Royal Ahold case; "Schroeder's other cited cases do not support the broad waiver he seeks here. In Royal Ahold N.V. Securities Litig., F.R.D. 433 (D. Md. 2005), a securities class action, the defendant company disclosed the details of its internal investigation in a public SEC filing and produced investigative reports (which quoted from witness interview memoranda) to the lead plaintiffs, but nonetheless withheld the majority of the underlying interview memoranda. The court

found that because the company publicly disclosed details of its internal investigation 'in order to improve its position with investors, financial institutions, and the regulatory agencies, it also implicitly has waived its right to assert work product privilege as to the underlying memoranda supporting its disclosures.' Id. at 437. Here, by contrast, Schroeder already has the interview memoranda underlying the Special Committee's disclosure to the SEC."; rejecting the executive's effort to obtain communications between Skadden and its forensic accounting investigation consultant; "Communications between Skadden and its consultant, LECG, need not be produced. The withheld communications reportedly contain 'documents related to methods for document review and retention, discussions regarding how to locate and interpret metadata, a collection of documents that LECG deemed important related to a particular witness, and emails discussing special projects that LECG completed during the investigation.' (Miller Decl. ¶ 34). It is not apparent that any of those communications were disclosed beyond Skadden and LECG. Further, it appears that these communications comprise opinion work product, and Schroeder has not demonstrated a substantial need for any facts that might be contained in them. Schroeder's motion as to these documents is denied." (emphases added); ordering Skadden to produce the factual portion of documents provided to KLA and its law firm Morgan Lewis, but not Skadden's drafts or other documents "that contain or reflect" opinion work product; "With respect to the communications between and among Skadden/the Special Committee and KLA/Morgan Lewis, it is not clear exactly what this universe of documents includes. However, the withheld communications reportedly comprise 'documents reflecting numerous requests for information from the Company and discussions of what Skadden did during the investigation.' (Miller Decl. ¶ 35). This court finds that any factual information contained in these documents should be produced. However, drafts and other documents that contain or reflect an attorney's mental impressions (if any) need not be produced (or, if feasible, such information may be redacted). See Roberts, 254 F.R.D. at 383 (ordering production of attorney notes reflecting communications with the company's board of directors, with opinion work product redacted)." (emphases added); "As for the KLA opinion grant binders, on the record presented, it appears that the option summaries and legal memoranda comprise facts that are inextricably intertwined with opinion work product.")

- [Privilege Point, 2/23/11]

Court Deals With a Strange Reversal of Positions

February 23, 2011

In most situations, a client hiring a lawyer to conduct an investigation of some incident argues that the lawyer's report deserves privilege protection. However, in some situations clients have the opposite incentive.

In Lerman v. Turner, Case No. 10 C 2169, 2011 U.S. Dist. LEXIS 715 (N.D. Ill. Jan. 5, 2011), Columbia College Chicago hired a lawyer from Schiff Hardin to investigate the college's termination of a tenured professor. The college placed the Schiff Hardin lawyer's report in the professor's personnel file, which it then made available to the terminated professor. The professor argued that this waived the college's privilege, triggering a subject matter waiver that entitled her to additional privileged documents on the same subject. To avoid this disaster, the college argued that the Schiff Hardin lawyer had acted merely as an investigator and not a legal advisor, so his report did not deserve privilege protection. The court agreed with the professor – pointing to the lawyer's "Upjohn warnings" to an interviewee, his transmittal of the report to the college's general counsel and other factors. Id. at *19. The court also agreed with the professor that the college's waiver of the privilege triggered a subject matter waiver (although finding only a narrow scope of that waiver).

Strange situations like this do not frequently arise, but they usually reflect a client's failure to properly protect privileged communications and later attempts to avoid a subject matter waiver.

- [Privilege Point, 2/12/14]

Avoiding Waiver When Disclosing Facts to the Government: Part I

February 12, 2014

All but a handful of courts find that companies disclosing privileged communications or protected work product to the government waive both of those protections. Courts properly analyzing waiver rules also recognize that disclosing historical facts does not cause a waiver – because historical facts are not privileged.

In two related cases, Judge Francis of the Southern District of New York dealt with the intersection of these basic principles. In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 170559 (S.D.N.Y. Nov. 5, 2013), Weatherford retained Latham & Watkins and Davis Polk to conduct two separate corporate investigations into material weaknesses in the company's internal controls over financial reporting. The court acknowledged that both investigations deserved work product protection. However, the court also found that the company waived its privilege and fact (but not opinion) work product protection by disclosing information about the investigations to the SEC. In defining the scope of the resulting waiver, the court (1) rejected plaintiffs' argument that the waiver extended to "all materials relevant" to the investigations; (2) found that the waiver covered any material actually given to the SEC, and any oral representations company lawyers made to the SEC; and (3) held that the waiver also extended to any "underlying factual material explicitly referenced" in such material or representations. Id. at *28, *27.

Perhaps not surprisingly, the parties soon disagreed about the company's interpretation of the waiver's scope – which resulted in another opinion one month later. The next two Privilege Points describe that decision.

- [Privilege Point, 2/19/14]

Avoiding Waiver When Disclosing Facts to the Government: Part II

February 19, 2014

Last week's Privilege Point described a Southern District of New York decision holding that a company providing information to the SEC about two internal corporate investigations waived privilege and fact work product protection for material or oral representations given to the SEC, and any "underlying factual material explicitly referenced" in such material or representations. In re Weatherford Int'l Sec. Litig., No. 11 Civ. 1646 (LAK (JCF), 2013 U.S. Dist. LEXIS 170559, at *27 (S.D.N.Y. Nov. 5, 2013).

About a month later, the court had to provide additional guidance. In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 176278, at *7 (S.D.N.Y. Dec. 16, 2013), the court first focused on "interview materials" Davis Polk lawyers used to create four PowerPoint presentations to the SEC. The court held that the company did not have to produce any interview materials "unless those specific materials are explicitly identified, cited, or quoted in information disclosed to the SEC." Id. at *10. Interestingly, the court rejected plaintiffs' argument that the company crossed that line "where the presentations assert that a particular witness made a statement." Id. at *7. The court acknowledged that such a representation to the SEC obviously implied "that an interview took place" and also provided "a strong inference that it was memorialized in some way" – but ultimately concluded that "plaintiffs have not shown that those memorializations were, themselves, explicitly referenced in communications with the SEC." Id. at *7-8.

The court then turned to the company's redactions in the interview summaries produced in response to the earlier ruling. Next week's Privilege Point will address that analysis.

- **[Privilege Point, 2/26/14]**

Avoiding Waiver When Disclosing Facts to the Government: Part III

February 26, 2014

The last two Privilege Points (Part I & Part II) discussed the scope of a privilege and fact work product waiver caused by a company's presentations to the SEC about two internal corporate investigations. The Southern District of New York held that the waiver covered materials or oral representations given to the SEC, as well as "any underlying factual material explicitly referenced in" the materials or representations – but then had to provide additional guidance. In re Weatherford Int'l Sec. Litig., No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 170559, at *27 (S.D.N.Y. Nov. 5, 2013).

In In re Weatherford International Securities Litigation, No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 176278, at *10 (S.D.N.Y. Dec. 16, 2013), the court addressed plaintiffs' complaint that the company had not fully produced those witness interview summaries that were "explicitly identified, cited, or quoted in information disclosed to the SEC." The company explained that it had produced "only the 'portions of summaries . . . that were . . . read or conveyed in substantial part to the SEC,'" and redacted the rest. Id. at *12 (internal citation omitted). Criticizing that as a "crabbed view of their discovery obligations," the court ordered the company to produce all factual portions of any such interview summaries -- redacting "only material that reflects an attorney's 'explicit mental impressions, conclusions, opinions or legal theories.'" Id. at *12-13 (citation omitted). In other words, the company had to produce all non-opinion portions of any witness interview summaries the company had quoted to the SEC.

It can be very difficult to reconcile two basic principles: (1) disclosure of privileged communications or work product to the government generally waives those protections; and (2) disclosing historical facts does not waive either protection. As explained in these opinions by widely-respected S.D.N.Y. Judge Francis, companies hoping to avoid a broad waiver when making disclosures to the government should limit their presentations to historical facts – without explicitly referencing, identifying, citing, or quoting any underlying material or witness interviews.

- [Privilege Point, 4/1/15]

The Subject Matter Waiver Risk Continues to Recede

April 1, 2015

In some situations, disclosure or reliance on privileged communications or protected work product triggers a "subject matter waiver" — requiring the owner's disclosure of additional related communications or work product. Historically, some jurisdictions found a subject matter waiver in many counterintuitive contexts — for instance, based even on litigants' inadvertent production of a protected document.

Many jurisdictions eventually adopted a common law doctrine finding subject matter waivers only upon intentional disclosure in a judicial setting. Recently, Federal Rule of Evidence 502 has limited subject matter waivers to litigants' disclosure or use of protected communications to paint a misleading picture in litigation. Courts are taking these developments to heart. In Mitre Sports International, Ltd. v. Home Box Office, Inc., 304 F.R.D. 369, 371 (S.D.N.Y. 2015), defendant HBO argued that Mitre triggered a subject matter waiver covering its investigation of possible child labor violations by (1) allowing its Rule 30(b)(6) witness to testify about the investigation, and (2) "attaching the products of its investigation to its complaint" against HBO. The court rejected HBO's argument, holding that (1) the witness's deposition answers and Rule 30(b)(6) designation did not amount to "an attempt by Mitre to use protected information to influence a decision maker" (noting that Mitre had not cited any of the testimony in its summary judgment motion) (*id.* at 372); and (2) Mitre's "attaching the products of its investigation to its complaint seems to have been done more for public relations reasons than legal reasons" — because "[t]he complaint is not evidence, and Mitre cannot offer it as such." *Id.* at 374.

Corporations should be relieved by the declining threat of subject matter waivers, although they should still avoid the disclosure of, affirmative use of, or reliance on privileged communications or protected work product to gain some advantage in litigation.

- [Privilege Point, 10/21/15]

More Courts take a Narrow View of Subject Matter Waivers

October 21, 2015

Thanks to common law developments and Federal Rule of Evidence 502, the frightening specter of subject matter waivers now usually only arises when litigants affirmatively rely on privileged communications to gain some litigation advantage.

In In re General Motors LLC Ignition Switch Litigation, Nos. 14-MD-2543 & 14-MC-2543 (JMF), 2015 U.S. Dist. LEXIS 106170 (S.D.N.Y. Aug. 11, 2015), the court handling the GM ignition switch MDL rejected plaintiffs' attempt to depose Jenner & Block partner Anton Valukas about the basis for his widely-publicized report on GM's conduct. The court pointed to GM's pledge not to make offensive use of the Valukas Report at trial, or call Valukas to testify. The court concluded that GM's commitment "undermines" plaintiffs' attempt to explore witnesses' disagreement with Valukas' conclusions. Id. at *1004. One day earlier, another court dealt with a GM trademark issue. In Cue, Inc. v. General Motors LLC, Civ. A. No. 13-12647-IT, 2015 U.S. Dist. LEXIS 104638 (D. Mass. Aug. 10, 2015), plaintiff argued that GM triggered a subject matter waiver by pointing to its lawyer's trademark advice as demonstrating its lack of bad faith. The court "agree[d] that GM's use of that fact would place its counsel's advice at issue," but took GM at its word that the company "did not intend to rely on advice of its counsel" at trial. Id. at *24. The court therefore denied plaintiff's motion to compel disclosure of related privileged communications — "without prejudice to renewal if GM seeks to use the legal department's 'okay' in order to show a lack of bad faith." Id.

Corporations should be relieved that courts are increasing focus on documents and arguments the corporations plan to use at trial — rather than on the disclosure of privileged communication during fast-paced discovery or pretrial pleading skirmishes.

- Krys v. Paul, Weiss, Rifkind, Wharton, & Garrison LLP (In re China Med. Techs., Inc.), 539 B.R. 643, 654, 655, 656, 658 (S.D.N.Y. 2015) (holding that a bankruptcy liquidator could waive the attorney-client privilege that belonged to a company's Audit Committee, but could not waive the Audit Committee's work product protection, which belonged solely or jointly to the Audit Committee's lawyer's at Paul Weiss; "The issue now before the Court is whether the capacity of the Audit Committee to retain independent counsel and to conduct unfettered internal investigations that implicate corporate management should thwart the statutory obligation of a trustee in bankruptcy to maximize the value of the estate by conducting investigations into a corporation's prebankruptcy affairs."; "Weintraub [CFTC v. Weintraub, 471 U.S. 343 (1985)] did not squarely address the circumstances here. Its analysis was limited to whether privileges asserted by a corporation's counsel were waivable by that corporation's trustee in bankruptcy. The asserted privileges here relate to an investigation by Appellees on behalf of a corporation's audit committee, and the precise relationship between that committee and the corporation is disputed. Despite these factual distinctions, however, the same considerations that weighed in favor of the trustee in Weintraub weigh in favor of Appellant here."; "It is true that the Audit Committee was 'independent' in some sense. It could retain counsel, and it legitimately expected that its communications with counsel would be protected against intrusion by management. But the Audit Committee is not an individual, nor is its status analogous to that of an individual. Instead, it was a committee constituted by CMED's Board of Directors, and thus a critical component of CMED's management infrastructure."; "[T]he justifications for protected attorney-client communications dissipate in bankruptcy. Prebankruptcy, audit committees 'play a critical role in monitoring corporate management and a corporation's auditor.' Without the prebankruptcy protection of attorney-client privilege, audit committees could not provide 'independent review and oversight of a company's financial reporting processes, internal controls and independent auditors,' nor could they offer a 'forum separate from management in which auditors and other interested parties [could] candidly discuss concerns.' SEC Release No. 8220, 'Standards Relating to Listed Company Audit Committees,' File No. 87-02-03, 79 SEC Docket 2876, 2003 WL 1833875, at *19 (Apr. 9, 2003). But as the Bankruptcy Court noted in its Opinion, 'any miscreants have left the company' in bankruptcy; corporate management is deposed in favor of the trustee, and there is no longer a need to insulate committee-counsel communications from managerial intrusion. Without a legitimate fear of managerial intrusion or retaliation in bankruptcy, Appellees' assertions as to a potential chilling effect ring hollow." (alteration in original) (citations omitted); "Although the Court recognizes that this is a difficult issue in a largely ill-defined area of the

law, it nevertheless respectfully disagrees with the legal determination of the Bankruptcy Court below. The Court finds that Appellant, as CMED's Liquidator, now owns and can thus waive the Audit Committee's attorney-client privilege, regardless of the Committee's prebankruptcy independence. The Bankruptcy Court's ruling to the contrary is hereby reversed."; "The Court's ruling as to attorney-client privilege does not extend, however, to Appellees' assertion of work product protections, which the Bankruptcy Court Opinion only peripherally addressed. Importantly, because 'work product protection belongs to the Audit Committee's counsel and cannot be waived by the client,' it does not fall within the ambit of Weintraub. Thus, even assuming that the Liquidator owns those documents for which Appellees have asserted work-product protection, he cannot waive this protection unilaterally. Appellant, at the very least, has not cited any cases suggesting otherwise." (citations omitted)).

- [Privilege Point, 11/2/16]

Does Releasing an Internal Investigation Report Always Trigger a Subject Matter Privilege Waiver?

November 2, 2016

One might think that a corporation or government entity would always trigger a subject matter privilege waiver by disclosing an internal investigation report. But subject matter waiver risks have been receding.

In Hawa v. Coatesville Area School District, Civ. A. No. 15-4828, 2016 U.S. Dist. LEXIS 122912 (E.D. Pa. Sept. 12, 2016), defendant school district released its investigation report into racist text messaging among administrators. Not surprisingly, plaintiffs claimed a waiver, and sought all related documents and privileged communications. The court rejected plaintiffs' efforts, noting that "[t]he 'central element' in determining whether a partial waiver exists is the question of fairness." Id. at *6 (citation omitted). The court noted that plaintiffs "have not argued that [defendant] has made any strategic use of the Report in this litigation, that it relies on the Attorneys' investigation as a form of defense in this action or that it has 'made factual assertions, the truth of which can only be assessed by examination of the privileged communications.'" Id. at *7 (citation omitted). The court also concluded that plaintiffs could obtain "non-privileged materials the Attorneys collected in their investigation . . . through ordinary discovery addressed to the materials' original sources." Id. at *7-8.

Some courts might find that such a release constitutes an effort to gain some advantage in the "court of public opinion," but cases like this continue the trend toward courts' rejection of broad subject matter waivers.

- In re Application of Financialright GmbH, No. 17-mc-105 (DAB), 2017 U.S. Dist. LEXIS 107778, at *4-5, *15, *15-16, *16, *16-17 (S.D.N.Y. June 23, 2017) (addressing plaintiffs' efforts to discover documents related to Jones Day's investigation into the Volkswagen "emissions scandal"; finding that attorney-client privilege and the work product doctrine protected documents related to the investigation, and that Jones Day did not waive either protection by disclosing protected documents to the government, pursuant to an agreement of which DOJ agreed to keep the documents confidential except if it decided in its "sole discretion" that it could disclose the documents to discharge its duties; "One issue here is whether Volkswagen waived any privilege covering the documents in question. Jones Day says that it 'has never submitted its interview notes to VW or to the DoJ, or shared the content with the public, and it has not even commented publicly on its representation of [Volkswagen]'. . . In the course of cooperating with the DOJ criminal investigation, Jones Day entered into an agreement with the DOJ 'to preserve VW's claims of attorney-client privilege and work product protection for information disclosed to DOJ in the course of that cooperation.'. . . The agreement states that 'VW, through its counsel Jones Day, intends to provide DOJ oral briefings regarding its investigation, and may furnish additional documents or other information to DOJ in connection with such oral briefings.'. . . The agreement further says that 'to the extent any [privileged materials] are provided to DOJ pursuant to this agreement, VW does not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege.' (Id.) Under the agreement, DOJ was to keep any privileged materials confidential 'except to the extent that [it] determine[d] in its sole discretion that disclosure would be in furtherance of [its] discharge of its duties and responsibilities or is otherwise required by law.'. . . Applicants point to a press release which states that the Volkswagen 'Supervisory Board directed the law firm Jones Day to share all findings of its independent investigation of the diesel matter with the DOJ. The Statement of Facts draws upon Day's extensive work, as well as on evidence developed by the DOJ.'" (alterations in original) (emphases added)); "The Second Circuit, however, has declined to adopt a 'rigid rule' in 'situations in which [a government agency] and the disclosing party have entered into an explicit agreement that the [agency] will maintain the confidentiality of the disclosed materials.' Courts in this Circuit have varied in their approaches to such a situation and have held that waiver should be determined on a case-by-case basis." (alterations in original) (emphasis added); "Jones Day, in assisting Volkswagen's cooperation with authorities, entered into a non-waiver agreement regarding privileged documents. The agreement states that while Jones Day will provide oral briefings and additional documents in connection with its VW investigation, 'to the extent any [privileged

materials] are provided to DOJ pursuant to this agreement, VW does not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege." (alteration in original); "The Court here is swayed by the cases holding that disclosures made pursuant to non-waiver agreements do not waive the protections of the work-product doctrine or attorney-client privilege, recognizing, among other factors the 'strong public interest in encouraging disclosure and cooperation with law enforcement agencies; [and that] violating a cooperating party's confidentiality expectations jeopardizes this public interest." (alteration in original); "Applicants point to the provision stating that DOJ was to keep any privileged materials confidential 'except to the extent that [it] determine[d] in its sole discretion that disclosure would be in furtherance of [its] discretion of its duties and responsibilities or is otherwise required by law.' . . . That the DOJ has such discretion does not change the Court's determination. While the agreement gives DOJ discretion, that discretion is cabined by the requirement that any disclosure would be in furtherance of it duties or otherwise required by law. Furthermore, courts making a selective-waiver determination have still held that there was no waiver when nearly identical discretionary provisions were at issue. E.g., In re Symbol Techs., 2016 U.S. Dist. LEXIS 139200, 2016 WL 8377036, at *14." (alterations in original) (emphases added)).

- [Privilege Point, 7/26/17]

Cadwalader Loses Work Product and Privilege Claims for 51 Internal Investigation Witness Interview Memoranda: Part II

July 26, 2017

Last week's Privilege Point explained that Cadwalader Wickersham & Taft's client Washington Metropolitan Area Transit Authority (WMATA) lost a work product claim for 51 witness interviews the firm prepared during its internal investigation into self-dealing at WMATA. Banneker Ventures, LLC v. Graham, 253 F. Supp. 3d 64 (D.D.C. 2017).

Unlike the court's focus on the investigation's primary business motivation in rejecting the work product claim, the court's privilege analysis found that WMATA waived its privilege protection. The court noted that WMATA publicly released the final Cadwalader report -- which "disclosed counsel's legal and factual conclusions," and "cite[d] extensively to the interview memoranda throughout the entirety of the document." Id. at 74. The court acknowledged a Cadwalader lawyer's declaration that the interview memoranda references "were intended only for use by Cadwalader" -- but noted that "WMATA failed to remove the references . . . from the version of the [Cadwalader] Report that was made available to the public." Id. at 74 n.1. The court also noted that WMATA "has also used the [Cadwalader] Report to its advantage in this litigation" -- by "us[ing] the [Cadwalader] Report and facts disclosed in that report to support its claims and defenses." Id. at 74. The court therefore found a subject matter waiver, and ordered WMATA to produce all of Cadwalader's 51 witness interview memoranda except the portions which (1) "contain subjects not covered by the [Cadwalader] Report," and (2) "material and other comments, if any, as to a lawyer's mental impressions." Id. at 74-75.

- Meyer v. NCL (Bah.), Ltd., Case No. 16-23238-CIV-
WILLIAMS/SIMONTON, 2017 U.S. Dist. LEXIS 125045, at *13-14 (S.D.
Fla. Aug. 8, 2017) (holding that an investigation following a physical
assault on a cruise ship deserved work product protection; also holding
that the cruise line did not waive that work product protection by providing
witness statements to the FBI; "[T]here is nothing in the record to
demonstrate that the Defendant and the FBI were in an adversarial
posture, or that the Defendant produced the witness statements for any
other reason besides cooperation. Apart from whether the disclosure was
required under CVSSA, the undersigned finds that the Defendant did not
waive the work-product protection of the witness statements by providing
them to the FBI." (emphasis added)).

- U.S. SEC v. Herrera, 324 F.R.D. 258, 265 (S.D. Fla. 2017) (analyzing the work product waiver impact of Morgan Lewis's PowerPoint presentation and "oral downloads" to the SEC of the results of its investigation into inventory accounting errors in a client's Brazilian subsidiary; concluding that Morgan Lewis's oral download to the SEC of witness interview content waived work product protection, and triggered a subject matter waiver as to those witnesses; also concluding that Morgan Lewis's PowerPoint presentation to the SEC only disclosed historical facts, and therefore did not deserve work product protection – so its disclosure to the government did not trigger a waiver; "Defendants contend that ML made other oral disclosures of work-product information to the SEC, above and beyond the oral downloads of the 12 interviews. The Undersigned cannot reach any conclusions about further disclosures unless and until ML provides additional clarification about what was disclosed. Defendants contend that the ML attorneys took notes of the discussions they had with the SEC and perhaps with the Department of Justice. Defendants request that the Undersigned review in camera ML's attorneys' notes of an October 29, 2013 meeting. ML does not oppose this request. . . . But the Undersigned is unsure about whether ML attorneys met with the SEC and/or the Department of Justice on days other than [sic] October 29, 2013."; "Therefore, ML shall, within seven days from this Order, file under seal a copy of all attorney notes discussing or reflecting what information was disclosed to the SEC or the Department of Justice during meetings (or otherwise).")

- In re National Prescription Opiate Litig., Case No. 17-MD-2804, 2018 U.S. Dist. LEXIS 142270, at *59, *59-60, *68-69, *69, *70-71 (N.D. Ohio Aug. 1, 2018) (holding that the release of a Wilson Sonsini-prepared report to a Special Committee following a law firm’s investigation did not trigger a subject matter waiver; “The [Special Review] Committee retained the law firm of Wilson Sonsini Goodrich & Rosati to assist with the investigation. Wilson Sonsini interviewed forty-six witnesses and collected and reviewed numerous documents and reported its findings to the Committee. The Committee ultimately produced the Board Response, which concluded that McKesson’s oversight procedures could be improved but that the McKesson Board and senior management had not engaged in any serious wrongdoing.”; “Plaintiffs in this case have obtained McKesson’s 40-page Board Response, but now seek production of the following related materials: (1) a list of the forty-six individuals interviewed; (2) any statements collected from the forty-six individuals interviewed; (3) the search terms applied to collect documents for review in creating the Board Response; and (4) the actual documents collected by applying these search terms, if not already produced in discovery. McKesson opposes production of these materials, asserting attorney-client privilege and the work product doctrine. Plaintiffs respond that the materials are not privileged or, if they are, McKesson waived privilege by publishing the Board Response.”; “Finally, plaintiffs argue that, by publishing the Teamsters Report, McKesson waived any attorney-client or work-product privileges as to the attorney interview notes, the search terms, and documents reviewed by Wilson Sonsini. Plaintiffs assert the Teamsters Report disclosed much of the substance of interviews conducted and documents collected in conducting the investigation, so any privilege is waived. See In re Grand Jury, 78 F.3d 251, 254-55 (6th Cir. 1996) (attorney-client privilege waived as to specific communications disclosed and other communications related to the same subject matter, where party disclosed to third parties the legal conclusions and facts upon which those conclusions were based, but did not reveal the attorney’s advice); see also In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2nd Cir. 1993) (finding waiver of work product privilege by party’s decision to selectively disclose confidential materials in order to achieve other beneficial purposes).”; “McKesson counters it did not waive any privilege. It correctly points out the Board Response did not disclose the specific contents of any of the attorney interview notes or the search terms used in the investigation. Further, the few documents identified in the Board Response either have been or will be produced in this litigation.”; “The undersigned agrees there has been no waiver in the circumstances of this case, because the Board Response did not disclose privileged communications or work product relating to the investigation.”; “In sum, the undersigned agrees with McKesson that mere release of the Board Report did not waive any

privilege. Therefore, at this time, plaintiffs are not entitled to discovery of attorney notes or memoranda of interviews, the search terms counsel used to find documents, or which documents they chose for review based on those search terms. Plaintiffs also assert, however, that, if McKesson seeks to introduce evidence of Wilson Sonsini's investigation outlined in the Board Response (for example, to show McKesson's due diligence), then doing so would waive any asserted privilege. See In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 471 (S.D.N.Y. 1996) (holding it is unfair for a party to assert privilege to shield a report and then use the same report as sword). McKesson has not (yet) attempted to use the Board Response offensively in this litigation. But if it seeks to do so, the Court will reconsider whether plaintiffs are entitled to discover the information they have asked for but which this Ruling denies. See In re Vioxx, 2007 U.S. Dist. LEXIS 23164, 2007 WL 854251 at *5. ('If things change, however, and the Martin Report is sought to be used offensively in this litigation, or if Mr. Martin seeks to testify, the Court will have to reconsider whether the Plaintiffs are entitled to discover the materials underlying the investigation.')." (footnote omitted)).

- [Privilege Point, 2/5/20]

**Privilege Issues In High-Profile Corporate Sexual Harassment Case:
Part IV**

February 5, 2020

The last three Privilege Points described six favorable analyses from a Southern District of New York decision (Judge Gorenstein) assessing defendant Barnes & Noble's privilege assertions covering its investigation and later firing of its CEO for sexual harassment. Parneros v. Barnes & Noble, Inc., 332 F.R.D. 482 (S.D.N.Y. 2019).

Seventh, the court addressed fired CEO Parneros's argument that Barnes & Noble waived its privilege protection for communications relating to its press release when announcing Parneros's firing – because the press release said Parneros's termination "was taken by the Company's Board of Directors who were advised by the law firm Paul, Weiss." Id. at 500. The court rejected Parneros's argument, noting that "[b]ecause the . . . press release does not disclose the substance of counsel's advice, but rather only discloses the fact of counsel's consultation, there was no waiver based on the inclusion of the statement in the press release." Id. Eighth, the court addressed fired CEO Parneros's argument that Barnes & Noble triggered an "at issue" waiver by including in its Answer a contention that Barnes & Noble's termination decision was "clearly made in good faith." Id. at 501-02. The court rejected Parneros's argument – explaining that "the mere use of the term 'good faith' in an Answer does not reflect reliance on a 'good faith' defense," and emphasizing that "Barnes & Noble has disclaimed any intention to assert a 'good faith' defense." Id. at 502.

This extensive well-reasoned opinion by such a well-respected judge in such a high-profile case provides favorable holdings and practical guidance for corporations seeking to maximize their investigation-related privilege protection.

- [Privilege Point, 11/4/20]

Court Applies the General Rule Finding a Privilege Waiver When Clients Disclose Privileged Communications to Public Relations Consultants

November 4, 2020

One of the most dangerous misperceptions among corporate clients is that disclosing privileged communications to such friendly outsiders as public relations consultants does not waive privilege protection as long as there is a confidentiality agreement in place. A steady stream of cases have rejected that approach, yet large corporate clients and sophisticated law firms continue to rely on that mistaken view.

In United States ex rel. Wollman v. Massachusetts General Hospital, Inc., 475 F. Supp. 3d 45 (D. Mass. 2020), Mass. General Hospital hired a former U.S. Attorney and his law firm Cooley, LLP, to investigate allegations that Mass. General fraudulently billed Medicare and Medicaid. The government sought the investigation report, and Mass. General predictably resisted. Unsurprisingly, Mass. General first claimed work product, but the court rejected that assertion: “there is no indication in the engagement letter, the Report itself, or the employee interviews that the Investigation was intended to relate to the [eventual litigation].” Id. at 60-61. The court then turned to Mass. General’s privilege claim – noting that Mass. General had disclosed the Report to public relations consultant Rasky “to assist in responding to an investigation by the [newspaper] Boston Globe Spotlight Team into the practice of overlapping surgeries.” Id. at 65-66. The court bluntly concluded that “the production of the Report to Rasky waived the attorney-client privilege.” Id. at 68. But the court found that because Mass. General and other defendants “have not sought to use the . . . Report in any fashion, much less to gain an adversarial advantage,” the waiver did not trigger a subject matter waiver. Id. at 69. The court explained that “[w]hile an argument can be made that they used the Report as a ‘sword and shield’ in their dealings with the press, the distinction between use in a judicial and nonjudicial setting is significant.” Id.

All of these conclusions follow generally accepted principles. It is remarkable that one of America’s great hospitals, a former U.S. Attorney, and a prestigious law firm would be involved in such a disclosure.

- [Privilege Point, 3/3/21]

Three Subject Matter Waiver Decisions Send Mixed Signals: Part II

March 3, 2021

Last week's Privilege Point described a decision applying the subject matter waiver doctrine, which relies on fairness notions to prevent litigants from relying on privileged communications as a "sword" while simultaneously using the privilege as a "shield." Does the doctrine apply to statements outside a judicial setting?

In Utesch v. Lannett Co., Civ. A. No. 16-5932, 2020 U.S. Dist. LEXIS 232413 (E.D. Pa. Dec. 10, 2020), securities fraud class action plaintiffs alleged that defendant lied about its law firm Fox Rothschild's investigation into alleged price fixing. Among other things, the court rejected plaintiffs' argument that Lannett triggered a subject matter waiver by: (1) "informing the public, outside the present litigation, that the reported results of the investigation found no wrongdoing," and (2) "stating in various SEC filings that '[b]ased on reviews performed to date by outside counsel, [Lannett] currently believes that it has acted in compliance with all applicable laws and regulations' with respect to its pricing practices." Id. at *33 (alteration in original). The court pointed to a seminal Second Circuit case in explaining that "the extrajudicial disclosure of privileged communications waives privilege only as to the protected information 'actually revealed.'" Id. (citing In re von Bulow, 828 F.2d 94, 103 (2d Cir. 1987)).

Not all courts would be this forgiving. Next week's Privilege Point describes an earlier case taking a frighteningly more expansive view.

- O’Gorman v. Mercer Kitchen, No. 20-cv-1404 (LJL), 2021 U.S. Dist. LEXIS 67625, at *10-11 (S.D.N.Y. Apr. 7, 2021) (holding that a Pillsbury lawyer’s investigation deserved privilege protection, and that the Pillsbury lawyer did not waive that protection by disclosing just the investigation results to a third party human resource company assisting the client; “To the extent that Ms. Rizzo [Pillsbury lawyer] shared the results of her investigation with AHRA [Third party human resources company], Plaintiff’s claim of waiver confuses disclosure of the conclusion of an investigation with disclosure of communications that resulted in that conclusion. See In re Gen. Motors, 80 F. Supp. 3d at 528. Reading Plaintiff’s allegations and evidence generously, Ms. Rizzo disclosed some findings of the Pillsbury investigation—there was no corroboration for Plaintiff’s claims and Plaintiff harbored animosity for the accused hotel employee. She did not share with AHRA client communications (or documents containing client communications) or the contents of the interviews that resulted in that conclusion. She did not tell AHRA what she told the client or what the client had told her. Accordingly, there was no waiver. See id.”)
- Pascal v. Czerwinski, C.A. No. 2020-0320-SG, 2021 Del. Ch. LEXIS 229, at *7 (Del. Ch. Oct. 4, 2021) (unpublished opinion) (holding that a compensation consultant was inside privilege protection; “I find that attorney-client privilege is not waived when a consultant, who was retained to provide assistance to the client and its attorneys in making judgments that involve legal analysis, is copied into email chains, provided that the intent is to keep these communications confidential. Here, the compensation consultants were copied on or active participants in numerous email threads discussing presentations to be made to the Company’s compensation committee, the drafting of the Company’s proxies, and various recommendations and research of both counsel and the compensation consultants, often in the carbon-copied presence of the client. I am convinced that these communications were intended to remain confidential, as defined in the Delaware Rules of Evidence, because the compensation consultants received disclosure ‘in furtherance of the rendition of professional legal services to the client.’ As such, this finding appears to apply to most of the documents that have been submitted for in camera review. I have not at this stage considered whether unfair use of any of these privileged documents requires remediation by the Court.” (footnotes omitted) (citation omitted)).

- Elm 3DS Innovations, LLC v. Samsung Elecs. Co., C.A. No. 14-1430-LPS-JLH, 2021 U.S. Dist. LEXIS 198902, at *13-14, *14-15, *15 (D. Del. Oct. 15, 2021) (acknowledging the privilege implications of historical documents sent to or received from a lawyer, and adopting an imaginative process for responding to discovery about those documents; “I do have some concerns about Plaintiff’s privilege claims with respect to the following three groups of documents. The first group consists of documents that Plaintiff withheld in their entirety but that should be redacted in part and produced. Most, if not all of the documents in this group are email ‘chains’ where some links on the chain consist of communications with third parties. Communications with third parties are obviously not protected by the attorney-client privilege. The documents should be appropriately redacted and produced. For example, ElmPriv_1050 contains communications between Elm’s counsel and representatives from third party SK Hynix. Those communications are not privileged. The top communication is protected by the attorney-client privilege and may be redacted. Similarly, ElmPriv_1118 contains communications between Plaintiff’s counsel and a representative from third party IBM. Again, those communications are not privileged and should be produced. The top two communications appear to contain attorney-client privileged information, however, and may be redacted before production.” (footnote omitted); “Here is how I see it. The emails themselves demonstrate that the client sender (or client recipient) had the non-privileged article in their possession because at one point they sent (or received) it. The client cannot immunize discovery of those articles merely because they were sent to (or received from) their lawyer. Nor can the client conceal the fact that they were and are in possession of those articles. On the other hand, I am sensitive to the possibility that the fact that a client sent (or received) a particular article to (or from) his attorney on a certain date can implicate privilege concerns. See Willis Elec., 2021 U.S. Dist. LEXIS 27974, 2021 WL 568454, at *7.”; “In view of the foregoing, this is how the parties should proceed with respect to this group. Plaintiff must either (1) produce the non-privileged attachments or (2) if Plaintiff contends that the act of sending a particular attachment is privileged, confirm that the attachment has already been produced in discovery under circumstances that demonstrate which custodians had possession of it.” (footnote omitted)).

- [Privilege Point, 1/12/22]

Court Issues a Favorable Privilege Decision About an Investigation Report Resulting in an Employee's Firing

January 12, 2022

Courts frequently face a common scenario: an in-house lawyer investigates alleged employee misconduct, and prepares a report that the company relies on in firing the employee. Do such reports deserve privilege protection, and what happens if the employer produces a redacted version of such a report to justify the firing?

In Maiurano v. Cantor Fitzgerald Securities, No. 19 Civ. 10042 (KPF), 2021 U.S. Dist. LEXIS 207746 (S.D.N.Y. Oct. 27, 2021), Cantor Fitzgerald's Deputy General Counsel investigated an employee's alleged financial transaction improprieties. Cantor Fitzgerald fired the employee, who then sued the company. Cantor Fitzgerald produced its lawyer's investigation report, but "redacted the entire sections entitled 'Conclusion' and 'Observations and Recommendations.'" Id. at *2. Not surprisingly, plaintiff argued that Cantor Fitzgerald waived its privilege by "producing the redacted version of the Memorandum and relying on it as a basis for Plaintiff's termination." Id. at *3. The court first said it "has little difficulty finding" that the redacted portions of the Memorandum deserved privilege protection. Id. at *5. More significantly, the court then accepted Cantor Fitzgerald's argument "that its decision to terminate Plaintiff was 'based, only in part, on the factual findings of the [Memorandum], all of which have been disclosed to Plaintiff.'" Id. at *7 (alteration in original). The court ultimately denied plaintiff's waiver argument, emphasizing that Cantor Fitzgerald "further states that it will not rely 'on the privileged portions of the [Memorandum] as the basis for terminating [Plaintiff's] employment, which will be presented through objective proof of [Plaintiff's] misconduct.'" Id. (alterations in original).

This helpful case provides a useful roadmap for companies finding themselves in the same situation.

- [Privilege Point, 8/30/23]

**Federal and State Courts Issue Helpful Investigation-Related Decisions:
Part I**

August 30, 2023

Internal corporate or other entity investigations frequently generate discovery motions that focus on privilege and work product creation and waiver issues. Two recent decisions offer some good news for defendants resisting discovery of investigation-related documents.

In Wisk Aero LLC v. Archer Aviation Inc., Case No. 21-cv-02450-WHO (DMR), 2023 U.S. Dist. LEXIS 103780 (N.D. Cal. June 14, 2023), the court understandably held that defendant waived some work product protection by relying on its expert FTI Consulting's forensic investigation of alleged trade secret misappropriation and patent infringement. But the court properly held that defendant's "waiver extends to 'factual' work product concerning the same subject matter as the disclosed work product — FTI's investigation — but does not extend to opinion work product." Id. at *28-29. This generally accepted favorable waiver scope standard protects what in most cases the investigating corporation worries most about disclosing.

This absolute or nearly absolute protection for opinion work product adds to the litany of factors making work product more attractive in some cases than the attorney-client privilege. Next week's Privilege Point will describe a favorable Texas Supreme Court investigation-related decision.

- **[Privilege Point, 9/6/23]**

**Federal and State Courts Issue Helpful Investigation-Related Decisions:
Part II**

September 6, 2023

Last week's Privilege Point described a federal court case holding that explicit reliance on a consultant's investigation waived fact work product protection related to the investigation — but not opinion work product protection.

About two weeks later, in University of Texas System v. Franklin Center for Government & Public Integrity, the Texas Supreme Court issued a very favorable investigation-related decision, finding that Kroll investigators were protected as a "lawyer's representative" because they acted under the direction of UT's General Counsel; Kroll's investigation into allegations of undue influence in the University's admissions process deserved privilege protection, as shown by affidavits "prepared after the fact, as are most affidavits prepared in the litigation context." 675 S.W.3d 273, 286-87 (Tex. 2023). The Court then found that the publication of Kroll's report did not waive privilege as to "all the privilege-log documents" (as the lower court had ruled), but instead only triggered a subject matter waiver requiring production of: (1) internal UT privileged emails, but only to the extent that Kroll's published report "contains quotes or very specific paraphrases of the emails"; (2) Kroll's interview notes, but only to the extent that the Kroll report "amounted to disclosure of a 'significant part' of the [interview] communication." Id. at 279, 288, 289.

Lawyers arranging for internal corporate investigations should take heart in the federal court's affirmation of continuing protection for opinion work product despite a waiver of fact work product protection. And the Texas Supreme Court's favorable investigation-related ruling may serve as a model for lawyers' investigation and later publications of the results.

- [Privilege Point, 11/22/23]

Relying on an Investigation May Not Forfeit All Privilege Protection

November 22, 2023

Clients relying on an investigation's result to gain some advantage understandably trigger a subject matter waiver. But some courts recognize that those clients may still claim privilege for some related communications.

In Thomas v. Marshall Public Schools, — F. Supp. 3d —, 2023 U.S. Dist. LEXIS 156933 (D. Minn. Sept. 6, 2023), defendant school system indicated that it would rely on outside lawyers' investigation report to defend against the principal's allegation that she was improperly demoted. The defendant school district produced the investigation report, and the court allowed the plaintiff to depose the investigating outside lawyers. But the court prohibited plaintiff from inquiring into the outside lawyers' "legal advice . . . regarding whether to conduct the investigation, and how to respond to the investigation findings and conclusions." Id. at *32-33. The court noted that "[t]hese topics are not addressed in the Investigation Report." Id.

Corporations undertaking an investigation upon which they expect to rely should keep in mind this critical distinction. As long as the investigation report does not include them, the privilege should protect lawyers' advice about whether to investigate, and how to react to the investigation's results. But because not all courts "get it," lawyers should watch their language in such communications in case a court uses too broad a brush in applying the subject matter waiver doctrine.

XI. PRIVILEGE LITIGATION

A. Privilege Logs

- [Privilege Point, 6/28/02]

Court Adopts an Unforgiving Approach to Privilege Logs

June 28, 2002

Although some courts will give litigants a "second chance" to prepare an appropriately complete and detailed privilege log, other courts are less forgiving. Such a harsh approach can be especially troublesome in situations where every litigant has trouble compiling a privilege log -- such as with handwriting that is difficult to read and identify.

In American Casualty Co. v. Healthcare Indemnity, Inc., No. 002301-DJW, 2002 U.S. Dist. LEXIS 952 (D. Kan. Jan. 21, 2002), the court held that a party's failure to indicate on a privilege log whose handwriting appears on documents meant that the documents would have to be produced with the handwriting.

As tempting as it is to put off such onerous tasks as identifying the author of handwriting that might be protected by the attorney-client privilege or the work-product doctrine, litigants delaying such a task risk losing the fight over the handwriting.

- [Privilege Point, 8/14/02]

Must Privilege Logs Include Documents Generated After a Lawsuit Begins?

August 14, 2002

In most cases, litigants follow an informal convention relieving both sides of the obligation to include on their privilege logs any documents created after the lawsuit began. Otherwise, the privilege log would have to be updated continually-even including drafts of the privilege log itself.

As a technical matter, however, even post-lawsuit documents must be included on a privilege log. In Horton v. United States, 204 F.R.D. 670, 673 (D. Colo. 2002), the Court held that "the mere fact that a document concerning the litigation is created and exchanged between lawyer and client after the lawsuit is commenced does not mean necessarily that the document is privileged and not subject to discovery."

Litigants will undoubtedly continue to follow the standard informal convention, but it would be wise to state somewhere in a pleading responding to a discovery request that post-lawsuit documents will not be included on the litigant's privilege log.

- [Privilege Point, 2/12/03]

Circuit Court Reverses Lower Court's Strict Ruling on Privilege Logs

February 12, 2003

Corporations asserting the attorney-client privilege for intracorporate communications must establish that the communications were not shared beyond those with a "need to know" within the company. One recent District Court decision held that a company had failed to carry its burden of proof, because its privilege log did not demonstrate that each company employee receiving privileged communication met the "need to know" standard.

In Federal Trade Commission v. GlaxoSmithKline, 294 F.3d 141, 147-48 (D.C. Cir. 2002), the Circuit Court reversed this decision. It held that the District Court's ruling was "overreaching," and that courts may "reasonably infer" (absent "evidence to the contrary") that company employees receiving privileged communication needed them to perform their work.

Lawyers representing corporations in litigation should take comfort in this more reasonable standard, but continue to train their clients to share privileged communications only with those company employees who "need to know" the information.

- **[Privilege Point, 2/19/03]**

How Much Detail Must a Privilege Log Contain?

February 19, 2003

Litigants must prepare a "privilege log" describing withheld documents. Courts have frequently discussed the level of detail required for such logs.

In Maine v. United States Dep't of Interior, 298 F.3d 60, 72 (1st Cir. 2002), the court held that the Federal Government had not provided an adequate description of some documents on its log. For instance, the court held that the following description fell short of the required specificity: "14-page draft statement of material fact from an agency official to the DOJ lawyer representing the Services in the Defenders of Wildlife case in order to assist the lawyer in preparing pleadings in the case."

Many litigators' privilege logs contain statements similar to that found inadequate by the First Circuit, and lawyers should become familiar with the approach taken by the court in which they are litigating.

- [Privilege Point, 2/4/04]

Courts Disagree About Giving Litigants a "Second Chance" in Preparing Privilege Logs

February 4, 2004

All courts acknowledge the general rule that a party might waive the attorney-client privilege or the work product doctrine by not providing a privilege log, or by submitting an inadequate log. Most courts give litigants a second chance, but other courts are less forgiving.

In Constar International, Inc. v. Continental Pet Technologies, Inc., Civ. No. 99-234-JJF, 2003 U.S. Dist. LEXIS 21132 (D. Del. Nov. 19, 2003), the court rejected defendant's argument that plaintiff had waived the attorney-client privilege by not properly citing the protection in its privilege log. Just one day earlier, however, the court in In re Honeywell International Inc. Securities Litigation, 230 F.R.D. 293 (S.D.N.Y. 2003), found that Honeywell had waived the work product protection that might have otherwise have covered documents by initially asserting only the attorney-client privilege — and attempting to add a work product claim later. The court explained that "[p]arties should not be permitted to re-engineer privilege logs to align their privilege assertions with their legal arguments." Id. at 299.

These two cases decided just one day apart highlight the importance of properly preparing privilege logs the first time — it is difficult to predict in advance whether the court will take the forgiving or the harsh approach.

- **[Privilege Point, 10/18/06]**

How Many "Bites" at the Privilege Log Apple Does a Litigant Get?

October 18, 2006

Many courts acknowledge that a litigant who fails to properly log protected documents might have to produce them. Interestingly, some courts use a "waiver" analysis, although the failure to log a protected document does not disclose any privileged communications (which would cause an express waiver) and does not seek some advantage by relying on the fact of legal advice (which would cause an implied waiver). It would be more appropriate to treat an inadequate log as amounting to a failure to establish the privilege - although the unfortunate outcome is the same either way.

Although many courts state in the abstract that a litigant failing to properly log a document can lose the privilege, most courts give litigants another chance. However, some courts are not as generous. In Hovis v. General Dynamics Corp. (In re Marine Energy Sys.), Case No. 97-01929-W, Adv. No. 98-80220-W, Ch. 7, 2006 Bankr. LEXIS 1655 (Bankr. D.S.C. July 17, 2006), the court granted defendants a second chance to adequately log documents. When the court found that defendants' amended log was inadequate, it ordered defendants to produce the withheld documents.

Although litigants should be heartened by many courts' willingness to give them another chance to adequately log documents, they should never count on a court's generosity.

- [Privilege Point, 11/29/06]

Courts' Privilege Log Requirements Demand Difficult-to-Obtain Information

November 29, 2006

Nearly every court requires a party withholding documents during discovery to provide some description of the withheld documents on a "privilege log." Such logs normally include information such as type of document, date, author, recipients and basis for the protection. However, some troubling decisions demand much more.

In Turner v. Moen Steel Erection, Inc., No. 8:06CV227, 2006 U.S. Dist. LEXIS 72874, at *5 n.1 (D. Neb. Oct. 5, 2006), the court held that defendant's privilege log did not comply with the court's order, which required that logs include (among other things) "the identities and positions of all persons who were given or have received copies of [withheld documents] and the dates copies were received by them." A couple of weeks later, another court required litigants withholding documents to identify (among other things) "all persons or entities known to have been furnished the documents or informed of their substance." National Fire & Marine Ins. Co. v. Gurr, No. 3:05-CV-0658-BES (VPC), 2006 U.S. Dist. LEXIS 75974, at *16 (D. Nev. Oct. 18, 2006).

Depending on the size of the company and the age of the document, it could be nearly impossible to include this information on a privilege log -- unless someone interviews every recipient of the document (even those not listed on the document itself).

- [Privilege Point, 2/14/07]

Must Privilege Logs Separately Identify Each Part of an E-Mail "String"?

February 14, 2007

Courts traditionally have insisted that a privilege log separately identify and address each document and each attachment. As in so many other areas, the increasing use of e-mails has generated a debate about the required level of privilege log detail.

When confronted with the specific issue of whether a privilege log must separately list and deal with each portion of an e-mail string, sometimes courts answer in the affirmative. In re Universal Serv. Fund Tel. Billing Practices Litig., 232 F.R.D. 669, 672-73 (D. Kan. 2005). However, many recent cases note (without discussing) that privilege log entries refer to e-mail "strings" rather than separate e-mails. For instance, in Vaughan v. Celanese Americas Corp., Civ. No. 3:06CV104-W, 2006 U.S. Dist. LEXIS 89888, at *10-11 (W.D.N.C. Dec. 11, 2006), the court explicitly approved four privilege log entries that identified the withheld document as an "email string."

In the abstract, it is easy to see why privilege logs should not lump an entire e-mail string together, but in the real world it is easy to see why courts permit it.

- [Privilege Point, 11/17/10]

Courts Take Differing Positions on Privilege Logs: Part I

November 17, 2010

Although the federal rules do not explicitly mandate a privilege log, they require a litigant withholding documents to describe them. Most courts point to this provision as requiring a privilege log, but take widely varying approaches to such logs. Several decisions issued at about the same time highlight courts' disagreements.

In Lurensky v. Wellinghoff, 271 F.R.D. 345, 355 (D.D.C. 2010), widely respected U.S. Magistrate Judge John Facciola acknowledged with his usual refreshing frankness that he finds "privilege logs to be on the whole useless." Judge Facciola also explained that he reviewed both a log and the adversary's objections to the log and "frankly, can make neither heads nor tails of either." Id. at 356. The judge decided to review the documents himself. Four days later, a Delaware court took a much harsher approach. In Klig v. Deloitte LLP, C.A. No. 4993-VCL, 2010 Del. Ch. LEXIS 193, at *15 (Del. Ch. Sept. 7, 2010) (not released for publication), the court found that Deloitte's law firm (Skadden Arps) had "intentionally produced chaff" by using boilerplate document descriptions in a privilege log. The court noted that Deloitte's "counsel knew how to prepare an adequate log" because another Delaware court had earlier found a similar log insufficient. Id. at *14. The court had noted earlier in a discovery hearing that allowing an amended log would reward such improper conduct, because the "only thing that happens when you then get challenged on it is you actually have to go back and do what you . . . should have done in the first place." Id. at *10 (internal quotations omitted). The court overruled Deloitte's privilege claims, although it stayed its order to allow an interlocutory appeal.

Three other cases decided exactly seven days later show a similar dichotomy. These will be discussed in next week's Privilege Point.

- **[Privilege Point, 11/24/10]**

Courts Take Differing Positions on Privilege Logs: Part II

November 24, 2010

Last week's Privilege Point highlighted courts' different attitudes toward litigants' inadequate privilege logs. Exactly one week after the second of those decisions, three other courts issued similarly divergent opinions.

One court found that the litigants did not have to even bother logging privileged communications between clients and lawyers (along with "all support staff and vendors") "regardless of the date made or created." Vasudevan Software, Inc. v. IBM Corp., No. C09-05897 RS (HRL), 2010 U.S. Dist. LEXIS 100835, at *19 (N.D. Cal. Sept. 14, 2010). On the same day, another court awarded attorneys' fees but did not strip the privilege from a litigant who had failed to include privileged communications on a privilege log. The court acknowledged that the plaintiff was "a lawyer with extensive litigation experience," but noted that he and his wife were proceeding pro se in the matter. Smith v. James C. Hormel School of Va. Inst. of Autism, Civ. A. No. 3:08-cv-00030, 2010 U.S. Dist. LEXIS 95668, at *18 (W.D. Va. Sept. 14, 2010). Also on the same day, another court rejected a non-party's privilege claim – because it had not logged any withheld documents. The court noted that Rule 45 required a privilege log, and that "[w]ithout producing a privilege log, [the non-party] cannot avail itself of the attorney-client privilege." Teton Homes Eur. v. Forks RV, Cause No. 1:10-CV-33, 2010 U.S. Dist. LEXIS 96109, at *9 (N.D. Ind. Sept. 14, 2010). The court's order that the non-party respond to the subpoena might give it a chance to submit a log, and avoid losing the privilege.

Given courts' varying attitudes toward privilege logs, lawyers must familiarize themselves with the pertinent court's rules and precedent.

- [Privilege Point, 4/20/11]

Court Allows Eli Lilly to Skip a Privilege Log

April 20, 2011

The federal rules do not explicitly require privilege logs. However, the rules require a detailed description of any withheld documents, and most courts insist on or expect a log.

Some courts are more lenient. In Eli Lilly & Co. v. Valeant Pharmaceuticals International, Case No. 1:08-cv-1720-TWP-TAB, 2011 U.S. Dist. LEXIS 15246 (S.D. Ind. Feb. 15, 2011), defendant Valeant asked the district court to reverse a magistrate judge's order allowing plaintiff Eli Lilly to withhold documents without logging them. The court agreed with the magistrate judge, noting "the tenuous connection between the requested documents and the core issues of the case." Id. at *5. As the court explained it, "requiring Lilly to prepare a privilege log for documents that are marginally relevant to this garden-variety contract dispute would be unduly burdensome." Id.

Only a handful of courts take such a forgiving view, but corporate litigants might consider seeking a similar ruling in the right circumstances.

- [Privilege Point, 12/26/12]

Courts Implicitly Acknowledge the Wisdom of Litigants Revising and Supplementing Their Privilege Logs

December 26, 2012

Some courts essentially allow adversaries to play "gotcha" with a litigant's privilege log – finding the log inadequate and not giving the litigant another chance. However, many courts acknowledge both the fairness and practical advantages of allowing litigants to revise and supplement their privilege logs.

In re Denture Cream Products Liability Litigation, Case No. 09-2051-MD-ALTONAGA/SIMONTON, 2012 U.S. Dist. LEXIS 151014 (S.D. Fla. Oct. 18, 2012), the court approved descriptions on Proctor & Gamble's privilege log. The court pointed out that Proctor & Gamble had the log descriptions "supplemented after a meet and confer held in October of 2011, and again after a meet and confer held in March of 2012." Id. at *48. The next day, the Southern District of Ohio noted that plaintiffs challenged defendants' withholding of documents "under the first privilege log, even though Defendants have since revised their privilege log for a second time." Wilkinson v. Greater Dayton Reg'l Transit Auth., Case No. 3:11cv00247, 2012 U.S. Dist. LEXIS 150579, at *5 (S.D. Ohio Oct. 19, 2012). The court chastised plaintiffs for not complying with the local rule requiring parties to exhaust all extra-judicial means of resolving discovery disputes before seeking judicial intervention. The court complained that the plaintiffs were asking it to "overlook or ignore the further revisions Defendants have made in the second revised privilege log" – ultimately holding that the new log "effectively supercedes [sic] [defendants'] first revised privilege log and moots the parties' dispute." Id. at *7-8.

Although revising or supplementing a privilege log might serve as an acknowledgment that the withholding litigant was not as careful as it should have been the first time around, in most courts such a move will enhance the odds of successfully withholding protected documents.

- [Privilege Point, 7/3/13]

Courts Issue Practical Rulings on Privilege Logs

July 3, 2013

Some courts have adopted unrealistically strict rules about privilege logs, such as a requirement to list every person who learned a withheld document's content. Fortunately, other courts take a more common-sense view of privilege logs.

In SGD Engineering Ltd. v. Lockheed Martin Corp., Case No. 2:11-cv-2493-DGC, 2013 U.S. Dist. LEXIS 74186 (D. Ariz. Apr. 17, 2013), the court rejected plaintiff's argument that defendant had waived its privilege by submitting five versions of a privilege log and dropping privilege claims for several hundred documents. The court acknowledged that "[i]n large-volume document cases like this, it is not unusual for the privilege proponent to revise the details of its privilege log." Id. at *18. A week later, the Southern District of New York analyzed the government's argument that defendants' privilege log was inadequate. In In re 650 Fifth Avenue & Related Properties, the court noted that "[w]hat is good for the goose is good for the gander," and held that "[i]f the Government persists in its request that defendants revise their log to more adequately support the basis for their assertions of privilege, the Court will require that they produce a log with a similar level of detail." No. 08 Civ. 10934 (KBF), 2013 U.S. Dist. LEXIS 64150, at *10 (S.D.N.Y. Apr. 24, 2013).

It is refreshing to see some courts' realistic approach to privilege log issues.

- **[Privilege Point, 4/9/14]**

Decision Highlights Courts' Differing Privilege Log Requirements

April 9, 2014

Although Fed. R. Civ. P. 26 does not require privilege logs, most courts expect them – and many courts specifically require them. However, courts take widely varying approaches to log requirements.

In Khasin v. Hershey Co., Case No. 5:12-cv-01862-EJD-PSG, 2014 U.S. Dist. LEXIS 23886 (N.D. Cal. Feb. 21, 2014), plaintiff challenged defendant Hershey's privilege log. The court rejected Khasin's argument that Hershey's log improperly "failed to provide the organizational positions of senders and recipients." Id. at *12. The court noted that plaintiff's arguments "are based on an incorrect recitation of the requirements for a privilege log" – because plaintiff relied on the Second Circuit's "test for a sufficient privilege log [that] requires a greater degree of specificity than the one required by the Ninth Circuit." Id. at *12-13. The court pointedly noted that "the Ninth Circuit's test does not require a privilege log to provide the organizational positions of senders and recipients." Id. at *14.

As in so many other areas, litigants must check the pertinent court's specific approach to both the substance and the logistics of privilege claims.

- [Privilege Point, 6/3/15]

Courts React Differently to Litigants' Failure to Properly Log Withheld Documents

June 3, 2015

The Federal Rules of Civil Procedure do not require privilege logs, but most courts require one in their local rules, or at least expect one. Courts can react in widely varying ways to litigants' failure to prepare any log, or failure to prepare an adequate log. Four decisions highlight the spectrum of courts' possible remedies.

In Apple Inc. v. Samsung Electronics Co., the court condemned defendant Samsung's privilege log as having provided "only generic statements" supported by a "vague declaration" — but explained that he had earlier "granted in camera review" rather than ordering the documents produced. 306 F.R.D. 234, 240 (N.D. Cal. 2015) (citation omitted). In Thermoset Corp. v. Building Materials Corp. of America, the court noted that defendant did not provide a supplemental privilege log until 38 days after producing responsive documents, but declined to find a waiver despite the tardiness — relying on a "holistic reasonableness analysis." Case No. 14-60268-CIV-COHN/SELTZER, 2015 U.S. Dist. LEXIS 45924, at *19 (S.D. Fla. Apr. 8, 2015) (citation omitted). In United States v. Biberstein, the court criticized respondent's privilege log as providing "little help to the Court" — because it lacked pertinent dates and contained only "boilerplate language." No. 7:14-CV-175-BO, 2015 U.S. Dist. LEXIS 55139, at *4-5 (E.D.N.C. Mar. 23, 2015). Noting that respondent "had numerous opportunities to meet his burden to demonstrate that the documents are privileged" (*id.*), the court ordered defendant to produce all the withheld documents (declining respondent's offer to allow the court's *in camera* review). In Swoboda v. Manders, the court condemned plaintiff's failure to prepare a log — bluntly ordering plaintiff to produce "any documents related to allegations in the plaintiff's complaint" (apparently even including "communications with counsel that [took] place after the filing of a law suit"). Civ. A. No. 14-19-SCR, 2015 U.S. Dist. LEXIS 54329, at *11-12 (M.D. La. Apr. 27, 2015).

Given the unpredictability of courts' reactions to nonexistent, tardy, or insufficient privilege logs, litigants should comply with local rules and customs — and familiarize themselves with the presiding judge's likely approach.

- Ball v. USAA Life Ins. Co., No. 2:16-cv-00041-DCN, 2016 U.S. Dist. LEXIS 201567, at *13 (D.S.C. May 16, 2016) (in an opinion by Judge Norton, holding that a corporation can claim privilege even without identifying the recipient lawyer; “USAA explained to the court that it did not identify the specific attorney in the privilege log because the emails were sent to a group within the legal department called ‘Life Claims and Annuities Referrals,’ comprised of lawyers and non-lawyers. The requests set out the underlying facts and then requested legal advice relating to that set of facts. The court has reviewed these documents and finds that they are protected by the attorney-client privilege. The court also finds that USAA’s failure to identify the specific attorney to which the request was sent excusable given the circumstances of the request and the nature of the legal department’s emailing system.”)

- [Privilege Point, 6/1/16]

Courts Deal with Litigants' Tardy or Inadequate Privilege Logs

June 1, 2016

Courts frequently deal with litigants' tardy or inadequate privilege logs. Among other things, they must decide the standard of review for a magistrate judge's initial determination; who has jurisdiction to impose sanctions; and the obvious issue of a late or inadequate log's implications. Three decisions decided in the same month highlight these issues.

In United States SEC v. Commonwealth Advisors, Inc., the court extensively analyzed the proper standard for reviewing a magistrate judge's decision that a litigant waived its privilege protection by including "factually incorrect entries" in an amended log (following the magistrate judge's conclusion that the first log was inadequate). Civ. A. No. 3:12-00700-JWD-EWD, 2016 U.S. Dist. LEXIS 46438, at *4 (M.D. La. Apr. 6, 2016). The court applied a "clearly erroneous" standard in upholding the magistrate judge's harsh sanction. *Id.* at *6. A few weeks later, in NLRB v. D. Bailey Management Co., No. 2:16-cv-02156-CAS (AFMx), 2016 U.S. Dist. LEXIS 57550 (C.D. Cal. Apr. 25, 2016), the court first held that an administrative law judge lacked the power to sanction a litigant's tardy log by finding a waiver — but then itself found that the defendant waived its privilege by failing to log withheld documents for nearly a year. Three days after that, the court in Anderson v. Mountain States Mutual Casualty Co., Civ. A. No. 15-cv-01316-RM-NYW, 2016 U.S. Dist. LEXIS 56733 (D. Colo. Apr. 28, 2016), followed the more generous approach many courts take — finding a litigant's logs inadequate, but giving it a second chance.

The SEC v. Commonwealth Advisors court recognized that "[d]iscovery has become the preeminent battleground in modern litigation, perhaps eclipsing the rare trial." 2016 U.S. Dist. LEXIS 46438, at *2 n.1. That battleground often includes skirmishes over privilege logs' timing and adequacy.

- [Privilege Point, 6/7/17]

Court Offers Rare Good News and a Helpful Hint about Effective Privilege Logs

June 7, 2017

Plaintiffs suing document-laden corporate defendants often try to make privilege log mistakes into a destructive side show.

In Dyson, Inc. v. SharkNinja Operating LLC, No. 1:14-cv-0779, 2017 U.S. Dist. LEXIS 52074 (N.D. Ill. Apr. 5, 2017), the court acknowledged that defendant had made privilege log mistakes and withheld some unprotected documents. But the court refused plaintiff's request for a Special Master's appointment – noting that defendant's over-designation was not "a systemic problem," and that "it appears to the Court that this is simply the type of human error that will necessarily occur when a large document review and production is undertaken." Id. at *15. The court's review of some withheld documents also provided a helpful hint about how lawyers and their corporate clients can maximize their chance of winning privilege fights. The court held that an email seeking "'initial reactions'" to what was likely an advertisement was not privileged, although a lawyer received a copy. Id. at *7 (internal citation omitted). The court noted that the email "does not request legal advice from [the lawyer] or discuss any legal issues." Id.

Some courts' refreshingly realistic approach to privilege log errors should encourage corporate defendants. But those defendants should train their employees seeking legal advice to explicitly request it in communications – because even tolerant courts often protect only those documents which demonstrate their primarily legal purpose on their face.

- In re Abilify (Aripiprazole) Prods. Liab. Litig., Case No. 3:16-md-2734, 2017 U.S. Dist. LEXIS 213493, at *14-15, *15-16 (N.D. Fla. Dec. 29, 2017) (in an opinion by Judge Jones, analyzing privilege log requirements for corporate transactions, and concluding that it “is not fatal” if there is no individual identified; “Management level employees within complex organizations such as BMS and OAPI are permitted to discuss legal advice sought and given without losing the privilege. Long v. Anderson University, 204 F.R.D. 129 (S.D. Ind. 2001) (email communications between one university employee and another regarding communications they had with university counsel and the legal advice given were privileged.); In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 796 (E.D. La. 2007) (privilege extends to ‘communications between corporate employees in which prior advice received is being transmitted to those who have a need to know in the scope of their corporate responsibilities.’). This is so even where the attorney is not identified as an author or addressee of a communication. Santrade, Ltd. v. General Elec. Co., 150 F.R.D. 539, 545 (E.D. N.C. 1993) (‘[a] document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds . . . In instances where the client is a corporation, documents subject to the privilege may be transmitted between non-attorneys to relay information requested by attorneys.’) (alterations in original); “With regard to those instances where a specific name is not identified, this is not fatal to the assertion of privilege so long as it is evident that the information being compiled or discussed by corporate employees was information requested by or generated by an attorney. Indeed, it is not uncommon within a complex organization that when a request for information is made by outside counsel communications among corporate employees transmitting the request for information frequently will simply refer to the request as coming from outside counsel as opposed to a specific attorney or law firm. The important inquiry from a privilege perspective is the nature of the communication and the context in which it is made and not necessarily the precise identification of the source of the request for information.”)

- Md. Restorative Justice Initiative v. Hogan, Civ. Case No. 16-01021-ELH, 2018 U.S. Dist. LEXIS 182955, at *14 (D. Md. Oct. 25, 2018) (“[T]he Court finds that failure to include a document’s author or receiver is not per se insufficient. The objective is to provide enough information to determine whether a claimed privilege can be sustained, without revealing the very information claimed to be privileged.”)

- In re 3M Combat Arms Earplug Prods. Liab. Litig., Case No. 3:19-md-2885, 2020 U.S. Dist. LEXIS 48461, at *8-9, *13-14, *14-15 (N.D. Fla. Mar. 20, 2020) (in an opinion by Judge Jones, holding that the corporate communications may deserve privilege protection primarily copied to a lawyer, or if there is no lawyer author or recipient; “Plaintiffs do not provide any legal authority or compelling basis for the Court to compel Defendants to amend their privilege logs to include the number of pages for each entry, particularly where the required details of the parties’ privilege logs were set forth early in this litigation. The Court further will not require Defendants to itemize each email in a thread for the additional reason that it poses a risk of revealing privileged information. Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 642 (D. Nev. 2013); Muro v. Target Corp., 250 F.R.D. 350, 362-63 (N.D. Ill. 2007).”; “In the same vein, Plaintiffs’ other challenges to the scope of attorney-client privilege in the corporate setting are without merit. Plaintiff argues that communications ‘where neither the sender/author nor recipient is an attorney’ are not privileged—or are highly suspect—because they ‘are more likely to be business communications than communications that were made for the primary purpose of giving or receiving legal advice.’ Corporate employees within complex organizations, such as Defendants, may discuss legal advice sought and given without losing the privilege, even when an attorney is not an author or recipient of the communication. Abilify, 2017 U.S. Dist. LEXIS 213493, 2017 WL 6757558, at *5. ‘The same protections afforded to communications between counsel and client extend to communications between corporate employees who are working together to compile facts for in-house counsel to use in rendering legal advice to the company.’ Fed. Trade Comm’n v. Boehringer Ingelheim Pharm., Inc., 180 F. Supp. 3d 1, 34 (D.D.C. 2016).”; “What’s more, the fact that a corporate communication is addressed to numerous employees and only ‘carbon copies’ in-house counsel is not dispositive of whether the attorney-client privilege applies. The number of lawyers or non-lawyers to whom a communication is addressed is, in most circumstances, immaterial. ‘The key question as to whether emails distributed among a business team are subject to the attorney-client privilege is dependent upon whether the attorney is providing legal advice even though the attorney may be a copyee of an email that also contains business advice.’ Abilify, 2017 U.S. Dist. LEXIS 213493, 2017 WL 6757558, at *7. This question mirrors the primary purpose standard for attorney-client privilege.”)

- **[Privilege Point, 11/11/20]**

Some Courts Require Privilege Logs to Include Goofy Data

November 11, 2020

Although the Federal Rules do not explicitly require privilege logs, every court seems to do so. Most courts require such logs to include predictable data, but some courts require logs to provide data that seem largely irrelevant.

In Hardman v. Unified Government, Case No. 19-2251-KHV-TJJ, 2020 U.S. Dist. LEXIS 143857, at *9 (D. Kan. Aug. 10, 2020), the court explained that “[c]ourts in this district have determined privilege logs must include [among the standard data] (7) the number of pages of the document.” One cannot but wonder why that matters. Requiring document lengths seems harmless, but other courts’ requirements could be almost impossible to satisfy. Among other things, some courts require privilege logs to identify all persons who had access to the withheld documents.

Lawyers obviously must check with the pertinent court’s log requirements, in addition to that court’s possibly unique approach to privilege and work product issues.

- Mr. Dee's Inc. v. Inmar, Inc., No. 1:19cv141, 2021 U.S. Dist. LEXIS 163460, at *24 (M.D.N.C. Aug. 30, 2021) ("Although the privilege log fails to identify an author or recipient (likely because Document No. 502 existed in paper form and does not reflect electronic creation or transmission), Defendants have provided enough information to allow Plaintiffs to assess the claim of attorney-client privilege: an unknown employee prepared Document No. 502 to facilitate the provision of legal advice (Docket Entry 220-1 at 4), and outside counsel indeed received and relied upon Document No. 502 in creating another document that Defendants have produced to Plaintiffs (Docket Entry 225 at 5 n.3 (citing Docket Entry 226, ¶ 13 n.2)). Insofar as Plaintiffs have speculated about broader dissemination of Document No. 502, thus resulting in a waiver of attorney-client privilege, that unsupported basis remains inadequate to justify in camera review. See Anderson, 2017 U.S. Dist. LEXIS 81572, 2017 WL 2313470, at *5.")
- Mr. Dee's Inc. v. Inmar, Inc., No. 1:19cv141, 2021 U.S. Dist. LEXIS 163460, at *23-24 (M.D.N.C. Aug. 30, 2021) ("Plaintiffs have requested in camera inspection of Document No. 502 based on Defendants' incomplete assertion of attorney-client privilege, given that the privilege log fails to identify an author or any recipients other than Horoschak. (Docket Entry 220 at 8-9.) Per Defendants, Document No. 502 consists of a schedule to an agreement, a blank page depicting only a paper clip, and two substantive pages. (Docket Entry 225 at 5 n.3 (citing Docket Entry 226, ¶ 13 n.2).) Defendants already have provided to Plaintiffs (i) the schedule to the agreement and (ii) a document prepared by Horoschak based on the two substantive pages. (Id.)")
- Mr. Dee's Inc. v. Inmar, Inc., No. 1:19cv141, 2021 U.S. Dist. LEXIS 163460, at *2-3 (M.D.N.C. Aug. 30, 2021) ("Document No. 502, dated January 1, 2007, identifies neither an author nor a sender. (Docket Entry 220-1 at 4.) The privilege log refers to that document as '[c]onfidential analysis of pre-and post-Joint Venture retail client movement between clearing agents prepared for outside counsel, [] Horoschak, Esq., to aid the provision of legal advice regarding unwinding of coupon sub-processing agreement. Date is estimated.' (Id.)" (alterations in original))

- Mr. Dee's Inc. v. Inmar, Inc., No. 1:19cv141, 2021 U.S. Dist. LEXIS 163460, at *21 (M.D.N.C. Aug. 30, 2021) ("Here, neither the privilege log nor the Declaration clarifies whether Document No. 117 actually reveals legal advice. Given that the Court must strictly construe the attorney-client privilege, In re Grand Jury Subpoena, 341 F.3d at 335, and only shield from disclosure communications that 'convey legal advice to the limited number of people necessary for the company to act on that legal advice,' In re Zetia (Ezetimibe) Antitrust Litig., 2020 U.S. Dist. LEXIS 61020, 2020 WL 1593544, at *4, Defendants must produce Document No. 117 for in camera inspection.")
- Mr. Dee's Inc. v. Inmar, Inc., No. 1:19cv141, 2021 U.S. Dist. LEXIS 163460 (M.D.N.C. Aug. 30, 2021) ("A neighboring court has noted the ambiguity that can result from the invocation of attorney-client privilege as to documents that 'reflect' legal advice. See McAirlands, Inc., 2014 U.S. Dist. LEXIS 201138, 2014 WL 12782814, at *4. In that case, representations during oral argument clarified that the 'privilege log use[d] the term "reflecting" legal advice synonymously with "conveying," "providing," or "relaying" legal advice,' id., thus rendering attorney-client privilege applicable to '[d]ocuments "reflecting" legal advice,' id. In other words, the substance of the communication, rather than the description in the privilege log, controlled whether the attorney-client privilege applied. See id. ('declin[ing] to find that otherwise privileged documents lose their privilege simply due to semantics of the privilege log descriptions').") (alterations in original))
- Mr. Dee's Inc. v. Inmar, Inc., No. 1:19cv141, 2021 U.S. Dist. LEXIS 163460, at *13-14 (M.D.N.C. Aug. 30, 2021) (explaining privilege protection for attachments and transmittal communications; "[W]hen 'a privileged document has attachments, each attachment must individually satisfy the criteria for falling within the privilege.' Leonen v. Johns-Manville, 135 F.R.D. 94, 98 (D.N.J. 1990). Regarding documents sent via email or other means, 'transmittal records that [neither] include legal advice nor disclose privileged matters are not subject to the attorney-client privilege.' Shaffer v. Northwestern Mut. Life Ins. Co., No. 5:05CV1, 2006 U.S. Dist. LEXIS 59294, 2006 WL 2432110, at *2 (N.D.W. Va. Aug. 21, 2006) (unpublished) (internal quotation marks omitted); accord Window World of Baton Rouge, LLC v. Window World, Inc., Nos. 15 CVS 1, 15 CVS 2, 2019 NCBC LEXIS 54, 2019 WL 3995941, at *26-27 (N.C. Super. Ct. Aug. 16, 2019) (unpublished) (collecting cases).") (alteration in original))

- [Privilege Point, 11/23/22]

Musk-Twitter Feud Privilege Fallout: Part II

November 23, 2022

Last week's Privilege Point described a Delaware court's acknowledgment that the normal In re Asia Global Crossing, Ltd., 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005), standard does not apply to the world's wealthiest man. Four days later, Musk lost a privilege issue, under standard privilege log doctrine.

In Twitter, Inc. v. Musk, Civ. A. No. 2022-0613-KSJM, 2022 Del. Ch. LEXIS 244, at *1 (Del. Ch. Sept. 23, 2022), Musk challenged "the legitimacy of [Twitter]'s privilege claims and the adequacy of [its] privilege log." To be sure, a litigant's grossly tardy or inadequate privilege logs can result in what is called a "blanket waiver" (the term "waiver" seems inappropriate – the result amounts to a sanction). Given the speed, volume and complexity of the document discovery in Musk's feud with Twitter, the court unsurprisingly denied Musk's effort to strip away all of Twitter's privilege. But some deficiencies bring such sanctions. In Geomatrix Systems, LLC v. Eljen Corp., No. 3:20-cv-1900 (JBA), 2022 U.S. Dist. LEXIS 177039 (D. Conn. Sept. 29, 2022), the court overruled plaintiff's privilege objections – noting that they "were not properly raised for at least seven months, despite court intervention and multiple opportunities." Id. at *33.

Although such severe punishment is rare, some courts reject litigants' tardy or inadequate privilege objections or logs.

- [Privilege Point, 1/4/23]

Court Provides Useful Guidance for Preparing a Defensible Privilege Log

January 4, 2023

In earlier times, litigants essentially trusted each other to withhold (without identifying) responsive documents protected by the attorney-client privilege or the work product doctrine. Now every court seems to require a privilege "log" listing the withheld documents (although the Federal Rules do not require such a "log").

Inexplicably, some lawyers prepare logs with page after page of the identical minimalist entries such as "email reflecting legal advice" or "email relating to legal issue." In Raymond v. Unum Group, the court approved defendants' privilege log descriptions in the face of the adversary's challenge — concluding that they "do more than generally state that the communications were for purposes of rendering or obtaining 'legal advice.'" Civ. A. No. 20-352-BAJ-EWD, 2022 U.S. Dist. LEXIS 188715, at *7 (M.D. La. Oct. 17, 2022). The court noted that each entry included the subject matter of the purported legal advice, such as: "legal advice regarding insured's eligibility" for certain benefits; "requesting legal advice regarding insured's earnings"; "providing legal advice regarding [plaintiff's] eligibility for benefits," etc. Id. at *7-8.

Courts normally give litigants a second chance to upgrade their privilege log, but wise lawyers prepare a more detailed log from the beginning. Such savvy lawyers also: avoid boilerplate repetitive entries; recognize that extensive wordy entries may be more successful; and assure that the first few pages of a lengthy privilege log are the most carefully prepared.

B. Evidentiary Support

- [Privilege Point, 6/18/05]

How Much Detail Must a Privilege-Supporting Affidavit Contain?

June 18, 2003

Those asserting the attorney-client privilege must carry the burden of proving it, and many courts require affidavits supporting privilege claims (either with the initial log, or if a dispute arises). How detailed must these affidavits be?

In Koehler v. Bank of Bermuda, Ltd., No. M18-302, Judgment No. 931745, 2003 U.S. Dist. LEXIS 1946, at *30 (S.D.N.Y. Feb 10, 2003), the Bank filed a supporting affidavit by its chief compliance officer stating (among other things) that the withheld documents were "intended to be and [were] in fact kept confidential" and were "made in order to assist in obtaining or providing legal advice or services" and "not disclosed to others for a non-privileged purpose." The court found the affidavit insufficient, because it amounted to "a purely conclusory assertion." The court explained that "[p]arrot[ing] the applicable general legal standards is inadequate," and for this and other reasons ordered privileged documents produced. Id. at *31.

Litigants preparing affidavits to support their privilege claims should become familiar with the level of detail required by the applicable court.

- [Privilege Point, 5/19/04]

May a Litigant Refuse to Provide Information About Facts and Documents Supporting its Claim by Citing the Work Product Doctrine?

May 19, 2004

Litigants frequently ask the adversary to identify facts, witnesses, documents, etc. supporting its claims. Adversaries receiving such discovery requests frequently claim that the answers would reflect their lawyers' opinions and mental impressions, and therefore deserve protection under the work product doctrine.

Courts properly analyzing the work product doctrine routinely overrule such objections. In Director Dividends, Inc. v. SBC Communications, Inc., No. 01-CV-1974, 2003 U.S. Dist. LEXIS 24296 (E.D. Pa. Dec. 31, 2003), the plaintiff objected to defendant SBC's interrogatory asking plaintiff to identify documents with relevant data about plaintiff's damage claim. Plaintiff argued that requiring it to answer the interrogatory was analogous to requiring a lawyer preparing a witness for deposition to identify the particular documents the lawyer used in the preparation. The court rejected the analogy – explaining that the latter type of discovery was aimed solely at learning the opposing lawyer's opinions, while SBC's discovery was “trying to uncover the factual basis for Plaintiff's damages claim, which is the purpose of discovery.” Id. at *8.

Although litigants may frequently delay answering this type of “contention” interrogatories until a later time, they ultimately cannot decline to identify facts, documents or witnesses that support their claim.

- [Privilege Point, 12/8/04]

Court Takes a Common Sense View of Fights Over a Privilege Log

December 8, 2004

Every court recognizes that a party claiming privilege or work product protection must carry the burden of proof, and provide specific support for the asserted protection – document by document if necessary. However, courts disagree about when the proponent of a protection must come forward with specific support.

In SEC v. Beacon Hill Asset Management, LLC, 231 F.R.D. 134 (S.D.N.Y. 2004), the SEC argued that Beacon Hill had not provided the specific support for each document on its privilege log, and moved to compel production of all the documents. The Southern District acknowledged the SEC's point, but explained that "in the absence of a specific challenge, specifically addressing BH's assertion of the attorney-client privilege with respect to these documents, I do not believe any such showing is required. Any other procedure would transform the requirement of providing an index of withheld documents into an obligation to provide evidence of every element of the privilege as to every document withheld." Id. at 141 (citation omitted)

Litigants should not count on every court taking such a common sense approach, but the Southern District's explanation makes great sense – especially in large document productions.

- [Privilege Point, 12/21/05]

Should the Judge Hearing a Case Also Review Arguably Privileged Documents in Camera?

December 21, 2005

Courts everywhere recognize that some privilege determinations may require an in camera review. Remarkably, many judges handling a case undertake this job themselves – despite the obvious possibility of prejudice if they read documents ultimately determined to be privileged.

In United States v. Velazquez, 141 F. App'x 526 (9th Cir. 2005), the Ninth Circuit addressed a district court's handling of a motion by the criminal defendant's lawyer to withdraw. Among other things, the Ninth Circuit noted with praise that "the district court insured that the judge presiding over Velazquez's criminal case did not hear any privileged communications." Id. at 527. Although arising in a different setting from a situation that might involve an in camera review, the same logic should apply in such a context.

Having a different judge (or magistrate, special master, etc.) conduct the in camera review makes sense, and would deter litigants from seeking an in camera review of all of their adversary's allegedly privileged documents – in an effort to "poison the well" with the judge who will be hearing the case.

- [Privilege Point, 4/7/10]

Which Judge Should Conduct an In Camera Review?

April 7, 2010

If the court overseeing a privilege or work product dispute cannot determine a protection's applicability from the privilege log or some other facts, the judge normally must arrange for an in camera review of the documents themselves. It might make sense to have another judge (or a special master) review the documents, to avoid the judge hearing the case becoming tainted with documents the judge might ultimately determine should never have been disclosed outside the attorney-client relationship.

Some courts take that approach, but others take the opposite approach. In State ex rel. Marshall County Commission v. Carter, 689 S.E.2d 796, 801 (W. Va. 2010), a litigant argued that an administrative law judge should not conduct an in camera privilege review, because he or she "may be improperly influenced in their fact finding by knowledge of privileged material that is inadmissible at a hearing." The West Virginia Supreme Court rejected that argument, noting that circuit court judges and administrative law judges "regularly" consider evidence "which is ultimately determined to be inadmissible." Id. at 802.

That approach does not seem to adequately address the significant societal purpose of the attorney-client privilege – which is to prevent any third parties from learning the substance of protected communications, not just prevent public disclosure at trial.

- [Privilege Point, 7/6/11]

When Must a Producing Party Provide Evidentiary Support for Withheld Documents?

July 6, 2011

Most courts follow a common-sense approach which requires a party withholding documents to provide evidentiary support for the privilege only after the adversary identifies which documents it seeks from the privilege log. Any other approach would require enormous time and expense by the producing party to support privilege claims that the adversary might never challenge.

However, some courts are more demanding. In Schmitz v. Davis, Case No. 10-4011-RDR, 2011 U.S. Dist. LEXIS 45936, at *27 (D. Kan. Apr. 28, 2011), the court warned that "the objecting party has the burden to establish the existence of the privilege or immunity prior to the time the Court is asked to determine its sufficiency and applicability." The court added that a party's failure to do so "is not excused because the document is later shown to be one that would have been privileged if a timely showing had been made." Id. at *27-28. Despite this harsh language, the court granted defendant "a second opportunity to make the required showing." Id. at *30.

Although this court's bark seems worse than its bite, litigants should always check the pertinent court's approach to this issue, and hope that the court takes the common-sense view.

- [Privilege Point, 5/2/12]

Southern District of New York Recognizes a Logical Approach to Evidentiary Support for Privilege Assertions

May 2, 2012

Some courts require litigants withholding protected documents to provide evidentiary support for the withholding along with their privilege log. That can create an enormous burden for companies.

In Go v. Rockefeller University, 280 F.R.D. 165 (S.D.N.Y. 2012), Judge Pittman noted that the withholding party is required to prepare a privilege log. The court further held that "the withholding party then has to submit evidence" only "[i]f the assertions of privilege or work-product protection are challenged and the dispute cannot be resolved informally." Id. at 174. The court explained that this process "saves the Court and the parties from having to address any elements of a privilege or protection that are not in dispute." Id.

Not all courts follow this common sense approach, but it is the most logical process.

- [Privilege Point, 12/19/12]

Courts Decline to Conduct an In Camera Review of Withheld Documents

December 19, 2012

Although in many situations courts conduct an in camera review of withheld documents to determine the validity of a privilege or work product claim, courts can decline to conduct an in camera review for a number of reasons.

In Bozella v. County of Dutchess, No. 10 Civ. 4917 (CS) (GAY), 2012 U.S. Dist. LEXIS 149586, at *5 (S.D.N.Y. Oct. 17, 2012), Magistrate Judge Yanthis did "not see any need for an in camera review" of emails between co-counsel which were clearly prepared in anticipation of litigation. Eight days later, the Kentucky Supreme Court recognized that conducting an in camera review falls within the trial court's "sound discretion." Collins v. Braden, 384 S.W.3d 154, 164 (Ky. 2012). The court noted that an in camera review "can have its limitations," in part because such a review "can overly burden a trial court." Id.

In some situations, an in camera review does not provide the trial court with the information it needs. For instance, the withheld document itself might not indicate that it was shared with some third party – which might have waived a protection. As in other aspects of courts' dealing with privilege claims, there is really no "one size fits all" process.

- [Privilege Point, 7/2/14]

Court Requires an Adversary to Specifically Challenge a Litigant's Privilege Log

July 2, 2014

In most situations, litigants withholding protected documents must specifically list and describe the documents, rather than relying on blanket privilege or work product assertions. Do courts require an adversary to show the same level of specificity in challenging a litigant's privilege log?

In Feld v. Fireman's Fund Insurance Co., 300 F.R.D. 9 (D.D.C. 2014), circus owner Feld sought attorneys' fees after winning an insurance coverage action against defendant insurance company. Among other things, the insurance company challenged Feld's withholding of documents on work product protection grounds. Although acknowledging that the defendant "ha[d] not seen the actual documents, so it might have been difficult to offer detailed objections to individual entries on Feld's privilege log," the court noted that defendant "has not even attempted to do so, instead offering only one paragraph of generalized argument that is purportedly applicable to every single document in dispute." Id. at 12. The court rejected the insurance company's blanket challenge to Feld's log -- concluding that Feld's lawyers "are presumed to be conducting themselves diligently and in good faith" in preparing privilege logs in their role as "officers of the court." Id. at 13. The court nevertheless "reviewed a limited sample of the disputed documents in camera" and found Feld's privilege log adequate. Id. (footnote omitted). Interestingly, the court specifically described one log entry as an "email thread" -- thus implicitly disagreeing with courts that require each email to be separately logged. Id.

Corporations that frequently log numerous protected documents should take comfort in both aspects of such common-sense opinions.

- [Privilege Point, 7/1/15]

Challenging an Adversary's Entire Privilege Log

July 1, 2015

Unless an adversary's entire log clearly falls below the required specificity standard, litigants generally must object to specific log entries rather than challenge the whole log.

In United States v. Louisiana, Civ. A. No. 11-470-JWD-RLB, 2015 U.S. Dist. LEXIS 67026 (M.D. La. May 22, 2015), the federal government challenged defendant Louisiana state agency's entire 2,302-page log. The court disagreed with the federal government's position that "each entry in the privilege log is insufficient," and noted that the federal government had provided only thirteen examples of arguably "insufficient descriptions." Id. at *6 (internal citation omitted). The court labeled as "an unworkable solution" its review of each individual entry — "as evidenced by the United States not undergoing this analysis." Id. at *7. Instead, the court ordered the federal government to cite forty specific entries "which are exemplary of the entries it challenges as insufficient." Id. at *10.

While courts criticize and even sanction lawyers for preparing completely insufficient privilege logs, it is refreshing to see a court reject a blanket challenge to an entire log.

- [Privilege Point, 1/17/18]

When Must Litigants Provide Evidentiary Support for Their Privilege or Work Product Claims?

January 17, 2018

As with so many other logistical issues, courts disagree about when litigants must provide evidentiary support for withholding their protected communications. Most courts require such evidentiary support only after an adversary challenges the litigant's privilege log. See, e.g., Fid. & Deposit Co. v. Travelers Cas. & Sur. Co., Case No. 2:13-cv-00380-JAD-GWF, 2017 U.S. Dist. LEXIS 84070, at *9 (D. Nev. May 31, 2017) (explaining that "it may be necessary to supplement the privilege log with affidavits or declarations if the basis for the claim of privilege cannot be adequately assessed from the privilege log").

But other courts are more demanding. In Crumpley v. Associated Wholesale Grocers, Inc., Case No. 16-2298-DDC-GLR, 2017 U.S. Dist. LEXIS 178300 (D. Kan. Oct. 27, 2017), defendant supplied a supporting affidavit after earlier submitting its privilege log. The court bluntly noted that defendant "puts the proverbial cart before the horse." Id. at *6. The court pointedly emphasized that "[o]ur cases have repeatedly held that the privilege log itself must contain competent evidence," and that "[s]imply attaching an affidavit to the response to a motion to compel misses the point of privilege logs." Id.

Most courts do not require simultaneous evidentiary support along with privilege logs. Such an approach seems to be a waste of resources -- requiring the withholding litigant to support privilege claims that the adversary may never challenge.

- [Privilege Point, 6/27/18]

May Litigants Rely on Their Lawyers' Statements to Support Privilege Claims?

June 27, 2018

Every court agrees that litigants must support their privilege claims with something other than naked assertions. But they disagree about the type of support required to justify withholding documents or testimony.

In Jeddo Coal Co. v. Rio Tinto Procurement (Sing.) PTD Ltd., the court dropped to a footnote its off-handed assurance that "Rio Tinto may also provide a cover letter or other document that explains the basis for the privilege and identifies the persons who are party to the communications." Civ. No. 3: 16-CV-621, 2018 U.S. Dist. LEXIS 57803, at *20 n.2 (M.D. Pa. Apr. 5, 2018). Most courts require far more. A couple weeks later, in Motorola Solutions, Inc. v. Hytera Communications Corp., the court blasted defendant's privilege claim for one withheld email, sarcastically noting that Motorola's "lawyers assure us, with absolutely no evidentiary support – that the email was the necessary first step in ... obtaining legal advice." No. 17 C 1973, 2018 U.S. Dist. LEXIS 64095, at *5 (N.D. Ill. Apr. 17, 2018). The court quoted an earlier Seventh Circuit case for the proposition that "[l]awyers' talk is no substitute for data" – and then pointedly remarked that "[l]ittle wonder that the courts are unanimous in requiring proof of assertions made in briefs." Id. (citation omitted).

Courts' differing attitudes toward the required level of evidentiary support highlight the need for corporations and their lawyers to carefully check the pertinent court's and even the presiding judge's earlier rulings and inclinations.

- [Privilege Point, 6/26/19]

When Must Parties Present Evidentiary Support For Withholding Protected Documents?

June 26, 2019

Although the federal and most if not all state rules do not explicitly require privilege logs, all or nearly all courts demand that parties withholding protected documents describe them with specificity in a log. And all courts ultimately require parties withholding such documents to support their asserted protections' applicability – with competent evidence.

Courts disagree about when parties must present their supporting evidence. Most courts take the common sense view that parties can wait to present such evidence until the adversary challenges a withheld document's protection. This certainly saves the producing party an enormous amount of time, money and effort. But some courts are more demanding. In Pipeline Productions, Inc. v. Madison Companies, LLC, the court ominously stated that "judges in this district have repeatedly outlined the criteria a privilege log must contain" -- including "an evidentiary showing based on competent evidence" supporting (among other things) any assertion: "that the document was created under the supervision of an attorney"; "that the document was prepared in the course of adversarial litigation or in anticipation of a threat of adversarial litigation"; and "that the documents do not contain or incorporate non-privileged underlying facts." Case No. 15-4890-KHV, 2019 U.S. Dist. LEXIS 41048, at *5-6 (D. Kan. Mar. 14, 2019) (citations omitted).

Fortunately for corporate defendants legitimately withholding numerous protected documents, most courts wait to see if an adversary challenges a party's privilege or work product assertion before requiring such evidentiary support.

- In re Apple Inc. Sec. Litig., Case No. 4:19-cv-2033-YGR, 2022 U.S. Dist. LEXIS 172182, at *5-6 (N.D. Cal. Sept. 12, 2022) (finding Apple's affidavits insufficient to support its privilege claim; "[D]efendants argue that Judge Spero departed from 'settled law' by concluding that certain internal communications were non-privileged even though counsel for Apple submitted sworn declarations to the contrary. As Judge Spero states in the order, '[a]ttorney declarations generally are necessary to support the designating party's position in a dispute about attorney-client privilege.' (quoting Dolby Lab's Licensing Corp. v. Adobe Inc., 402 F. Supp. 3d 855, 865 (N.D. Cal. 2019)). That does not mean such affidavits are dispositive, particularly when, as Judge Spero found here, such declarations are 'vague' or otherwise inadequate. The order reveals that Judge Spero considered the declarations and found them wanting. Such factual determinations are not clearly erroneous." (internal citations omitted))

- [Privilege Point, 1/25/23]

In Camera Reviews' Process and Downside: Part I

January 25, 2023

Attorney-client privilege protection depends on content, and some work product claims also depend in part on content. Because a litigant's privilege log obviously does not disclose withheld documents' content, the adversary often seeks the court's in camera review of those withheld documents.

Courts disagree about the standard for undertaking such in camera reviews. In Wisk Aero LLC v. Archer Aviation Inc., the court articulated the majority view (citing a Ninth Circuit case): "the decision whether to conduct the [in camera] review rests within the discretion of the district court." Case No. 21-cv-02450-WHO (DMR), 2022 U.S. Dist. LEXIS 202429, at *4-5 (N.D. Cal. Nov. 7, 2022) (citation omitted). Two days later, the court in Akerman LLP v. Cohen articulated the rare minority view — noting that "[f]or over thirty years," the court has held that before being required to turn over withheld documents a litigant "is entitled to an in camera review of the documents by the trial court." 352 So. 3d 331, 340 (Fla. Dist. Ct. App. 2022) (citation omitted).

Lawyers on both sides of this issue must check the tribunal's approach. Next week's Privilege Point will address in camera reviews' process, and their unstated downside.

C. Interrogatories and Depositions

- [Privilege Point, 1/16/02]

Can a Party Refuse to Answer Contention Interrogatories Based on a Work Product Claim?

January 16, 2002

At first blush, it might seem that the work product doctrine would protect from disclosure the identity of documents and facts supporting a party's contentions. After all, compiling such data is at the heart of a party's and its lawyer's pre-trial work.

However, most courts do not allow a party to withhold answers to so-called "contention interrogatories" based on a work product claim. Although courts sometimes permit a party to delay answering such interrogatories, they reason that a party obviously intends to reveal the identity of documents and supporting facts at trial, and therefore cannot refuse to answer questions about them before trial. The reason decision in Robert W. Carver v Velodyne Acoustics, Inc., 202 F.R.D. 273 (W.D.Wash. 2001) takes this approach.

Lawyers should not count on the work product doctrine as a basis for refusing to respond to an adversary's contention interrogatories.

- Under Seal v. United States (In re Grand Jury Subpoena Under Seal), 415 F.3d 333, 336-37 (4th Cir. 2005) (addressing a corporate employee's claim that he subjectively believed that the company's in-house and outside lawyers jointly represented him and the company; ultimately rejecting his claim; noting but not working into the analysis the fact that company's in-house and outside lawyers represented the executive during an interview before the SEC; explaining that both lawyers "stated that they represented [the executive] 'for purposes of [the] deposition.'")
- United States v. Stein, 463 F. Supp. 2d 459, 466 (S.D.N.Y. 2006) (in an opinion by District Judge Lewis Kaplan, assessing an effort by a KPMG partner to prevent KPMG from waiving the attorney-client privilege otherwise covering communications between KPMG's lawyers and a partner; finding that the partner could not prevent KPMG from waiving the privilege because the partner was not a joint client of KPMG's lawyers; rejecting the partner's argument that KPMG's lawyer had previously represented a partner on two occasions; "To begin with, the occasions on which Warley and KPMG were jointly represented occurred in circumstances in which Warley was a witness, not a party, to the litigation. The Court is not persuaded that representation of an employee by employer-retained counsel where the employee's role is that of a witness in a lawsuit against the employer could give rise to a reasonable expectation on the part of the employee that all communications she might have with employer-retained counsel, even a long time thereafter, were made in the context of an individual attorney-client relationship.")

- **[Privilege Point, 3/5/08]**

Interplay Between the Privilege and Rule 30(b)(6) Depositions

March 5, 2008

Fed. R. Civ. P. Rule 30(b)(6) and state counterparts allow the adversary of a corporation or other organization to demand that the organization designate a spokesperson to answer deposition questions about designated topics. This useful discovery device implicates privilege issues -- especially when applied against the government.

In Metropolitan Life Insurance Co. v. Muldoon, Civ. A. No. 06-2026-CM-DJW, 2007 U.S. Dist. LEXIS 94530 (D. Kan. Dec. 20, 2007), Muldoon had settled a Federal Tort Claims Act case against the United States, but later declared bankruptcy. Plaintiff MetLife filed a lawsuit to determine the fate of the annuity payments. One of the defendants sought a Rule 30(b)(6) deposition of the United States government, designating such topics as the government's policy toward structured settlements. The court quashed the deposition notice, holding that "[t]he deposition would necessarily inquire into the strategies and policies applied by the United States in resolving federal tort claims litigation. Thus, a request to depose a government representative regarding [that topic] would invade the attorney-client privilege and work product doctrine." Id. at *6.

Courts might not be so protective of corporate defendants, but company lawyers should be prepared to cite decisions like this in similar settings.

- [Privilege Point, 4/8/09]

Court Assesses the Risk of In-House Lawyers Verifying Interrogatory Answers

April 8, 2009

In-house lawyers frequently play the lead role in gathering information for inclusion in their corporate clients' interrogatory answers. Not surprisingly, they sometimes also verify the interrogatory answers as the corporate representative most familiar with the information.

In Tailored Lighting, Inc. v. Osram Sylvania Products, Inc., 255 F.R.D. 340 (W.D.N.Y. 2009), defendant Sylvania sought to prevent the deposition of its former Chief Intellectual Property Counsel, who had verified the company's answers to interrogatories in a case brought by plaintiff Tailored Lighting. The court cited the Second Circuit standard for deposing an adversary's lawyer (which provides somewhat less protection than the majority rule), and allowed the deposition to proceed. However, the court held that the work product doctrine protected the lawyer's "thought processes concerning whom and what documents to consult in investigating [plaintiff's] interrogatories . . . [and] his deliberations about what information to include and what to exclude in the answers." Id. at 345.

Although the court's limitation provides some protection, Sylvania could have avoided the nightmarish task of analyzing each deposition question if it had arranged for a nonlawyer to verify its interrogatory answers.

- [Privilege Point, 2/8/12]

Court Orders a Litigant to Answer Contention Interrogatories

February 8, 2012

Contention interrogatories highlight the critical role of timing in the work product doctrine context. No one would expect a court to order litigants to answer such interrogatories early in the discovery process, but at some point every litigant obviously must disclose its contentions.

In Pouncil v. Branch Law Firm, 277 F.R.D. 642 (D. Kan. 2011), defendants in a legal malpractice case asked the court to delay their obligation to answer contention interrogatories until completion of discovery. The court acknowledged that Fed. R. Civ. P. 33(a)(2) allows courts to take that step. However, the court ordered the defendants to answer plaintiff's contention interrogatories "as fully as they can, keeping in mind their continuing obligation to supplement their discovery responses as additional or different information becomes available." Id. at 650.

In most litigation, courts insist that both sides answer contention interrogatories at about the same time – which often deters both litigants from filing such interrogatories earlier than they are prepared to answer such interrogatories themselves.

- [Privilege Point, 3/6/13]

Courts Discourage Depositions of an Adversary's Trial Lawyer

March 6, 2013

Litigants sometimes seek to depose an adversary's trial lawyer. In some situations, such discovery must be appropriate because the trial lawyer possesses relevant knowledge about some historical event. But given the disruptive and inevitably acrimonious nature of such depositions, every court discourages them.

In Axiom Worldwide, Inc. v. HTRD Group Hong Kong Ltd., Case No. 8:11-cv-1468-T-33TBM, 2013 U.S. Dist. LEXIS 8475 (M.D. Fla. Jan. 22, 2013), plaintiff served defendant's trial lawyer with a deposition notice. The court considered two widely recognized standards for such discovery. The Second Circuit applies what it calls a "'flexible test,'" which examines "'whether the proposed deposition would entail an inappropriate burden or hardship on the responding party.'" Id. at *8 (citation omitted). The court also looked at the much stricter standard adopted by the Eighth Circuit in Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986). The Shelton standard permits such depositions only if the moving party establishes that the adversary's trial lawyer possesses "crucial" non-privileged information unavailable elsewhere. Id. at 1327. Acknowledging that the Eleventh Circuit has not selected a standard, the Axiom court applied a variation of Shelton, permitting a deposition limited to the defendant's trial lawyer's "non-privileged, personal knowledge" about a specific pertinent topic. Axiom, 2013 U.S. Dist. LEXIS 8475, at *15-16. The court also took a step that other courts have adopted – permitting the plaintiff to depose the defendant's lawyer "only by written questions" that the judge would review and approve beforehand. Id. at *16.

No court holds that trial lawyers are always immune from discovery, but all courts discourage such discovery.

- [Privilege Point, 8/12/15]

When Do Contention Interrogatories Impermissibly Seek Protected Work Product?

August 12, 2015

Under the Federal Rules and parallel state rules, litigants may use what are called "contention interrogatories" to explore adversaries' factual support for their legal contentions. Courts normally regulate the timing of those, generally prohibiting litigants from using that tactic too early in the discovery process. This timing issue highlights the "intensely practical" nature of the work product doctrine — in contrast to the more abstract and absolute attorney-client privilege.

In Lawrence v. Schlumberger Technology Corp., Case No. 1:14-cv-00524 JLT, 2015 U.S. Dist. LEXIS 78024, at *3-6 (E.D. Cal. June 16, 2015), plaintiff submitted contention interrogatories asking defendant to "state all facts" on which the defendant based certain employee classifications pursuant to the California Labor Code and other regulations. The court agreed with defendant that "the interrogatory may invade the attorney work product privilege" — noting that "[h]ad Plaintiff not intended to invade this privilege, he would not have referenced California law or the Wage Orders." Id. at *11. But the court concluded that "when the objectionable material is carved away, there remains a permissible question." Id. at *14. The court therefore ordered defendant to provide the facts underlying its employee classification of plaintiff's job position (with no reference to the law).

Although litigants ultimately must explain the factual basis for their legal contentions, they should be on the lookout for contention interrogatories that impermissibly seek their work product before applicable rules, court orders, or the trial process require the disclosure.

- **[Privilege Point, 12/16/15]**

Court Analyzes Rule 30(b)(6) Witness's Preparation Duties

December 16, 2015

Under Fed. R. Civ. P. 30(b)(6), an entity must prepare a designated witness to testify about specified topics. This type of deposition implicates several competing principles, because (1) such witnesses must provide historical facts, which are never privileged; and (2) those witnesses almost invariably learn such historical facts during deposition preparation sessions with the company's lawyer, which normally deserve privilege and work product doctrine protection.

In In re Cathode Ray Tube (CRT) Antitrust Litigation, plaintiffs sought to compel a defendant's Rule 30(b)(6) witness to testify about its outside lawyers' internal investigation into pertinent facts — insisting that the "corporate designee must be prepared to testify about factual information transmitted to or from counsel." Master Case No. 3:07-cv-05944SC, 2015 U.S. Dist. LEXIS 147413, at *219-20 (N.D. Cal. Oct. 5, 2015). Among other things, plaintiffs asked that the designated witness be compelled to review the company lawyers' witness interview memoranda. The court rejected plaintiffs' motion, concluding that (1) the company lawyers' witness interview memoranda "so intertwine facts and attorney mental impressions that the facts cannot be readily separated from the attorney impressions"; (2) the facts contained in the interview memoranda might be inaccurate, "due to faulty memory or transcription"; and (3) requiring the designated witness to "study the interview memoranda and attempt to extract underlying 'facts' known to the corporation would be an exceedingly time-consuming and problematic undertaking." *Id.* at *227. The court also noted that plaintiffs had already deposed ten current or former company employees involved in the underlying events.

Not all courts would so readily protect corporate defendants' work product. However, many courts struggle when analyzing privilege and work product protection issues involving Rule 30(b)(6) depositions.

- [Privilege Point, 3/30/16]

Another Court Deals with Rule 30(b)(6) Depositions

March 30, 2016

Under Fed. R. Civ. P. 30(b)(6), corporations must designate a witness to testify about the corporation's knowledge. Surprisingly few courts have reconciled this requirement with the common if not universal role that lawyers play in preparing such witnesses.

In 01 Communique Laboratory, Inc. v. Citrix Systems, Inc., the plaintiff "inquired [during its deposition of Citrix's Rule 30(b)(6) witness] whether Citrix believed that any of its products infringed [Citrix's licensor's] patents and whether Citrix believed the . . . patents were valid." Case No. 1:06-cv-253, 2016 U.S. Dist. LEXIS 3011, at *6 (N.D. Ohio Jan. 10, 2016). Citrix's witness refused to answer the questions, "on the basis that Citrix's beliefs were inseparable from the legal advice it received with respect to those issues." Id. The court upheld the magistrate judge's conclusion that "Citrix's beliefs regarding the legal issues of infringement and validity were based entirely on the advice of counsel" — meaning that "Citrix's beliefs are one and the same as the advice of counsel, regardless of whether [plaintiff's] questions attempted to directly elicit privileged information." Id. at *9.

Not all courts would be this generous to corporations claiming privilege during their Rule 30(b)(6) witness's deposition testimony. At some point, corporations must state their positions in pleadings, deposition testimony or at trial — but some courts provide more protection than others in the deposition context.

- [Privilege Point, 2/22/17]

Does the Shelton Standard Apply to In-House Lawyers?

February 22, 2017

Nearly every court protects a litigant's lawyer from depositions or other discovery under what is called the Shelton standard (Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986)) or under similarly restrictive doctrines. Under the Shelton standard, adversaries seeking to depose litigants' lawyers must show that (1) the information they seek is not available elsewhere; (2) the information is not privileged; and (3) the information is crucial.

Courts disagree about which lawyers deserve protection under this or similar standards. In Allen v. TV One, LLC, Civ. A. No. DKC 15-1960, 2016 U.S. Dist. LEXIS 169641 (D. Md. Dec. 8, 2016), the court noted that the Shelton standard rests on courts' desire to avoid the inevitable ill feelings that would arise when a lawyer deposes the opposing party's lawyer, and the risk of revealing that lawyer's litigation strategy. The court ultimately held the Shelton test inapplicable -- because the proposed deposition witness was "Defendant's former in-house counsel, who left Defendant's employ more than a year before Plaintiff filed her EEOC claim or this lawsuit." Id. at *5 n.3.

Although the Allen court assessed the other Shelton elements, some courts automatically reject the Shelton doctrine's application to former and even current in-house lawyers.

- **[Privilege Point, 2/3/21]**

Practical Guidelines for Lawyer Depositions

February 3, 2021

Although fortunately rare, lawyers' depositions almost always involve complicated privilege issues. One might argue that just about every question posed to a lawyer would justify a privilege assertion — but that would go too far.

In Evanston Insurance Co. v. Murphy, No. CV-19-04954-PHX-MTL, 2020 U.S. Dist. 218817 (D. Ariz. Nov. 23, 2020), a non-party lawyer's deposition triggered privilege objections and challenges to those objections. The court carefully sorted through the deposition transcript, and understandably distinguished between non-objectionable and objectionable questions. For instance, the court held that questions about whether the deponent/lawyer represented certain entities "did not involve privileged material." Id. at *10. In contrast, the court explained that "the answer to the question, 'Why not just try the case or settle the case within your 9 million policy limits?' would conceivably entail attorney-client privileged communications and strategies." Id. at *9.

Although lawyers' depositions often generate subtle privilege distinctions, a helpful starting rule of thumb is that lawyers being deposed generally: (1) cannot object to "who, what, when, where" questions; but (2) can object to "why" questions.

- **[Privilege Point, 6/30/21]**

Contention Interrogatories: Not If, But When

June 30, 2021

It should come as no surprise that litigants normally seek discovery about their adversaries' legal contentions and factual support. On the other hand, litigants' lawyers understandably consider their trial strategy and their selection of factual support to be protected work product until they have made final decisions about both. How does the law reconcile these two competing interests?

In HealthEdge Software, Inc. v. Sharp Health Plan, plaintiff objected on work product grounds to defendant's request that plaintiff produce (among other things) "[a]ll DOCUMENTS upon which [HealthEdge] relies in support of its affirmative defenses set forth in its answer to the [Sharp] counterclaim." Civ. A. No. 19-cv-11020-ADB, 2021 U.S. Dist. LEXIS 88061, at *12 (D. Mass. May 6, 2021) (second and third alterations in original). After acknowledging that HealthEdge must "eventually respond to these requests," the court upheld HealthEdge's objection – pointing to Federal Rule of Civil Procedure 33(a)(2)'s provision allowing the court to "order that such discovery requests not be responded to until later in the litigation." Id. at *12-13. The court then invited defendant Sharp to "renew these requests for production at the close of discovery, at which point HealthEdge shall respond." Id. at *13.

This common sense approach reconciles the competing interests. It also highlights a basic distinction between the attorney-client privilege and the work product doctrine. Lawyers create work product with the intention of eventually disclosing much of it.

- [Privilege Point, 6/8/22]

Privilege Protection for Deposition-Break Communications: It's Complicated

June 8, 2022

Some court rules explicitly prohibit communications between a deposition witness and her lawyer during a deposition break, except to discuss whether to assert a privilege objection to a pending question. See, e.g., Local Civ. Rule 30-04(E) (D.S.C.); D. Md. Local Rules, Appendix A, Discovery Guideline 6(f), (g). Absent such court-imposed prohibitions, determining whether deposition-break communications deserve privilege protection can involve very subtle distinctions.

In Pape v. Suffolk County Society for Prevention of Cruelty to Animals, the court acknowledged a court rule prohibiting such communications "during the pendency of a question," but then articulated what seemed like a clear rule in other circumstances: "the conversation . . . that occurred during a natural break in the deposition when no question was pending is protected by the attorney-client privilege." No. 20-cv-01490 (JMA) (JMW), 2022 U.S. Dist. LEXIS 68430, at *13-14 (E.D.N.Y. Apr. 13, 2022). Then the court began to back off – noting that the privilege would not protect such deposition-break communications if defense counsel instructed the witness "on how to answer Plaintiff's questions, or [if counsel] 'reminded' him of certain facts." Id. at *14. The court ultimately upheld the privilege assertion, emphasizing that: (1) plaintiff's lawyer had not asked "whether the conversation with counsel refreshed the witness's recollection," or whether a third party was present; and (2) "[t]here is no claim by Plaintiff that [the witness] changed the course of his testimony after speaking with Defense Counsel during the short recess." Id. at *14, *15 (footnote omitted).

Lawyers on either side of this issue should check the pertinent court's rule, and be prepared to deal with these subtle but critical questions.

- Blackmore v. Union Pac. R.R., No. 8:21CV318, 2022 U.S. Dist. LEXIS 155249, at *17, *20 (D. Neb. Aug. 29, 2022) (assessing work product protection in a Rule 30(b)(6) context; “The lawyer’s thought processes and organization of evidence for trial is work product—whether requested directly from UP’s lawyer or through the conduit of a 30(b)(6) witness. When asked to explain all facts supporting a defense or claim, the 30(b)(6) designee’s deposition testimony reveals which facts opposing counsel found important, counsel’s mental impressions, and counsel’s conclusions or opinions about those facts. In other words, a deponent’s answers to 30(b)(6) requests for all facts supporting a claim or defense impermissibly discloses counsel’s work product. Fairview Health Services v. Quest Software Inc., 2021 U.S. Dist. LEXIS 215816, 2021 WL 5087564, at *7[] (D. Minn. 2021).”; “Courts have concluded that a Rule 30(b)(6) deposition is burdensome, poses serious work product issues, and is not the proper vehicle for obtaining a summary of the opposing parties’ allegations, noting and holding that discovery under other rules is more appropriate.”)

- **[Privilege Point, 8/2/23]**

The Strange Fiction of Rule 30(b)(6)

August 2, 2023

Under Fed. R. Civ. P. 30(b)(6), a litigant seeking a corporate adversary's deposition may insist that the corporation designate an individual to testify on the corporation's behalf about designated topics. The concept makes sense, because otherwise the litigant may have to depose numerous employees (who may or may not have the pertinent knowledge). But in practice, Rule 30(b)(6) depositions essentially rely on a fiction.

In Damarr-Faruq v. City of Pleasantville Police Department, plaintiffs' lawyer took a Rule 30(b)(6) deposition of defendant City — which objected when plaintiffs' lawyer "sought to reveal communications with the [defendant]'s counsel." Civ. No. 21-1866 (KMW)(EAP), 2023 U.S. Dist. LEXIS 103181, at *6 (D.N.J. June 13, 2023). Plaintiffs' counsel correctly noted that the City "must provide responsive underlying factual information, even though such information was transmitted through an organization's attorneys." Id. But the court sustained the City's objections — holding that plaintiffs' lawyer could not ask about those privileged communications, but instead could ask "solely for the facts" conveyed through such privileged communications. Id.

Corporations' lawyers almost inevitably prepare their Rule 30(b)(6) witnesses to testify — gathering and conveying the pertinent facts to those witnesses. In fact, not playing such a central role might amount to malpractice. But adversaries must recognize the fiction that the deposition witnesses are only providing facts, rather than disclosing the factual portions of what were privileged communications. This may seem odd, but the process works — few Rule 30(b)(6) depositions provoke discovery motions like this.

D. Discovery About Discovery

- [Privilege Point, 11/27/02]

Who Must Pay to Retrieve and Review Archived E-Mails?

November 27, 2002

Because e-mails represent an increasingly fruitful area of discovery, courts have begun to wrestle with allocating the costs of retrieving and reviewing archived e-mails.

In Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 432 (S.D.N.Y. 2002), the Southern District of New York indicated that a party generally will be required to bear its own cost of producing active e-mail files, but can shift some of the cost of retrieving archived e-mails to the party seeking them in discovery. On the other hand, a producing party generally must pay for reviewing the archived e-mails for privilege, because the party had "retained privileged or confidential documents in electronic form but failed to designate them to specific files."

One would expect other courts to consider who should bear the cost of retrieving and reviewing archived e-mails and other electronic materials—it will be interesting to see how the law develops in this area.

- In re Honeywell International, Inc., No. M8-85 (WHP), 2003 U.S. Dist. LEXIS 20602 (S.D.N.Y. Nov. 18, 2003) (denying a class plaintiffs' motion to obtain a copy of non-party PWC's document retention policy; "Plaintiffs seek a copy of PWC's document retention policies from January 1999 to the present, as well as all documents reflecting how the documents sought by the subpoena were preserved, maintained and collected by PWC for production to plaintiffs. To support their motion, plaintiffs refer to a recent SEC administrative settlement in an unrelated matter where PWC allegedly altered and destroyed workpapers. Moreover, plaintiffs insist that there are documents missing from PWC's production that should have been produced."; "PWC labels plaintiffs' reliance on the SEC administrative settlement as 'transparent and inflammatory.' . . . PWC further argues that plaintiffs' sparring over document retention rests on the misapprehension that certain documents should exist. PWC claims it has advised plaintiffs that it retains workpapers for a period of seven years. Finally, PWC maintains that there is no basis for plaintiffs to demand documents reflecting PWC's efforts to comply with the subpoena."; "Plaintiffs lack of a concrete basis for this request. Therefore, their motion to compel production of documents related to PWC's document retention and destruction policies, and the efforts to preserve, maintain and collect documents, is denied.")

- [Privilege Point, 8/31/05]

Does the Attorney-Client Privilege Protect a Company's Internal Communications Suspending the Company's Normal Document Retention Process?

August 31, 2005

With the increasing importance of preserving documents when litigation begins or looms, an obvious question presents itself: does the privilege protect companies' widely circulated memoranda suspending the document retention system and ordering preservation of documents?

In Kirk v. Ford Motor Co., 116 P.3d 27, 34 (Idaho 2005), the Idaho Supreme Court protected from disclosure Ford's Suspension Orders, finding that they "were both confidential and for the express purpose of disseminating legal advice from Ford's OGC, to its client."

Companies might want to tout their preservation efforts, but it is comforting to know that the privilege might protect a suspension order if the company wants to assert it.

- Samsung Electronics Co. v. Rambus Inc., 439 F. Supp. 2d 524, 543 (E.D. Va. 2006) ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.' Zubulake, 220 F.R.D. at 218. See also Broccoli v. Echostar Communications Corp., 229 F.R.D. 506, 510 (D. Md. 2005)."), rev'd and remanded on other grounds, 523 F.3d 1374 (Fed. Cir. 2008)
- India Brewing, Inc. v. Miller Brewing Co., Case No. 05-C-0467, 2006 U.S. Dist. LEXIS 50550 (E.D. Wis. July 13, 2006) (denying plaintiff's motion to compel defendant's document retention policy; "IBI characterizes this testimony as Cochran's [Defendant's employee] admission that he may have destroyed documents related to this case based on the document retention policy. IBI says it needs the policy to determine whether additional documents were destroyed."; "IBI's characterization of Cochran's testimony is a stretch. Cochran said he did not remember writing to Judge or Harvey and admitted only that if he had written a letter he would have saved it, and that his standard procedure is to follow a records retention policy. That is a far cry from Cochran admitting that he may have destroyed documents pertinent to this case. In addition, regardless of whether Cochran did or did not keep a letter that he might have written but cannot remember, IBI has failed to persuade the court that the document retention policy (and, for that matter, the five-year business plan letter that may or may not exist) is relevant to any claim or defense alleged in the pleadings."; "Thus, the motion to compel production of the document retention policy will be denied.")

- India Brewing, Inc. v. Miller Brewing Co., Case No. 05-C-0467, 2006 U.S. Dist. LEXIS 50550 (E.D. Wisc. July 13, 2006) (analyzing discovery about discovery; ordering defendant to identify those who helped with discovery responses; "In Interrogatories 28 through 40, IBI asks Miller to identify all persons who provided or assisted in providing responses to IBI's first, second, and third set of requests to admit; IBI's first, second, third, and fourth sets of interrogatories; and IBI's first, second, third, fourth, and fifth sets of requests to produce; as well as all persons involved in the 'reasonable investigation' alleged in P 118 of the First Amended Counterclaims."; "IBI is not obligated to rely on Miller's representations regarding who it believes to be pertinent witnesses or individuals with relevant information. Civil L.R. 33.1(b)(2) contemplates interrogatories inquiring about persons with knowledge of discoverable information or evidence. Obviously, those persons at Miller or within its control who assisted substantively in preparing responses to interrogatories have knowledge of discoverable information."; "The court clarifies that not every copy-room employee who saw the discovery responses is covered by the court's order. Instead, the order covers, for instance, those persons who provided substantive information in preparation of Miller's discovery responses or who have knowledge regarding the existence of responsive evidence.")
- Discover Financial Services, Inc. v. Visa U.S.A., Inc., No. 04 Civ. 7844 (BSJ), 2006 WL 3230157 (S.D.N.Y. Nov. 8, 2006) (ordering defendant Wells Fargo to provide a Rule 30(b)(6) witness to testify about its document collection and production; "American Express asks me to order Wells Fargo to provide Rule 30(b)(6) witnesses to address the topics of Wells Fargo's document retention, collection and production efforts in this litigation."; "In 1996, the Department of Justice's Antitrust Division (the 'DOJ') served Civil Investigatory Demands upon Wells Fargo and other banks."; "On the other hand, American Express waited until November 1998 before sending any 'litigation hold' notice to its employees telling them to retain documents relevant to the DOJ Case or American Express's potential follow-on lawsuit."; "Pursuant to F.R. Civ. P. Rule 26(b)(2), I direct that American Express may take no more than one deposition of a Wells Fargo representative which is devoted to American Express's Topics 1 and/or 2, and such a deposition may not exceed 3 hours.")

- EEOC v. The Boeing Company, No. CV 05-03034-PHX-FJM, 2007 U.S. Dist. LEXIS 29107 (D. Ariz. April 18, 2007) (rejecting plaintiff's Rule 30(b)(6) topic focusing on Boeing's document search and production; "Topic 24 pertains to '[t]he efforts Boeing undertook to locate' certain documents identified in plaintiff's requests for production of documents, and 'the reasons why Boeing was unable to locate the documents.' . . . Plaintiff contends that this topic is relevant and therefore discoverable because it 'asks for information about the efforts Boeing took to locate documents.'"; "Parties may obtain discovery regarding the 'existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.' Fed. R. Civ. P. 26(b)(1). However, any matter a party seeks to discover must be relevant to a claim or defense. Id."; "In arguing that Topic 24 seeks discovery that is within the scope of Rule 26(b)(1), plaintiff does not explain why defendant's efforts to locate documents are relevant to a claim or defense in this case. Further, this topic requests information defendant has already provided. . . . Finally, we deny plaintiff's motion to compel pursuant to Rule 26(b)(3), Fed. R. Civ. P., to the extent that Topic 24 seeks to discover defense counsel's legal theories regarding the manner in which defendant responded to plaintiff's requests.")

- Cunningham v. The Standard Fire Ins. Co., Civ. A. No. 07-cv-02538-REB-KLM, 2008 U.S. Dist. LEXIS 11734 (D. Colo. July 1, 2008) (analyzing discovery about discovery; denying plaintiff's effort to obtain discovery requested as follows: "'Knowledge concerning the storage, preservation and backup of emails relating to claims authored or received by Susan Yeckley, Gilbert Friedmann and Alice Barron as well as any other adjusters who handled Plaintiff's claims.'"; finding that the information was irrelevant in plaintiff's allegation that defendants breached an insurance policy for acted in bad faith).
- Cunningham v. The Standard Fire Insurance Company, Civ. A. No. 07-cv-02538-REB-KLM, 2008 U.S. Dist. LEXIS 117304 (D. Colo. July 1, 2008) (addressing plaintiff's Rule 30(b)(6) topic: "'Knowledge concerning the storage, preservation and backup of emails relating to claims authored or received by Susan Yeckley, Gilbert Friedmann and Alice Barron as well as any other adjusters who handled Plaintiff's claims.'"; in agreement with defendant that the topic is inappropriate; "Defendants argue that the information sought in this topic is irrelevant to whether Defendants breached Plaintiff's insurance policy or acted in bad faith while adjusting his claim. . . . Plaintiff states that he has requested all emails relating to his claim, and that the resulting number of documents he has received is small. . . . As Plaintiff states that he 'communicated with [Defendants] via email from the beginning of this claim, yet there are almost no emails pertaining to this claim during the year 2006,' it appears that Plaintiff is arguing that he believes that Defendants lost emails or information relating to his claim. . . . However, Defendants have stated that, to their knowledge, 'all emails between Plaintiff and [Defendants] have been disclosed. Plaintiff cannot reference, and has not referenced, any specific email that he believes is missing.'"; "The Court agrees that the 'storage, preservation and back of emails' is not relevant to whether Defendants breached Plaintiff's insurance policy or acted in bad faith in adjusting his claim. . . . Plaintiff has not met his burden of establishing the relevancy of this information, or that this request is not redundant. Accordingly, the Motion is GRANTED respect to Category 8.")

- Alta Refrigeration, Inc. v. AmeriCold Logistics, LLC, 688 S.E.2d 658, 667, 668 (Ga. Ct. App. 2009) (holding the post-accident investigation report did not deserve work product protection; explaining that the party asserting the work product protection filed an affidavit contending that the investigation was motivated by a serious accident, but that the report was actually conducted pursuant to company policy; "In granting Alta's motion to compel, the trial court found that the Keithley Report 'was prepared according to AmeriCold's standard operating procedure,' and 'was not prepared in anticipation of litigation.' The trial court based on this finding on the fact that both AmeriCold's own safety manuals and relevant OSHA regulations 'required AmeriCold to conduct an investigation after the release of ammonia into the workplace.'"; "This argument, however, fails to recognize that while the affidavits may have been only testimonial evidence on this issue, they were not the only factual evidence regarding the same. The other evidence included copies of AmeriCold's own 'Incident Investigation Policy,' which outlined the procedures to be followed after a 'catastrophic release of ammonia.' That policy dictated that, following such an incident, the General Manager/Chief Engineer of the facility would select members of an 'Incident Investigation Team,' and stated that '[t]he exact membership of the Team will be dependent upon the severity and circumstances surrounding the incident.' The Incident Investigation Team would be responsible for conducting an investigation to ascertain the facts surrounding the incident, to determine the cause of the incident, and to recommend corrective and preventative measures. The team would then make a written report of the foregoing, and attach the same to an 'Incident Investigation Form.'"; "Notably, the foregoing policy specifically stated that the Incident Investigation Team must be appointed within 48 hours of the incident, to comply with the relevant OSHA regulation."; denying work product protection).

- [Privilege Point, 11/7/12]

Does the Work Product Doctrine Protection Protect the Identity of Corporate Employees Who Helped Answer Interrogatories?

November 7, 2012

Last week's Privilege Point discussed possible work product protection for the identity of witnesses a lawyer thought important enough to interview. Some courts have applied such protection even in the context of what might be called "discovery about discovery."

In Yerger v. Liberty Mutual Group, Inc., No. 5:11-CV-238-D, 2012 U.S. Dist. LEXIS 136291 (E.D.N.C. Sept. 24, 2012), plaintiff filed an interrogatory seeking the identity of anyone who had assisted the corporate defendant in answering interrogatories. The court denied the plaintiff's motion to compel, finding that the interrogatory "is an inquiry into the manner in which defendant is preparing its case for trial, rather than the facts relating to the claims and defenses in the case." Id. at *12. Because "this interrogatory inquires into details about defendant's preparation of its responses to interrogatories," the interrogatory's focus "is on gaining insight into defense counsel's mental impressions and legal theories." Id.

As "discovery about discovery" disputes increasingly generate litigation side shows, companies should keep in mind the protection that some courts recognize.

- Whiting v. Hogan, No. 12-CV-08039-PHX-GMS, 2013 U.S. Dist. LEXIS 35381, at *20-22 (D. Ariz. Mar. 14, 2013) (protecting as privileged communications relating to discovery responses; "Defendants assert that Bleus [plaintiff's lawyer] routinely asked attorney-client privileged questions during the deposition. The first instance is when Bleus inquired whether Hogan spoke with Guerrieri [defendant's lawyer] during a break about his deposition testimony. . . . Bleus did not inquire into the substance of that conversation. . . . Therefore, his question did not implicate the attorney-client privilege. The second instance is when Bleus questioned Hogan about who helped prepare his discovery responses at which point Guerrieri objected, stating that '[w]e're getting really dangerously close to attorney/client privilege here. I'm going to instruct him not to answer in a minute.' . . . Bleus again inquired as to who placed certain words in Hogan's responses, eliciting another objection. . . . At that point, Bleus called the Court to clarify what he could properly ask from Hogan. . . . Upon return, he stated that the Court permitted him to ask about the substance of Hogan's discovery responses but not their formal preparation. . . . Bleus followed the proper procedure and did not retread the same ground during the remainder of the deposition. Thus, after receiving direction from the Court, Bleus's questioning did not repeatedly implicate the attorney-client privilege or work product immunity in a manner amounting to bad faith.")

- Martin v. Allstate Insurance Corporation, Civ. A. No. 3:12-CV-00923-G-BK, 2013 U.S. Dist. LEXIS 50675 (N.D. Tex. April 4, 2013) (denying plaintiff's attempt to seek discovery about defendant's document search and production; "Plaintiff's proposed Rule 30(b)(6) deposition Topics 2-7 include (1) Defendant's document retention policies; (2) Defendant's efforts in responding to Plaintiff's discovery; (3) Defendant's computer systems; (4) the date by which Defendant anticipated that Plaintiff would sue; and (5) Defendant's efforts, including any instructions to employees, to preserve documents and electronic information relevant to the anticipated suit."; "Plaintiff responds that the discovery sought is relevant because Defendant failed to timely and fully produce key documents in response to Plaintiff's first Request for Production."; "Upon consideration of the parties' arguments, the Court agrees with Defendant that deposition Topics 2-7 are overbroad and irrelevant. While Plaintiff speculates that Defendant may have additional documentation that it has not produced, there is no evidence to support that supposition at this point. Defendant's explanation for the manner in which it has produced documents, based on Plaintiff's staggered discovery requests and clarifications, is plausible. Moreover, defense counsel are surely aware that they are under an ongoing obligation to supplement their discovery responses if additional responsive information is located. Fed. R. Civ. P. 26(e)(1). As to Topic 4, which seeks testimony about Defendant's computer systems, if Defendant refuses to supply the necessary information, Plaintiff is under no obligation to accept Defendant's request to use search terms to locate responsive discovery. Defendant will simply be obligated to manually search for the requested documents.")
- Moore v. Dan Holdings, Inc., No. 1:12CV503, 2013 U.S. Dist. LEXIS 61378, at *19 (M.D.N.C. Apr. 30, 2013) (holding that an employment discrimination plaintiff was not entitled to details about a company lawyer's investigation of alleged employment discrimination, such as the identity of the witnesses, etc.; "[A]lthough Defendants cannot prevent fact witnesses from presenting information during the course of discovery simply because such witnesses also provided information to Defendants' counsel, Plaintiff may not attempt to learn the underlying facts simply by using discovery to inquire about the investigation conducted by Defendants' counsel.")

- Apple, Inc. v. Samsung Elecs. Co., Case No. 12-CV-0630-LHK (PSG), 2013 U.S. Dist. LEXIS 67085, at *38, *39 n.10 (N.D. Cal. May 9, 2013) (noting that third party Google had originally asserted that the work product doctrine protected the search term it used when searching for responsive documents, but eventually abandoned that argument; "Apple seeks from Google a list of the search terms and custodians Google used to find and produce documents responsive to Apple's subpoena. Despite suggestions in its brief that Google's production is deficient, Apple at this time is not seeking to compel more complete production from Google nor is it directly opposing Google's objections to the requests. Apple's request is far more basic: it wants to know how Google created the universe from which it produced documents. Using this information, Apple wants to evaluate the adequacy of Google's search, and if it finds that search wanting, it then will pursue other courses of action to obtain responsive discovery." (footnote omitted); "See Formfactor, Inc. v. Micro-Probe, Inc., Case No. C-10-03095 PJH (JCS), 2012 U.S. Dist. LEXIS 62233, 2012 WL 1575093, at *7 n.4 (N.D. Cal. May 3, 2012) (listing cases explaining why search terms are not work product). At the hearing, Google disagreed that search terms and custodians are not work product but admitted that courts generally have not found protection for that type of information.")

- Grayson Consulting, Inc. v. Cathcart, Nos. 2:07-cv-02992- & -00593-DCN, 2013 U.S. Dist. LEXIS 107218, at *16, *16-17 (D.S.C. July 31, 2013) (analyzing the effect of deposition answers in a Rule 30(b)(6) deposition; "During the deposition, Grayson's counsel and Mr. Piona engaged in the following colloquy: Q: 'So did Mr. Jarvis come back to the company to Cyprus to help [Ms. Papacosta] gather the documents [in response to litigation pending in this court]?' A: 'No.' Q: 'How did he assist?' A: 'Sorry? Yes, sure, they speak each other so that Ms. Papacosta can take all the document that are required by Mr. Paul Jarvis.' Q: 'Did Ms. Papacosta tell you about her conversations with Mr. Jarvis?' Q: 'Do you know if Ms. Papacosta interviewed Mr. Jarvis?'; "Grayson's questions go to conversations that Ms. Papacosta, in her role as Vision's in-house counsel, had with Mr. Jarvis, Vision's former CEO, about collecting information for this pending litigation. The answers to these two specific questions are not privileged, but if Mr. Piona had answered these questions in the affirmative, then any further information about Ms. Papacosta's discussions with Mr. Jarvis would undoubtedly be privileged. If Mr. Piona had answered these questions in the negative, then there would be no further information at all. As a result, no harm has arisen from Vision's improper objections to these questions.")

- In re Jemsek Clinic, P.A. v. Blue Cross and Blue Shield of North Carolina, Case No.: 06-31766, Ch. 11, Case No.: 06-31986, Ch. 11, Adversary Proc. No.: 07-3006, 2013 Bankr. LEXIS 3121 (W.D.N.C. Aug. 2, 2013) ("Several of the proposed deposition topics relate to BCBSNC's document retention policies and its efforts in identifying, preserving, collecting, and producing documents in this case."; "Various courts have held that such non-merits-based discovery is improper when the requesting party has not made a threshold showing that spoliation has actually occurred."; "The Jemsek Defendants argue that the spoliation threshold has been met because BCBSNC 'cannot find' a relevant May 28, 2007 email from BCBSNC CEO Bob Greczyn to Steve Gammarino of the Blue Cross and Blue Shield Association."; "The loss of one potentially relevant e-mail among thousands that BCBSNC has produced does not meet the burden. Given the vast number of documents produced in discovery, the loss of a single email is hardly surprising; nor is it probative of spoliation. Similarly, the OPM documents are isolated non productions of post suit documents and are likely irrelevant and privileged. The ESI matter and the contention that BCBSNC misled that Jemsek Defendants about the same will not do. As the Order Denying the Motion to Compel states, ESI was not even requested in discovery and the Jemsek Defendants' theory that BCBSNC misled them about its existence was found to be unsubstantiated."; "The proposed line of questioning is simply not relevant to the remaining counterclaims and defenses, and the Jemsek Defendants have not made a showing that willful spoliation has occurred."; "Apart from those document retention topics to which BCBSNC has not objected (e.g., For Topic 1 regarding the 2003 Litigation Hold, BCBSNC has stated that it has no objection to discovery as to subparts (b)-(j) from July 1, 2006 through the filing of the Jemsek Defendants' counterclaims), the proposed deposition discovery is simply too far afield from this litigation to be undertaken. With no real proof that documents and information were willfully destroyed, this Court will not authorize an inquiry of such breadth and certain expense.")

- In re Weatherford Int'l Secs. Litig., No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 110928, at *15 (S.D.N.Y. Aug. 5, 2013) (in an opinion by Magistrate Judge James Francis, analyzing a topic for a Rule 30(b)(6) deposition; "Question 27, 30, and 31 ask about the number of custodians from whom documents were collected in connection with Weatherford's internal investigations, SEC subpoenas, and negotiations with the SEC and also whether e-mails from a particular person was [sic] produced to the SEC. These questions do not seek the substance of any communication or documents, thus work product protection does not apply. . . . [F]or a party to assert that the 'selection and compilation' privilege applies, it must demonstrate "'a real, rather than speculative, concern that counsel's thought processes in relation to pending or anticipated litigation will be exposed through disclosure of the compiled documents.'" (citation omitted))
- In re Weatherford Int'l Secs. Litig., No. 11 Civ. 1646 (LAK) (JCF), 2013 U.S. Dist. LEXIS 110928, at *17-18 (S.D.N.Y. Aug. 5, 2013) (in an opinion by Magistrate Judge James Francis, analyzing a topic for a Rule 30(b)(6) deposition; requiring the Rule 30(b)(6) deponent to disclose facts about the logistics of an investigation (such as the number of interviews, etc.); holding that the witness did not have to answer what amounted to "why" questions going to motive; "Questions 34 and 35 seek information about why Weatherford's Director of Internal Audit retained counsel, and questions 43 and 44 seek information as to the purpose of counsel's representation of Weatherford's Audit Committee. "[C]ommunications revealing the client's motive in seeking representation . . . are within the attorney-client privilege." . . . Accordingly, the defendants do not need to answer these questions.")
- In re Arpin Am. Moving Sys., LLC, No. 05-13-01446-CV, 2013 Tex. App. LEXIS 14574 (Tex. App. 5d Dec. 2, 2013) ("As to request 15, discovery regarding the methods of document collection and production invades the work product privilege.")

- Miller v. York Risk Services Group, 2:13-cv-1419 JWS, 2014 U.S. Dist. LEXIS 51859 (D. Ariz. April 15, 2014) (delaying plaintiff's request for a deposition about defendant's collection of documents; "Plaintiffs note that with respect to their RICO claim they will need to discover electronically stored information and contend that the requested Rule 30(b)(6) deposition will allow them to tailor their discovery requests to avoid potential disputes over what may be discovered. They contend that other courts have allowed discovery of the very sort they seek for that reason. Plaintiffs cite no appellate decision to support that specific proposition, and the district court decisions they cite are mostly from trial courts in other circuits. They do cite two district court cases from within the Ninth Circuit."; "[I]t remains to be determined whether starting the discovery process with a wide ranging inquiry into the manner and method by which a party stores and manages ESI is a helpful and appropriate approach to obtaining substantive information. In this court's view it is not. Plaintiffs contend that starting with discovery of the manner and means of how Defendant stores ESI will allow them to tailor requests in the future. The court's view is that starting discovery with such an inquiry puts the cart before the horse and likely will increase, rather than decrease, discovery disputes. Instead of beginning with a deposition that address nothing put process, discovery should start with inquiries that seek substantive information. If Defendant then asserts that retrieving relevant information stored electronically would be unduly burdensome, it might then be appropriate to proceed with a Rule 30(b)(6) deposition of the type Plaintiffs seek.")

- Becker v. Willamette Community Bank, 6:12-cv-01427-TC, 2014 U.S. Dist. LEXIS 88616, at *11-12 (D. Ore. June 20, 2014) (analyzing a situation in which plaintiff was interviewed by a bank's in-house lawyer when her superior sued the bank, after which the bank fired her for helping the superior; holding that the plaintiff owned any privilege protection that covered her interview; analyzing discovery about discovery; "The court disagrees with the Bank that Ms. Reukauf's gathering of documents pursuant to a discovery request by Connolly in her litigation against the Bank is protected by the Bank's attorney-client privilege. So long as the questioning is limited to documents gathered pursuant to Connolly's discovery requests, such reveals nothing about the ' legal advice and impressions' of the Bank's counsel, who was simply channeling the requests of Connolly's counsel. Thus any claim of privilege regarding questions directed at documents gathered by Reukauf in response to Connolly's discovery request is rejected. Any questioning, however, that seeks to probe what documents Reukauf gathered at Guest's request for the Bank's use in the Connolly litigation (and not for production to Connolly) would be subject to the attorney-client privilege.")
- Cormack v. United States, No. 13-232C, 2014 U.S. Claims LEXIS 664 (Fed. Cl. July 18, 2014) (analyzing discovery about discovery; holding that an email relaying information about the location of documents did not deserve privilege protection, but did deserve work product protection; "In the e-mail in question, the employee provided the in-house counsel with information regarding the location of certain documents at the apparent request of counsel. . . . This is hardly a communication conveying information for the purpose of obtaining legal advice. The e-mail relayed only the physical location of certain documents, information that in-house counsel could not directly use to form the basis of her legal advice for the company. Consequently, the e-mail in question does not fall under the protection of the attorney-client privilege.")
- Cormack v. United States, No. 13-232C, 2014 U.S. Claims LEXIS 664 (Fed. Cl. July 18, 2014) (analyzing discovery about discovery; holding that an email relaying information about the location of documents did not deserve privilege protection, but did deserve work product protection; "The court concludes that the e-mail reveals a specific request for information made by in-house counsel for Systems apparently for potential use in the FSS patent infringement litigation, on the reasonable assumption that Systems would eventually be involved in the litigation. Although the information revealed is factual in nature, i.e., the location of specific documents, the nature of the request also reveals the in-house counsel's thought processes.")

- Freedman v. Weatherford International Ltd., 12 Civ. 2121 (LAK) (JCF), 2014 U.S. Dist. LEXIS 102248 (S.D.N.Y. July 25, 2014) (analyzing discovery about discovery; holding that plaintiffs were not entitled to a defendant's report about document searches; "Here, in essence, the plaintiffs seek discovery on discovery, on the asserted basis that they are 'entitled to test the reasonableness and adequacy of [the] [d]efendants' production.'"; "There are circumstances where such collateral discovery is warranted. Here, however, the plaintiffs have not proffered an adequate factual basis for their belief that the current production is deficient. Their contention that the defendants' production is deficient because 85% of the pages produced relate to Dobina, despite the different class periods and false statements at issue here . . . Is too conclusory to provide that basis. Furthermore, the use of 'dramatically different' search terms in this action as compared to those utilized in either the investigations or the Dobina action . . . Is not surprising in light of the differing class periods and varying false statements. Given the absence of a legal basis for the plaintiffs' request, the motion is denied.")

- Freedman v. Weatherford International Ltd., 12 Civ. 2121 (LAK) (JCF), 2014 U.S. Dist. LEXIS 133950 (S.D.N.Y. Sept. 12, 2014) (in an opinion by Judge Francis; addressing discovery about discovery; denying plaintiff's attempt to discover search terms defendant used during the document review and production process; "It is unsurprising that some relevant documents may have fallen through the cracks. But, most importantly, the plaintiffs' proposed exercise is unlikely to remedy the alleged discovery defects. In light of its dubious value, I will not require Weatherford to provide the requested report.")
- National Financial Partners Corp. v. Ray, 13 CVS 3319, 2014 NCBC LEXIS 50 (N.C. Sup. Ct. Oct. 13, 2014) (analyzing discovery about discovery; "The Rays' Interrogatory No. 5 requests that Plaintiffs identify all documents that Plaintiffs reviewed and/or relied upon in responding to the Rays' interrogatories."; "The Court concludes that in merely seeking identification of documents, Interrogatory No. 5 requests only factual information that is not confidential or privileged and, therefore, offends neither the work product doctrine nor the attorney-client privilege.")
- Pate v. Winn-Dixie Stores, Inc., Civ. A. No. CV213-166, 2014 U.S. Dist. LEXIS 14874 (S.D. Ga. Oct. 20, 2014) (analyzing discovery about discovery; "Defendant asserts, without explanation, that the attorney-client privilege protects against the disclosure of its and its designated agent's methods of preparing for deposition. Without further information as to the nature of these methods or the basis for the privilege, the Court is unable to determine, at this time, that Defendant may withhold this otherwise discoverable information. Because preparation for deposition often requires investigating numerous sources of information, it is unlikely that all efforts to prepare for the deposition in this case constitute privileged communications. If Defendant believes that the attorney-client privilege applies to any particular method of preparation, Defendant, through its counsel or designated agent at the deposition, may assert such a privilege in accordance with Federal Rule of Civil Procedure 26(b)(5)(A).")

- United States v. Halliburton Co., Case No. 1:05-CV-1276, 2014 U.S. Dist. LEXIS 162680 (D.D.C. Nov. 20, 2014) (addressing discovery about discovery; "It is not clear that these litigation hold notices and follow-up emails represent protected attorney work product. A party may discover the steps the opposing party has taken to preserve relevant information. The notices were sent from KBR's CEO to large groups of employees, and can fairly be said to merely describe KBR's document retention practices, rather than relate any attorney's preparations for litigation. Thus, it is not clear that these documents are attorney work product at all.")

- [Privilege Point, 11/26/14]

Courts Address "Discovery about Discovery": Part I

November 26, 2014

Plaintiffs sometimes try to generate a litigation "side show" by challenging corporate defendants' steps in preparing their discovery responses. Courts' reactions to such efforts highlight disagreements about the work product doctrine's application in that context.

In Estate of Jaquez v. City of New York, No. 10 Civ. 2881 (KBF), 2014 U.S. Dist. LEXIS 148717 (S.D.N.Y. Oct. 10, 2014), Judge Forrest addressed plaintiff's effort to learn what deposition transcripts a defense witness had reviewed before testifying. The court acknowledged that a lawyer's "general selection of materials to be covered during a preparation session are [sic] usually protected from an omnibus request for disclosure." Id. at *4. However, the court held that the plaintiff could ask a witness whether his or her recollection "was refreshed by a specific document shown during the preparation — and to identify such a document." Id. at *5. The court then added another more subtle principle — holding that a defense lawyer who had "shared the substance" of another witness's testimony with a deponent could not avoid disclosure under this refreshment rule "simply by reading or summarizing it to the witness instead of having the witness read it him or herself." Id. at *8. As the court bluntly put it "in for a penny, in for a pound." Id.

If a lawyer preparing a witness simply discusses historical facts (without attributing them to another deposition witness), it is difficult to imagine how this process would work. Next week's Privilege Point addresses two other decisions issued just a few days later, also focusing on what could be called "discovery about discovery."

- [Privilege Point, 12/3/14]

Courts Address "Discovery about Discovery": Part II

December 3, 2014

Last week's Privilege Point described a court's complicated approach to lawyers' deposition preparation sessions and adversaries' efforts to determine if the preparation refreshed a witness's recollection. That court acknowledged that the work product doctrine generally protects lawyers' "selection of materials to be covered during a preparation session." Estate of Jaquez v. City of New York, No. 10 Civ. 2881 (KBF), 2014 U.S. Dist. LEXIS 148717, at *4 (S.D.N.Y. Oct. 10, 2014).

Three days later, however, a North Carolina state court dealt with an adversary's interrogatory asking that litigants "identify all documents that [they] reviewed and/or relied upon in responding to the . . . interrogatories." Nat'l Fin. Partners Corp. v. Ray, 2014 NCBC 49, ¶ 41 (N.C. Super. Ct. Oct. 13, 2014). The court held that "in merely seeking identification of documents, [the interrogatory] requests only factual information" that did not deserve protection under either the attorney-client privilege or the work product doctrine. Id. ¶ 43. A week after that, a federal court addressed defendant Winn-Dixie's argument that the attorney-client privilege protected its "methods of preparing for deposition." Pate v. Winn-Dixie Stores, Inc., Civ. A. No. CV213-166, 2014 U.S. Dist. LEXIS 148764, at *13 (S.D. Ga. Oct. 20, 2014). Although concluding that it needed more information, the court warned that "[b]ecause preparation for deposition often requires investigating numerous sources of information, it is unlikely that all efforts to prepare for the deposition in this case constitute privileged communications." Id.

Although courts disagree about both the attorney-client privilege's and the work product doctrine's application to the process of preparing discovery responses, companies should not assume that their lawyers' involvement in those efforts automatically assures either protection.

- GE v. United States, 119 F. Supp. 3d 17, 18, 18-19, 19, 20, 20-21, 21 (D. Conn. 2015) (holding that GE's lawyers at Davis Polk could review for responsiveness GE-related documents sought by the United States from third parties Westport Insurance Company and Cahill Gordon; "Plaintiff General Electric Company ('GE') and defendant United States are embroiled in a high-stakes dispute involving GE's claim for a tax refund with interest of approximately \$660 million. The dispute stems from a series of complex corporate restructuring/sale transactions that occurred more than ten years ago."; "The parties are now entangled in a discovery dispute involving a legal issue that does not appear (so far as the parties' briefings reflect) to have been previously addressed in any published decision -- perhaps surprisingly so, because I would expect the issue to be framed with some frequency in complex litigation. The issue here supposes a lawsuit between Party A and Party B and that Party A issues a subpoena to a non-party seeking documents that may be subject to a claim of privilege by opposing party B. It further supposes the right of Party B to conduct a privilege review of the subpoenaed documents before they are produced by the non-party to Party A to ensure that the document production does not include documents subject to a claim of attorney-client privilege."; "The question, then, is whether Party B (or, more precisely, its counsel) may also -- at the non-party's request -- conduct a responsiveness review of the documents before they are produced to Party A. In short, is it proper for a non-party recipient of a document subpoena from Party A to delegate or outsource a portion of its compliance obligations to the opposing Party B and its counsel in the litigation?"; "Here, the issue arises in the context of the Government's complaint about GE's conduct with respect to two subpoenas served by the Government on two non-parties to this action: Westport Insurance Company ('Westport') and Cahill Gordon & Reindel LLP ('Cahill'). Westport is a former subsidiary of GE and possesses documents relating to a former GE insurance subsidiary of great importance to this litigation. Cahill is a major law firm that served as counsel to GE on a range of transactional matters in 2002 and 2003 that are also important to the tax dispute in this case."; "Although the Government does not contest GE's right to conduct a privilege review, it vehemently objects to GE or its counsel's involvement in deciding what documents are responsive to the subpoenas that it has served on Westport and Cahill."; "The Government has a right to receive documents that are responsive to its subpoenas, not to have a completely neutral party review and decide what documents are responsive."; "Nor am I persuaded by the Government's myopic view of the scope of the ethical rules that otherwise govern Davis Polk's conduct. The ethical obligations of counsel do not run solely to a client. Quite to the contrary, counsel have multiple ethical obligations to third parties and to the Court that foreclose them from lying, from concealing or altering

evidence, or from otherwise engaging in conduct inimical to the due administration of justice. I decline to conclude that David Polk attorneys are free from ethical constraints with respect to their review of Westport and Cahill documents or to presume that Davis Polk attorneys will fail to disclose non-privileged, responsive documents in breach of their ethical obligations."; "I reject the Government's argument that it is categorically improper for a party (or its counsel) in a lawsuit to undertake not only a privilege review but also a responsiveness review of documents that have been sought by the opposing party from a non-party to the litigation. My conclusion assumes that the non-party has knowingly delegated responsibility to a party to the litigation to conduct a responsiveness review. And of course it presupposes as always that the non-party recipient of a subpoena -- notwithstanding its administrative delegation of functions to any third party -- remains ultimately answerable to ensure that its obligations to fulfill the requirements of the subpoena are fully and faithfully discharged."

- RSUI Indemnity Co. v. American States Ins. Co., Civ. A. No. 12-2820 Section: "I" (4), 2015 U.S. Dist. LEXIS 22133 (E.D. La. Feb. 18, 2015) (addressing discovery about discovery in an insurance dispute; allowing the discovery; "RSUI contends that it seeks this information from American because American's response to its request for file handling guidelines stated that the guidelines did not exist. However, RSUI contends that American's staff counsel confirmed the existence of the guidelines when he testified during his deposition that the guidelines place responsibility and decision making authority on the claims department."; "[T]he name of the attorney and the process American used to identify responsive documents is not subject to the protections of either attorney-client privilege or work-product doctrine. The name of the attorney is not classified as a confidential communications nor is it a material assembled and brought into being in anticipation of litigation. American's process in identifying responsive documents is also not privileged because RSUI does not seek the disclosure of the content of the communications made between American and its counsel, but the actions American took to search for the guidelines.")

- Brady v. Grendene USA Inc., Case No. 12cv604-GPC (KSC), 2015 U.S. Dist. LEXIS 54118 (S.D. Cal. April 23, 2015) (analyzing discovery about discovery; finding that both the attorney-client privilege and the work product doctrine protected the process of plaintiffs deciding whether the documents deserved confidentiality protection; "[A]ttesting to the method and manner in which they designated materials produced in discovery as 'Confidential' or 'Confidential -- Attorneys Eyes Only' under the Protective Order."; "The defendants request that plaintiffs' counsel memorialize in writing the 'standards he or she used for each type of designation' and the factors that 'he or she took into account' and 'relied on' when making confidentiality designations. . . . A written declaration of this nature would fall squarely within the work product doctrine's protections."; "The defendants seek to learn 'who had the first say in making the designation decisions.' . . . This question implicates the privilege to the extent it calls for the content of discussions between counsel and their clients in the preparation and production of documents.")
- Cohen v. Trump, Civ. No. 13-CV-2519-GPC (WVG), 2015 U.S. Dist. LEXIS 74542 (S.D. Cal. June 9, 2015) ("As Plaintiff notes in his Motion to Compel, this Court has previously recognized that discovery regarding the circumstances of a company's litigation hold is not privileged, even if the hold memo itself is privileged.")

- Johnson v. Ford Motor Company, Case No. 3:13-cv-06529, 2015 U.S. Dist. LEXIS 90108 (S.D.W. Va. July 8, 2015) (ordering defendant Ford to produce a 30(b)(6) deponent to testify about Ford's document retention policy; "Ford moves to quash topics 18 and 78, arguing that questions regarding Ford's document retention policies and potential loss or disposal of relevant documents constitute irrelevant 'non-merits' discovery and are improper in the absence of a threshold showing that spoliation or discovery abuse has occurred. Along the same line, Ford contends that topic 79, seeking information regarding Ford's document collection and production in this case, should be quashed because it is irrelevant 'discovery on discovery' and invades attorney work product. The Court DENIES Ford's motion to quash these topics."; "Here, there have been repeated concerns voiced by Plaintiffs regarding the thoroughness of Ford's document search, retrieval, and production. Although Ford deflects these concerns with frequent complaints of overly broad and burdensome requests, it has failed to supply any detailed information to support its position. Indeed, Ford has resisted sharing any specific facts regarding its collection of relevant and responsive materials. At the same time that Ford acknowledges the existence of variations in the search terms and processes used by its custodians, along with limitations in some of the searches, it refuses to expressly state the nature of the variations and limitations, instead asserting work product protection. Ford has cloaked the circumstances surrounding its document search and retrieval in secrecy, leading to skepticism about the thoroughness and accuracy of that process. This practice violates 'the principles of an open, transparent discovery process.'"; "Contrary to Ford's contentions, discovery of document retention and disposition policies is not contingent upon a claim of spoliation or proof of discovery abuses, and may be accomplished through a Rule 30(b)(6) witness."; "Ford's assertion that sharing facts about its search terms and the identities of custodians who searched their records will require disclosure of attorney work product is equally unavailing. . . . Undoubtedly, the search terms used by the custodians and the names of the custodians that ran searches can be disclosed without revealing the substance of discussions with counsel. . . . Ford argues that its 30(b)(6) witness on this topic would likely be an attorney; however, that argument contradicts Ford's prior description of its document retrieval process as a 'self-select' method by which the individual employees conducted searches of their own documents using terms of their own choosing. Thus, while Ford correctly notes that the deposition of a party's attorney is generally not permitted, Ford should also understand that it cannot avoid a legitimate area of inquiry simply by selecting an attorney as its corporate designee."; "Accordingly, Ford is ORDERED to produce a Rule 30(b)(6) witness to provide an overview of its claims investigation process, to testify regarding its document retention and destruction

policies, and to supply details regarding the document search performed by Ford to date.")

- Banks v. St. Francis Health Center, Inc., Case No. 15-cv-2602-JAR-TJJ, 2015 U.S. Dist. LEXIS 157752 (D. Kansas Nov. 23, 2015) (denying plaintiff's efforts to obtain defendant's search terms in a discrimination and harassment case; "Plaintiff's motion to compel as to Interrogatory Nos. 16 and 17 is therefore denied, but without prejudice to further motion showing specific instances and examples from which the Court could reasonably conclude that Defendant did not make reasonable and adequate efforts to preserve or collect relevant information and thereby justify discovery concerning Defendant's preservation and collection efforts.").
- PCS Phosphate Co., Inc. v. American Home Assurance Co., No. 5:14-CV-99-D, 2015 U.S. Dist. LEXIS 165548 (E.D.N.C. Dec. 10, 2015) ("PCS seeks the requested documents to assist in the narrowing and specifying [sic] future discovery requests and in avoiding or resolving disputes over what information is in American Home's possession, custody or control. . . . Document retention policies are generally discoverable.").
- Guyton v. Exact Software North America, Case No. 2:14-cv-502, 2015 U.S. Dist. LEXIS 170241 (S.D. Ohio Dec. 21, 2015) (finding that a litigant's search for documents deserved privileged protection; "Here, the record is unclear as to whether the information sought was privileged. That is, if Ms. Pannkuk's [Defendant's human resources manager] answer to the questions posed would have been that counsel asked her to search for, preserve, or review documents, or to interview employees, such communications would be protected from discovery by the attorney-client privilege. If, however, someone other than counsel asked Ms. Pannkuk to search for, preserve, or review documents, or to interview employees, those communications would not be privileged. In the latter instance, it would have been improper to instruct Ms. Pannkuk not to answer.").

- Guyton v. Exact Software North America, Case No. 2:14-cv-502, 2015 U.S. Dist. LEXIS 170241 (S.D. Ohio Dec. 21, 2015) (finding that a litigant's search for documents deserved privileged protection; "This Court . . . Finds that Ms. Pannkuk's [Defendant's human resources manager] counsel properly objected to the questions and instructed Ms. Pannkuk not to answer. As an initial matter, the questions concerning who provided the information in Ms. Pannkuk's affidavit are improper. In *United States v. University Hospital, Inc.*, 2007 U.S. Dist. LEXIS 41189, 2007 WL 1665748 (S.D. Ohio June 6, 2007)(Black, M.J.), the Court considered whether the plaintiff should be permitted to ask a witness about 'the evolution of his affidavit,' which included 'specific questioning as to: who prepared the affidavit, what the proposed changes were, any communications between [the witness] and whomever helped prepare the affidavit, and the contents of all drafts of the affidavit.' 2007 U.S. Dist. LEXIS 41189, [WL] at *1. . . . Here, the questions about 'the evolution of [the] affidavit' are just the type which the Court found to be improper in *University Hospital, Inc.*, 2007 U.S. Dist. LEXIS 41189, 2007 WL 1665748. This Court agrees with reasoning in *University Hospital*, and it is unaware of any decision in which the Court determined the discovery of that information to be proper. Thus, Ms. Pannkuk's counsel properly objected and instructed her not to answer the questions on the basis of attorney-client privilege. In addition, the questions about the attorneys' knowledge call for speculation and, to the extent that an answer would reveal communications between Ms. Pannkuk and her attorneys, they seek information protected by the attorney-client privilege. Similarly, the questions directly inquiring about communications between Ms. Pannkuk and her attorneys are clearly subject to protection under the attorney-client privilege.").

- Loop Ai Labs Inc. v. Gatti, Case No. 15-cv-00798-HSG (DMR), 2016 U.S. Dist. LEXIS 114247 (N.D. Cal. Aug. 25, 2016) (analyzing discovery about discovery, and concluding that plaintiff's witnesses must answer questions about their document collection; "Healy [Plaintiff's lawyer] also refused to allow Plaintiff's witnesses to answer questions about their document collection and production in this litigation on the basis of attorney-client privilege. For example, following a question about whether he had retrieved Google chat communications with Defendant Anna Gatti for purposes of this litigation, Healy objected that the question called for attorney-client privileged information. Peintner stated 'I won't answer about something my attorney has required me to recollect.' . . . Counsel again asked the question, to which Healy reiterated her objection and instructed the witness not to answer, stating, '[e]verything he's done in this litigation is at the direction of counsel.' This objection, along with counsel's other objections based on attorney-client privilege as to questions about the witnesses' own document collection efforts, was improper. It appears to rest on a misunderstanding of what attorney-client privilege protects, since the questions did not seek the content of attorney-client privileged communications. See, e.g., Peintner Dep. at 185, 186, 187 ('Have you ever seen the document requests that my client served on Loop?'); Ehlen Dep. at 33 ('Have you looked for a copy of documents related to your employment with Loop?'), 34, 102; Calafiore Dep. at 444-46 ('Did you look for documents to give to the company attorney? . . . Did you search your e-mails for documents in this litigation? . . . Did you search the servers for any documents to produce in this litigation?'), 447-48, 527, 534; 30(b)(6) Dep. at 405-06 ('Did you collect the document and give it to your counsel to produce?').")
- Wellin v. Wellin, No. 2:13-cv-1831-DCN, No. 2:13-cv-3595-DCN, No. 2:14-cv-4067-DCN, 2016 U.S. Dist. LEXIS 135604 (D.S.C. Sept. 30, 2016) ("The court also finds that Questions 31 and 32, which seek to determine who asked Plum [child of decedent whose estate was at issue in the litigation] to sign the affidavit and who Plum consulted before signing, seek privileged information to the extent Plum's answers would implicate confidential communications with her attorneys."; "The court finds that Question 6, which asks why Plum sought representation in this action, also seeks privileged information to the extent Plum's answer would necessarily require her to reveal the contents of confidential communications she made to her attorneys in seeking their representation.")

- [Privilege Point, 10/5/16]

"Are Common Interest Agreements Discoverable, and Why Does Anyone Care?"

October 5, 2016

Courts sometimes wrestle with common interest agreements' discoverability.

In GeoMetWatch Corp. v. Hall, the court noted that "[c]ases that have addressed whether joint-defense agreements are discoverable or protected by the joint-defense privilege run the gamut." Case No. 1:14-cv-60-JNP-PMW, 2016 U.S. Dist. LEXIS 91274, at *5 (D. Utah July 12, 2016). The court cited decisions holding "that joint-defense agreements are indeed protected by the joint-defense privilege," but also noted that "[o]ther courts have found that joint-defense agreements are not protected by that privilege." Id. at *5-6. The court ultimately concluded that "the joint defense agreements are not relevant to the parties' respective claims and/or defenses" in the case – which involved an indemnification dispute. Id. at *7.

Courts addressing the common interest doctrine rarely if ever point to the pertinent common interest agreements' provisions. Instead, courts look at the context, not the agreements. Common interest participants should remember that they cannot automatically contract into privilege protection, and that about half of common interest agreements fail.

- Storer v. Crown Cork & Seal Co., Civ. A. No. 14-2488, 2017 U.S. Dist. LEXIS 13349 (W.D. La. Jan. 31, 2017) (ordering defendant Trane to designate a Rule 30(b)(6) about the following matters; "At the September Rule 30(b)(6) deposition, Trane's attorney instructed the corporate representative not to answer the following questions: 'What Mr. Dorman was told on the April 2016 call that led him to believe that "'Mr. Hopkins and other individuals inside of Trane did considerable amount of work to try and bring together the necessary information"; "'After Mr. Dorman testified that he was given the opportunity to ask Mr. Hopkins questions during the April 2016 call to ensure that preparation for the Rule 30(b)(6) deposition was adequate, thorough, and accurate], what is an example of a question he asked Mr. Hopkins and a satisfactory answer he received"; "'What investigation was done regarding any topic in the Rule 30(b)(6) notice"; "'What questions Mr. Dorman asked to ensure that all documents regarding any particular matter in the notice were examined; and"; "'Who at Trane conducted the investigation into any particular topic in the notice"; "Trane agrees that plaintiffs have the right to discover what actions were taken by Hopkins to discharge his task of searching for the requested information. . . . For their part, plaintiffs correctly argue that they were not seeking information about legal advice provided by counsel. . . . Rather, they sought information regarding Trane's efforts to search for responsive records and documents."; "Trane is hereby ORDERED to produce one or more representatives fully prepared to discuss all of the 30(b)(6) deposition matters noticed by plaintiffs, including the efforts made to research those matters.")
- Singh v. Shonrock, Case No. 15-9369-JWL-GEB, 2017 U.S. Dist. LEXIS 25549 (D. Kan. Feb. 22, 2017) (ordering a Rule 30(b)(6) witness to testify about document holds; "Plaintiff asks what ESU did, after it received a retention letter from Plaintiff's former counsel, to preserve documents and ESI. . . . Defendants argue they have produced the single non-privileged email in their possession regarding implementation of the litigation hold, and expressed some concern during the conference regarding potential disclosure of attorney-client privileged information. Although Defendants are correct their communications with their attorneys are privileged, the actions taken by the college after being notified of the litigation hold are not, without some other showing, subject to privilege. Additionally, the production of a single email does not provide information sufficient to respond to Plaintiff's request. Therefore, Defendants' objections to Topic No. 10 are overruled, and defendant ESU must prepare and produce a witness most knowledgeable and prepared to discuss the university's actions to preserve evidence.")

- AP Atlantic, Inc. v. Crescent Univ. City Venture, LLC, 15 CVS 14745 (Master File), 16 CVS 14844 (Related Case), 2017 NCBC LEXIS 49 (N.C. Super. June 6, 2017) (holding that the privilege did not protect a joint defense agreement; "Crescent has failed to meet its burden to establish that the common interest doctrine protects discovery of the JDA. Based on the Court's in camera review of the emails constituting the JDA, the Court concludes that the JDA is not a confidential communication between an attorney, his client, or a third-party 'relat[ing] to a matter about which the attorney is being professionally consulted.'"; "Rather, the JDA simply reflects Crescent's agreement with Summit, prior to any demand related to this litigation ever having been made against Summit, 'to exchange information for the purpose of facilitating legal representation of the parties.' . . . The JDA does not itself convey confidential information to facilitate the rendering of legal advice in connection with this or other specific litigation.")
- Cejka v. Vectrus Sys. Corp., Civ. A. No. 15-cv-02418-MEH, 2017 U.S. Dist. LEXIS 117419 (D. Colo. July 27, 2017) ("First, the Court finds the legal hold notice issued by Vectrus' in-house counsel to a Fluor attorney on July 20, 2015 is protected from disclosure by the work-product doctrine. Although this action was not filed until October 30, 2015, it is undisputed that Vectrus received a copy of the draft complaint from Plaintiffs' counsel in June 2015, and the Court finds the legal hold notice was prepared because of the prospect of litigation. In addition, the Court finds that the notice contains Vectrus' counsel's mental impressions, which are clearly protected by the work-product doctrine.")

- Taber v. Ford Motor Company, Case No. 16-00162-CV-W-SWH, 2017 U.S. Dist. LEXIS 160709 (W.D. Mo. Sept. 29, 2017) (holding that a litigation hold memorandum deserved work product protection, but that the plaintiffs could overcome that protection; "A suspension order is a modification of the normal document retention policy, for which Ford did not assert a claim of privilege. The Court agrees with the reasoning of Symes [an earlier decision relied upon by the court] that there is no evident selection process by which documents may be identified as helpful or detrimental to Ford's presentation of its defense. And there is nothing in the documents reflecting how Ford's counsel might evaluate the company's response to discovery. . . . Thus, the Court rejects defendant's attorney-client privilege claim for the suspension orders."; "However, defendant has also challenged the relevancy of the suspension orders as well as asserting a work product privilege for the documents. Not only must the party seeking discovery demonstrate the relevancy of any information sought through the discovery process, but before the work product privilege may be overcome, plaintiffs must show a need for the information. In Symes, the Commissioner concluded that the plaintiff had demonstrated a need for the suspension orders, thereby overcoming the work product doctrine because the plaintiff intended to offer an instruction at trial on spoliation based upon the alleged destruction of certain test data. . . . The Court recognizes that the issue of spoliation has been present when the production of suspension orders has been ordered in some of the other relevant caselaw."; "Plaintiffs have raised the issue of spoliation in briefing. . . . In the Court's view, documents 44 and 45 have not been properly authenticated or even explained by plaintiffs' counsel. Thus, the Court will not infer that spoliation is an issue in this case based upon the current status of the briefing. However, the parties in this case have had ongoing and contentious discovery disputes for the last year. These disputes range from the format of the document production which necessitated plaintiffs hiring a third party vendor to try and make the electronic production usable and has extended to what was relevant OSI material. The initial discovery requests were submitted over one year ago. According to plaintiffs, over 3,700 documents have been produced by Ford since the filing of the motion to compel. . . . The Court notes that Ford did not produce privilege logs as to OSI material until after several court conferences and a motion to compel had been filed. Furthermore, defendant admits that outside counsel has destroyed some files. . . . Given the many discovery issues which have unnecessarily extended the time for resolving this case, the Court believes that plaintiffs have demonstrated the relevancy and their substantial need for the suspension orders in order to try and determine as quickly as possible if all relevant documents have been produced.")

- **[Privilege Point, 12/4/19]**

Privilege, Work Product and Litigation Holds: Part II

December 4, 2019

Last week's Privilege Point described a court's understandable decision not to address an attorney-client privilege claim when a defendant had successfully claimed work product protection that the plaintiff could not overcome.

The work product doctrine can protect documents created when the holder is in or reasonably anticipates litigation. Some courts reason that the mental state providing that protection also triggers the requirement to preserve pertinent documents. Litigants' failure to have preserved pertinent documents starting as of the date they claim work product protection has occasionally resulted in spoliation issues. But defendants who have issued "litigation holds" can point to those in arguing that they reasonably anticipated litigation as of that date. In Johnson v. Air Liquide Large Industries U.S. L.P., Case No. 2:18-CV-259-WCB, 2019 U.S. Dist. LEXIS 152963, at *14 (E.D. Tex. Sept. 9, 2019), the court understandably noted that defendant's "proposed measures for preserving evidence strongly suggest an awareness of the likelihood of litigation and an intention to take steps in anticipation of that litigation."

Litigants' failure to have imposed litigation holds can hamper a work product claim and create other potentially troublesome issues -- but their issuance of such holds can buttress a work product protection claim.

- [Privilege Point, 6/24/20]

Are “Litigation Holds” Protected by the Privilege or the Work Product Doctrine?

June 24, 2020

With pandemic-triggered litigation predicted to increase, corporations’ lawyers undoubtedly will address the possible duty to impose “litigation holds,” which direct corporate employees to preserve pertinent documents.

Do such “litigation holds” themselves deserve any protection? They might theoretically convey legal advice to corporate employees who need it – thus meriting attorney-client privilege protection. But most “litigation holds” do not provide sufficient detail to justify that assertion. In In re 3M Combat Arms Earplug Products Liability Litigation, Case No. 3:19-md-2885, 2020 U.S. Dist. LEXIS 48461 (N.D. Fla. Mar. 20, 2020), the court dealt with the more commonly-asserted work product protection. Taking the majority view, the court found that litigation holds are “textbook work product” – because “[u]nlike normal business activities . . . litigation hold notices are prepared because of the prospect of litigation.” Id. at *23. The court also adopted the majority view in assessing whether the adversary could overcome that work product protection – understandably explaining that “[t]he prevailing view is that litigation hold notices are discoverable only if there is a preliminary showing of spoliation.” Id. at *22.

This approach makes sense. It does not provide absolute protection, but instead prevents corporations’ adversaries from second-guessing such “litigation holds” absent evidence that the holds did not properly result in document preservation.

- Adkisson v. Jacobs Eng'g Grp., Inc., No. 3:13-CV-505-TAV-HBG, 2021 U.S. Dist. LEXIS 7982, at *29 (E.D. Tenn. Jan. 15, 2021) (holding that the privilege protected litigation hold memoranda sent to corporate employees; “Defendant correctly details how Entries 12 and 55 were communications sent by Mr. Draper to corporate employees, including, information technology personnel, comprising of legal advice related to a litigation hold in the pending LaCroix litigation. See, e.g., EPAC Techs., Inc. v. Thomas Nelson, Inc., No 3:12-CV-00463, 2015 U.S. Dist. LEXIS 198583, 2015 WL 13729725, at *6 (M.D. Tenn. Dec. 1, 2015) (‘Generally, litigation holds letters are privileged and are not discoverable.’).”)
- Rodriguez v. Seabreeze Jetlev LLC, 620 F. Supp. 3d 1009, 1018 (N.D. Cal. 2022) (analyzing privilege and work product issues in a wrongful death case; concluding that the common interest doctrine protected communications among estate beneficiaries and the plaintiff eligible under maritime law to pursue the litigation, but that non-beneficiaries did not have such a common interest even though they had a financial interest in maximizing the recovery; “For example, a witness may decline to answer questions such as: ‘How many meetings were there with [your counsel] or any one from his office to form the [limited partnership]?’ United States v. Landon, No. C 06-3734 JF (PVT), 2006 U.S. Dist. LEXIS 96667, 2006 WL 3377894, at *4 (N.D. Cal. Oct. 30, 2006). This question is inappropriate because the answer would confirm the specific nature of the legal advice received. Id.” (alterations in original))

- United States v. Coburn, Civ. No. 2:19-cr-00120 (KM), 2022 U.S. Dist. LEXIS 21429, at *16-17, *17 (D.N.J. Feb. 1, 2022) (analyzing privilege and work product issues involving defendant's third party subpoena on another company (Cognizant); "A second disputed category of documents consists of Cognizant's records pertaining to document retention and collection policies. Documents relating to legal advice concerning the formulation of such policies are facially privileged and will not be produced. More generally, Cognizant represents that certain records were made when Cognizant was facing criminal and civil liability in connection with the allegations against Defendants. According to Cognizant, they include (1) communications among Cognizant's executives, in-house counsel, and outside counsel; and (2) litigation hold memoranda and other documents that relate to the areas to be investigated and the custodians and document sources to be searched. (Cross Mot. To Quash Cognizant Cat. A Subpoenas at 38-39.) Such records clearly pertain to litigation strategy and the provision of legal advice in advance of litigation, and were created at a time when litigation was reasonably anticipated. Thus, Cognizant's assertion of attorney client and work product privilege over them is proper. See Upjohn, 449 U.S. at 391, 394-95; Leonen, 135 F.R.D. at 98; In re Gabapentin Patent Litig., 214 F.R.D. at 183-84."; "A caveat: I will require that the document retention policies themselves, and the dates of their promulgation, be produced, as they do not bear the earmarks of privilege and are relevant to understanding the document production itself.")

- Safelite Grp., Inc. v. Lockridge, Case No. 2:21-cv-04558, 2022 U.S. Dist. LEXIS 230992, at *10-11 (S.D. Ohio Dec. 22, 2022) (“Initially, ‘[t]he fact of a litigation hold is not privileged or protected by work product.’ Beaudry v. TeleCheck Servs., Inc., No. 3-07-0842, 2013 U.S. Dist. LEXIS 206840, 2013 WL 12355782, at *2 (M.D. Tenn. Mar. 31, 2013). Nevertheless, litigation hold letters generally are privileged and are not discoverable. EPAC Techs., Inc. v. Thomas Nelson, Inc., No. 3:12-CV-00463, 2015 U.S. Dist. LEXIS 198583, 2015 WL 13729725, at *6 (M.D. Tenn. Dec. 1, 2015)[.]” (first alteration in original))

- [Privilege Point, 12/21/22]

Court Addresses Privilege Protection for Litigation Holds

December 21, 2022

Companies in or anticipating litigation normally impose litigation holds. If litigation ensues, does the attorney-client privilege or the work product doctrine protect the content of such a hold or the fact of its imposition?

In Roytlander v. D. Malek Realty, LLC, No. 21-cv-00052 (MKB) (JMW), 2022 U.S. Dist. LEXIS 183438 (E.D.N.Y. Oct. 6, 2022), the court adopted the most common approach to this issue: (1) the privilege does not protect the fact of a litigation hold's imposition (or the absence of such an imposition); (2) a litigation hold's content normally deserves privilege protection; but (3) "litigation hold letters may indeed be discoverable where there has been a preliminary showing of spoliation." Id. at *9. While the court did not address work product protection for such litigation holds, presumably the same rules apply.

This widely accepted general judicial approach to privilege protection is fairly generous — most litigation holds do not provide much insight into lawyers' advice to their clients. Almost by definition, litigation holds deserve work product protection — but that can sometimes be overcome.

- [Privilege Point, 1/25/23]

In Camera Reviews' Process and Downside: Part I

January 25, 2023

Attorney-client privilege protection depends on content, and some work product claims also depend in part on content. Because a litigant's privilege log obviously does not disclose withheld documents' content, the adversary often seeks the court's in camera review of those withheld documents.

Courts disagree about the standard for undertaking such in camera reviews. In Wisk Aero LLC v. Archer Aviation Inc., the court articulated the majority view (citing a Ninth Circuit case): "the decision whether to conduct the [in camera] review rests within the discretion of the district court." Case No. 21-cv-02450-WHO (DMR), 2022 U.S. Dist. LEXIS 202429, at *4-5 (N.D. Cal. Nov. 7, 2022) (citation omitted). Two days later, the court in Akerman LLP v. Cohen articulated the rare minority view — noting that "[f]or over thirty years," the court has held that before being required to turn over withheld documents a litigant "is entitled to an in camera review of the documents by the trial court." 352 So. 3d 331, 340 (Fla. Dist. Ct. App. 2022) (citation omitted).

Lawyers on both sides of this issue must check the tribunal's approach. Next week's Privilege Point will address in camera reviews' process, and their unstated downside.

- [Privilege Point, 2/1/23]

In Camera Reviews' Process and Downside: Part II

February 1, 2023

Last week's Privilege Point described courts' various standards for their in camera review of withheld documents. The vast majority recognizes the trial court's discretion, but some courts always conduct an in camera review before ordering production of withheld documents.

A few days after the decisions summarized in last week's Privilege Point, the court in Adams v. Hanover Foods Corp. described its in camera review's conclusion, which highlights why many courts conduct such reviews: "Our review of the emails — where the defendants assert a privilege demonstrates that they consist mainly of business communications and not requests for legal advice or legal assistance to the defendant." Civ. A. No. 1:21-cv-00909, 2022 U.S. Dist. LEXIS 210101, at *5 (M.D. Pa. Nov. 18, 2022). Such conclusions should remind lawyers to train their clients and discipline themselves to make sure that any legitimately privileged communications reflect clients' requests for legal advice and lawyers' responsive legal advice.

Presumably because it would tie up judicial resources in nearly every court, the same judge overseeing the litigation ordinarily conducts the in camera review. In a perfect world, another judge would do that. So litigants should remember that even if they win a privilege dispute, the judge hearing their case will have read the documents — so litigants and their lawyers should always be careful what they write.

E. Appeal

- [Privilege Point, 7/25/12]

Two Circuit Courts Continue the Trend Against Allowing Interlocutory Appeals of Privilege Issues

July 25, 2012

Courts generally dislike interlocutory appeals, because they delay litigation and increase appellate courts' workloads. Courts traditionally have taken a more forgiving approach to interlocutory appeals of lower court orders requiring the production of privileged communications or work product – because of the "cat out of the bag" effect. However, in recent years federal courts have been retreating from this forgiving approach. Most notably, in 2009 the United States Supreme Court held that litigants could no longer rely on the collateral order doctrine to seek an immediate appeal of such orders. Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599 (2009).

In Ott v. City of Milwaukee, 682 F.3d 552 (7th Cir. 2012), the Seventh Circuit held that the Mohawk case mentioned above applied with equal force to non-parties subject to discovery under Rule 45. Five days earlier, in In re Grand Jury, 680 F.3d 328 (3d Cir. 2012), the Third Circuit focused on the Perlman doctrine, under which the privilege's owner can immediately appeal an order requiring a third party to produce the owner's privileged communications. The Perlman doctrine rests on the assumption that the third party would not want to risk contempt as a vehicle for interlocutory appeal, because it does not own the privilege. The Third Circuit held that the Perlman doctrine does not apply if (1) the privilege's owner was ordered to produce the communications, and (2) the owner could obtain possession of the privileged communications from the third party (in this case, a law firm which was ethically obligated to hand privileged documents back to its client).

Appellate courts' hostility to interlocutory appeals raises the stakes in any privilege fight at the trial court level – because a litigant losing a privilege fight might have to produce privileged communications during the litigation, and wait until a final order is issued before seeking appellate relief (which by then is largely useless).

- [Privilege Point, 2/6/13]

Third Circuit Restricts Interlocutory Appeals of Unfavorable Privilege Rulings

February 6, 2013

Appellate courts traditionally allowed several options for seeking interlocutory appeals of trial court rulings ordering the disclosure of privileged communications or documents. Those courts recognized the "cat out of the bag" impact of such rulings, which usually cannot be fully remedied in a normal post-trial appeal. However, in 2009 the United States Supreme Court signaled disapproval of such interlocutory appeals, by eliminating the "collateral order" type of interlocutory appeals on such privilege issues. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009).

In In re Grand Jury, 705 F.3d 133 (3d Cir. 2012), the Third Circuit continued this trend. It analyzed another route to an interlocutory appeal, called the Perlman doctrine. Perlman v. United States, 247 U.S. 7 (1918). Under that approach, the privilege's owner can file an interlocutory appeal if a court orders disclosure of the owner's privileged communications that are in a third party's possession – under the theory that the third party will not be inclined to ignore the order and be held in contempt (which normally can be immediately appealed). In Grand Jury, the documents were in the possession of the company's outside law firms (including Blank Rome). Relying on the client's power to retrieve its documents from its lawyers, the Third Circuit held that the company could obtain its documents from Blank Rome, ignore a trial court order requiring their production, and then immediately appeal the resulting contempt order.

Although ignoring a court's order to disclose privileged documents normally makes an interlocutory appeal available, that route has obvious atmospheric and public relations drawbacks.

- [Privilege Point, 5/21/14]

Some States Continue to Allow Interlocutory Review of Adverse Privilege Decisions

May 21, 2014

Over the past several years, federal courts have severely curtailed the availability of interlocutory review of district courts' denial of privilege or work product claims. Justice Sotomayor's first Supreme Court opinion eliminated the availability of a collateral order doctrine interlocutory appeal. Mohawk Indus. Inc. v. Carpenter, 558 U.S. 100 (2009). In most situations, federal court litigants ordered to produce protected documents must rely on the rarely-available mandamus procedure to seek interlocutory review.

In contrast, many states continue to allow interlocutory reviews. In Montanez v. Publix Super Markets, Inc., the court granted defendant's petition for writ of certiorari -- interlocutorily reversing a trial court's order compelling plaintiff to produce "her original handwritten responses to [defendant's] interrogatories." 135 So. 3d 510, 513 (Fla. Dist. Ct. App. 2014). In other states, it seems easier than in the federal courts to obtain mandamus relief. In Seahaus La Jolla Owners Ass'n v. Superior Court, 169 Cal. Rptr. 3d 390 (Cal. Ct. App. 2014), the court issued a writ of mandamus, reversing the trial court's denial of plaintiff homeowners association's privilege claim for communications between the association's lawyers and individual homeowners.

The general unavailability in federal court of interlocutory review dramatically raises the stakes in any trial court privilege or work product dispute. But many states have not followed the federal courts' lead in restricting such review.

- [Privilege Point, 2/25/15]

Circuit Courts Explain Privilege Issue Appellate Review Standards

February 25, 2015

Attorney-client privilege issues frequently involve a complicated mixture of fact and law. Three circuit court decisions issued in a three-week period explain the basic approach that most courts take.

In United States v. Bey, 772 F.3d 1099, 1101 (7th Cir. 2014), the Seventh Circuit held that an appellate court "reviews de novo the scope of the attorney-client privilege." Nearly three weeks later, the Ninth Circuit applied essentially the same standard — explaining that privilege protection presents "a mixed question of law and fact which this court reviews independently and without deference to the district court." United States v. Quiel, Nos. 13-10503 & -10504, 2014 U.S. App. LEXIS 24049, at *3 (9th Cir. Dec. 19, 2014) (unpublished opinion) (internal quotations and citation omitted). Just three days after that, the Tenth Circuit focused on more subtle peripheral issues, holding that (1) "[w]e review district court decisions regarding waiver of attorney-client privilege and work-product protection for abuse of discretion"; and (2) "we review the district court's underlying factual findings for clear error and its rulings on purely legal questions de novo." Seneca Ins. Co. v. W. Claims, Inc., 774 F.3d 1272, 1275 (10th Cir. 2014).

At least at the federal level, appellate courts issue very few privilege rulings in the civil context (the first two decisions described above involved criminal cases). Still, lawyers should familiarize themselves with the applicable appellate review standards.

- [Privilege Point, 10/16/19]

Can You Immediately Appeal An Adverse Privilege Ruling?

October 16, 2019

Although appellate courts understandably do not like piecemeal reviews before a final judgment, privilege issues seem particularly well-suited for interlocutory appeals. Once a court orders production of protected documents or testimony, making the loser wait until the case ends before allowing an appeal does not give much relief. Unfortunately, federal courts have essentially eliminated interlocutory appeals of adverse privilege rulings, except in very unusual circumstances. Litigants can always try the mandamus route, although that normally is a long shot.

But some states continue to allow interlocutory appeals. In In re Alexander, the court granted a litigant's petition for writ of mandamus, explaining that "[a]ppeal is not an adequate remedy when the trial court has erroneously ordered the production of privileged documents." 580 S.W.3d 858, 864 (Tex. App. 2019). Exactly one week later, the court in Crosmun v. Trustees of Fayetteville Technical Community College, 832 S.E.2d 223 (N.C. Ct. App. 2019), vacated the lower court's protocol that would have given plaintiff's forensic expert access to defendant's privileged computer files. The court acknowledged that interlocutory orders "are ordinarily not subject to immediate appeal," but noted that orders "affect[ing] a substantial right" should be immediately appealable. Id. at 231. The court emphasized that "[t]his rule applies to attorney work-product immunity and common law attorney-client privilege." Id.

Corporations and their lawyers should familiarize themselves with states' attitude toward interlocutory appeals of privilege rulings.

- Under Seal 1 v. United States (In re Grand Jury 2021 Subpoenas), 87 F.4th 229, 246, 247 (4th Cir. 2023) (explaining the rare possibility of interlocutory appeal possibilities; “The applicability of the Perlman [Perlman v. United States, 247 U.S. 7 (1918)] doctrine is a closer question. Ultimately, we conclude that the doctrine likewise fails to justify this Court’s exercise of jurisdiction over Doe’s arguments at this stage. Insofar as Doe himself seeks immediate review, Perlman’s applicability is irreconcilable with the Supreme Court’s extreme narrowing of interlocutory appeals via the collateral-order doctrine in Mohawk [Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009)]. This is because, even in the context of a disclosure order directed at a third party—of which Perlman would traditionally permit immediate review—an aggrieved litigant can still simply press the alleged privilege on direct appeal in a manner no different than that required by the Supreme Court in the context of the collateral-order doctrine.” (footnote omitted); “We conclude that the Supreme Court’s narrowing of the collateral-order exception to the final-judgment rule in Mohawk applies equally to the Perlman doctrine—thereby excluding immediate litigant-sought review.”)
- Under Seal 1 v. United States (In re Grand Jury 2021 Subpoenas), 87 F.4th 229, 252 (4th Cir. 2023) (explaining the rare possibility of interlocutory appeal possibilities; “As discussed, ‘we review a district court’s ruling on privilege for abuse of discretion, factual findings as to whether a privilege applies for clear error, and the application of legal principles de novo.’ In re Grand Jury Subpoena, 870 F.3d at 316 (simplified).”)

- [Privilege Point, 8/16/23]

**State Courts Offer Some Hope for Adverse Privilege Rulings’
Interlocutory Appeals**

August 16, 2023

Federal courts have eliminated nearly any chance for unsuccessful trial court litigants to immediately appeal adverse privilege or work product rulings – inexplicably rejecting the obvious “cat out of the bag” nature of such rulings. In federal court, the difficult “mandamus” route normally provides the only remedy.

But in state courts, losing trial court litigants have more hope. In Petzold v. Castro, 365 So. 3d 1199 (Fla. Dist. Ct. App. 2023), the Florida Court of Appeal interlocutorily overruled the trial court’s erroneous decision equating the subject matter waiver impact of an inadvertent disclosure of a privileged communication and an intentional disclosure. Approximately two weeks later in McGlothlin v. Astrosky, 532 P.3d 1185 (Ariz. Ct. App. 2023), the Arizona Court of Appeals interlocutorily reviewed what it found to be the trial court’s erroneous in camera review of privileged documents, although ultimately agreeing with the trial court’s substantive conclusions.

Litigants familiar with the very slim odds of interlocutory appeals in federal court privilege disputes might be pleasantly surprised when litigating in a state court.