A PRACTITIONER'S SUMMARY GUIDE TO THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

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CHAPTER 1

ORGANIZATION OF THE OUTLINE

1.1 Introduction

This outline contains sixty chapters, focusing on:

- The attorney-client privilege (Chapters 2-32).
- The work product doctrine (Chapters 33-50).
- The process of asserting and litigating both protections (Chapters 51-60).

1.2 Attorney-Client Privilege

Chapter 2 introduces the attorney-client privilege, and provides some basic principles.

- The attorney-client privilege stands alone as the oldest and most important evidentiary privilege.

1.3 Clients

Chapters 3 through 8 address the "client" component of the attorney-client privilege.

- Chapter 3 introduces the topic, and Chapter 4 deals with a variety of clients.
- Chapter 5 discusses joint representations, in which a lawyer represents multiple clients on the same matter.
- Chapter 6 discusses privilege in the corporate context.
- Chapter 7 discusses the "fiduciary exception," under which beneficiaries of a fiduciary duty may sometimes access communications between the fiduciary and its lawyer.
- Chapter 8 discusses communications with clients' agents or consultants, which normally do not deserve privilege protection.

1.4 Lawyers

Chapters 9 and 10 address the "lawyer" component of the attorney-client privilege.

- Chapter 9 discusses lawyers, and Chapter 10 discusses lawyers' agents and consultants.

1.5 Content of Communications

Chapters 11 through 18 address the attorney-client privilege's key "content" requirement.

- Chapter 11 discusses generally unprotected background facts about attorney-client relationships and attorney-client communications.
- Chapter 12 introduces the content requirement, and Chapter 13 discusses the attorney-client privilege protection's limitation to communications that primarily relate to clients' request for legal advice.
- Chapter 14 discusses lawyers' role as legal advisors, and Chapter 15 discusses particular communications regardless of the communications' client-lawyer direction.
- Chapter 16 discusses the privilege's application to clients' communications to lawyers, and Chapter 17 discusses communications running the other way.
- Chapter 18 discusses what is called the "crime-fraud exception," which denies privilege protection for communications that further a client's crime or serious wrongdoing.

1.6 Context of Communications

Chapters 19 through 21 address communications' context, rather than their content.

- Chapter 19 discusses the effect of third parties' presence during otherwise privileged communications, which generally aborts the privilege.
- Chapter 20 discusses the "joint defense" or "common interest" doctrine, which stands as an exception to the normally destructive participation of a third party in privileged communications.
- Chapter 21 discusses the privilege's evaporation when clients intend to disclose communications to those outside the attorney-client relationship.

1.7 Privilege Protection for Internal Corporate Investigations

Chapter 22 discusses privilege protection in two specific contexts: corporate investigations and insurance.

1.8 Waiver of the Privilege

Chapters 23 through 32 address the topic of waiver, in which disclosure of a pre-existing privileged communication usually destroys the privilege protection.

- Chapter 23 introduces these chapters, and Chapter 24 discusses the power to waive privilege protection.

- Chapter 25 discusses basic principles governing express waiver, which involves the actual disclosure of privileged communications.

- Chapter 26 discusses intentional express waiver, and Chapter 27 discusses inadvertent express waiver.

- Chapter 28 discusses implied waiver, which can result from reliance on the fact of a communication even without its disclosure.

- Chapter 29 discusses the most extreme form of implied waiver, called the "at issue" doctrine -- under which litigants' affirmative assertion can waive the privilege, even if the litigants do not disclose, rely on or even refer to privileged communications.

- Chapter 30 discusses the circumstances in which a waiver can trigger the requirement to disclose additional privileged communications (called a "subject matter waiver"), and Chapter 31 discusses the scope of such a subject matter waiver.

- Chapter 32 discusses various new laws, rules, and other public policy issues involving the privilege.

1.9 Work Product Protection

Chapters 33 through 38 begin the discussion of the work product doctrine.

- Chapter 33 discusses that doctrine's history, and important differences between that doctrine and the attorney-client privilege.

- Chapter 34 discusses who can create protected work product, and Chapter 35 discusses basic work product principles.

- The three basic work product elements are "litigation" (discussed in Chapter 36), "anticipation" (discussed in Chapter 37) and "motivation" (discussed in Chapter 38).

1.10 Protected Content

Chapters 39 through 42 address work product's content.

- Chapter 39 discusses basic content principles.

- The next two chapters focus on two different varieties of work product: fact work product (discussed in Chapter 40) and opinion work product (discussed in Chapter 41).

- Chapter 42 discusses possible opinion work product protection for the identity of facts, documents, witnesses, etc., that do not intrinsically deserve their own privilege or work product protection (often called the Sporck doctrine).

1.11 Protection for Internal Corporate Investigations

Chapter 43 discusses work product protection in the two specific contexts of corporate investigations and insurance.

1.12 Overcoming Work Product Protection

Chapters 44 through 46 address an issue that does not arise in the attorney-client privilege protection -- an adversary's ability to overcome a litigant's work product protection.

- Chapter 44 discusses basic principles governing this concept.

- The next two chapters focus on the elements for overcoming litigants' fact work product protection (discussed in Chapter 45) or opinion work product protection (discussed in Chapter 46).

1.13 Waiver of the Work Product Protection

Chapters 47 through 50 address waiver principles in the work product context.

- Chapter 47 discusses the power to waive the protection, and the significant differences between work product and attorney-client privilege waiver.

- Chapter 48 discusses intentional and inadvertent express waiver, implied waiver, and at issue waiver principles in the work product context.

- Chapter 49 discusses the special rules governing waiver when dealing with testifying and non-testifying experts.

- Chapter 50 discusses subject matter waiver.

1.14 Litigation Overview

Chapters 51 through 60 address the substantive and logistical ramifications of litigants' assertion of, and litigation involving, both the attorney-client privilege and the work product doctrine protection.

- Chapter 51 introduces these issues, and provides an overview of Chapters 52 through 60.

1.15 Source and Choice of Law

Chapters 52 and 53 address the source of, and choice of law governing, attorney-client and work product doctrine protections, respectively.

1.16 Asserting the Protections

Chapters 54 through 56 address litigants' assertion of privilege and work product protection.

- Chapter 54 discusses litigants' collection and withholding of protected communications or documents, as well as their objections and redaction of protected parts of otherwise unprotected communications or documents.

- Chapter 55 discusses privilege logs.

- Chapter 56 discusses evidentiary support for withheld communications and documents.

1.17 Litigating the Protections

Chapters 57 through 60 address litigation issues that can arise in connection with an attorney-client privilege or a work product doctrine assertion.

- Chapter 57 discusses standard burdens of proof and the effect of headers.

- Chapter 58 discusses specific types of discovery, including contention interrogatories, Rule 30(b)(6) depositions, discovery of lawyers, and adversaries' efforts to examine litigants' discovery responses (what could be called "discovery about discovery").

- Chapter 59 discusses courts' role in attorney-client privilege and work product doctrine litigation, including bifurcation; choice of judge to review withheld communications or documents; in camera review; and some courts' questionable activity in connection with privilege or work product determinations.

- Chapter 60 discusses the logistics and standards of review in the appellate context.

CHAPTER 2

ATTORNEY-CLIENT PRIVILEGE: INTRODUCTION AND BASIC PRINCIPLES

2.1 Introduction

The attorney-client privilege stands alone as the oldest and most important evidentiary protection.

- Lawyers should familiarize themselves with attorney-client privilege principles, because they can affect every communication in which a lawyer participates.

2.2 Ethics Duty of Confidentiality Contrasted

The attorney-client privilege protects communications between clients and their lawyers under certain circumstances.

In contrast, lawyers' ethics duty of confidentiality generally covers far more, usually any client-related information lawyers obtain during the attorney-client relationship.[1]

- Thus, the ethics duty covers information that courts generally do not find to be privileged, such as a clients' identity.

2.3 Societal Benefits and Costs of the Privilege

The attorney-client privilege provides societal benefits, but at a cost. [2.301]

The privilege arose in Roman times,[2] and later developed in English jurisprudence, before developing organically in every United States jurisdiction. [2.302]

The privilege benefits society by encouraging clients to freely share all pertinent information with their lawyers with the assurance that no third parties will ever discover what the clients said.

- This allows lawyers to guide clients toward lawful behavior, and resolve disputes. [2.303]

However, society pays a heavy price for this benefit, because the privilege undoubtedly hides the truth. [2.304]

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1 ABA Model Rule 1.6.

2 Evergreen Trading, LLC v. United States, 80 Fed. Cl. 122, 128 n.6 (Fed. Cl. 2007).

The tension between these competing societal interests reflects itself in the privilege's fragility and narrowness. [2.305]

The United States Supreme Court has emphasized the importance of certainty,[3] so clients feel safe in fully disclosing pertinent facts to their lawyers. [2.306]

2.4 The Privilege's Absolute Protection

The privilege generally provides absolute protection from disclosure to third parties. [2.401]

The vast majority of courts hold that this absolute protection prevents third parties from discovering the communications, even if they have substantial need or society would arguably benefit from disclosure. [2.402]

- This protection generally extends to disclosure of any sort, not just to admissibility of privileged communications in court. [2.403]

Some courts inexplicably take a different approach, but New Jersey seems to be the only jurisdiction that does not extend absolute protection. [2.404]

2.5 Clients' and Lawyers' Inability to Create or Disclaim Privilege Protection

Clients and lawyers cannot create privilege protection where the law does not recognize it, and cannot even disclaim privilege protection if the law provides such protection. [2.501]

Clients' subjective belief that the privilege applies does not assure privilege protection.[4] [2.502]

Similarly, parties cannot agree that the privilege applies to their communications.

- The law either supplies the protection, or it does not. [2.503]

In fact, parties cannot even disclaim privilege protection if the law would otherwise protect the communications.[5] [2.504]

2.6 Consensus Formulation

Nearly every court agrees on a consensus formulation for the attorney-client privilege protection.

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[3] Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

[4] In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921, 923 (8th Cir.), cert. denied, 521 U.S. 1105 (1997).

[5] Sinclair Oil Corp. v. Texaco, Inc., 208 F.R.D. 329 (N.D. Okla. 2002).

- The privilege can protect communications between clients and their lawyers in a confidential setting, if the communications relate to legal advice and do not further a crime or fraud, as long as the privilege has not been waived.

2.7 Key Elements of the Privilege

The attorney-client privilege rests on:

- Intimacy of the attorney-client relationship.
- Confidentiality within that intimate relationship.
- Communications within that intimate relationship.

2.8 Types of Privileged Communications

The attorney-client privilege can protect two types of communications from clients to their lawyers, and two types of communications going the other way.

Clients:

- Give their lawyers facts the lawyers need in order to give legal advice.
- Ask for legal advice.

Lawyers:

- Ask their clients for facts the lawyers need.
- Give legal advice.

2.9 Current Trends and the Future

Some recent developments seem to favor the law's recognition of an absolute attorney-client privilege protection.

- No state has followed New Jersey in finding what amounts to a "public interest" exception.
- Federal courts continue to recognize the privilege's protection in most traditional contexts.

However, there have also been troubling signs.

- Some courts refuse to protect the factual portions of privileged communications, or preliminary drafts of documents whose final version will be disclosed outside the intimate attorney-client relationship.

- Federal courts have been dramatically curtailing the availability of interlocutory appellate review of trial court orders requiring disclosure of privileged communications.

Overall, the attorney-client privilege is alive and well.

CHAPTER 3

CLIENTS: INTRODUCTION AND BASIC PRINCIPLES

3.1 Introduction

Under the standard formulation as reflected in all the case law, the attorney-client privilege protection depends on the involvement of clients.

- In some limited circumstances, clients' agents are considered inside the privilege protection. Chapter 8 discusses that issue.

3.2 Existence of an Attorney-Client Relationship

Substantive law determines if an attorney-client relationship exists.[6]

3.3 Client's Actions and Uncommunicated Statements

In some situations, the privilege can protect from disclosure clients' acts, demeanor, and even uncommunicated statements.

- Chapter 12 discusses the first two issues, and Chapter 16 discusses the third issue.

3.4 Client's Ownership of the Privilege

Every court agrees that clients own the attorney-client privilege.

- This contrasts with clients' and lawyers' joint ownership of the work product doctrine protection. Chapter 34 discusses that issue.

As clients' agents and fiduciaries, lawyers must assert the privilege on all available occasions and take care not to waive it.[7]

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[6] ABA Model Rule, Scope [17].

[7] Via Techs., Inc. v. SONICBlue Claims, LLC, 782 F. Supp. 2d 843, 867 (N.D. Cal. 2011).

CHAPTER 4

CLIENT RELATIONSHIPS

4.1 Introduction

The privilege can protect communications between lawyers and prospective, individual, governmental, and institutional clients.

4.2 Prospective Clients

In some circumstances prospective clients can claim privilege protection for their communications with lawyers they do not ultimately retain. [4.201]

- Under the majority rule, the privilege protects communications with prospective clients who engage in confidential communications with lawyers who have invited such communications and who explicitly or implicitly agree to keep them confidential even if the prospective clients did not retain the lawyers.[8] [4.202]

In addressing the parallel ethics duty of confidentiality, and thus presumably also applying to privilege protection, the ABA Model Rules and most states' ethics rules do not protect unsolicited electronic or other communications to lawyers.[9] [4.203]

4.3 Individual Clients

Individual clients obviously can enjoy privilege protection for their communications in the proper circumstances. [4.301]

Courts generally recognize that the privilege protection extends beyond the attorney-client privilege relationship, and even beyond individual clients' death.[10] [4.302]

Courts disagree about individual clients' successors' control of the privilege.

- In contrast to the usual rule in the corporate context, bankrupt individuals' trustees do not necessarily control the individuals' privilege protection. Chapter 24 discusses that issue. [4.303]

- Courts also disagree about ownership of deceased individual clients' privilege protection. Chapter 24 discusses that issue. [4.304]

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[8] Ceglia v. Zuckerberg, No. 10-CV-00569A(F), 2012 U.S. Dist. LEXIS 55367, at *16 (W.D.N.Y. Apr. 19, 2012).

[9] ABA Model Rule 1.16.

[10] Swidler & Berlin v. United States, 524 U.S. 399 (1998).

In some limited circumstances, individual clients' agents can be inside privilege protection.

- Chapter 8 discusses that issue. [4.305]

4.4 Government Entities as Clients

Government entities can enjoy privilege protection for communications with their lawyers. [4.401]

- Examples include: city, county, federal government agency, school district, township, state, military command, association of municipalities.

Given the special nature of the government, special privilege principles often apply to such communications. [4.402]

- The privilege normally does not protect communications that amount to public policy advice.[11]

- The privilege generally does not extend to communications that are part of an adjudicative process that must be open to the public.

- The privilege usually does not protect communications between government lawyers and employees that carry the force of law.

Similar to the rule in the corporate context, it can be very difficult for individual government employees to claim that they are personally represented by government's lawyers.[12] [4.403]

- Chapter 24 discusses individual government employees' power to waive the government's privilege protection. [4.404]

Federal and state freedom of information act statutes and regulations often parallel common law attorney-client privilege protection. [4.405]

4.5 Non-Corporate Institutional Clients

Very few cases deal with privilege protection for non-corporate institutional clients.

Courts have found that some institutions can enjoy attorney-client privilege protection.

- Examples include: partnerships,[13] unincorporated associations.[14]

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[11] Pritchard v. Cnty. of Erie (In re Cnty. of Erie), 473 F.3d 413, 417 (2d Cir. 2007); Reed v. Baxter, 134 F.3d 351, 357 (6th Cir.), cert. denied, 525 U.S. 820 (1998).

[12] In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921, 923 (8th Cir.), cert. denied, 521 U.S. 1105 (1997).

CHAPTER 5

JOINT CLIENTS

5.1 Introduction

Lawyers representing multiple clients on the same matter face a number of complicated privilege issues.

5.2 Number of Jointly Represented Clients

Theoretically, there is no limit on the number of clients a lawyer can jointly represent on the same matter.

- One court held that the privilege protected a lawyer's mailings to thousands of joint clients.[15]

5.3 Existence of a Joint Representation

Substantive law defines whether a joint representation exists. [5.301]

As with any other type of representation, there must be a "meeting of the minds" on the existence of joint representation. [5.302]

- Courts examine documentary evidence and the parties' reasonable expectation in determining if a joint representation exists.[16]

In some situations an arguable joint client can successfully argue that a joint representation did not exist. [5.303]

- This almost always involves corporations arguing that their lawyers did not jointly represent a corporate affiliate or a corporate employee. Chapter 6 discusses that issue.

Third parties rarely if ever succeed in arguing that a joint representation did not exist, as long as the joint clients defend its existence. [5.304]

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[13] Opus Corp. v. IBM Corp., 956 F. Supp. 1503, 1508 (D. Minn. 1996).

[14] United States v. Duke Energy Corp., No. 1:00CV1262, 2012 U.S. Dist. LEXIS 59565, at *35 (M.D.N.C. Apr. 30, 2012).

[15] S. Scrap Material Co. v. Fleming, Civ. A. No. 01-2554 SECTION: "M" (3), 2003 U.S. Dist. LEXIS 13558, at *14, *16 (E.D. La. July 29, 2003).

[16] Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd., 150 F.R.D. 648, 652-53 (N.D. Cal. 1993); FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000).

- For instance, one court rejected the government's argument that a joint representation could not have existed between a company's buyer and seller who had an active dispute about the sale -- finding that the two clients were entitled to hire the same lawyer in an effort to resolve the dispute.[17]

- This general principle means that even joint clients with some arguable adverse interests can usually assure privilege protection for their communications by entering into a joint representation, which generally cannot be challenged by a third party.

5.4 Effect of a Joint Representation: Ethics Rules

A joint representation obviously implicates a number of ethics rules. [5.401]

Of course, each joint client deserves the joint lawyer's loyalty. [5.402]

This usually means that if direct adversity develops between the joint clients, the lawyer must withdraw from representing all of the joint clients.

- However, the ethics rules permit the joint clients in nearly any situation to consent to such adversity, and even consent in advance to later direct adversity.

The other effect of a joint representation involves what could be called "information flow." [5.403]

- As a matter of ethics, the ABA Model Rules contain a confusing set of provisions -- advising lawyers to warn their joint clients that there generally can be no secrets among them, but then apparently requiring lawyers to maintain the confidentiality of information that one joint client shares with the lawyer, but does not want shared with the other joint clients.[18]

- The Restatement seems to explicitly adopt a "no secrets" approach, but even that is not very clear.[19]

5.5 Effect of a Joint Representation: Privilege Principles

In addition to ethics implications, joint representations have a number of attorney-client privilege implications. [5.501]

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17 Oppliger v. United States, Nos. 8:06CV750 & 8:08CV530, 2010 U.S. Dist. LEXIS 15251, at *14 (D. Neb. Feb. 8, 2010).

18 ABA Model Rule 1.7 cmt. [31].

19 Restatement (Third) of Law Governing Lawyers § 60 cmt. l (2000).

It is clear that the privilege can protect communications between the joint lawyer and any of the joint clients about the pertinent joint matter, or all of them communicating together. [5.502]

Communications between the joint clients (not involving a lawyer) can sometimes deserve privilege protection, if the clients are formulating a question to pose to their joint lawyer or one joint client is relaying the lawyer's advice to another joint client. [5.503]

- This usually comes up in the corporate context, when corporate employees communicate directly with each other. Chapter 16 discusses that issue.

Another generally accepted principle normally allows any joint client equal access to the joint lawyer's files. [5.504]

- This can become very important if there is a falling out among the joint clients. Chapter 24 discusses that issue.

5.6 Waiver in Joint Representations

Chapter 24 discusses each joint client's power to waive her own communication.

5.7 Adversity Among Jointly Represented Clients

Chapter 24 discusses the effect of adversity developing among joint clients.

5.8 Comparison to Common Interest Agreements

A joint representation differs dramatically from a joint defense/common interest agreement. [5.801]

- Chapter 20 discusses the latter.

In a joint representation, the same lawyer represents multiple clients.

- Under common interest arrangements, each client participant retains his or her own lawyer.

The main advantage of a joint representation is that it assures privilege protection. [5.802]

- The main disadvantage involves ethics issues, some of which may preclude a joint representation altogether, or require the lawyer's withdrawal if adversity develops.

- Some of the ethics issues can be resolved with consents or prospective consents.

There are several advantages and disadvantages of a common interest agreement, compared to a joint representation. [5.803]

The advantages of a common interest agreement over a joint representation include:

- A common interest agreement can offer protection among separately represented clients with adverse interests; a common interest agreement does not require sharing of privileged communications among the participants; adversity among the common interest participants does not entitle one participant to learn about another participant's private privileged communications with his or her own lawyer; in the case of adversity, a lawyer representing a common interest participant is more likely to be allowed to continue representing his or her client.

The disadvantages of a common interest agreement over a joint representation include:

- Most courts require the participants to be in or anticipate litigation; courts disagree about the type and degree of commonality required for an effective common interest agreement; courts sometimes select their own date for a common interest agreement's effectiveness; a common interest agreement is more likely to draw a third party's challenge; common interest participants will not know in advance which court will handle such a third party's challenge; common interest participants will not know until it is too late whether their agreement has been effective to avoid a waiver; the chance that common interest participants will have waived the privilege, resulting in a subject matter waiver.

Chapter 20 discusses that issue in more detail.

Clients and their lawyers deciding to use a joint representation rather than a common interest agreement to maximize privilege protection have a number of options.

- The clients can hire a new law firm to jointly represent them, but in that scenario the clients' own lawyers' participation in the communications might jeopardize privilege protection.

- The clients can select one of their law firms to jointly represent all the clients -- but in that scenario the presence of the other clients' lawyers might jeopardize the privilege.

- The safest course might be to have all clients' law firms jointly represent all the clients. This scenario creates conflicts issues, which usually can be addressed through prospective consents.

CHAPTER 6

CORPORATE CLIENTS

6.1 Introduction

The attorney-client privilege in the corporate context implicates a number of often subtle and complicated principles. [6.101]

Every court agrees that corporations can enjoy privilege protection for certain communications with their lawyers.[20] [6.102]

- However, most courts apply a heightened level of scrutiny whenever a corporation claims privilege protection. [6.103]

6.2 Defining the "Client" Within a Corporate Entity

As in every situation, lawyers must properly identify the "client" in the corporate context. [6.201]

The law's "default" position is that the "client" in a corporate setting is the incorporeal entity itself.[21] [6.202]

- However, with an explicit agreement, lawyers can instead enter into an attorney-client relationship with a corporation's consultant or component, such as the board of directors, a subset of the board such as a special committee, etc.[22] [6.203]

Lawyers representing a corporate entity do not automatically represent its owners, although in the case of a closely held corporation it can be difficult to distinguish between a representation of the entity and of its owners.

6.3 Communications Within a Corporate Family

Within a corporate family, lawyers must also define the "client." [6.301]

Most courts find that the privilege protects communications between a corporation's lawyers and employees of wholly owned corporate affiliates.[23] [6.302]

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[20] Keating v. McCahill, Civ. A. No. 11-518, 2012 U.S. Dist. LEXIS 91179, at *8 (E.D. Pa. June 28, 2012).

[21] ABA Model Rule 1.13.

[22] Ex parte Smith, 942 So. 2d 356 (Ala. 2006).

[23] Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 370 (3d Cir. 2007).

- Examples include: corporations related through common ownership and control; a corporation's wholly owned subsidiary; the 90-percent owner of an affiliated entity; wholly owned or majority-owned subsidiary; three grandchild subsidiaries for which the parent took legal responsibility; subsidiary making disclosures to its parent (without reference to the percentage ownership); affiliated corporation; parent corporation, subsidiaries, and affiliates; related corporations.

Some courts take a narrower approach, and either require lawyers to jointly represent those corporate affiliates to earn privilege protection, or protect only communications in which the corporate affiliates share a common legal interest.[24] [6.303]

Lawyers can maximize privilege protection by jointly representing corporate affiliates, or entering into a common interest agreement if the other affiliates have their own lawyers -- but those arrangements implicate conflicts of interest and other ethics issues. [6.304]

6.4 Effect of Corporate Stock Transactions

Corporate transactions involving the sale of a corporate affiliate's stock involve privilege implications. [6.401]

Nearly every court recognizes that the sale of a corporation's stock to a new owner does not change the identity of the lawyer's "client" -- the corporation itself.[25]

Lawyers who jointly represent a corporate parent and an affiliate in the latter's sale or spin-off can face standard joint representation issues (discussed in Chapters 5 and 24). [6.402]

- Those can include the requirement to share lawyers' files with the newly-independent affiliate (now a former joint client), and the possibility of being disqualified from representing the parent in a dispute with its former affiliate.

Other rules and statutes might also apply in this setting. [6.403]

- Some state laws govern the ownership of files after such transactions.

6.5 Effect of Corporate Asset Transactions

The sale of a corporation's assets also implicates privilege principles. [6.501]

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[24] Bowne, Inc. v. AmBase Corp., 150 F.R.D. 465, 491 (S.D.N.Y. 1993).

[25] McCaugherty v. Siffermann, 132 F.R.D. 234, 245 (N.D. Cal. 1990).

Most courts formerly followed what is called the "bright-line" test, under which the sale of corporations' assets did not transfer the privilege's ownership to the assets' purchaser. [6.502]

- This contrasted with the sale of corporations' stock.

In recent years, courts have increasingly applied what they call the "practical consequences" test -- under which the privilege can transfer to the assets' purchaser. [6.503]

- This approach began in the context of a purchaser buying substantially all of a bankrupt company's assets and continuing in the same business, but now has spread to more ordinary transactions.[26]

6.6 Representation of Corporate Affiliates in the Transaction

Lawyers' joint representation of a corporate parent and an affiliate in the former's sale of the latter's stock or assets can have dramatic consequences. [6.601]

In a number of cases, lawyers representing corporate parents have unsuccessfully argued that they did not also jointly represent the affiliate whose stock or assets the parent sold.[27] [6.602]

- This failure resulted in the ability of the affiliate's purchaser (or the bankruptcy trustee succeeding to the bankrupt affiliate's privilege rights) to access the joint lawyers' files related to the transaction.[28]

6.7 Agreements Altering the Privilege's Ownership

Some courts have stated that lawyers can alter these general principles by adding provisions in stock or asset transactional documents. [6.701]

Courts generally recognize that lawyers can avoid a joint representation of the parent and the affiliate whose stock or assets are being sold, which eliminates the joint representation implications (including the affiliate's later access to the lawyer's files). [6.702]

Courts have also suggested other possible steps to alter the general rules, such as excluding power over the privilege from the assets being sold, or adding a prospective consent to any transactional documents.[29] [6.703]

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26 Orbit One Commc'ns, Inc. v. Numerex Corp., 255 F.R.D. 98 (S.D.N.Y. 2008).

27 In re Mirant Corp., 326 B.R. 646, 649 (Bankr. N.D. Tex. 2005).

28 In re Crescent Resources, LLC, 457 B.R. 506 (Bankr. W.D. Tex. 2011).

29 Girl Scouts-Western Okla., Inc. v. Barringer-Thomson, 252 P.3d 844, 847, 849 (Okla. 2011).

- Other courts have held that such parties generally cannot control the privilege's ownership, which is instead governed by operation of law.[30]

The transfer of privileged communications to a corporation's buyer in a sale transaction usually does not waive either the seller's or the buyer's privilege protection.[31] [6.704]

Unfortunately, most of these judicial suggestions about altering the privilege's ownership have not actually been tested in later litigation. [6.705]

- So it remains uncertain whether lawyers representing transactional parties can assure different treatment of the privilege after such transactions.

6.8 Bankrupt and Defunct Corporations

Corporations' bankruptcy or dissolution has privilege implications. [6.801]

Under the general rule, the entity stepping into the shoes of management generally controls the privilege when companies declare bankruptcy.[32] [6.802]

- Examples include: trustee in bankruptcy, receiver for an insolvent corporation, bankruptcy trustee of a bankrupt limited partnership, debtor-in-possession, liquidating trust, liquidator for an insurance company, FDIC as a bank receiver.

Courts disagree about whether defunct corporations can assert any privilege. [6.803]

- That question becomes important if an adversary seeks privileged communications from some third party such as the law firm, which had represented the now-defunct company.

- Courts have also discussed whether the privilege survives bankruptcy committees' disbanding. [6.804]

6.9 Separate and Joint Representations of Employees

Given the unique nature of the corporate context, courts have addressed lawyers' ability to jointly represent a corporation and its employees. [6.901]

- Determining whether lawyers jointly represent any multiple clients implicates privilege principles, because each client normally shares power over the privilege. [6.902]

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30 Trading Techs. Int'l, Inc. v. GL Consultants, Inc., Civ. A. Nos. 05-4120 & -5164, 2012 U.S. Dist. LEXIS 34489, at *19 (N.D. Ill. Mar. 14, 2012).

31 Martinez-Hernandez v. Butterball, LLC, No. 5:07-CV-174-H(2), 2011 U.S. Dist. LEXIS 112043, at *9-10 (E.D.N.C. Sept. 29, 2011).

32 Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349 (1985).

Most courts permit corporations' lawyers to intentionally represent company employees in non-corporate matters. [6.903]

- These are usually separate representations, rather than joint representations on the same matter.

It might be theoretically possible for corporations' lawyers to intentionally represent a corporate employee in a separate representation involving corporate matters. [6.904]

- However, such separate representations can create conflicts of interest risks.[33]

Corporate lawyers should carefully avoid accidentally creating a separate representation of an employee on a corporate matter. [6.905]

- Such representations give power over the privilege to the employee, rather than to the corporate client.

Corporate lawyers can also jointly represent a corporation and its employees on the same matter. [6.906]

- For instance, lawyers frequently represent a corporation and a senior executive jointly sued by a third party.

As with separate representations, lawyers should carefully avoid accidentally creating such joint representations on corporate matters. [6.907]

- Disclaiming such joint representations usually involve lawyers giving so-called Upjohn warnings (discussed below).

Because corporate lawyers constantly work with corporate employees who might have a selfish interest in seeking some power over the privilege normally applicable to their communications, most courts make it very difficult for such employees to successfully claim a separate or a joint representation on corporate matters. [6.908]

- Many courts call this the Bevill standard.[34]

Under the Bevill standard, corporate employees seeking to prove either a joint or separate attorney-client relationship with the company's lawyer must satisfy an exacting standard.

- Such employees normally must establish that the employee approached the corporation's attorney for legal advice; the employee made it clear that

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[33] United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

[34] In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1986).

the request had to do with matters that arose in his or her individual capacity; the attorney understood this request and advised on the matter even though there was a potential for conflict; these communications were confidential; the subject matter of the communication did not concern a more general corporate matter.

- The last element is most important -- the communications usually may not relate to the employees' duties on the corporations' behalf.[35]

6.10 "Control Group" Standards for Communications

Given corporations' incorporeal nature, corporate lawyers obviously must communicate with corporations' individual constituents -- which implicates privilege issues. [6.1001]

Most courts formerly followed what they called the "control group" standard, under which the privilege protected only lawyers' communications with the upper corporate management who acted on lawyers' advice. [6.1002]

- Only Illinois and a few other states continue to follow this "control group" standard.[36]

All but a handful of states now follow what courts call the Upjohn standard, named for a United States Supreme Court decision.[37] [6.1003]

- Under the Upjohn standard, the privilege can protect corporations' lawyers' communications with any level of corporate employee, as long as that employee possess facts that the lawyer needs before advising corporate clients. [6.1004]

This usually involves corporations' lawyers providing what they often called an "Upjohn warning" to employees with whom lawyers communicate.

- The typical "Upjohn warning" contains two elements -- one of which focuses on ethics and one of which focuses on privilege protection.

- An "Upjohn warning" should note that the lawyer represents the company and not the employee; confirm that the employee has information not generally available elsewhere, which the lawyer needs in order to give advice to the corporate client; advise the employee not to disclose the communication's substance, except to other employees with a need to know.

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35 In re Grand Jury Subpoena, 274 F.3d 563, 573-74 (1st Cir. 2001).

36 Jentz v. ConAgra Foods, Inc., Case Nos. 10-cv-0474- & -0952-MJR-PMF, 2011 U.S. Dist. LEXIS 127546, at *7 (S.D. Ill. Nov. 3, 2011).

37 Upjohn Co. v. United States, 449 U.S. 383 (1981).

The Upjohn standard is not self-executing -- lawyers must satisfy the standard to assure privilege protection.

- Corporations' lawyers' failure to properly satisfy the Upjohn standard can forfeit the privilege protection's availability.[38]

Not surprisingly, employees' personal lawyers' presence during what would otherwise be privileged communications can affect the privilege protection's availability. [6.1005]

- Chapter 19 discusses that issue.

Employee-to-employee communications without a lawyer's involvement can deserve privilege protection in certain limited circumstances. [6.1006]

- Chapter 16 discusses that issue.

Widespread intracorporate circulation of privileged communications can either abort or waive the privilege. [6.1007]

- Chapters 19 and 26 discuss that issue.

- Chapter 15 discusses some courts' conclusion that such a widespread intracorporate distribution means that the communications were primarily business rather than legal-related, and therefore do not deserve privilege protection ab initio.

Employees using their employers' computers for their personal privileged communications usually forfeit their privilege protection. [6.1008]

- Chapter 19 discusses that issue.

State ethics rules govern adversaries' ability to communicate ex parte with corporate litigants' employees.[39] [6.1009]

- Most states follow an ethics parallel to the "control group" test -- permitting such ex parte communications except with corporate litigants' upper management.

6.11 "Need to Know" Standard for Communications

The "need to know" standard within a corporation can affect several privilege issues. [6.1101]

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[38] Lewis v. Wells Fargo & Co., 266 F.R.D. 433, 445 (N.D. Cal. 2010); Clarke v. J.P. Morgan Chase & Co., No. 08 Civ. 02400 (CM) (DF), 2009 U.S. Dist. LEXIS 30719, at *6 (S.D.N.Y. Apr. 10, 2009); Deel v. Bank of Am., N.A., 227 F.R.D. 456, 461 (W.D. Va. 2005).

[39] ABA Model Rule 4.2.

Determining whether employees have a "need to know" can affect several privilege determinations. [6.1102]

- Examples include whether the privilege protects communications with such an employee; whether the employee's presence during otherwise privileged communications aborts the privilege; whether disclosure of pre-existing privileged communications to the employee waives the privilege.

In contrast to the Upjohn standard, the "need to know" standard focuses on lawyers' provision of legal advice. [6.1103]

- For instance, the Upjohn standard might protect a lawyer's communications with a janitor who saw a guest slip on a wet floor, but the "need to know" standard probably excludes the janitor -- because he or she does not need to know the lawyer's analysis of the corporation's liability. [6.1104]

In contrast to the "control group" standard, the "need to know" standard applies to employees at any level who need lawyers' advice.[40]

- For instance, lower-level sales employees who do not make corporate decisions may have a "need to know" lawyers' advice about avoiding antitrust problems.

Courts disagree about how broadly the "need to know" standard applies.[41] [6.1105]

- Some courts essentially allow corporations to decide for themselves which employees meet the "need to know" standard.[42]

Most courts require evidentiary support for including employees within the "need to know" standard.[43] [6.1106]

- Some courts require corporations to prove that every employee involved in intracorporate communications met the "need to know" standard.[44]

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[40] Delta Fin. Corp. v. Morrison, No. 011118/2003, 2007 N.Y. Slip Op. 51955U at 4 (N.Y. Sup. Ct. Oct. 11, 2007).

[41] Verschoth v. Time Warner Inc., No. 00 Civ. 1339 (AGS) (JCF), 2001 U.S. Dist. LEXIS 3174, at *6-7 (S.D.N.Y. Mar. 22, 2001).

[42] FTC v. GlaxoSmithKline, 294 F.3d 141, 145 (D.C. Cir. 2002).

[43] In re N.Y. Renu with Moistureloc Prod. Liab. Litig., MDL No. 1785, C/A No. 2:06-MN-77777-DCN, 2008 U.S. Dist. LEXIS 88515 (D.S.C. May 6, 2008).

[44] Orion Corp. v. Sun Pharm. Indus., Ltd., Civ. A. Nos. 07-5436 & 08-5545 (MCC), 2010 U.S. Dist. LEXIS 15975 (D.N.J. Feb. 18, 2010).

In contrast to the fragile attorney-client privilege, the work product doctrine normally permits nearly any employee to share work product without losing that more robust protection. [6.1107]

- Chapter 48 discusses that issue.

It makes the most sense to give corporations a wide berth in defining for themselves which of their employees have a "need to know." [6.1108]

6.12 Communications with Former Employees

Corporations' lawyers occasionally communicate with former corporate employees, which can implicate privilege protection. [6.1201]

Most courts protect such communications -- as long as they focus on former employees' time at the company.[45] [6.1202]

- This is a logical extension of the Upjohn standard, which does not look at employees' place in the corporate hierarchy -- but instead assesses whether the employees (or former employees) possess facts lawyers need before advising corporate clients.

Corporations' lawyers can usually assure privilege protection by jointly representing corporations and former employees, but that carries the same conflict and other ethics implications of any other joint representations. [6.1203]

Former employees' personal lawyers' presence during otherwise privileged communications can abort the privilege. [6.1204]

- Chapter 19 discusses that issue.

The work product doctrine can provide a separate protection for corporations' lawyers' communications with former employees. [6.1205]

- Chapter 41 discusses that issue.

The ethics rules generally permit adversaries' ex parte communications with former corporate employees, even if they were in upper management when they were employed. [6.1206]

Courts disagree about former directors', officers' and employees' right to obtain privileged documents to which they had access while at the company. [6.1207]

- Most courts hold that corporations can deny such access.[46]

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[45] Peralta v. Cendant Corp., 190 F.R.D. 38, 41 (D. Conn. 1999).

Chapter 26 discusses privilege waiver issues involving former employees. [6.1208]

6.13 Communications with Independent Contractors

A welcome expansion of privilege protection in the corporate context involves what courts call the Bieter doctrine. [6.1301]

The Bieter doctrine can extend privilege protection to communications with third parties who are the "functional equivalent" of employees.[47]

- Most courts have adopted this doctrine, normally applying a multi-part test in analyzing its application.[48] [6.1302]

- Some courts take a much narrower view.

Some courts find that third parties are the "functional equivalent" of employees. [6.1303]

- Examples include independent contractor assisting in film production; day-to-day manager of a business entity; pharmaceutical consulting firm; public relations consultant; advisor assisting a company with a patent prosecution; independent contractor who assisted a company in developing "an automated nucleic acid detection system"; consultant delegated the job of communicating on the company's behalf "in order to obtain legal advice for the company"; company's "functional CFO"; architect and construction management company employee assisting a real estate project; insurance company's founder and current consultant; consultant whose company managed the plaintiff's business, including overseeing its operations and sales of a product that was at issue in the litigation; consultant who wrote up a patent for an invention; two advisors and consultants to a board of trustees, who "performed functions that would have been performed by high-level managers with significant responsibilities had [the company] conducted its business in a more traditional corporate setting"; Chief of Cardiology for a practice group, even though he only worked twenty hours per month at the practice and also had a "full-time position with a private cardiology group"; company consultant who was a former lawyer for the company; employees of two consulting companies which assisted a party in preparing a bid; consultant/lobbyists assisting a casino in obtaining an Alabama bingo license; company accountant and tax consultant, even though he was employed by his own firm; client's consultant, who acted as the client's "eyes and ears" at a construction project; auto dealership's advisor who

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46 Dexia Credit Local v. Rogan, 231 F.R.D. 268, 278 (N.D. Ill. 2004).

47 In re Bieter Co., 16 F.3d 929, 938 (8th Cir. 1994).

48 Steinfeld v. IMS Health Inc., No. 10 Civ. 3301 (CS)(PED), 2011 U.S. Dist. LEXIS 142288, at * 9-11 (S.D.N.Y. Dec. 9, 2011).

performed site design and evaluation services, and investigated regulatory requirements covering the project site -- although the advisor had other clients and spent only about one quarter of his time on the dealership's project; advisor who assisted the defendant in negotiations, but who did not draw a salary, keep track of the time he worked for the defendant, or work in the defendant's office (but who "should be characterized as the functional equivalent of an executive, due to his high-level oversight of the company and his interest in the company's financial health."; a company's president's acquaintance, who was "intimately involved" in achieving the company's "chief objective, obtaining a patent"; government affairs consultant; a Colorado Department of Corrections independent contractor; nontestifying expert; consultants hired "for the express purpose of assisting with efforts" to sell a company.

Some courts find that third parties are not the "functional equivalent" of employees. [6.1304]

- Examples include talent agency employee; commercial real estate employee acting as a leasing agent; "independent equity compensation consultant"; environmental consultant; accountant; Whirlpool's advertising agencies; a company's financial consultant who apparently never used an office made available to him in defendant's premises, and who was able to "start and build a successful consulting business" despite spending 80-85 percent of his time working on a restructuring deal for the defendant; Duke University official appointed by MIT to conduct an investigation into an MIT student's suicide; a former 25-year employee, now acting as a full-time consultant; employees of a company providing computing, consulting, and other support services to credit card issuers, concluding the company "was merely a transaction processing and computer services corporation provided standard trade services" to the bank; an apartment complex's "managing agent"; employees of a consulting firm assisting GMAC in GMAC's investigation of the financial effect of the 9-11 attack on the World Trade Center; employees of the insurance broker for the World Trade Center's lessee, who participated in discussions with the lessee's employees after the 9-11 attack on the World Trade Center; former Home Depot independent contractor.

6.14 Communications with Agents/Consultants

In some rare situations, the privilege can protect communications involving corporations' agents or consultants, who are not the "functional equivalent" of employees.

- Chapter 8 discusses that issue.

- Chapter 19 discusses the effect of such agents' presence during otherwise privileged communications, and Chapter 26 discusses the waiver implications of disclosing privileged communications to such agents.

6.15 Shareholders' Right to Privileged Communications

Shareholders can sometimes gain access to privileged communications between a corporations' management and their lawyers.

- Chapter 7 discusses that issue, because that issue involves what courts call the "fiduciary exception."

CHAPTER 7

THE "FIDUCIARY EXCEPTION"

7.1 Introduction

In some situations, the law considers a fiduciary's lawyer's real "client" to be the beneficiary, rather than the fiduciary.

- This concept implicates the attorney-client privilege's ownership.

7.2 Historic Trust Principle

Traditional trust doctrine rooted in English law considered a trust's beneficiary to be the trustee's lawyer's real client.

- This approach meant that the trustee could not withhold from the beneficiary communications between the trustee and his or her lawyer about the trust's administration.

7.3 Shareholders' Right to Privileged Communications

Traditional English trust principles eventually merged with a somewhat parallel approach that United States courts initially took in derivative litigation. [7.301]

This doctrine is known as the Garner doctrine, named for a 1970 Fifth Circuit case.[49]

- In Garner, the court recognized that in some limited situations a corporation's shareholders should be considered the true "client" of the company's lawyer. [7.302]

This made sense in derivative lawsuits, in which the shareholders essentially step into the shoes of management and pursue some action that they claim management wrongfully failed to pursue.

- Many courts now accept the Garner doctrine.[50]

Some courts have rejected the Garner doctrine.[51] [7.303]

Unlike the traditional trust principle in which a trust's beneficiaries were nearly automatically entitled to seek communications between the trustee and its lawyer, the

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[49] Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971).

[50] Kosachuk v. Harper, C.A. No. 17928, 2000 Del. Ch. LEXIS 176, at *2 (Del. Ch. Dec. 9, 2000).

[51] Milroy v. Hanson, 875 F. Supp. 646, 651-52 (D. Neb. 1995).

Garner doctrine includes a requirement that shareholders establish "good cause" for access between management's communications with the company's lawyer. [7.304]

Courts disagree about whether plaintiffs seeking to apply the Garner doctrine have to prove that they were shareholders at the pertinent time. [7.305]

- The Garner doctrine recognizes that shareholders can renew their request for such access, based on changed circumstances. [7.306]

Courts disagree about the doctrine's application to work product. [7.307]

- Chapter 44 discusses that issue.

Some courts later expanded the Garner doctrine beyond derivative lawsuits -- applying the same basic principle even in shareholders' direct lawsuits against their company.[52] [7.308]

- However, some courts have rejected such an expansion.[53]

7.4 Naming the Expanded Doctrine

Courts relying on both the traditional trust principle and the more recent Garner doctrine eventually relied on their common theme in applying the same approach to other fiduciaries who receive legal advice about their fiduciary function.

- Courts began to use the broader label "fiduciary exception."

- This was an unfortunate term, because the approach is not really an "exception" to the attorney-client privilege. Instead, it essentially identifies the beneficiary of a fiduciary function as the real "client."

7.5 Courts' Continuing Debate about Applicability

Most federal courts recognize the fiduciary exception.[54]

- However, some courts do not recognize the fiduciary exception.[55]

State courts also disagree about the fiduciary exception's applicability.

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[52] Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412 (N.D. Ill. 2006).

[53] Blau v. Harrison (In re JP Morgan Chase & Co. Sec. Litig.), MDL No. 1783, Master Dkt. No. 06 C 4674, 2007 U.S. Dist. LEXIS 60095, at *27-28 (N.D. Ill. Aug. 13, 2007).

[54] Jicarilla Apache Nation v. United States, 88 Fed. Cl. 1 (Fed. Cl. 2009), rev'd on other grounds, 131 S. Ct. 2313 (2011).

[55] Murphy v. Gorman, 271 F.R.D. 296 (D.N.M. 2010).

- Several states have enacted statutes explicitly rejecting the exception's applicability to trusts.

7.6 Absence of "Good Cause" Requirement

In the expanded version of the fiduciary exception that many courts have adopted, beneficiaries do not have to satisfy the "good cause" standard included in the Garner doctrine.

7.7 Examples to which Exception Applies

Some courts apply the fiduciary exception to beneficiaries.

- Examples include ERISA plan beneficiaries, regarding administration of the plan; trust beneficiaries; a bankruptcy creditors' committee; non-union employees; estate beneficiaries; union members; presidential advisors; limited partners.

7.8 Examples to which Exception Does Not Apply

In contrast, some courts reject the fiduciary exception's application to other beneficiaries.

- Examples include an Indian Tribe, whose funds were managed by the United States Government; trust beneficiaries (seeking communications about litigation between the trustee and a beneficiary); a member of an LLC; a corporation affiliated with an insurer; a Chapter 7 beneficiary; an insolvent bank's trustee.

7.9 Limitation to Fiduciary Functions

Even at its broadest, the fiduciary exception only applies to otherwise privileged communications in which the fiduciary seeks advice about fiduciary functions.[56]

7.10 "Settlor Exception"

In the ERISA context, which has spawned the vast majority of fiduciary exception cases, courts agree that the exception does not apply to such non-fiduciary actions as establishing or terminating ERISA plans.[57]

- This is called the "settlor exception."

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[56] Baker v. Kingsley, Case No. 03 C 1750, 2007 U.S. Dist. LEXIS 8375, at *8-9 (N.D. Ill. Feb. 5, 2007).

[57] Allen v. Honeywell Ret. Earnings Plan, 698 F. Supp. 2d 1197, 1200 (D. Ariz. 2010).

- This name is doubly unfortunate, because it essentially involves an "exception" to the "fiduciary exception" -- which is not really an "exception."

7.11 "Liability Exception"

Courts applying the fiduciary exception in the ERISA context also generally acknowledge that ERISA beneficiaries are not entitled to see communications between the fiduciary and a lawyer about the fiduciary's possible liability.[58]

- This is called the "liability exception."

Applying this "liability exception" requires the court to determine when a fiduciary ceased to engage in ERISA plan administration, and instead began focusing on his or her own liability.

- Some courts apply the "liability exception" as soon as an ERISA administrator makes a decision about benefits, while some courts reject such a bright-line rule and instead engage in a fact-intensive analysis.[59]

7.12 Other Fiduciary Exception Issues

The fiduciary exception can also involve a waiver analysis.

- A fiduciary whose communications do not deserve privilege protection presumably is outside attorney-client privilege protection for waiver purposes.

7.13 Application to Law Firms

Some courts have pointed to lawyers' role as their clients' fiduciaries, and hold that law firms cannot withhold from disgruntled clients any internal law firm communications about possible malpractice, dealing with conflicts of interest, etc.

- Courts taking the broadest approach to this issue have denied law firms' privilege and work product protection claims for internal communications involving the firms' in-house general counsel.[60]

Some courts have rejected the fiduciary exception's application in the law firm setting.

- There seems to be a trend in favor of this narrow approach.[61]

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[58] Tebo v. Sedgwick Claims Mgmt. Servs., Inc., Civ. A. No. 09-40068-FDS, 2010 U.S. Dist. LEXIS 50834, at *9 n.5 (D. Mass. May 20, 2010).

[59] Tatum v. R.J. Reynolds Tobacco Co., 247 F.R.D. 488, 498 (M.D.N.C. 2008).

[60] Asset Funding Grp., L.L.C. v. Adams & Reese, L.L.P., Civ. A. No. 07-2965 SECTION "B"(4), 2009 U.S. Dist. LEXIS 48420 (E.D. La. June 4, 2009).

CHAPTER 8

CLIENT AGENTS/CONSULTANTS

8.1 Introduction

Perhaps the most counterintuitive and dangerous aspect of attorney-client privilege law involves client agents -- whose participation or later sharing in privileged communications normally aborts or waives the fragile attorney-client privilege protection.

- Most courts extend privilege protection only to client agents necessary for the transmission of privileged communications between the clients and their lawyers.

8.2 Characterization of Client Agents

The privilege implications of client agents can arise in three separate settings.

- When clients or their lawyers communicate with such agents.
- When such agents participate in otherwise privileged communications.
- When clients or their lawyers disclose pre-existing privileged communications to such agents.

Under the majority rule, in all three contexts the bottom line is the same -- if the client agent is outside privilege protection, the privilege is either unavailable or waived.

8.3 Client Agents Necessary to Transmit Communications

Courts agree that the privilege protects communications with client agents clearly necessary to transmit privileged communications.

- Examples include interpreter or translator required by the client to effectively communicate with a lawyer; member of the client's staff, such as a secretary or administrative assistant, who merely creates, transmits or files the privileged communications; mother acting as her incarcerated son's agent in arranging for a lawyer; representative of an incapacitated person, for example, parents of a quadriplegic assisting in finding a lawyer for their son; parents helping a minor child who requires legal advice or representation.

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[61] St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 746 S.E.2d 98 (Ga. 2013); RFF Family P'ship, LP v. Burns & Levinson, LLP, 991 N.E.2d 1066 (Mass. 2013).

8.4 Defining the Level of Necessity

Beyond client agents clearly necessary for the transmission of privileged communications, courts disagree about the standard for determining if a client agent is inside or outside privilege protection.

- The Restatement[62] and some courts find that the privilege extends to communications with, in the presence of, or shared with, client agents who assist the client in some way.

- Most courts take a far narrower view, and find that the privilege extends only to client agents necessary, or in some cases indispensable, to the transmission of privileged communications.

8.5 Client Agents Within Privilege Protection

Some courts take a broad approach, finding that the privilege protects communications with clients' agents.

- Examples include KPMG, JPMorgan Securities and other consultants assisting with a merger; third-party insurance administrator; insurance company employee arranging for a lawyer to represent an insured; accountant; fund manager; tax manager; third-party claims administrator; PWC, acting as a client's agent in communicating with the client's lawyer; investment advisor JPMorgan; insurance company adjustor; lay union representative; insured's insurance broker; third-party workers compensation claims administrator; client's daughter; client's investment banking firm Goldman Sachs; client's husband; company's in-house lawyer acting as agent for a customer; friend; agent hired by a client for purposes of her communications with attorneys; risk management analyst; company owner's son, who acted as his father's representative; financial and tax advisor; insurance agent; business consultant.

8.6 Client Agents Outside Privilege Protection

Some courts take a much narrower approach, finding that the privilege does not protect communications with clients' agents.

- Examples include father (although he was a lawyer); talent agency employee; company CEO's friend; union representative; financial advisor; JPMorgan, explaining that "feedback" about the transaction was "not enough to show that JPMorgan was necessary, or at least highly useful, in facilitating the legal advice"; accountant; client's son, because the client "has not demonstrated that [the son] was or is a 'necessary' agent.";

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62 Restatement (Third) of Law Governing Lawyers § 70 cmt. f (2000).

"representative," despite the litigant's argument that the agent was included in otherwise privileged communications "because of his knowledge of the facts."; management consultant; land purchase agent; on-site monitor of business operations; patent agent; treating physician who communicated with the client's lawyer; business consultant; corporate client's "lay adviser"; employment plaintiff's husband (whose emails "do not appear necessary to effectuate" the representation; insurance broker; valuation consultant; investigator; tax consultant; public relations consultant; managing agent for the client's apartment complex; insurance consultant; reorganization consultant; fellow law firm employee (unrelated to a request for legal advice); another lawyer not representing the client (and who was not a participant in a common interest arrangement); litigation consultant who was not assisting the lawyers; White House aide who sought privilege protection for notes of his conversations with journalists; investment banker; paralegal acting only as a friend; union official with whom police union members spoke before they hired a lawyer; presidential aide who claimed that the president needed him as an intermediary to effectively communicate with presidential lawyers; environmental consultant hired to formulate a remediation plan; consultant who prepared a government report.

8.7 Importance of a Choice of Law Analysis

Given states' different approaches to this issue, choosing the applicable law (discussed in Chapter 52) can have a dramatic impact.

- Some courts must choose between a state's law which takes the broad approach and another state's law that follows the majority narrow approach.[63]

8.8 "Functional Equivalent" Doctrine

Client agents who are the "functional equivalent" of corporate employees are usually inside privilege protection.

- Chapter 6 discusses that issue.

8.9 Change in Agents' Roles

To make matters more complicated, a client agent's role can change over time.

- An agent who is necessary for the transmission of privileged communications might later be unnecessary.

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[63] 3Com Corp. v. Diamond II Holdings, Inc., C.A. No. 3933-VCN, 2010 Del. Ch. LEXIS 126 (Del. Ch. May 31, 2010).

8.10 Client Agents Versus Lawyer Agents

In contrast to client agents, lawyers' agents can be inside the privilege protection if they assist the lawyer in providing legal advice.

- Chapter 10 discusses that issue.

8.11 Application of the Work Product Doctrine

Because the work product doctrine can protect documents prepared by or for a party or its "representative" under certain circumstances, client agents are nearly always inside work product protection.

- In some situations, a client agent's presence during otherwise privileged communications aborts the attorney-client privilege -- but the client agent's documents created during such communications deserve work product protection.[64]

The broader nature of work product doctrine protection means that the participation of friendly client agents in work product-protected activities does not abort that protection, and that disclosing work product to them does not waive that more robust protection.

- Chapters 47 and 48 discuss that issue.

8.12 Importance of Educating Clients

The very limited range of client agents inside privilege protection highlights one of the most counter-intuitive aspects of privilege law.

- Lawyers should educate their clients about the narrowness of the privilege, and the risks of involving client agents in privileged communications, or disclosing privileged communications to them.

[64] Nat'l Educ. Training Grp. v. Skillsoft Corp., No. M8-85 (WHP), 1999 U.S. Dist. LEXIS 8680, at *12-13 (S.D.N.Y. June 9, 1999).

CHAPTER 9

LAWYERS

9.1 Introduction

The attorney-client privilege's traditional formulation generally requires a lawyer's involvement.

9.2 Nonlawyers

Nonlawyers (not acting as clients) usually cannot enjoy privilege protection.

- For instance, clients clearly can represent themselves pro se -- but cannot engage in privileged communications while doing so.

9.3 Patent Agents

Courts disagree about the privilege's applicability to communications involving nonlawyer patent agents serving a function that is similar to that of lawyers.[65]

9.4 Nonlawyers Thought by Clients to be Lawyers

Clients generally can claim privilege protection for their communications with a nonlawyer they reasonably thought was a lawyer.

- The Restatement explains that even imposters posing as lawyers can engage in privileged communications under this approach.[66]

A 2011 Southern District of New York decision confirmed that this general rule applies to corporations whose management reasonably (but erroneously) believes that in-house lawyers are authorized to practice law.[67]

9.5 Lawyers Not Able to Practice Law

The privilege generally does not extend to lawyers not eligible to practice law in any jurisdiction, absent application of the client-perception principle discussed above.

- This general rule normally applies to lawyers employed by institutions which cannot practice law -- such as accounting firms.

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[65] Buyer's Direct Inc. v. Belk, Inc., No. SACV 12-00370-DOC (MLGx), 2012 U.S. Dist. LEXIS 57543 (C.D. Cal. Apr. 24, 2012).

[66] Restatement (Third) of Law Governing Lawyers § 72 cmt. e (2000).

[67] Gucci Am., Inc. v. Guess?, Inc., No. 09 Civ. 4373 (SAS) (JLL), 2011 U.S. Dist. LEXIS 15, at *19-20 (S.D.N.Y. Jan. 3, 2011).

9.6 Multijurisdictional Practice Issues

Courts agree that the privilege can protect communications with a lawyer who is eligible to practice in some jurisdiction -- even if not in the jurisdiction where the lawyer practices or communicates.[68]

9.7 In-House Lawyers

In the United States, courts agree that in-house lawyers are entitled to exactly the same privilege protection as outside lawyers.[69] [9.701]

- This includes lawyers representing multiple members of a corporate family [9.702] and law firms' in-house lawyers. [9.703]

- Chapter 7 discusses some courts' application of the "fiduciary exception" to the latter.

In-house lawyers licensed in some jurisdiction can engage in privileged communications in other jurisdictions. [9.704]

Most courts apply special scrutiny to any privilege claims involving in-house lawyers, because such lawyers frequently give business advice. [9.705]

- Chapter 15 discusses that issue.

Some courts have condemned privilege claims by in-house lawyers engaging in what the courts have seen as overreaching or manipulation. [9.706]

- Chapter 14 discusses that issue.

In most states, in-house lawyers can pursue wrongful termination claims against their former employer/clients. [9.707]

- Chapter 28 discusses that issue.

9.8 Foreign Nonlawyers

Some United States courts have extended privilege protection to foreign patent agents who engage in activities that normally would be undertaken by lawyers in the United States.

- Examples include Japanese patent agents; Dutch patent agent; British patent agents; Norwegian, German, and Israeli patent agents.

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[68] Mills v. Iowa, 285 F.R.D. 411 (S.D. Iowa 2012).

[69] Henderson Apartment Venture, LLC v. Miller, Case No. 2:09-cv-01849, 2011 U.S. Dist. LEXIS 40829, at *28 (D. Nev. Mar. 31, 2011).

Some courts refuse to protect such communications.[70]

9.9 Foreign Lawyers

United States courts generally treat foreign lawyers the same as United States lawyers in analyzing privilege protection for their communications. [9.901]

- In some countries, in-house lawyers can provide legal advice to their client/employers' customers, which United States jurisdictions prohibit. [9.902]

The EU and many European countries do not extend privilege protection to communications to or from corporations' in-house lawyers.[71] [9.903]

United States courts analyzing such communications usually undertake a choice of law analysis to determine whether United States principles apply, or whether the court will look to another country's more restrictive policy in declining to protect in-house lawyers' communications. [9.904]

- Chapter 52 discusses that issue.

9.10 Work Product Doctrine Contrasted

Because any party's "representative" can create protected work product, lawyers known by their clients to lack the necessary authority to practice law can nevertheless create protected work product.

- Chapter 34 discusses that issue.

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[70] Medtronic Xomed, Inc. v. Gyrus ENT LLC, Case No. 3:04-cv-400-J-32MCR, 2006 U.S. Dist. LEXIS 12886 (M.D. Fla. Mar. 10, 2006).

[71] Akzo Nobel Chems. Ltd. v. European Comm'n, Case C-550/07 P (E.C.J. Sept. 14, 2010) (available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=82839&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3515879.

CHAPTER 10

LAWYER AGENTS/CONSULTANTS

10.1 Introduction

Lawyer agents or consultants can sometimes be inside attorney-client privilege protection.

- To deserve this protection, such agents generally must be assisting the lawyer in providing legal advice.
- This is normally called the Kovel doctrine, after a 1961 Second Circuit case.[72]

10.2 Privilege Protection for Lawyer Agents

As with client agents, the privilege implications of lawyer agents' communications can arise in three different settings.

- When clients or their lawyers directly communicate with such agents.
- When such agents participate in otherwise privileged communications.
- When clients or their lawyers disclose pre-existing privileged communications to such agents.

10.3 Comparison to Client Agents

As explained in Chapter 9, most courts take a very narrow view of privilege protection for client agents, finding them inside privilege protection only if they are necessary for the transmission of privileged communications.

- Some courts limit privilege protection to such client agents as translators or interpreters.

Courts' analyses of lawyer agents' privilege protection focus on whether the agents are assisting the lawyer in providing legal advice.

- However, both the necessity and translator/interpreter analyses from the client agent context seem to have affected courts' view of privilege protection for lawyer agents.

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[72] United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).

10.4 Lawyer Agents Transmitting Privileged Communications

The privilege clearly covers communications involving lawyers' staff necessary for the transmission of privileged communications or directly working for the lawyer.[73]

- Examples include secretaries; file clerks; paralegals; other law firm or law department employees.

10.5 Other Lawyer Agents

Courts have struggled with analyzing whether other lawyer agents are inside privilege protection.

Unfortunately, courts often start with the client agent analysis, which normally limits privilege protection to client agents such as translators or interpreters.

- The seminal Kovel case[74] found that an accountant assisting a lawyer in providing legal advice was within privilege protection by analogizing accounting concepts to a foreign language, and the accountant to a linguist.

- This unfortunate analogy has often limited the type of lawyer agents that courts will consider inside privilege protection.

10.6 Scope of Available Protection

If a court finds that an agent assisting a lawyer in giving legal advice is inside privilege protection, the court can extend privilege protection to a number of communications.

- Examples include communications between a lawyer and the agent;[75] communications in which the client provides facts to the agent; materials the lawyer has given to the agent; materials generated by the agent.

10.7 Protected Lawyer Agents Versus Unprotected Client Agents

Courts' reliance on the client agent analogy has often led them off in the wrong direction.

- Thus, courts sometimes look at whether a lawyer agent played an "interpretive" role in assisting the lawyer.

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73 Equity Residential v. Kendall Risk Mgmt., Inc., 246 F.R.D. 557, 563 (N.D. Ill. 2007).

74 United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).

75 United States v. Adlman, 68 F.3d 1495, 1499 (2d Cir. 1995), vacated and remanded on other grounds, 134 F.3d 1194 (2d Cir. 1998).

It would make far more sense to extend privilege protection to agents a lawyer reasonably believes would provide enough assistance to justify their involvement.

- In other words, courts should not second guess lawyers either about the need for an agent's participation or the type of role the agent plays in assisting the lawyer.

10.8 Nondispositive Factors

Most courts hold that the privilege's applicability to lawyer agents does not rest solely on the logistics of the agent's involvement. [10.801]

- For instance, a lawyer cannot assure privilege protection by retaining an agent who is really providing his or her own advice to the lawyer's client -- courts examine the bona fides of the agent's role.[76] [10.802]

Similarly, lawyers cannot assure privilege protection by simply parroting the appropriate Kovel standard in some documentation. [10.803]

Communication flow with the agent is likewise not dispositive. [10.804]

- However, an agent's communications directly with the client are not as likely as those with the lawyer to support a contention that the agent was assisting the lawyer in providing legal advice.[77]

10.9 "Need" of the Agent's Assistance

Courts' reliance on the client agent analysis' translation/interpretive role has resulted in many surprisingly narrow decisions.

- Thus, some courts find lawyer agents outside privilege protection unless the agents act as interpreters -- assisting lawyers in understanding data they would not otherwise comprehend.[78]

- These courts' restrictive approach often means that lawyers have already waived their clients' privilege by involving such agents in their otherwise privileged communications.[79]

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[76] Asousa P'ship v. Smithfield Foods, Inc. (In re Asousa P'ship), Ch. 11 No. 01-12295DWS, Adv. No. 04-1012, 2005 Bankr. LEXIS 2373, at *19 (Bankr. E.D. Pa. Nov. 17, 2005).

[77] AVX Corp. v. Horry Land Co., Civ. A. No. 4:07-cv-3299-TLW-TER, 2010 U.S. Dist. LEXIS 125169, at *29 (D.S.C. Nov. 24, 2010).

[78] Columbia Data Prods., Inc. v. Autonomy Corp., Civ. A. No. 11-12077-NMG, 2012 U.S. Dist. LEXIS 175920, at *38 (D. Mass. Dec. 12, 2012).

[79] Krys v. Sugrue (In re Refco Sec. Litig.), 280 F.R.D. 102, 105 (S.D.N.Y. 2011).

In addition to requiring lawyer agents' translator/interpretive role, some courts have also focused on the "necessity" element required for client agents' privilege protection.[80]

- It might make sense for courts to determine whether a client agent's role was necessary, but it does not make sense for a court to analyze whether a lawyer really "needed" an agent's assistance in providing legal advice.

- Lawyers should be permitted to make that judgment call on their own, and not lose privilege protection if a court later determines that the agent was not much help, or that the lawyer really did not require such assistance.

10.10 Best Practices

Lawyers hoping to demonstrate the bona fides of an agent's role in providing legal advice can consider a number of steps.

- The lawyer should select the agent or contemporaneously document why the lawyer has found it appropriate to rely on an agent the client selected.

- The lawyer's (or client's) retention agreement with the agent should contemporaneously document how the agent will assist the lawyer in providing legal advice.

- The agent should work under the lawyer's direction, rather than the client's direction.

- If accurate, the lawyer should analogize such an agent's assistance to that of a translator or interpreter of complex topics to a lawyer unfamiliar with them.

- The lawyer should incorporate the agent's work into the lawyer's legal advice, rather than simply forwarding the agent's advice to the client.

- When the lawyer provides legal advice to the client, the lawyer should contemporaneously document the way in which the lawyer relied on the agent's assistance in providing that advice (or explain why the agent did not provide helpful assistance, despite the lawyer's initial hope that the agent would do so).

10.11 Lawyer Agents Found Protected by Privilege

Some courts take a broad approach, finding that the privilege protects communications with lawyers' agents.

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[80] Via v. Commonwealth, 590 S.E.2d 583, 595 (Va. Ct. App. 2004).

- Examples include translator; investment banking firm; accountant; professional engineering firm assisting a lawyer in responding to OSHA; actuarial consultant who provided "'information and analyses on actuarial issues'" and whose "'expertise was critical'" for the lawyer to provide advice to the client; demutualization agent; consultant who analyzed "employment data at [the client] with respect to race"; nonlawyer Gucci employee (described by the court as considering himself to be a "trained legal professional") who was "deputized to gather information from Gucci employees to assist in litigation."; financial advisor Morgan Stanley, which the court found was "acting as agent" for a law firm; insurance company employee arranging for insureds to be represented by a lawyer hired by the insurance company; KPMG investigator (a former Assistant United States Attorney and law firm partner) who was "brought in by Morgan Stanley's in house counsel for the purpose of conducting an investigation that would assist counsel in providing informed legal advice."; employee in a drug company's internal audit group assigned to assist the lawyer in that company's compliance group, analogizing the internal audit group employee to a paralegal assisting the lawyer and protecting her notes of interviews attended by the corporate compliance group lawyer; former corporate employee interviewing company employees on a lawyer's behalf; public relations firm; current client employee interviewing other employees on the lawyer's behalf; consultant; financial advisor; patent agent; psychiatrist; medical facility risk manager collecting facts for the facility's lawyer; private investigator; environmental consultant; investment banking firm; actuary; translator; psychologist.

10.12 Lawyer Agents Found Not Protected by Privilege

Some courts take a much narrower approach, finding that the privilege does not protect communications with lawyers' agents.

- Examples include investment company; talent agency employee; commercial real estate company employee; fair labor standards act audit consultant; third-party script checker assisting in preparing a movie; consultant on investment mechanisms; appraiser; accountant; employment consultant; environmental consultant; investment banker, pointing to the lack of any reference to legal purpose in investment banker's retainer letter; investigator; public relations firm; insurance adjuster; architect; management consultant; asset valuation consultant; tax consultant; investigator hired to perform public relations tasks; insurance company employee arranging for insureds to be represented by a lawyer hired by the insurance company; litigation consultant; company employee compiling data to assist business decision-makers; engineering firm hired to conduct environmental studies; financial advisor; client's expert consultant hired to prepare a report for submission to the government.

These courts concluded that such lawyer agents were outside privilege protection only after the lawyer had already disclosed privileged communications to them.

- It was too late by that time to avoid waiving the privilege.

10.13 "Morphing" of a Lawyer Agent Role

Just as client agents can morph from a non-privileged role to a privileged role, lawyer agents' role can change over time.[81]

10.14 Lawyer Agents Playing Dual Roles

An agent might assist the client in one task and assist the lawyer in another task -- the latter of which might deserve privilege protection.[82]

10.15 Non-Testifying Experts

Lawyer agents might also deserve protection from discovery as specially retained litigation-related non-testifying experts.

- Chapter 34 discusses that issue.

10.16 Lawyer Agent's Role in Work Product Doctrine Protection

Because the work product doctrine can protect any party "representative's" documents, lawyer agents outside privilege protection may nevertheless create protected work product. Chapter 34 discusses that issue.

- Under the broader work product protection, disclosing protected work product to such lawyer agents usually does not waive that more robust protection. Chapter 48 discusses that issue.

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[81] AMCO Ins. Co. v. Madera Quality Nut LLC, No. 1:04-cv-06456-SMS, 2006 U.S. Dist. LEXIS 21205, at *54 (E.D. Cal. Apr. 10, 2006).

[82] United States ex rel. Robinson v. Northrop Grumman Corp., No. 89 C 6111, 2002 U.S. Dist. LEXIS 10538 (N.D. Ill. June 19, 2003).

CHAPTER 11

UNPROTECTED BACKGROUND INFORMATION

11.1 Introduction

Because attorney-client privilege protection depends on a communication's content, the privilege normally does not protect the logistical details of an attorney-client relationship or communication.

11.2 Communications about Background Information

The normal absence of privilege protection for background logistical details parallels the usual lack of protection for historical facts.

- Chapters 16 and 17 discuss that issue.

However, the privilege normally does not protect communications about background logistical details, unlike the privilege's usual applicability to communications about historical facts.

- This is because the former type of communication rarely if ever involves a client's request for legal advice, while the latter frequently do.

11.3 Fact of the Representation

In most situations, the privilege does not protect the fact of an attorney-client relationship or a client's identity. [11.301]

Most courts do not protect basic logistical details about an attorney-client relationship.[83] [11.302]

- Examples include date of a client referral; fact of the relationship; timing of a lawyer's employment; factual circumstances surrounding the attorney-client relationship; scope and nature of employment; length of time the lawyer represented the client; fact of the lawyer's withdrawal; identity of a non-client who retained and paid a lawyer; fact that the client has contacted the lawyer.

The privilege usually does not protect a client's identity.[84] [11.303]

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[83] Norfolk v. Comparato, Case No. 11-81120-Civ-Hurley/Hopkins, 2012 U.S. Dist. LEXIS 107092, at *6 (S.D. Fla. July 12, 2012).

[84] Torres v. Toback, Bernstein & Reiss LLP, 278 F.R.D. 321, 322 (E.D.N.Y. 2012).

- In certain very limited circumstances, the privilege can protect a client's identity if its disclosure would somehow reveal a privileged communication's substance, or implicate the client in some criminal conduct (called the "last link" rule).[85]

The privilege usually does not protect other facts about clients. [11.304]

- Examples include client's whereabouts; client's address; client's trust account held by a lawyer.

The privilege usually does not protect retainer agreements. [11.305]

- A portion of a retainer agreement might deserve protection if it specifically describes what the client has requested the lawyer to do, or what the lawyer proposes to do.[86]

11.4 General Subject Matter of the Representation

The privilege normally does not protect the general subject matter of a representation. [11.401]

The privilege usually does not extend to a general description of why the client hired a lawyer. [11.402]

- Examples include purposes for which an attorney was retained; internal law firm documents relating to conflicts; fact that a lawyer provided advice to a client; general description of the work; general subject matter of the consultation;[87] nature and extent of the lawyer's work for a client; date the lawyer's services were provided.

The privilege can protect information about the specific nature of the representation. [11.403]

- For instance, the privilege might protect the fact that the client sought a lawyer's advice about the effect of adultery on a possible divorce.

Some courts state in the abstract that the privilege normally does not protect a lawyer's acts. [11.404]

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85 United States v. Legal Servs., 100 F. Supp. 2d 42, 44-45 (D.D.C. 2000).

86 Stanley v. Bayer Healthcare LLC, Case No. 11cv862-IEG (BLM), 2011 U.S. Dist. LEXIS 132363, at *12 (S.D. Cal. Nov. 16, 2011).

87 Doe v. D.C., Civ. A. No. 03-1789 (GK/JMF), 2005 U.S. Dist. LEXIS 8578, at *7-8 (D.D.C. May 11, 2005).

- This general rule may apply in most situations, but some lawyer acts can clearly deserve privilege protection -- such as dictating a brief.

Because the privilege usually does not protect general information about the subject matter of a representation, disclosing that information does not waive the privilege protection. [11.405]

- Chapter 25 discusses that issue.

If a client retains a lawyer in connection with litigation or anticipated litigation, the work product doctrine might provide a separate type of protection to this type of information. [11.406]

- Chapter 35 discusses that issue.

11.5 Unprotected Fee Information

The privilege usually does not protect general information about lawyers' fees. [11.501]

The privilege usually does not extend to facts about a lawyer-client fee arrangement.[88] [11.502]

- Examples include details of a retainer agreement; arrangements for financing litigation; contingent fee contract; who paid the fee; matters relating to fees; fee arrangement; lawyer's hourly rate.

- As with retainer agreements, portions of fee arrangements can deserve privilege protection -- if disclosing them would tend to reveal privileged communications, the lawyer's strategy, etc.

The privilege usually does not extend to other facts about fees.[89] [11.503]

- Examples include lawyer's receipt of fees; fees charged to the client; fees paid by the client; timing of the client's payments; fee information; amount of agreed-upon fees.

As with fees, the lawyer's expenses and the client's reimbursement of those expenses usually do not deserve privilege protection. [11.504]

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[88] NewMarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie. S.C.A., 258 F.R.D. 95, 101 (S.D.N.Y. 2009).

[89] BASF Agro B.V. v. CIPLA Ltd., Case No. 3:07-CV-125 (CDL), 2012 U.S. Dist. LEXIS 104659, at *8 (M.D. Ga. July 25, 2012).

11.6 Protected Fee Information

Some courts have taken a broader approach, and protected general information about fees.[90]

- The privilege can protect otherwise privileged communications about fees.

11.7 Lawyers' Bills

The privilege usually does not protect basic information about lawyers' bills.[91] [11.701]

- Examples include: dates of service and identity of the lawyers providing the service; billing records; general subject matter of a billing statement; expense reports; estate lawyer's fee expense itemization; hourly statements.

The privilege can protect specific billing entries that would disclose privileged communications, the lawyer's strategy, etc.[92] [11.702]

- Examples include: specific nature of the lawyer's services; lawyer's research into a particular statute; confidential communications; lawyer's strategy; client's specific motive in seeking representation; lawyer's research in a particular area of the law; lawyer's litigation strategy; time spent on a particular task.

Clients' efforts to have a third party pay for lawyers' bills can impliedly waive their privilege protection. [11.703]

- Chapter 28 discusses that issue.

The separate work product doctrine can protect a lawyer's litigation-related bills. [11.704]

- Chapter 40 discusses that issue.

11.8 Background Facts about Attorney-Client Communications

The privilege's general inapplicability to background logistical details about an attorney-client relationship also applies to attorney-client communications. [11.801]

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[90] Tallman v. Freedman Anselmo Lindberg LLC, No. 11-cv-3201, 2012 U.S. Dist. LEXIS 45972, at *10 (C.D. Ill. Apr. 2, 2012).

[91] Nat'l Union Fire Ins. Co. v. Mead Johnson & Co., No. 3:11-cv-RLY-WGH, 2012 U.S. Dist. LEXIS 1371 (S.D. Ind. Jan. 5, 2012).

[92] BG Real Estate Servs., Inc. v. Am. Equity Ins. Co., Civ. A. No. 04-3408 SECTION "A" (2), 2005 U.S. Dist. LEXIS 10330, at *20 (E.D. La. May 18, 2005).

The privilege usually does not extend to background logistical details about otherwise protected communications.[93] [11.802]

- Examples include date and recipients of a memorandum; general subject matter of a meeting; fact of a communication between a client and a lawyer; date and time of a lawyer-client meeting; whether anyone took notes in a privileged meeting; fact of a meeting between a client and a lawyer; date of a meeting between a client and lawyer; people present at a meeting between a client and a lawyer; date the client authorized a lawsuit; client's request for a meeting with a lawyer; date of the communication; fact of a conversation between a client and a lawyer; number and duration of meetings; identity of the person arranging for a meeting between a client and a lawyer; location of a meeting between a client and a lawyer; provenance of a document and the circumstances surrounding its creation.

Some courts take a more expansive approach, and extend privilege protection even to the fact of a privileged communication.[94] [11.803]

Given these general principles, clients generally do not waive their privilege protection by disclosing (1) that the clients communicated with a lawyer, and (2) what acts the clients took after such communication. [11.804]

- Such disclosures do not reveal any privileged communication, because the lawyer might have advised the client not to undertake the action.

The separate work product doctrine can protect background logistical details about an attorney-client communication. [11.805]

- Chapter 42 discusses that issue.

11.9 Subject Matter of Attorney-Client Communications

The privilege's general inapplicability to the general subject matter of an attorney-client representation also applies to attorney-client communications. [11.901]

The privilege usually does not protect the general subject matter of an otherwise protected communication.[95] [11.902]

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93 Arkalon Grazing Ass'n v. Chesapeake Operating, Inc., Case No. 09-1394-EFM, 2010 U.S. Dist. LEXIS 132350, at *5 (D. Kan. Dec. 14, 2010).

94 SEC v. Wyly, No. 10 Civ. 5760 (SAS), 2011 U.S. Dist. LEXIS 87660, at *76 (S.D.N.Y. July 27, 2011).

95 Preferred Care Partners Holding Corp. v. Humana, Inc., 258 F.R.D. 684, 693 (S.D. Fla. 2009).

- In contrast, the privilege can extend to more specific facts about privileged communications.

CHAPTER 12

CONTENT AND "COMMUNICATION" ELEMENT

12.1 Introduction

When analyzing attorney-client privilege protection, content is king.

- Context plays a lesser role in determining the privilege's applicability.
- This contrasts with the work product doctrine, which focuses more on context than content. Chapter 35 discusses that issue.

Attorney-client privilege protection usually involves communications, nearly always between clients and their lawyers.

- The privilege can extend to essentially any type of communication, and sometimes even to acts.

12.2 Approach of this Outline

This outline analyzes common misperceptions about this "content" element of attorney-client privilege protection, then focuses on general rules governing all privileged communications.

The outline focuses on attorney-client communications' content in several chapters.

- Chapter 11 discusses the privilege's general inapplicability to background logistical details about attorney-client relationships and communications.

This chapter focuses on the privilege's possible applicability to different types of communications and even acts.

The outline then turns to lawyers' role in such communications.

- Chapter 14 focuses on whether the lawyer was primarily acting as a legal advisor, and Chapter 15 emphasizes the importance of such communications' substance -- which must primarily relate to legal advice.

Some privilege principles apply regardless of a communication's direction, while other specific rules apply when clients communicate to lawyers and when lawyers communicate to clients.

- Chapter 15 discusses the rules applicable to all communications.

- Chapter 16 focuses on client-to-lawyer communications, and Chapter 17 focuses on lawyer-to-client communications.

12.3 Forms of Transmission and Substance

The privilege can protect any form of communication. [12.301]

The privilege can extend to written, oral or other types of communication.[96] [12.302]

Privilege protection can protect new forms of communications as they arise. [12.303]

- Courts extend privilege protection to electronic forms of communications such as email, texting, etc., in appropriate circumstances.[97]

- As in the ethics context, such new forms of communications may have a more difficult time than traditional types of communications satisfying the expectation of confidentiality requirement.

Any type of content can deserve privilege protection in the appropriate circumstances. [12.304]

- The privilege can extend to communications about non-confidential matters (such as an auto accident) -- but the fact that a communication is confidential does not make it privileged.[98]

12.4 Clients' Acts

In some circumstances, even a client's acts can deserve privilege protection. [12.401]

- Courts disagree about the protection available for a client's demeanor, which is a kind of "act."

Clients' acts can sometimes constitute communications deserving privilege protection. [12.402]

- For instance, a client might hold up a number of fingers to answer a lawyer's question.

Some courts have extended privilege protection to clients' act of transmitting to a lawyer documents that do not intrinsically deserve privilege protection.[99]

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[96] Wielgus v. Ryobi Techs., Inc., Case No. 08 CV 1597, 2010 U.S. Dist. LEXIS 80425, at *9 (N.D. Ill. Aug. 4, 2010).

[97] Belton v. United States, Civ. No. 09-cv-345-JD, 2010 U.S. Dist. LEXIS 16264, at *3 (D.N.H. Feb. 23, 2010) (not for publication).

[98] White v. Union Pac. Ry. Co., Case No. 09-1407-EFM-KGG, 2010 U.S. Dist. LEXIS 102053, at *11 (D. Kan. Sept. 17, 2010).

In some situations, a client's demeanor might be relevant to some issue. [12.403]

- For instance, criminal defendants' demeanor might indicate their mental state when entering a guilty plea, or testators' demeanor might shed light on their testamentary capacity.

Courts disagree about privilege protection available for information about clients' demeanor.

- Some courts hold that the privilege protects lawyers' impression of clients' demeanor gained in a private setting, but not in a public setting.

The privilege usually does not protect acts that clients take after receiving legal advice.[100] [12.404]

- That clients acted a certain way does not necessarily disclose lawyers' advice, because the clients might have ignored that advice.

12.5 Lawyers' Acts

As with clients' acts, the privilege normally does not extend to lawyers' acts.

- However, privilege protection can extend to lawyers' act of researching a certain specific area of law, or even lawyers' acts during an investigation.[101]

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99 Solin v. O'Melveny & Myers, LLP, 107 Cal. Rptr. 2d 456, 461 (Cal. Ct. App. 2001).

100 In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 805 n.27 (E.D. La. 2007).

101 Le v. City of Wilmington, 480 F. App'x 678, 687 (3d Cir. 2012).

CHAPTER 13

CONTENT: LEGAL ADVICE REQUIREMENT

13.1 Introduction

Despite common misperceptions by many clients and even some lawyers, the attorney-client privilege does not automatically protect communications simply because a lawyer participated in them.

- The privilege only protects communications primarily motivated by a client's request for legal advice from a lawyer.

13.2 Common Misperceptions about the Privilege

Many clients misperceive the privilege's applicability.[102]

- Examples include labeling a document "privileged" assures the protection; the privilege automatically protects communications to or from a client; copying a lawyer on a document assures protection; a lawyer's participation in a meeting extends privilege protection to the meeting's communications.

Even some lawyers have misperceptions -- which the case law also belies.[103]

- Examples include:the privilege extends to a lawyer's files; the privilege protects a law firm's internal communications.

13.3 Communications Deserving Privilege Protection

The privilege can protect two types of communications from clients to lawyers and two types of communications from lawyers to clients.

- Clients relay facts to lawyers, and they ask for legal advice about those facts.

- Lawyers request facts, and provide legal advice about those facts.

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[102] Wiseman Oil Co. v. TIG Ins. Co., Civ. A. No. 011-1011, 2012 U.S. Dist. LEXIS 71140, at *8 (W.D. Pa. May 22, 2012).

[103] Sheeks v. El Paso Cnty. Sch. Dist. No. 11, Civ. A. No. 04-cv-1946-ZLW-CBS, 2006 U.S. Dist. LEXIS 27579, at *3 (D. Colo. Apr. 12, 2006) ("Defendant has cited no authority, and the Court has found none, indicating that internal law firm communications which are not conveyed to the client are covered by the attorney-client privilege.").

13.4 Basic Principles

Some basic privilege principles apply regardless of communications' direction (client-to-lawyer or lawyer-to-client). [13.401]

The privilege does not automatically protect all communications to or from lawyers. [13.402]

The privilege protects only communications motivated by clients' request for legal advice.[104] [13.403]

The privilege usually does not extend to non-substantive logistical communications. [13.404]

- These include communications about setting up meetings, travel plans, etc.[105]

- Courts disagree about the work product doctrine's application to such logistical communications. Chapter 39 discusses that issue.

Courts generally do not protect a lawyers' communication to clients about deposition or trial dates, etc. [13.405]

- Chapter 17 discusses that issue.

Unlike the work product doctrine, the privilege does not depend on ongoing or anticipated litigation. [13.406]

- It is usually worth assessing the possibility of anticipated litigation, to determine if the separate work product protection might apply.

The privilege usually does not protect communications between lawyers and non-client third parties. [13.407]

Lawyers' communications with third parties highlight subtle differences between attorney-client privilege and the work product protection. [13.408]

- Such communications generally do not deserve privilege protection, but lawyers' communications to or from their clients about such communications can deserve privilege protection if they contain lawyers' analytical input.

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[104] Dewitt v. Walgreen Co., Case No. 1:11-cv-00263-BLW, 2012 U.S. Dist. LEXIS 125493, at *5 (D. Idaho Sept. 4, 2012).

[105] Chevron Corp. v. Salazar, No. 11 Civ. 3718 (LAK) (JCF), 2011 U.S. Dist. LEXIS 92628, at *3-4 (S.D.N.Y. Aug. 16, 2011).

- In contrast, the work product doctrine can protect such communications. Chapter 41 discusses that issue.

- Lawyers' notes about such communications can deserve fact or opinion work product protection, depending on their content. Chapters 40 and 41 discuss that issue.

13.5 Multiple Related Communications

Litigants seeking privilege protection must establish the protection's applicability to each communication. [13.501]

Clients cannot assure protection by simply attaching intrinsically unprotected communications to a privileged communication. [13.502]

Transmittal communications to or from lawyers might deserve privilege protection, depending on their substance. [13.503]

Most transmittal communications do not deserve privilege protection.

- Examples include: fax transmittal coversheet; transmittal email; communication from or to a lawyer if it contains no substantive information; transmittal communication with a "terse description" of the attached document; transmittal communication saying "for your information"; Post-it® transmittal note; acknowledgement of receipt.

- In contrast, the privilege can extend to a substantive transmittal communication that otherwise satisfies the prerequisites for privilege protection.

The privilege does not automatically protect clients' communications just because the clients send a lawyer a copy of the communication. [13.504]

- However, the privilege can protect such communications if the client copies the lawyer as an implicit request for legal advice about the communications. Chapter 16 discusses that issue.

The privilege does not automatically protect communications during a meeting just because a lawyer attends the meeting.[106] [13.505]

- Courts sometimes assess each communication during such meetings, to determine if it deserves privilege protection.[107]

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[106] Dewitt, 2012 U.S. Dist. LEXIS 125493, at *8-9.

[107] Marsh v. Safir, No. 99 Civ. 8605 (JGK) (MHD), 2000 U.S. Dist. LEXIS 5136, at *39 (S.D.N.Y. Apr. 20, 2000).

13.6 Analyzing Each Communication

Given the content-based nature of privilege protection, courts usually analyze each pertinent communication. [13.601]

Courts disagree about whether privilege protection depends on the "primary purpose" of an entire communication, or of each discrete portion of such a communication. [13.602]

- Chapter 15 discusses that issue.

Courts also disagree about litigants' need to log every email in a string. [13.603]

- Chapter 55 discusses that issue.

Because privilege protection usually depends on content rather than context, an arguably privileged document is more likely than a work product protected document to require redaction. [13.604]

- Chapter 54 discusses that issue.

CHAPTER 14

ANALYZING THE LAWYER'S ROLE

14.1 Introduction

Attorney-client privilege protection depends on lawyer participants acting as legal advisors rather than playing some other nonlegal role.

- Even with lawyers acting as legal advisors, the privilege only applies to their communications relating to such legal advice. Chapter 15 discuses that issue.

14.2 Lawyer's Role is Not Dispositive

Several factors are not dispositive in undertaking this analysis. [14.201]

- Lawyers' participation in a communication does not automatically assure privilege protection. [14.202]

- The title lawyers use is likewise not dispositive.[108] [14.203]

Courts usually do not extend privilege protection to communications with lawyers performing services that nonlawyers could perform.[109] [14.204]

14.3 Lawyers Involved in Investigations

Many cases focus on lawyers' involvement in investigations, tax matters, and patent issues. [14.301]

Courts disagree about whether the privilege extends to communications with lawyers undertaking investigations. [14.302]

- Some courts protect such communications -- explaining that lawyers engaged in such investigations necessarily bring to bear their lawyer skills.[110]

- Some courts find that such lawyers are simply gathering historical facts, and therefore do not protect their communications.

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[108] Boudreau v. Gonzalez, Case No. 3:04cv1471 (PCD), 2006 U.S. Dist. LEXIS 86599, at *12, *13 (D. Conn. Nov. 29, 2006).

[109] United States v. Under Seal (In re Grand Jury Subpoena), 204 F.3d 516, 523 (4th Cir. 2000).

[110] Crutcher-Sanchez v. Cnty. of Dakota, No. 8:09CV288, 2011 U.S. Dist. LEXIS 20306, at *19 (D. Nev. Feb. 10, 2011).

- Corporations relying on the fact of such communications might impliedly waive privilege protection. Chapter 28 discusses that issue.

Most courts hold that the privilege does not protect communications to and from lawyers simply filling out clients' tax returns. [14.303]

- However, the privilege usually extends to communications with lawyers providing legal advice while preparing tax returns.[111]

Some courts previously expressed doubts about privilege protection for communications to and from lawyers assisting in patent prosecutions, but the trend favors extending privilege protection to such communications. [14.304]

14.4 Lawyers Involved in Other Matters

Courts have focused on privilege protection for communications to and from lawyers involved in other tasks. [14.401]

Lawyers employed by United States accounting firms cannot provide legal advice to such firms' clients, which usually makes privilege protection unavailable. [14.402]

- This contrasts with most European countries' rules.

The privilege normally does not extend to lawyers primarily playing a lobbying/public relations role.[112] [14.403]

Lawyers playing other nonlegal roles face the same general principle -- which usually precludes privilege protection. [14.404]

- Examples include business advisor; collection agent; friend; manager or investor in corporate entities; scrivener; funds transferor' insurance claims adjuster; claims handlers; media expert; parent providing parental advice; landowner and developer; police department officer; agent for the disbursement of money or property; member of corporate board of directors; claims investigator or adjuster; corporate officer; accountant; collection advisor; business transaction implementer; expert witness; negotiator; accreditation consultant; regulator; economic advisor; seller of equipment.

14.5 In-House Lawyers

In-house lawyers practicing in the United States deserve the same privilege protection as outside lawyers, but with a few different twists. [14.501]

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111 Kearney Partners Fund, LLC v. United States, Civ. A. No. 11-5095 (SRC), 2012 U.S. Dist. LEXIS 2665, at *5 (D.N.J. Jan. 9, 2012).

112 In re Grand Jury Subpoenas, 179 F. Supp. 2d 270, 274 (S.D.N.Y. 2001).

Every court recognizes that in-house lawyers may engage in privileged communications with their corporate client. [14.502]

- However, in-house lawyers with both law department and business titles will find it nearly impossible to successfully claim privilege protection for communications undertaken in the latter role.[113] [14.503]

- Some courts parse through communications involving lawyers wearing "two hats" -- finding some privileged and some not.[114]

Many courts recognize that in-house lawyers frequently provide primarily business-related advice -- in contrast to most outside lawyers. [14.504]

- Chapter 15 discusses the difference between protected legal advice and unprotected business or other advice.

Given in-house lawyers' frequent business role, some courts apply presumptions about their communications. [14.505]

- Some courts presume that in-house lawyers' communications constitute unprotected business advice, while outside lawyers' communications constitute protected legal advice.[115]

- Some courts presume that the privilege protects communications involving in-house lawyers assigned to the law department, while the privilege does not protect communications involving in-house lawyers assigned outside the law department.[116]

Even if they do not apply specific presumptions, most courts apply a more demanding standard to in-house lawyers' communications than to outside lawyers' communications. [14.506]

- Examples include privilege determinations are more difficult if the communications involve in house lawyers; courts must give a heightened level of scrutiny to privilege claims by in-house lawyers; in-house lawyers must make a stronger showing that the privilege applies; in-house lawyers must make a clear showing that the privilege applies to their communications; courts must be especially careful when examining

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113 Scott & Stringfellow, LLC v. AIG Commercial Equip. Fin., Inc., Civ. No. 3:10cv825-HEH-DWD, 2011 U.S. Dist. LEXIS 51028, at *12-13 (E.D. Va. May 12, 2011).

114 Rumain v. Baruch Coll. of City Univ. of N. Y., No. 06 Civ. 8256 (PCK) (MHD), 2007 U.S. Dist. LEXIS 92921 (S.D.N.Y. Dec. 14, 2007).

115 Lindley v. Life Investors Ins. Co. of Am., 267 F.R.D. 382, 389 (N.D. Okla. 2010).

116 Breneisen v. Motorola, Inc., Case No. 02C50509, 2003 U.S. Dist. LEXIS 11485, at *10-11 (N.D. Ill. July 3, 2003).

privilege claims by in-house lawyers; there is room for suspicion if in-house lawyers claim privilege protection; courts must be especially vigilant when examining in-house lawyers' privilege claims; courts must cautiously and narrowly approach in-house lawyers' privilege claims; courts should not give great weight to privilege claims by in-house lawyers.

- A few courts have taken the opposite approach, rejecting any heightened scrutiny for in-house lawyers' communications.[117]

Some courts have strongly criticized in-house lawyers' efforts to seek privilege protection by artificially involving themselves in corporate clients' internal communications.[118] [14.507]

Most foreign countries do not follow the United States in extending privilege protection to in-house lawyers' communications with their corporate clients' employees. [14.508]

- Chapter 52 discusses that issue.

14.6 Lawyers as Conduits To or From Clients

Some in-house lawyers act essentially as conduits of information to or from their client, which usually precludes privilege protection.

- Chapters 17 and 21 discuss that issue.

14.7 Work Product

Because any client "representative" can create protected work product, analyzing work product protection for in-house lawyers' documents does not depend on such lawyers acting in a legal role.

- Chapter 34 discusses that issue.

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[117] Davis v. PMA Co., Case No. CIV-11-359-C, 2012 U.S. Dist. LEXIS 130944, at *10-11 (W.D. Okla. Sept. 7, 2012).

[118] Bell Microprods. Inc. v. Relational Funding Corp., No. 02 C 329, 2002 U.S. Dist. LEXIS 18121, at *3-4 (N.D. Ill. Sept. 24, 2002) (criticizing a general counsel's instruction that company employees copy him on their emails "to assure that the attorney-client privilege is retained." (internal cite omitted); bluntly reminding the in-house lawyer: "that is not of course how privilege (or for that matter work product) operates.").

CHAPTER 15

BUSINESS AND OTHER NONLEGAL ADVICE

15.1 Introduction

Courts must sometimes analyze specific communications' content (rather than the participating lawyer's overall role) in determining possible attorney-client privilege protection.

- This usually involves distinguishing legal from business advice.

15.2 Distinguishing Between Legal and Business Advice

Many lawyers representing clients engaged in business operations provide business advice -- which does not deserve privilege protection. [15.201]

In distinguishing between protected legal and unprotected business advice, courts have identified several non-dispositive factors. [15.202]

- Examples include a presentation's title; or the involvement of an outside lawyer in a presentation.

Most courts apply a "primary purpose" test in analyzing privilege protection for a communication that arguably reflects both legal and business advice.[119] [15.203]

- This "primary purpose" test applies only if the communication contains both legal and business aspects -- pure business advice does not deserve privilege protection.[120]

Some courts take a very broad view of this "primary purpose" test.[121] [15.204]

- Some courts tend to give corporations the benefit of the doubt under the "primary purpose" test.[122]

Courts taking an expansive view have protected a variety of communications.

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[119] In re Chase Bank USA, N.A. "Check Loan" Contract Litig., MDL No. 2032, Case No. 3:09-md-2032 MMC (JSC), 2011 U.S. Dist. LEXIS 82706, at *14-15 (N.D. Cal. July 28, 2011).

[120] Keating v. McCahill, Civ. A. No. 11-518, 2012 U.S. Dist. LEXIS 91179, at *10 (E.D. Pa. June 28, 2012).

[121] SCO Grp., Inc. v. IBM Corp., Civ. No. 2:03CV0294 DAK, 2006 U.S. Dist. LEXIS 62980, at *12 (D. Utah Sept. 1, 2006).

[122] Cephalon, Inc. v. Johns Hopkins Univ., Civ. A. No. 3505-VCP, 2009 Del. Ch. LEXIS 207, at *4 (Del. Ch. Dec. 4, 2009).

- Examples include specific case loss reserves; company's post-accident memorandum; hospital's risk management documents; corporation's "document hold" notice sent to over 600 employees; memorandum that admittedly contained both legal and business advice.

Some courts take a much narrower view of the "primary purpose" test. [15.205]

- One court even found that a lawyer's drafting of transactional documents involved primarily business rather than legal advice.[123]

15.3 Applying the "Primary Purpose" Test

Courts disagree about how to apply the "primary purpose" test. [15.301]

- Some courts analyze an entire communication or document, and determine if its "primary purpose" as a whole involves legal rather than business aspects. [15.302]

- Some courts examine discrete portions of a single communication or document, protecting only primarily legal portions. [15.303]

Some courts have addressed other approaches. [15.304]

15.4 Intracorporate Circulation of Advice

Some courts point to the widespread intracorporate circulation of communications as an indicia of a primarily business rather than legal purpose. [15.401]

- This is sometimes called the Vioxx approach, named for a 2007 MDL case against Merck involving the drug Vioxx.[124]

Even before the Vioxx decision, some courts expressed this approach.[125] [15.402]

In Vioxx, the court relied on a special master's report prepared by law professor Paul Rice -- which concluded that Merck's widespread intracorporate circulation of arguably privileged communications demonstrated the primarily business-related nature of many communications. [15.403]

- After Vioxx, some courts have taken the same narrow view of the privilege.[126] [15.404]

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123 Blau v. Harrison (In re JP Morgan Chase & Co. Sec. Litig.), MDL No. 1783, Master Dkt. No. 06 C 4674, 2007 U.S. Dist. LEXIS 60095, at *9 (N.D. Ill. Aug. 13, 2007).

124 In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789 (E.D. La. 2007).

125 Lyondell-Citgo Ref., LP v. Petroleos de Venez., S.A., No. 02 Civ. 0795 (CBM), 2004 U.S. Dist. LEXIS 26076, at *2 (S.D.N.Y. Dec. 24, 2004).

In contrast, some courts have explicitly declined to adopt the Vioxx approach.[127] [15.405]

Some courts have implicitly rejected the Vioxx approach.

- For instance, some courts take a broad view of the "need to know" standard (Chapter 6); find that a wide array of corporate employees' participation in otherwise privileged communications does abort the privilege (Chapter 19); conclude that disclosing pre-existing privileged communications to a large number of corporate employees does not waive privilege protection (Chapter 26).

The narrow Vioxx approach seems contrary to modern reality and corporations' praiseworthy attempts to encourage transparency. [15.406]

- As long as privileged communications remain within the corporation, the participants' fiduciary duties should preserve the privilege, while assuring that legal advice is disseminated to those whom the corporation believes have a "need to know."

- Corporations benefit by having corporate employees observe lawyers' involvement in corporate decision-making -- even in matters on which they do not necessarily need legal advice.

- The number of employees involved in the judicial analyses usually represent a tiny percentage of the corporation's total number of employees, and it makes little sense to give a corporation's adversary access to purely internal privileged corporate communications because a few extra people within the corporation participated in those communications.

The narrow Vioxx approach represents a real danger to corporations, whose employees increasingly use email and other forms of electronic communications that can be easily transmitted to a large number of fellow employees.

15.5 Other Types of Nonlegal Advice

Some courts decline to extend privilege protection to other types of nonlegal advice.

- Examples include political advice; grammatical and typographical advice; financial advice; lobbying advice; technical advice; document retention advice; however, other courts protect this type of advice; marketing

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126 In re Seroquel Prods Liab. Litig., Case No. 6:06-md-1769-Orl-22DAB, 2008 U.S. Dist. LEXIS 39467 (M.D. Fla. May 7, 2008).

127 Se. Pa. Transp. Auth. v. CaremarkPCS Health, L.P., 254 F.R.D. 253, 261 n.3 (E.D. Pa. 2008).

advice; public relations advice; personal advice provided as a friend; accounting advice; advice about mailings; investment advice.

CHAPTER 16

CLIENT-TO-LAWYER COMMUNICATIONS

16.1 Introduction

Courts frequently deal with the attorney-client privilege's applicability to communications from clients to their lawyers.

- Despite some lawyers' egocentric belief to the contrary, clients' communications to their lawyers actually represent the key type of protected communications.

16.2 Uncommunicated Client Documents

The privilege can sometimes protect uncommunicated client documents. [16.201]

- The privilege can protect documents that a client prepares with the intent of eventually sending to a lawyer for purposes of obtaining legal advice, even if the document is not yet sent or has not arrived.[128] [16.202]

- The privilege can also protect uncommunicated documents clients prepare during their communications with a lawyer primarily related to legal advice, or which afterwards memorialize such a privileged communication.[129] [16.203]

16.3 Client-to-Client Communications

Despite the privilege's most common applicability to communications between clients and their lawyers, the protection can also occasionally extend to communications between jointly represented clients or between constituents of a single organizational client (such as employee-to-employee communications). [16.301]

- Joint clients or corporate employees can engage in privileged communications while preparing to approach a lawyer for legal advice.[130] [16.302]

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128 Walter v. Cincinnati Zoo & Botanical Garden, Case No. 1:05cv327, 2006 U.S. Dist. LEXIS 43350, at *8 (S.D. Ohio June 27, 2006).

129 Adamowicz v. IRS, 672 F. Supp. 2d 454, 472 (S.D.N.Y. 2009).

130 In re N.Y. Renu with Moistureloc Prod. Liab. Litig., MDL No. 1785, C/A No. 2:06-MN-7777-DCN, 2008 U.S. Dist. LEXIS 88515, at *28 (D.S.C. May 6, 2008).

- Joint clients or corporate employees can also contemporaneously memorialize communications with a lawyer from whom they are seeking legal advice. [16.303]

- Most commonly, joint clients or corporate employees can relay a lawyer's advice to their fellow joint clients or other corporate employees with a need to know that advice.[131] [16.304]

16.4 Client's Explicit or Implicit Request for Legal Advice: Introduction

The privilege can protect a client's explicit or implicit request for legal advice. [16.401]

The protection only extends to requests for legal advice, rather than business or other nonlegal advice. [16.402]

- Chapter 15 addresses that issue.

The privilege normally does not protect non-substantive communications about whether a client should obtain legal advice. [16.403]

In some situations, a client explicitly asks for legal advice -- which can clearly deserve privilege protection. [16.404]

Although often more difficult to assess, clients can also implicitly ask for legal advice.[132]

- Clients sometimes implicitly seek legal advice by sending a lawyer a contemporaneous description of historical facts, or a contemporaneous draft document, about which they seek legal advice.[133] [16.405]

- Simply copying a lawyer does not assure privilege protection. [16.406]

In a worrisome recent trend, some courts focus solely or primarily on the four corners of a client's communication to a lawyer in analyzing whether the client was seeking legal advice.[134] [16.407]

Courts should allow clients to provide extrinsic evidence that their communications constituted an implicit request for legal advice.

- Some courts assess extrinsic evidence such as affidavits.[135]

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131 GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc., No. 11 Civ. 1299 (HB) (FM), 2011 U.S. Dist. LEXIS 133724, at *44 (S.D.N.Y. Nov. 10, 2011).

132 Batt v. Manchester Oaks Homeowners Ass'n, 80 Va. Cir. 502, 505 (Va. Cir. Ct. 2010).

133 Cencast Servs., L.P. v. United States, 91 Fed. Cl. 496, 506 (Fed. Cl. 2010).

134 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).

16.5 Unprotected Historical Facts

The unprotected nature of historical facts reflects a fairly simple axiom -- but has generated troublesome judicial confusion. [16.501]

It should seem obvious that in nearly every situation the privilege does not extend to historical facts -- something either happened or didn't happen.[136] [16.502]

- However, an adversary must uncover those historical facts using other discovery, rather than seeking the "factual" portion of clients' communications to their lawyers.[137] [16.503]

- Similarly, the adversary should not be able to seek discovery from a client's lawyer about such historical facts that the client shared with the lawyer in connection with a request for legal advice about those facts.[138] [16.504]

Despite courts' recognition of this basic principle, relatively recent Fed .R. Civ. P. 26(b)(5)(B) and Federal Rule of Evidence 502 inexplicably refer to privileged or work product-protected "information."

In some circumstances, courts properly analyzing the privilege also protect the fact that a client has communicated with a lawyer about a specific matter, despite the general rule that historical facts do not deserve privilege protection. [16.505]

- Chapter 12 discusses that issue.

16.6 Pre-Existing Documents Received from Client

Pre-existing non-privileged documents do not gain privilege protection simply because the client gives those documents to a lawyer -- although a recent trend has extended privilege protection in certain limited circumstances. [16.601]

Clients cannot extend privilege protection to pre-existing non-privileged documents by sending them to a lawyer. [16.602]

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135 ADT Sec. Servs., Inc. v. Swenson, Civ. No. 07-2983 (JRT/AJB), 2010 U.S. Dist. LEXIS 74987, at *14-15 (D. Minn. July 26, 2010).

136 Keating v. McCahill, Civ. A. No. 11-518, 2012 U.S. Dist. LEXIS 91179, at *8 (E.D. Pa. June 28, 2012).

137 Harlow v. Sprint Nextel Corp., Case No. 08-2222-KHV-DJW, 2012 U.S. Dist. LEXIS 25868, at *20 n.28 (D. Kan. Feb. 28, 2012).

138 Specht v. Google, Inc., 268 F.R.D. 596, 601 (N.D. Ill. 2010).

- Otherwise, clients could simply box up their files and ship them all to a lawyer -- and then withhold those pre-existing documents during discovery.

A few recent cases have allowed clients to claim privilege protection for an email string of communications with other joint clients or fellow employees, which one of them then forwards to a lawyer -- explicitly or implicitly seeking legal advice about the earlier electronic "conversation."[139] [16.603]

- Some courts require that the withholding client prove that the earlier email string has been produced elsewhere during discovery -- but other courts essentially assume or presume as much.[140]

16.7 Client's Non-Substantive Communications

The privilege generally does not protect clients' non-substantive communications to lawyers.

- Examples include communications about where and when to meet, etc.

16.8 Client Communications Relaying Historical Facts

The privilege usually protects clients' contemporaneous communications to lawyers relaying historical facts. [16.801]

Most courts properly apply this principle.[141] [16.802]

- Other courts inexplicably find the privilege inapplicable to factual portions of such contemporaneous communications. [16.803]

- Such a position is ironic, because the privilege developed to protect precisely this type of communication.

16.9 Review of Draft Documents

The privilege can also protect clients' contemporaneous communications about which the client seeks legal advice. [16.901]

As with documents a client intends to but has not yet communicated to a lawyer, the privilege should protect a client's draft contemporaneous document that the client has not yet relayed to a lawyer. [16.902]

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139 Dawe v. Corr. USA, 263 F.R.D. 613, 621 (E.D. Cal. 2009).

140 Hilton-Rorar v. State & Fed. Commc'ns Inc., Case No. 5:09-CV-01004, 2010 U.S. Dist. LEXIS 36121 (N.D. Ohio Apr. 13, 2010).

141 Martin v. State Farm Mut. Auto. Ins. Co., Case No. 3:10-cv-0144, 2011 U.S. Dist. LEXIS 36058, at *11 (S.D. W. Va. Apr. 1, 2011).

Courts analyzing draft documents must distinguish between a work-in-process draft (reflecting a lawyer's input and thus deserving privilege protection), and a final draft which may not deserve protection because the client intends to disclose it outside the intimate attorney-client relationship.[142] [16.903]

The privilege usually protects draft contemporaneous documents (such as contracts or other transactional documents) that clients create for the purpose of obtaining legal advice about them.[143] [16.904]

- Examples include draft response to a government inquiry; draft grievance disposition; draft client policies; draft email to a third party; the client's draft patent application; the client's draft agreement, accompanied by a request for legal review and advice; the client's draft interrogatory answers; the client's draft letter to a third party; the client's invention report, which was not accompanied by an explicit request for legal advice.

As in other contexts, a worrisome trend involves some courts' narrow focus on just the four corners of such draft documents -- rather than on the context of their creation and the reason for their transmission to a lawyer.[144] [16.905]

Clients' inclusion of recipients other than lawyers can abort privilege protection. [16.906]

- Some courts adopt essentially a per se approach, precluding privilege protection.[145]

- Other courts take a more appropriate nuanced approach.[146]

If the privilege is available for such draft documents, courts must then determine if the privilege extends to the entire document or just to those portions that are not ultimately disclosed outside the intimate attorney-client relationship. [16.907]

- Chapter 21 discusses that issue.

16.10 Drafts Clients Intend to Disclose

Any privilege protection for documents normally "evaporates" once the client forms the intent to disclose them outside the attorney-client relationship.

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142 Judicial Watch, Inc. v. Dep't of Army, 435 F. Supp. 2d 81, 90 & n.5 (D.D.C. 2006).

143 Robbins & Myers, Inc. v. J.M. Huber Corp., 274 F.R.D. 63, 85 (W.D.N.Y. 2011).

144 United Food & Commercial Workers Union v. Chesapeake Energy Corp., No. CIV-09-1114-D, 2012 U.S. Dist. LEXIS 86913, at *30 (W.D. Okla. June 22, 2012).

145 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 nonlegal personnel within the corporation.").

146 SmithKline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 478 (E.D. Pa. 2005).

- Chapter 21 discusses that issue.

16.11 Clients' Acts after Advice is Received

The privilege generally does not protect the acts clients take after obtaining legal advice.

- Chapter 12 discusses that issue.

CHAPTER 17

LAWYER-TO-CLIENT COMMUNICATIONS

17.1 Introduction

The attorney-client privilege can protect communications from lawyers to their clients.

- These types of communications generally deserve less protection than clients' communications to their lawyers.

17.2 Uncommunicated Lawyer Documents

As with some documents that a client has not yet communicated to a lawyer, the privilege can protect documents a lawyer has not yet communicated to a client. [17.201]

The privilege generally applies to a lawyer's uncommunicated notes memorializing conversations with a client. [17.202]

In contrast, some courts fail to protect uncommunicated lawyer documents.[147] [17.203]

- Some courts apparently do not even protect a lawyer's legal research, unless it was communicated to the client.[148]

17.3 Lawyer-to-Lawyer Communications

In most situations the privilege can apply to lawyer-to-lawyer communications that directly relate to a lawyer's provision of legal advice to a client. [17.301]

Lawyers working together to represent a common client can nearly always engage in privileged communications about their joint work. [17.302]

However, the privilege does not always protect lawyer-to-lawyer communications. [17.303]

- For example, the privilege does not protect communications between lawyers representing different clients communicating without the type of common interest agreement courts require. Chapter 20 discusses that issue.

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147 Aiossa v. Bank of Am., N.A., CV 10-01275 (JS) (ETB), 2011 U.S. Dist. LEXIS 102207, at *31 (E.D.N.Y. Sept. 12, 2011).

148 360 Constr. Co., Inc. v. Atsalis Bros. Painting Co., 280 F.R.D. 347, 353 (E.D. Mich. 2012).

In contrast to the attorney-client privilege, the work product doctrine can protect a lawyer's communications with other lawyers, because that protection does not depend on a client's involvement. [17.304]

- Chapter 34 discusses that issue.

17.4 Rules Governing Lawyer-to-Client Communications

Under what is called the "derivative protection" doctrine, the privilege generally protects lawyers' communications to clients only to the extent that the communications relate to the clients' confidential communication to the lawyers. [17.401]

Courts take differing approaches to this basic principle. [17.402]

- Some courts essentially protect all communications from lawyers to their clients.[149]

- Some courts protect lawyer communications based on client confidences, or the disclosure of which would tend to reveal client confidences.

- At the other extreme, some courts seem to protect lawyer communications only if they disclose client confidences.[150]

Some courts have dealt with related issues. [17.403]

- After a long judicial debate, courts in Pennsylvania have extended privilege protection to lawyer-to-client communications.

- The Vioxx[151] decision discussed in Chapter 15 held that many communications from Merck in-house lawyers to Merck employees did not deserve privilege protection -- because the employees' communications to those lawyers forfeited any privilege protection when they also were widely circulated to Merck's nonlawyers.

17.5 Lawyers' Requests for Facts from Clients

The privilege generally protects a lawyer's request for historical facts from the client, which the lawyer needs before providing legal advice to the client.

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149 In re N.Y. Renu with Moistureloc Prod. Liab. Litig., MDL No. 1785, C/A No. 2:06-MN-77777-DCN, 2008 U.S. Dist. LEXIS 88515, at *38-39 (D.S.C. May 6, 2008).

150 Tex. v. United States, 279 F.R.D. 24, 27 (D.D.C. Jan. 2, 2012), vacated in part on other grounds, 270 F.R.D. 176 (D.D.C. Jan. 6, 2012).

151 In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789 (E.D. La. 2007).

17.6 Historical Facts

The privilege usually does not protect historical facts -- something either happened or it did not happen.

- This is the same principle that applies in the context of client-to-lawyer communications. Chapter 16 discusses that issue.

Despite courts' recognition of this basic principle, relatively recent Fed .R. Civ. P. 26(b)(5)(B) and Federal Rule of Evidence 502 inexplicably refer to privileged or work product-protected "information."

17.7 Historical Facts Within the Lawyer's Knowledge

Courts have debated the privilege's applicability to historical facts within lawyers' knowledge. [17.701]

Theoretically, the privilege does not protect historical facts that lawyers do not give their clients -- but as a practical matter the adversary's choice of discovery plays a key role. [17.702]

- Clients being deposed can honestly express ignorance about historical facts their lawyers have not shared with them -- but must include such facts when answering interrogatories.[152]

The privilege usually does not protect historical facts that lawyers provide to their clients with the expectation that the clients will pass the facts along to a third party outside privilege protection.[153] [17.703]

The privilege can only protect facts that lawyers give their client in the lawyers' role as legal advisors. [17.704]

- Some courts addressing clients' depositions allow clients to decline to testify about factual matters the clients learned from lawyers.[154]

- Some courts take exactly the opposite approach.[155]

Courts have analyzed various deposition questions focusing on client/deponents' knowledge of facts that the clients learned from their lawyers. [17.705]

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[152] Axler v. Scientific Ecology Grp., Inc., 196 F.R.D. 210, 212 (D. Mass. 2000).

[153] Note Funding Corp. v. Bobian Inv. Co., No. 93 CIV. 7427 (DAB), 1995 U.S. Dist. LEXIS 16605, at *9-10 (S.D.N.Y. Nov. 9, 1995).

[154] S. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1387 (Fla. 1994).

[155] Marianist Province of the United States, Inc. v. Century Indem. Co., Civ. A. No. 08-cv-01760-WYD-MEH, 2010 U.S. Dist. LEXIS 101241, at *7-8 (D. Colo. Sept. 7, 2010).

- Courts disagree about privilege protection for the fact that client/deponents learned something from lawyers, rather than from some other source.

- Adversaries presumably can identify such facts -- by asking client/deponents where they learned of each historical fact in their possession, and waiting for a privilege objection that will signal that a lawyer gave the client that fact.

In those unusual situations when an adversary can depose a litigant's lawyer, the lawyer generally must disclose historical facts in her possession. [17.706]

17.8 Pre-Existing Documents that Lawyers Give to their Clients

The privilege generally does not protect pre-existing non-privileged documents that lawyers give to their clients.

- This is the same principle that applies in the client-to-lawyer context, discussed in Chapter 16.

It seems strange that the law never developed privilege protection for the identity of such documents, which might reflect the lawyer's opinions or strategy.

- Such protection developed in the work product context. Chapter 42 discusses that issue.

17.9 Lawyer's Documents Relaying Facts to Clients

Privilege protection for lawyers' contemporaneous documents relaying historical facts to clients depends on their content.

Lawyers' simple recitation of some extrinsic facts or third party's communications generally does not deserve protection.[156]

- Examples include lawyers' documents that reports on a lawyer's discussions with a third party; provides an update on the factual context of the client's matter; reports on facts learned from a third party; reports on a public event; reports on negotiations; relates public record information.

In contrast, the privilege should protect documents which inherently reflect lawyers' legal advice, by including only cherry-picked facts emphasizing parts of a third-party's communication.

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[156] Urban Box Office Network, Inc. v. Interfase Managers, L.P., No. 01 Civ. 8854 (LTS)(THK), 2006 U.S. Dist. LEXIS 20648, at *8, *25-26 (S.D.N.Y. Apr. 18, 2006).

- Of course, portions of such documents that clearly contain legal advice can be redacted before disclosing the rest.

17.10 Drafts

Courts have addressed the privilege protection available for drafts of lawyer-created contemporaneous documents such as contracts, letters, etc. [17.1001]

Courts properly recognizing privilege principles characterize lawyer-created draft contemporaneous documents as a form of legal advice.[157] [17.1002]

One court cleverly noted that:

- If the lawyer and the client disclose the draft without changing it, the adversary can obtain that copy and does need the draft; if the lawyer and the client modify the draft, those modifications deserve privilege protection; if the lawyer and the client never disclose a version of the document, it necessarily reflected legal advice that was never disclosed and therefore deserves continuing protection.[158]

17.11 Protection for Lawyer-Created Drafts

Most courts protect lawyer-created draft contemporaneous documents.

- Examples include drafts of the following documents reflecting lawyers' input: corporate documents; legal memorandum; articles; public statements; letters; board related documents; public filings; contracts.

The privilege also normally extends to lawyer changes on client-created drafts, as long as the changes reflect legal advice.[159] [17.1101]

The privilege protection "evaporates" once the client forms the intent to disclose a draft document to someone outside privilege protection. [17.1102]

- Chapter 21 discusses that issue.

17.12 Legal Advice

The privilege can protect lawyers' legal advice, although that general statement involves a number of subtle issues. [17.1201]

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157 Jedwab v. MGM Grand Hotels, Inc., No. 8077, 1986 Del. Ch. LEXIS 383, at *7-8 (Del. Ch. Mar. 20, 1986).

158 Nesse v. Shaw Pittman, 202 F.R.D. 344, 351 (D.D.C. 2001).

159 Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res., Inc., Civ. A. No. 03-1496 c/w 03-1664 SECTION: "A" (4), 2004 U.S. Dist. LEXIS 10197, at *62 (E.D. La. June 3, 2004).

The privilege extends only to legal advice, not business or other nonlegal advice. [17.1202]

- Chapter 15 discusses that issue.

Under the "derivative protection" doctrine, legal advice usually deserves protection only if it discloses or at least reflects client confidences. [17.1203]

- That is discussed above.

17.13 Lawyer Advice Disclosed in Draft Documents

As explained above, most courts correctly characterize draft contemporaneous documents as legal advice.

- Lawyers' revisions to a client-created draft contemporaneous document can deserve protection if they involve legal rather than nonlegal advice. [17.1301]

The privilege generally does not extend to non-substantive communications. [17.1302]

- Thus, the privilege normally does not protect lawyers' communications to clients about trial dates, etc.[160]

The privilege usually extends to legal advice about external law, rather than advice about some internal corporate regulations.[161] [17.1303]

The privilege usually does not protect abstract or generic advice. [17.1304]

- Examples include deposition preparation video; manual for claims managers; "litigation manuals" about how the company should react to and handle litigation; training video prepared by a law firm containing basic business guidance; document containing "only generic descriptions of the law as it might apply to the securities industry, such as generalized references to 'what courts have said' and a general explanation of the 'due diligence defense' to some claims of securities fraud and misrepresentation;" internal compliance manual consisting of neutral and objective statements of the law (and hypotheticals); neutral analysis of government agency regulations; general guidance for employees; communication quoting statutory language that the lawyer thinks is important for the client; advice that a client's public statements could cause the client to lose lawsuits.

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160 Nwabeke v. Torso Tiger, Inc., Case No. 6:04-cv-410-Orl-18KRS, 2007 U.S. Dist. LEXIS 30117, at *8-9 (M.D. Fla. Apr. 24, 2007).

161 In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 803-04 (E.D. La. 2007).

Courts disagree about what level of specificity generates privilege protection for legal advice. [17.1305]

Some courts take a broad view, protecting fairly generic advice.

- Examples include company's "Suspension Order" directing the preservation of documents after litigation began; outside patent counsel's letter to a client about a conversation with a PTO examiner; annual litigation budget; bank litigation committee agenda.

Some courts take a narrower view, declining to protect generic advice.

- Examples include summary of a document; email from a lawyer to a client describing lease provisions, which the court held was educational in nature.

Some courts do not extend privilege protection to a lawyer's terse response to a client's request for legal advice -- such as "OK."[162] [17.1306]

- Other courts take what seems like the more logical approach, protecting even a lawyer's concise legal advice.[163]

17.14 Lawyer's Actions

The privilege usually does not protect lawyers' actions after their communications with clients.

- In contrast, most courts extend privilege protection (often in a deposition setting) to lawyers' "understanding" or "rationale" for such actions, which necessarily tend to disclose lawyers' advice or opinion.[164]

17.15 Expectation of Disclosure

The privilege covering lawyers' communications to clients "evaporates" once clients form the intent to disclose the communication to someone outside privilege protection.

- Chapter 21 discusses that issue.

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162 TVT Records, Inc. v. Island Def Jam Music Grp., 214 F.R.D. 143, 151 (S.D.N.Y. 2003).

163 Equity Residential v. Kendall Risk Mgmt., Inc., 246 F.R.D. 557, 568 (N.D. Ill. 2007).

164 Dearmand E. v. City of Antioch, No. C 08-1709 SI, 2009 U.S. Dist. LEXIS 76239, at *4-5 (N.D. Cal. July 24, 2009).

17.16 Discovery about Discovery

Lawyers' communications to clients sometimes implicate what could be called "discovery about discovery" -- which involves adversaries' efforts to analyze litigants' discovery responses.

- Chapter 58 discusses that issue.

17.17 Work Product Protection

In contrast to the attorney-client privilege, the work product doctrine can protect any client "representative's" document motivated by litigation or anticipated litigation, regardless of a lawyer's involvement.

- Chapter 34 discusses that issue.

CHAPTER 18

THE CRIME-FRAUD EXCEPTION

18.1 Introduction

The attorney-client privilege does not protect communications between clients and their lawyers that further the former's criminal, fraudulent, or other egregiously improper conduct.

- This principle is commonly called the "crime-fraud exception."

18.2 Applicability to Future Wrongdoing

The crime-fraud exception normally strips away privilege protection for communications related to a client's future wrongful acts -- not acts the client has already taken.[165]

Courts disagree about the exception's application to crimes or frauds that might be considered "ongoing."

- Most courts apply the exception to communications designed to conceal past crimes or frauds.[166]

- It makes sense to apply this approach to active acts of concealment, but a simple failure to disclose a client's previous misconduct might intrude on the general principle finding the exception inapplicable to communications about past wrongdoing.

18.3 Wrongdoing Covered by the Exception

The crime-fraud exception applies to clients' crimes and frauds, and courts have debated the exception's applicability to other wrongdoing. [18.301]

- The exception clearly applies to clients' criminal conduct. [18.302]

- Courts also extend the exception to clients' fraudulent conduct.[167] [18.303]

Courts disagree about the exception's application to other misconduct. [18.304]

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165 Cont'l Cas. Co. v. Am. Home Assurance Co., Civ. A. No. 2:00-0260, 2010 U.S. Dist. LEXIS 15717, at *21 (S.D. W. Va. Feb. 23, 2010).

166 Parvati Corp v. City of Oak Forest, No. 08 C 702, 2010 U.S. Dist. LEXIS 121010, at *10 (N.D. Ill. Nov. 16, 2010).

167 Chevron Corp. v. Salazar, 275 F.R.D. 437, 454 (S.D.N.Y. 2011).

Some courts take an expansive view, applying the exception to clients' wrongful conduct other than crimes or frauds.

- Examples include inequitable conduct in a patent context; conspiracy to elicit client confidences or secrets in violation of the ethics rules; causing a witness to not answer simple questions when being examined; intentional breach of fiduciary duty; deception and deceit; fraud on the United States Patent Office; spoliation of evidence in criminal cases and civil cases; insurance bad faith; securities fraud; baseless litigation (generally to the extent that it furthers some other wrongful conduct); violation of a foreign criminal law; intentional tort; lawyer's false discovery responses; lawyer's unprofessional behavior; lawyer's unethical behavior; lawyer's sanctionable conduct; gross negligence; intentional torts moored in fraud; serious unlawful activity, fraud on a court; conspiracy to deprive individuals of their civil rights; intentional infliction of emotional distress.

Some courts take a narrower approach, declining to apply the exception to some types of wrongdoing.

- Examples include inequitable conduct in patent cases; tortious conduct; trespass; filing of bankruptcy; frivolous lawsuit; government's malicious prosecution; firing or replacement of an employee; errors made during the discovery process; possible perjury in a malpractice case; late production of a document in litigation; insurance company's bad faith; unfair trade practices.

Adversaries seeking to apply the crime-fraud exception must sufficiently allege litigants' wrongdoing. [18.305]

Some courts have explained that the exception does not apply to clients' uncompleted crime, fraud, or other wrongdoing.[168] [18.306]

- This principle applies to wrongdoing that the client abandons, but should not apply to wrongdoing that law enforcement or some other outside person discovers in time to prevent.

Courts recognize that the exception normally does not apply simply because otherwise privileged communications would provide evidence of clients' wrongdoing. [18.307]

18.4 Connection Between the Wrongdoing and the Communication

Courts applying the exception generally require that the otherwise privileged communication bears some connection to clients' wrongdoing. [18.401]

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[168] Zimmerman v. Poly Prep Country Day Sch., No. 09 CV 4586 (FB), 2012 U.S. Dist. LEXIS 78816, at *24 (E.D.N.Y. June 5, 2012).

The exception can apply to any type of communication. [18.402]

- Most cases involve documents, but the same analysis applies to oral communications.

Some courts apply the exception only to otherwise privileged communications that "further" or "facilitate" clients' wrongdoing.[169] [18.403]

- Some courts take a more expansive view, applying the exception to otherwise privileged communications that simply bear some "relationship" to clients' wrongdoing.[170] [18.404]

18.5 Knowledge of the Wrongdoing

Courts analyzing the crime-fraud exception's applicability focus on the client's criminal or other wrongful intent. [18.501]

The exception usually can apply regardless of lawyers' lack of knowledge or intent. [18.503]

- This differs from the crime-fraud exception's application to work product. [18.504] Chapter 44 discusses that issue.

18.6 Applying the Exception

Courts applying the crime-fraud exception agree on several basic principles. [18.601]

- Among other things, courts analyze each withheld communication to determine if the exception applies. [18.602]

18.7 Process for Applying the Exception

Courts usually engage in a two-step process in analyzing the crime-fraud exception's applicability.[171]

- First, a court must determine whether an adversary seeking application of the exception has met the standard for the court's in camera review of the withheld communications.

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169 AP Links, LLC v. Russ, No. CV 09-5437 (TCP) (AKT), 2012 U.S. Dist. LEXIS 105974, at *13 (E.D.N.Y. July 30, 2012).

170 Britz Fertilizers, Inc. v. Bayer Corp., No. 1:06cv287 OWW DLB, 2009 U.S. Dist. LEXIS 44589, at *23 (E.D. Cal. May 4, 2009).

171 Tindall v. H & S Homes, LLC, Civ. A. No. 5:10-cv-44 (CAR), 2010 U.S. Dist. LEXIS 122067, *7, *3 (M.D. Ga. Nov. 17, 2010).

- Second, the court must then determine if the adversary seeking the exception's application has met the standard for actually stripping away a litigant's privilege protection.

18.8 Adversary Establishing the Crime-Fraud Exception

Because applying the crime-fraud exception involves a fact-intensive analysis, an adversary can point to changed circumstances in seeking its application even if the adversary has already lost an earlier attempt.[172]

18.9 First Step: In Camera Review

The first step in analyzing the crime-fraud exception's possible applicability focuses on the court's possible in camera review of the withheld communications.

The United States Supreme Court's decision in United States v. Zolin[173] provides guidance on this issue. [18.901]

Courts acknowledge that an adversary seeking an in camera review does not have to satisfy the higher standard necessary for stripping away a litigant's privilege protection. [18.902]

However, courts have articulated various standards for this initial burden. [18.902]

- Examples include probable cause; preponderance of the evidence; prima facie showing.

Courts disagree about their discretion to conduct such in camera reviews. [18.903]

- Most courts hold that they have discretion.[174]

- Some courts seem to require such an in camera review before determining whether to strip away a litigant's privilege.[175]

18.10 Second Step: Evidence and Hearing

The second step in determining the crime-fraud exception's applicability involves courts deciding whether adversaries have met the standard for stripping away litigants' privilege protection.

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172 Saint Annes Dev. Co, LLC v. Trabich, Civ. No. WDQ-07-1056, 2009 U.S. Dist. LEXIS 10257, at *27 (D. Md. Feb. 9, 2009).

173 United States v. Zolin, 491 U.S. 554 (1989).

174 In re Chevron Corp., 633 F.3d 153, 167 n.19 (3d Cir. 2011).

175 United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247, 253 n.5 (4th Cir. 2005).

This step includes some logistical issues.

- Courts disagree about whether a court can strip away litigants' privilege protection based only on adversaries' evidence. [18.1001]

- Courts also disagree about the necessity for an evidentiary hearing before stripping away litigants' privilege protection. [18.1002]

18.11 Standard for Overcoming the Privilege

The second step in courts' application of the crime-fraud exception involves substantive issues too. [18.1101]

Courts disagree about the appropriate standard for this second step in the process. [18.1102]

- Examples include clear and convincing showing; prima facie showing; reasonable basis; probable cause; preponderance of the evidence.

Courts have also articulated various definitions of these possible standards. [18.1103]

18.12 Expansion of the Exception

The increasing "criminalization" of American law, especially in the corporate context, threatens a parallel expansion of the crime-fraud exception's applicability.

CHAPTER 19

PRESENCE OF THIRD PARTIES

19.1 Introduction

Although the attorney-client privilege primarily depends on content rather than context, a communication's context can sometimes impact privilege protection issues.

19.2 "Expectation of Confidentiality" Element

What could be called the "expectation of confidentiality" privilege element extends privilege protection only to communications that the client intends to remain confidential.[176]

- One court used a useful phrase -- warning that clients wishing to create and preserve privilege protection "must treat confidentiality of attorney-client communications like jewels -- if not crown jewels."[177]

19.3 Characterizing Third Parties' Involvement

Given the importance of this confidentiality expectation, courts frequently must assess whether third parties participating in otherwise privileged communications are inside or outside privilege protection.

- If such third parties are inside privilege protection, their participation in otherwise privileged communications does not abort the privilege protection -- but the opposite conclusion results in the privilege's unavailability for such communications.

19.4 Expectation of Confidentiality Versus Waiver

The "expectation of confidentiality" element differs from waiver principles discussed in Chapters 23 through 31.

The privilege never protects communications in the presence of third parties outside privilege protection.

- In contrast, a waiver can occur upon disclosure of pre-existing privileged communications to someone outside privilege protection.

The "bottom line" is the same in each situation -- the privilege does not protect the communications.

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176 Lopes v. Vieira, 688 F. Supp. 2d 1050, 1058 (E.D. Cal. 2010).

177 In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989).

- However, waiving an existing privilege protection creates the risk of a subject matter waiver -- which sometimes requires litigants to disclose additional privileged communications on the same subject. Chapter 30 discusses that issue.

19.5 Sloppy Handling of Privileged Communications

In some situations, courts find that clients' sloppy handling of otherwise privileged communications means that the clients fall short of the "expectation of confidentiality" element.

- In extreme circumstances, this can abort privilege protection even without disclosure of the communication to someone outside privilege protection.

- Of course, the issue never arises unless adversaries find the communication or learns of the sloppy handling.

Courts usually assess the reasonableness of clients' steps to preserve confidentiality.

- For instance, leaving a privileged communication on a desk where adversaries might find it could forfeit the privilege, while leaving a computer password in the desk might not have the same effect -- because clients would not expect adversaries to search for the password and wrongfully gain access to the clients' computer.[178]

19.6 Uninvited Third Parties

Uninvited third parties' presence during otherwise privileged communications can abort privilege protection.

An uninvited third party's obvious presence during otherwise privileged communications generally forfeits privilege protection. [19.601]

Courts disagree about whether the adversary must prove that such an obvious uninvited third party actually overheard the otherwise privileged communications. [19.603]

- Some courts seem to require only proof that such an obvious third party was present, while some courts use almost a "reasonable man" standard in determining if clients communicated where they might have been overheard.[179]

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178 Parnes v. Parnes, 915 N.Y.S.2d 345 (N.Y. App. Div. 2011).

179 People v. Urbano, 26 Cal. Rptr. 3d 871, 875 (Cal. Ct. App. 2005) (internal citation omitted).

- Some courts seem to find the privilege unavailable only if the adversary presents evidence that an obvious third party actually overheard the communications.[180]

Privilege protection usually survives the presence of eavesdroppers or other uninvited third parties whose presence is not obvious. [19.604]

19.7 Invited Third Parties

The privilege might or might not protect communications in the presence of invited third parties -- depending on their role. [19.701]

Courts analyzing the effect of invited third parties' presence during otherwise privileged communications must characterize the third parties as either inside or outside privilege protection. [19.702]

- Courts undertaking this analysis sometimes require evidence describing such third parties' role and presence.[181] [19.703]

19.8 Intracorporate Communications with Corporate Employees

Within a corporate setting, fellow employees' presence might or might not abort privilege protection -- depending on the applicable law and those other employees' role. [19.801]

States following the minority "control group" standard for privilege protection in the corporate context examine whether such other employees fall inside the protected "control group" or outside that status. [19.802]

- Chapter 6 discusses the "control group" standard.

Courts following the majority Upjohn standard (also discussed in Chapter 6) usually find that the privilege protects intracorporate communications only if the participants had a "need to know" the legal advice sought and given. [19.803]

- Examples include employees of an affiliated corporation; functional equivalent of an employee; others helping to prepare a Form 10-K; "high-level" personnel; employees involved in decision-making; employees who need the company lawyer's advice; company vice president.

In contrast, most courts hold that privilege does not protect communications with or in the presence of employees with no "need to know."

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[180] Ashkinazi v. Sapir, No. 02 CV 0002 (RCC), 2004 U.S. Dist. LEXIS 14523, at *4 (S.D.N.Y. July 27, 2004).

[181] Pakieser v. Mich. Nurses Ass'n, Civ. A. No. 08-CV-14219-DT, 2009 U.S. Dist. LEXIS 118389 (E.D. Mich. Dec. 18, 2009).

- Examples include employee not involved in transmitting a communication or in decision-making.

A few courts have found that the privilege does not protect corporate communications which can be accessed by employees with no "need to know," even if they did not participate in such communications.[182] [19.804]

- This seems like an unnecessarily narrow and unrealistic view.

Most courts hold that the privilege does not protect communications in the presence of adverse employees or former employees. [19.805]

- Examples include: former employee accompanied by his own lawyer during a deposition preparation session; former director in a telephone call that also included her own lawyer; former employee; corporate board of directors members attending a law firm's report to the board about possible options backdating wrongdoing, who were themselves the subject of the investigation (and who were accompanied by their own personal lawyers); adverse employee attending a meeting between an employee and the company's lawyer.

Given corporate employees' and lawyers' frequent interaction with nonemployee agents and consultants, courts often analyze the privilege impact of those agents' participation in otherwise privileged communications. [19.806]

- That is discussed below.

19.9 Invited Client Agents

Clients sometimes involve their agents or consultants in otherwise privileged communications. [19.901]

Courts take widely varying views on the effect of such client agents' participation. [19.902]

- This issue parallels courts' disagreement about privilege protection for clients' and their lawyers' communications with such agents (Chapter 8), and the waiver impact of disclosing pre-existing privilege communications to such agents (Chapter 26).

The Restatement[183] and some courts take a broad approach, essentially allowing the privilege to protect communications despite the presence of client agents. [19.903]

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182 Traficante v. Homeq Servicing Corp., Civ. A. No. 9-746, 2010 U.S. Dist. LEXIS 80387 (W.D. Pa. Aug. 10, 2010).

183 Restatement (Third) of Law Governing Lawyers § 70 cmt. f (2000).

- Examples include translator; consultant sharing a common interest with a party; outside marketing consultant; union executive assisting a police officer; co-counsel; accountant; consultant; client's friend, who could add a "cool head" to meetings between the client and the client's lawyer; outside insurance claims adjuster; Korean businessman who could help a Korean client understand the culture and communications involved; business consultant (in dicta); outside auditor; investment banker in a client-lawyer meeting about a corporate transaction; insurance agent.

Most courts take a far narrower approach, finding that the privilege does not protect communications in the presence of client agents other than those "necessary" for the communications.[184] [19.904]

- Examples include corporation president's friend; former corporate employee's personal lawyer (attending a deposition preparation session); union organizer; union representative; girlfriend; film crew; accountant; witness's lawyer (during an interview by a company's audit committee); police officer, who attended an otherwise privileged communication between a defendant and his lawyer; auditor; co-venturer and the co-venturer's medical advisor; outside auditor attending meetings of a company's audit committee; advisor Merrill Lynch's employees; insurance broker for the World Trade Center's lessee, who attended meetings between the lessee, the lessee's law firm and others after the 9-11 attack on the World Trade Center; independent contractor acting as a mental health consultant; third-party doctor participating in a telephone call between a lawyer and a client; outside auditor attending a corporate board meeting; investment banker attending a corporate board meeting; political allies; friend; client's agent who accompanied the client to a meeting with a lawyer and then stayed at the meeting; employees from another company.

19.10 Family Members

Courts have analyzed the privilege implications of clients' family members participating in otherwise privileged communications. [19.1001]

Some courts seek additional evidence about such family members' role. [19.1002]

- For instance, a court might need to assess whether an elderly client required a child's involvement in otherwise privileged communications -- under whatever standard the court applies in such situations.[185]

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184 Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Case No. 08 Civ. 7508 (SAS), 2011 U.S. Dist. LEXIS 116850, at *16 (S.D.N.Y. Sept. 30, 2011).

185 Witte v. Witte, No. 4D11-3520, 2012 Fla. App. LEXIS 5178 (Fla. Dist. Ct. App. Apr. 4, 2012).

Some courts hold that family members' participation in otherwise privileged communications did not forfeit privilege protection. [19.1003]

- Examples include parents and neighbors of an 18-year-old student; father of a suspected murderer, although finding that the father could then waive the privilege; husband; son-in-law who spoke Farsi and could therefore help his father-in-law understand the communication; daughter accompanying her 76-year-old mother; parent accompanying a child.

Some courts hold that family members' participation in otherwise privileged communication aborted privilege protection. [19.1004]

- Examples include sister; sister who placed a telephone call to a lawyer for her incarcerated brother and then stayed on the line during their conversation; girlfriend; mother; children in a mother's meeting with a court-appointed psychologist; daughter; mother and a fiancé.

Courts have analyzed the privilege implications of a client's spouse participating in otherwise privileged communications -- which also implicates some states' marital privilege. [19.1005]

- Some courts find that a spouse's participation does not forfeit the privilege protection,[186] while some courts take the opposite approach.[187]

19.11 Invited Lawyer Agents

Clients and their lawyers sometimes involve lawyers' agents or consultants in otherwise privileged communications. [19.1101]

Courts agree that the privilege can protect communications in the presence of lawyers' nonlawyer staff assisting the lawyer.[188] [19.1102]

Courts disagree about the privilege implications of other lawyer agents' participation in otherwise privileged communications. [19.1103]

- The impact of such lawyer agents' participation generally follows the analysis that courts apply in analyzing direct communications with such lawyer agents. [19.1104] Chapter 10 discusses that issue.

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186 In re Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321 (S.D.N.Y. 2003).

187 Smith v. Fox, Civ. A. No. 5:08-CV-22-KSF, 2009 U.S. Dist. LEXIS 59275, at *9-10 (E.D. Ky. July 10, 2009).

188 United States v. Bennett, Case No. CR609-067, 2010 U.S. Dist. LEXIS 113955, at *18-19 (S.D. Ga. Oct. 5, 2010).

19.12 Electronic Communications

Courts generally hold that electronic communications can satisfy the pertinent "expectation of confidentiality" privilege element.

19.13 Personal Communications on Work Computers

Courts sometimes assess whether corporate employees can claim privilege protection for personal privileged communications using the employer's hardware or software.

- Courts usually analyze the employer's personnel policy to determine if it sufficiently warned employees that such use forfeited their personal privilege protection.[189]

- Only New Jersey seems to hold that even an explicitly articulated company policy cannot destroy employees' expectation of privilege protection in such a context.[190]

This issue sometimes can involve company lawyers' ethics responsibilities.[191]

19.14 Sloppy Destruction of Privileged Communications

Clients can forfeit their privilege if they engage in sloppy destruction of privileged communications, risking disclosure to third parties.[192]

- Most courts do not require dramatic destruction processes such as shredding, but expect clients to take reasonable steps when destroying privileged communications.[193]

19.15 Work Product Doctrine

The "expectation of confidentiality" element applies very differently in the work product context, because that more robust protection does not depend on confidentiality.

- Chapter 35 discusses that issue.

A third party whose presence destroys privilege protection might nevertheless be capable of creating protected work product, as a client "representative."[194]

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189 In re Asia Global Crossing, Ltd., 322 B.R. 247, 259 (Bankr. S.D.N.Y. 2005).

190 Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 655 (N.J. 2010).

191 Fiber Materials, Inc. v. Subilia, 974 A.2d 918, 928 (Me. 2009).

192 Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254 (N.D. Ill. 1981).

193 McCafferty's, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163, 169-70 (D. Md. 1998).

CHAPTER 20

THE JOINT DEFENSE/COMMON INTEREST DOCTRINE

20.1 Introduction

In certain specific circumstances, an agreement among multiple separately represented clients can avoid what would normally be a waiver upon their sharing of each other's privileged communications.

- However, so-called "joint defense" or (more commonly) "common interest" doctrine normally does not offer the assurance that many lawyers and their clients expect. Such agreements often fail, by which time it is too late to avoid a privilege waiver.

20.2 Common Interest Doctrine Versus Joint Representations

The common interest doctrine differs from joint representation arrangements in several important ways. [20.201]

- Chapter 5 discusses joint representations.

Under the common interest doctrine, each participant retains its own lawyer, and shares privileged communications with the other common interest participants only to the extent that it wants to share. [20.202]

The common interest doctrine has a number of advantages and disadvantages compared to joint representations. [20.203]

The advantages of the common interest doctrine over a joint representation include:

- Possible privilege protection among clients who normally could not be represented by a single lawyer because of serious conflicts.

- Absence of the normal requirement to share all privileged communications with the other participants (in contrast to joint representations' usual "no secrets" approach).

- Participants' ability to withhold from the other participants privileged communications with their own lawyers, if adversity develops.

- Increased likelihood that lawyers can continue representing their own clients if adversity develops.

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[194] Nat'l Educ. Training Grp. V. Skillsoft Corp., No. M8-85 (WHP), 1999 U.S. Dist. LEXIS 8680, at *12-13 (S.D.N.Y. June 9, 1999).

The disadvantages of the common interest doctrine compared to joint representations include:

- Most courts' recognition of valid common interest agreements only if the participants are in or reasonably "anticipate" litigation -- with the lack of a consensus "anticipation" standard compounding the uncertainty.

- Courts' disagreement about the type and degree of commonality required to support common interest agreements, which increases uncertainty about such agreements' effectiveness.

- Some courts' "micromanagement" of common interest agreements by selection of a later effective date than the participants contractually designated -- which means that any sharing of privileged communications before that date waived privilege protection.

- Greater likelihood of adversaries' challenges (resulting in over half of asserted common interest agreements failing).

- Common interest participants' usual inability to know in advance where adversaries might challenge their common interest agreements, which prevents the participants from planning ahead to meet the applicable standard.

- Common interest participants' inability to predict whether their agreement will survive courts' later scrutiny -- by which time it is too late for the participants to avoid having waived their privilege protection.

- The possibility that waivers occurring in connection with common interest agreements might result in subject matter waivers.

20.3 History of the Common Interest Doctrine

The common interest doctrine began in a nineteenth century criminal case, in which the Virginia Supreme Court allowed criminal co-defendants to share privileged communications without waiving their protection.[195]

As the doctrine spread to the civil context and began to protect plaintiffs as well as defendants, most courts began to use the broader term "common interest doctrine."[196]

- Despite the widespread adoption of the common interest doctrine, some states still do not appear to recognize it.[197]

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[195] Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822 (1871).

[196] McLane Foodservice, Inc. v. Ready Pac Produce, Inc., Civ. No. 10-6076 (RMB/JS), 2012 U.S. Dist. LEXIS 76343, at *2 n.1 (D.N.J. June 1, 2012).

20.4 Nature of the Protection

Some courts' description of the doctrine contains an erroneous conclusion -- although those courts' apparently incorrect articulation does not seem to have weakened the doctrine's applicability. [20.401]

Many courts state that the common interest doctrine applies only if the underlying communication disclosed to fellow common interest participants intrinsically deserves privilege protection.[198] [20.402]

- This is undeniably true for pre-existing communications, but obviously is not true for communications among the common interest participants' lawyers and the participants themselves.

- Fortunately, courts applying the doctrine normally protect such communications, despite the absence of any intrinsic privilege protection for them.

Courts normally require confidentiality among common interest participants.[199] [20.403]

20.5 Litigation or Anticipated Litigation

Perhaps the common interest doctrine's greatest weakness involves most courts' insistence that the participants be in or anticipate litigation. [20.501]

- Most courts recognize the doctrine, but have never settled on a uniform approach to this "anticipation of litigation" requirement.

Some courts do not recognize the common interest doctrine in any situation, regardless of any anticipated litigation. [20.502]

Some courts honor common interest agreements only in the context of active ongoing litigation.[200] [20.503]

Some courts examine each participant's involvement in or anticipated involvement in litigation, which risks rendering the protection unavailable for all the participants if one of them does not sufficiently anticipate litigation.[201] [20.504]

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197 State Farm Mut. Auto. Ins. Co. v. Hawkins, Case No. 08-10367, 2010 U.S. Dist. LEXIS 55260, at *19 (E.D. Mich. June 4, 2010); State ex rel. Stovall v. Brooke Grp., Ltd., Case No. 97-CV-319, slip op. at 8 (D. Kan. Oct. 15, 1997).

198 MGA Entm't, Inc. v. Nat'l Prods. Ltd., No. CV 10-07083 JAK (SSx), 2012 U.S. Dist. LEXIS 108408, at *9 (C.D. Cal. Aug. 2, 2012).

199 N.Y.C. Emps.' Ret. Sys. v. Berry (In re Juniper Networks, Inc. Sec. Litig.), Case Nos. C 06-4327 & 08-00245 JW (PVT), 2009 U.S. Dist. LEXIS 118859, at *10 (N.D. Cal. Dec. 9, 2009).

200 In re XL Specialty Ins. Co., 373 S.W.3d 46, 51-52 (Tex. 2012).

Courts' varying definitions of the required "anticipation" compounds the uncertainty.

- Examples include substantial possibility of litigation; strong possibility of future litigation; palpable threat of litigation; realistic basis for believing that the participant will be a party; threatened litigation; reasonably anticipated litigation; more than a "fear" of a lawsuit (which the court said was a "concern shared by most -- if not all -- corporations."); some prospect of litigation; potential litigation; contemplated litigation; facing no immediate threat of litigation.

Some courts extend common interest doctrine protection to participants who do not themselves necessarily anticipate litigation, but whose interests are aligned with other participants who are in or anticipate litigation.[202] [20.505]

- Courts have applied this approach to defendants and plaintiffs.

The Third[203] and Seventh[204] circuits have articulated a common interest doctrine protection that would apparently apply even in the absence of litigation or anticipated litigation. [20.506]

- However, lower courts in those circuits do not always follow that approach, which seems implausibly broad.[205]

20.6 Creation of the Protection

Courts recognizing the common interest doctrine have articulated various requirements for its application. [20.601]

All courts require a "meeting of the minds" among the common interest participants. [20.602]

- No court requires a written common interest agreement.[206] [20.603]

Courts disagree about intrinsic protection for common interest agreements themselves.

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201 Am. Legacy Found. v. Lorillard Tobacco Co., C. A. No. 19406, 2004 Del. Ch. LEXIS 157 (Del. Ch. Nov. 3, 2004).

202 Adair v. EQT Prod. Co., Case No. 1:10cv00037, 2012 U.S. Dist. LEXIS 89403, at *8 (W.D. Va. June 28, 2012).

203 Teleglobe Commc'ns Corp. v. BCE (In re Teleglobe Commc'ns Corp.), Inc., 493 F.3d 345, 364 (3d Cir. 2007).

204 United States v. BDO Seidman, LLP, 492 F.3d 806, 816 & n.6 (7th Cir. 2007).

205 3Com Corp. v. Diamond II Holdings, Inc., C.A. No. 3933-VCN, 2010 Del. Ch. LEXIS 126, at *32 (Del. Ch. May 31, 2010.

206 Pac. Pictures Corp. v. United States Dist. Court, No. 11 71844, 2012 U.S. App. LEXIS 7643, at *17-18 (9th Cir. Apr. 17, 2012).

- Some courts protect such agreements under the attorney-client privilege, while some do not. [20.604]

- Similarly, some courts protect such agreements under the work product doctrine, while some do not. [20.605]

20.7 Types of Common Interest Supporting Agreement

Courts require that common interest participants share a common legal interest.

- Common business or other nonlegal interests do not suffice.[207]

20.8 Degree of Commonality Required

Courts disagree about the required degree of commonality among common interest participants' interests. [20.801]

Some courts require an "identical" interest among the participants.[208] [20.802]

- Some courts articulate a standard requiring less than an identical interest.[209] [20.803]

Under either one of these standards, most courts focus on those interests on which the participants' interests align -- rather than requiring that the participants' interests overlap in every respect.

Even transactional adversaries can enjoy the common interest doctrine's benefits. [20.804]

- For instance, a potential buyer and seller of patent rights can share a common interest in the patents' validity and enforceability.[210]

Even direct litigation adversaries can participate in a common interest agreement. [20.805]

- For instance, co-defendants who have asserted claims against each other might share a common interest in defending against plaintiffs' claims.[211]

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207 McLane Foodservice, Inc. v. Ready Pac Produce, Inc., Civ. No. 10-6076 (RMB/JS), 2012 U.S. Dist. LEXIS 76343, at *13 (D.N.J. June 1, 2012).

208 Gulf Coast Shippers Ltd. P'ship v. DHL Express (USA), Inc., Case No. 2:09cv221, 2011 U.S. Dist. LEXIS 80938, at *17 (D. Utah July 15, 2011).

209 King Drug Co. of Florence, Inc. v. Cephalon, Inc., Civ. A. No. 2:06-cv-1797, 2011 U.S. Dist. LEXIS 71806, at *19(E.D. Pa. July 5, 2011).

210 High Point Sarl v. Sprint Nextel Corp., Civ. A. Case No. 09-2269-CM-DJW, 2012 U.S. Dist. LEXIS 8435, at *35 (D. Kan. Jan. 25, 2012).

Uncertainty over the commonality requirement adds to the risk of participants' reliance on the common interest doctrine. [20.806]

20.9 Participants in Communications

Courts disagree about the necessity for lawyers' involvement in communications sought to be protected by the common interest doctrine. [20.901]

Courts generally take one of three approaches. [20.902]

- Some courts appear to hold that the common interest doctrine can protect the participants' direct communications, without any of their lawyers' participation.[212]

- Some courts extend protection to participants' direct communications only if they were motivated by lawyers' instruction or relaying lawyers' advice.[213]

- Some courts only protect communications in which a lawyer participates.[214]

20.10 Courts' Application of the Doctrine

Courts' application of the common interest doctrine also highlights the risk of participants' reliance on the doctrine. [20.1001]

Among other things, courts examine each withheld communication to assess whether it furthered the asserted common legal interest. [20.1002]

Courts sometimes pick an effective date later than the date reflected in the participants' written or oral common interest agreement.[215] [20.1003]

- If this occurs, any privileged communications shared among the participants before the judicially selected date presumably already waived their privilege protection.

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211 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).

212 United States v. Under Seal (In re Grand Jury Subpoenas 89-3 & 89-4, John Doe 89-129), 902 F.2d 244, 249 (4th Cir. 1990).

213 John B. v. Goetz, No. 3:98-0168, 2010 U.S. Dist. LEXIS 8821, at *296 (M.D. Tenn. Jan. 28, 2010).

214 MobileMedia Ideas LLC v. Apple Inc., 890 F. Supp. 2d 508, 515 (D. Del. 2012).

215 Hunton & Williams v. United States DOJ, 590 F.3d 272 (4th Cir. 2010).

20.11 Examples of Assertions of the Doctrine

Courts reject over half of the common interest agreements they assess. [20.1101]

To be sure, some participants successfully assert the common interest doctrine's applicability. [20.1102]

- These situations usually involve co-defendants already in litigation, or participants who clearly anticipate imminent litigation.

- Examples include private company and the Army sharing a common interest in replacing a property manager; bank and debtor; two companies which had formed a third company to receive and defend patents the two companies transferred to it; two companies involved in the delivery of allegedly contaminated lettuce to Taco Bell restaurants, both of whom had been sued and who had sued each other; Wal Mart and a city; private plaintiff; patent owner and a possible buyer of the patent; credit and creditor seeking to confirm a plan in bankruptcy court; numerous states dealing with tobacco companies; producer and buyer of a computer chip involved in patent litigation; United States Government and the manufacturer of the BlackBerry smartphone; patent applicant and licensee; co-insureds; borrower and non-party lenders; states' attorneys general; copyright owner and royalty income recipient; trademark assignor and assignee; manufacturer and seller of allegedly infringing product; city and school district; parent and now bankrupt subsidiary; companies enforcing and exploiting patents; acquiring and acquired company communicating about the latter's asbestos liability; bond insurer and trustee; patent licensee and a developer; company and its shareholders; U.S. government and a relator; corporate affiliates; co-defendants accused of patent infringement; state and federal agencies; two banks which have signed a merger agreement; individual and the company he controlled; purchaser and the licensee of a patent; court-appointed receiver in a Chapter 11 bankruptcy and a secured creditor; accounting firm and a law firm facing the same legal issues; trustee and a noteholder; foundation and its advertising agency that had been threatened with litigation; city council and a city manager; major league baseball clubs and a major league properties company that had a common legal interest in enforcement of the baseball club's trademark rights; company and one of its former employees; inside and outside directors of a corporation; manufacturer and purchaser of products dealing with an infringement threat; parent and subsidiary.

However, many common interest agreement participants find to their undoubted dismay that a court has rejected their common interest doctrine assertion. [20.1103]

- Such adverse opinions necessarily mean that the participants have waived privilege protection for communications they already shared.

- Examples include EPA (seeking liability against any potentially responsible party) and the U.S. Army Corp of Engineers (seeking to avoid liability); patent licensor and licensee; manufacturer and customers; service provider whose employee stole confidential information from a company and the company who was allegedly victimized by the theft; company and a potential investor who is not yet a partner; debtor and creditor engaging in pre-petition strategizing; company and its litigation finance company assisting in the litigation; plaintiff and litigation financing company; government and a qui tam plaintiff; corporate audit committee and executive being investigated for wrongdoing; city and a property owner; company and its advertising agencies; company and its land purchase agent; company's audit committee and a third party witness; company and consultant with a financial state in the success of company transactions; litigant and payee of fees; government regulator and regulated company; bankruptcy trustee and creditor; company and board members being investigated for wrongdoing; company and the government cooperating in an investigation into a third party's alleged wrongdoing; inventor of patent and purchaser; two clients with similar problems; company and a shareholder; parties entering into a tolling agreement; employee plaintiff who settled her case and then shared information with the defendant's law firm; litigants coordinating only logistical and scheduling issues; banks negotiating but not yet agreed upon merger; corporation and bidder for the majority of its assets; companies working together on a patent; company and an executive cooperating in an internal investigation; company and the government cooperating in pursuing corporate executive wrongdoers; patent assignor and an assignee; bank and its investment advisors; affiliated corporations trying to assure that one of the corporations received payment; alleged victim of a fraud and the FBI, which was investigating the fraud; company and its outside auditor; licensor and licensee; companies jointly lobbying government regulators; company being investigated by the FTC and its advertising agency; two companies entering into a license agreement; company and an investment banker that had not been threatened with litigation; presidential advisor and the federal government; First Lady and the federal government; parties interested in preserving someone's reputation; company and its financial advisor; party and its "management consultant"; companies negotiating a merger (before execution of the merger agreement); two corporations involved in an arms-length asset purchase; company and a prospective buyer of the company.

20.12 Danger of a Subject Matter Waiver

If participants' attempt to seek common interest doctrine protection fails, the participants must then worry about a possible subject matter waiver (discussed in Chapter 30).

- Participants whose attempts fail because they did not sufficiently anticipate litigation probably do not have to worry about a subject matter waiver -- under common law principles and Rule of Evidence 502 (discussed in Chapter 30).

- In contrast, participants whose attempts fail because they did not demonstrate a sufficiently common interest might have to worry about a subject matter waiver.

20.13 Applicability in the Insurance Context

Several courts have addressed the common interest doctrine's applicability in the insurance context. [20.1301]

Some courts take a broad view, finding that an insurance carrier and its insured can enter into a valid common interest agreement.[216] [20.1302]

Some courts take a narrower view, holding that insurance carriers share only a financial rather than a legal common interest with their insureds.[217] [20.1303]

Some courts have rejected common interest agreements among those involved in an insurance context.

- Examples include an employer and a worker's compensation insurance carrier; between an insured and insurance company which had reserved its rights; between a plan administrator and insurance agents with whom they worked; an insurance company and insured; between an insurance company and a reinsurer; between an insurance company and a reinsurer's underwriter; the World Trade Center loan servicer and its insurance advisor; the World Trade Center lessee and his insurance broker; an insured and an insurance broker; reinsurers (because the "common interest" was commercial rather than legal).

Some Illinois courts apply what is called the Waste Management approach. [20.1304]

- This is discussed below.

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[216] Alit (No. 1) Ltd. v. Brooks Ins. Agency, Civ. A. No. 10-2403 (FLW), 2012 U.S. Dist. LEXIS 38144, at *30 (D.N.J. Mar. 21, 2012).

[217] McNally Tunneling Corp. v. City of Evanston, No. 00 C 6979, 2001 U.S. Dist. LEXIS 17090, at *9-10, *10-11 (N.D. Ill. Oct. 16, 2001).

Because non-adverse third parties can generally share work product without waiving that separate protection, the work product doctrine can sometimes provide an independent protection in the insurance context. [20.1305]

- Chapters 47 and 48 discuss that issue.

20.14 Later Adversity Among Participants

Adversity among common interest participants can affect the participants and their lawyers. [20.1401]

Among other things, a common interest participant who becomes adverse to another participant generally can obtain access to and use any privileged communications shared among the participants. [20.1402]

- In contrast to the joint representation context, adverse former participants cannot obtain access to other participants' private communications with their own lawyers. Chapter 24 discusses that issue.

Under what is called the Waste Management[218] approach, some Illinois courts hold that an insurance carrier who denied coverage and did not even assist the insured in the underlying case may nevertheless obtain otherwise privileged communications between the spurned insured and its lawyer -- because of some inherent common interest between the carrier and the insured. [20.1403]

- This approach does not make much sense, and courts outside Illinois have not adopted the same approach.

Because common interest participants' lawyers usually obtain privileged and confidential information from and about the other participants, some courts disqualify a participant's lawyer from later representing its client in a related matter adverse to other participants.[219] [20.1404]

- Participants' lawyers might be able to avoid such disqualification by including prospective consents in common interest agreements.[220]

20.15 Discovery about Discovery

The discoverability of common interest agreements can arise as an issue if an adversary engages in what could be called "discovery about discovery."

- Chapter 58 discusses that issue.

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218 Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991).

219 In re Gabapentin Patent Litig., 407 F. Supp. 2d 607, 615 (D.N.J. 2005).

220 In re Shared Memory Graphics LLC, 659 F.3d 1336 (Fed. Cir. 2011).

20.16 Work Product

Work product normally can be shared with non-adverse third parties without waiving that separate protection.

- Chapters 47 and 48 discuss that issue.

Because most courts apply the common interest doctrine only during ongoing litigation or in anticipation of litigation, this legal principle creates an ironic situation.

- In the litigation or anticipated litigation setting that most courts require for effective common interest agreements, such agreements usually are not necessary to avoid participants' waiving their work product protection -- which will cover most of what they will share.

- Thus, common interest agreement participants can eliminate much of the "sting" that can come from courts' rejection of their agreement by sharing only work product -- rather than communications protected only by the more fragile attorney-client privilege.

CHAPTER 21

INTENT TO DISCLOSE CONTENT

21.1 Introduction

Although attorney-client privilege protection depends more on content than context, courts agree that the privilege essentially "evaporates" when clients form the intent to disclose otherwise privileged communications outside the attorney-client relationship.

21.2 The Intent to Disclose Versus Waiver

This "intent to disclose" concept differs from the waiver doctrine.

- If clients form the intent to disclose privileged communications, the protection disappears even before the disclosure,[221] thus differing from express waivers (discussed in Chapter 26) -- and without clients' reliance on the communication, thus differing from implied waivers (discussed in Chapter 27).

The intended disclosures' waiver impact depends on what clients ultimately disclose.

- If clients ultimately disclose documents that on their face no longer deserve privilege protection, the disclosure does not cause a waiver (discussed in Chapter 35). For instance, once clients and lawyers agree on a pleading's final form, filing that pleading does not cause a waiver.

- In contrast, some communications undeniably deserve privilege protection that cannot be eliminated. For instance, clients who disclose a privileged legal memorandum from a lawyer cannot avoid a waiver -- even if clients try to disclaim privilege protection. Chapter 23 discusses that issue.

- In the latter situation, transforming the memorandum into a non-privileged "position paper," and disclosing that document, normally would not cause a waiver.

21.3 Documents

The attorney-client privilege does not protect documents that clients or their lawyers intend to disclose outside the attorney-client relationship.

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221 Griffith v. Davis, 161 F.R.D. 687, 694 (C.D. Cal. 1995).

- Ironically, privilege protection can disappear for documents that clients thought they had disclosed -- even if clients later discover that the documents had not actually been disclosed.[222]

Courts rely on this basic principle in requiring production of documents clients intend to disclose to various outsiders.

- Examples include others at a real estate closing; authorities dealing with child abuse; the public; Patent and Trademark Office; IRS; reinsurer; licensing authorities.

This principle applies in more subtle fashion to contemporaneous documents such as drafts.

- The privilege only evaporates for the final version that clients decide to disclose -- which sometimes requires courts to analyze whether a document represents the final version.[223]

Clients normally cannot disclaim privilege protection for facially privileged documents, and avoid waiving the privilege upon disclosing such documents.

21.4 Information

The privilege usually does not protect information clients intend to disclose outside the attorney-client relationship.

- In most situations, clients intend such information to be included in documents to be disclosed outside the attorney-client relationship.

Courts have applied this principle to various types of information clients intend to disclose to various outsiders.

- Examples include bankruptcy court; company targeted by the EEOC, which gathered the information in a questionnaire; other side in a transaction; criminal defendant; prosecutor; government; third parties; IRS in tax returns; Patent and Trademark Office.

Of course, clients can intend to disclose some information they give to their lawyers, but maintain other information's confidentiality.

Clients' intent to disclose information to one outsider generally prevents the clients from resisting dissemination to other outsiders.[224]

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[222] Tect Aerospace Wellington, Inc. V. Thyssenkrupp Materials NA, Case No. 07-1306-JTM, 2009 U.S. Dist. LEXIS 40230, at *6-7 (D. Kan. May 12, 2009).

[223] Morris v. Scenera Research, LLC, No. 09 CVS 19678, 2011 NCBC LEXIS 34, at *21-22 (N.C. Sup. Ct. Aug. 26, 2011).

21.5 Communications

The privilege usually does not protect communications clients intend to disclose outside the attorney-client relationship.[225]

21.6 Related Communications

Some courts inexplicably extend this "intent to disclose" principle to communications related to those communications clients intend to disclose.[226]

- This approach seems incorrect.

21.7 Preliminary Drafts of Documents

The basic "intent to disclose" principle applies in subtle ways to clients' and lawyers' drafts -- the final of version of which they intend to disclose outside the attorney-client relationship. [21.701]

Some courts protect all such preliminary drafts. [21.702]

- These courts reason that clients cannot withhold the final disclosed version, and that all drafts other than that final version necessarily reflect protected privileged communications.[227]

- Courts have applied this common sense principle to draft SEC filings.[228]

Courts applying what they call the Schenet[229] doctrine take a slightly less expansive view. [21.703]

- Under that approach, the privilege protects only those portions of preliminary drafts that do not appear in the final version.

- Sorting through all preliminary drafts to redact undisclosed sentences or words can be time-consuming and expensive.[230]

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224 U.S. v. Ruehle, 583 F.3d 600, 612 (9th Cir. 2009).

225 Estate of Putnam v. State, No. CV095010669, 2009 Conn. Super. LEXIS 3519, at *5 (Conn. Super. Ct. Dec. 29, 2009).

226 Fed. Election Comm'n v. Christian Coal., 178 F.R.D. 61, 67 (E.D. Va.), aff'd in part, modified in part, 178 F.R.D. 456 (E.D. Va. 1998).

227 Nesse v. Shaw Pittman, 202 F.R.D. 344, 351 (D.D.C. 2001).

228 Roth v. Aon Corp., 254 F.R.D. 538, 541 42 (N.D. Ill. 2009); Jedwab v. MGM Grand Hotels, Inc., No. 8077, 1986 Del. Ch. LEXIS 383, at *7-8 (Del. Ch. Mar. 20, 1986).

229 Schenet v. Anderson, 678 F. Supp. 1280 (E.D. Mich. 1988).

Some courts take an extreme view, inexplicably refusing to protect preliminary drafts of documents whose final version clients intend to disclose outside the attorney-client relationship.[231] [21.704]

- This approach seems wrong, and courts certainly would not apply it to their own judicial opinions' preliminary drafts -- even though they will publish the final version of such opinions.

It makes the most sense to protect all preliminary drafts of documents whose final version clients intend to disclose. [21.705]

21.8 Privileged Documents that Will Be Used at Trial

Courts usually require litigants to disclose privileged documents they intend to use at trial.

- Courts applying this general principle sometimes warn litigants ahead of time that they must disclose such documents or they will be precluded from using them at trial,[232] and sometimes refuse such documents' admission at trial if litigants have not disclosed the documents during discovery.

21.9 Work Product

The "intent to disclose" principle normally does not apply in the same way to work product, because in many situations litigants create work product intending to use it at trial.

- The main issue involving work product is the disclosure's timing. Chapter 35 discusses that issue.

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230 In re N.Y. Renu with Moistureloc, C/A No. 2:06-MN-77777-DCN, MDL. No. 1785, 2008 U.S. Dist. LEXIS 88515, at *17 18 (D.S.C. May 8, 2008).

231 In re Pappas, Case No. 08-10949, 2009 Bankr. LEXIS 1394, at *1-2 (Bankr. D. Del. June 3, 2009).

232 United States v. Capital Tax Corp., No. 04 CV 4138, 2011 U.S. Dist. LEXIS 13242, at *20 (N.D. Ill. Feb. 10, 2011).

CHAPTER 22

INTERNAL CORPORATE INVESTIGATIONS AND INSURANCE

22.1 Introduction

Courts have extensively analyzed attorney-client privilege protection for internal corporate investigations and insurance-related communications.

- Corporate investigations and insurance issues more frequently involve work product protection. Chapter 43 discusses that issue.

22.2 Early Decision in the Investigation Context

Corporations normally should consider before initiating an internal corporate investigation whether they might want to assert privilege protection.

- If corporations intend to disclose or rely on an internal corporate investigation, they may decide to forgo any privilege protection -- and instead undertake a deliberately non-protected investigation.

22.3 Communications about the Investigation

Regardless of any privilege protection available for communications undertaken during internal corporate investigations, the privilege can cover otherwise protected communications about the investigations, or about the investigations' results.[233]

22.4 Facts and Logistics of the Investigation

Most courts provide little if any protection to internal corporate investigation's logistics.

- Chapter 11 generally discusses that issue.

Some courts take a broader view, protecting even such logistical facts.[234]

- This issue parallels what could be called "discovery about discovery" -- adversaries' efforts to learn about litigants' actions in responding to discovery. Chapter 58 discusses that issue.

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[233] Malin v. Hospira, Inc.,No. 08 C 4393, 2010 U.S. Dist. LEXIS 98586, at *2-3 (N.D. Ill. Sept. 21, 2010).

[234] Le v. City of Wilmington, 480 F. App'x 678, 687 (3d Cir. 2012).

22.5 Internal Corporate Investigations: Introduction

In the investigation context, as elsewhere, the privilege only protects communications relating to clients' request for legal advice.

- Thus, the privilege does not protect investigation-related communications simply because lawyers undertook the investigation.

Courts generally examine three aspects of internal corporate investigations in determining the attorney-client privilege's applicability: initiation, course, and use.

22.6 Initiation of the Investigation

First, courts assessing privilege protection for internal corporate investigations examine the investigations' initiation.

The privilege only protects communications during investigations primarily motivated by legal rather than business or other nonlegal reasons.

- In determining investigations' primary purpose, courts focus on what initiated the investigation -- including any initiating documents.[235]

Corporations which do not involve lawyers very early in the process can find it nearly impossible to later prove that the investigations were primarily motivated by their need for legal advice.

Courts can look elsewhere for such evidence.

- Some courts seem skeptical of corporations' post hoc explanations of why they undertook internal investigations.[236]

22.7 Course of the Investigation

Second, courts examine internal corporate investigations' course.

- Although privilege protection does not depend on lawyers' involvement in every interview, etc., the greater lawyers' involvement, the more likely courts are to extend privilege protection.

22.8 Use of the Investigation

Third, courts examine internal corporate investigations' use.

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[235] Woodmen of the World Life Ins. Soc'y v. U.S. Bank Nat'l Ass'n, No. 8:09CV407, 2012 U.S. Dist. LEXIS 12462, at *20 (D. Neb. Feb. 2, 2012).

[236] Craig V. Rite Aid Corp., Civ. A. No. 4:08-CV-2317, 2012 U.S. Dist. LEXIS 16418, at *16 (M.D. Pa. Feb. 9, 2012).

Corporations using investigations' results for employment decisions, business restructuring, etc., may forfeit any arguable privilege protection.[237]

- As in other situations, the privilege only protects internal corporate investigations used for primarily legal rather than nonlegal reasons.

22.9 "Morphed" Investigations with Changing Motivations

Although theoretically investigations begun for some nonlegal reasons can "morph" into protected investigations, courts usually reject such arguments.

22.10 Parallel or Successive Investigations

In some situations, corporations can undertake parallel or successive investigations -- contemporaneously with or after a non-privileged investigation.

- This approach probably has a greater chance of success than the "morphed" investigation argument, and one court accepted a privilege claim in this context.[238]

- Although corporations face additional expense in undertaking such separate legally motivated internal corporate investigations, initiating separate investigations may offer the only hope for privilege protection if a corporation's first investigation fails to pass muster under the pertinent court's privilege analysis.

22.11 Examples from Internal Corporate Investigations

Depending on the initiation, course, and use of internal corporate investigations, courts reach differing conclusion about the privilege's applicability. [22.1101]

Some courts find the privilege applicable. [22.1102]

- Examples include investigation by an in-house lawyer for the city of Wilmington; investigation by Gibson Dunn and Schulte Roth into alleged financial irregularities in several hedge funds; investigation by the general counsel of Boston Scientific Corporation into a product recall; investigation by Howrey into various issues at Caterpillar; investigation by an outside law firm into conditions at a correctional facility; investigation by Hospira's in-house lawyer into a plaintiff's EEOC charges; investigation by KMPG (working under the direction of an in-house Morgan Stanley lawyer) into a former Morgan Stanley's employee's employment and whistle-blower claims; investigation by Sidley Austin into possible sexual molestation by a

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237 Cruz v. Coach Stores, Inc., 196 F.R.D. 228, 231 (S.D.N.Y. 2000).

238 Ratcliff v. Sprint Mo., Inc., 261 S.W.3d 534, 548 (Mo. Ct. App. 2008).

school district teacher; investigation by Vinson & Elkins and forensic accountant Deloitte & Touche into business practices of Suprema; investigation by Debevoise & Plimpton into Merck's possible wrongdoing in selling Vioxx; investigation by Morrison & Foerster, Wilson Sonsini and forensic accountant PWC into alleged options backdating at Brocade (although the privilege was later waived); investigation by Baker Botts and forensic accountant KPMG into possible wrongdoing at i2 Technologies; investigation by WilmerHale and forensic accountant Ernst & Young into possible overcharging of lending fees by Household.

Some courts find the privilege inapplicable. [22.1103]

- Examples include investigation into a retail store's slip and fall incident; investigation by Goodwin Proctor into a bank executive's possible misrepresentation about mortgage backed securities; investigation by Andrews Kurth and forensic accountant Grant Thornton into options backdating at Microtune; internal corporate investigation by an IBM ombudsman investigator into IBM's termination of a contract; investigation by Holland & Knight into possible wrongdoing by a company involving human remains; investigation by Watchell Lipton into alleged wrongdoing at Allied Irish Bank; investigation by Gibson, Dunn into its client's KPMG's audit of Seibu Corp.; Investigation into alleged discrimination and harassment at Coach stores.

Some of these investigations also involve work product claims.

- Chapter 43 discusses that issue.

22.12 Waiver in the Investigation Context

Normal waiver principles apply in the investigation context.

- Corporations disclosing privileged communications during or after such investigations can expressly waive privilege protection. Chapter 26 discusses that issue.

- Corporations relying on the fact of an investigation to gain some advantage can impliedly waive privilege protection. Chapter 28 discusses that issue.

22.13 Work Product in the Investigation Context

Internal corporate investigations also frequently involve work product issues.

- Chapter 43 discusses that issue.

22.14 Privilege Protection in the Insurance Context

Privilege issues can also arise in the insurance context. [22.1401]

States disagree about the existence of an attorney-client relationship between insurance companies and their insureds' lawyers. [22.1402]

- Some states recognize such a relationship,[239] while some states do not.

Even in the absence of a formal attorney-client relationship, some courts extend privilege protection to communications between insurance companies and their insureds' lawyers.[240] [22.1403]

- Adversity between insurance companies and their insureds normally eliminates whatever privilege protection would otherwise apply.[241]

Some courts find that insurance company employees deserve privilege protection as protected client agents. [22.1404]

- Some courts find the privilege applicable because insurance company employees act as insureds' lawyers' agents. [22.1405]

Courts disagree about the common interest doctrine's applicability in the insurance context. [22.1406]

- Chapter 20 discusses that issue.

Because communications in the insurance context frequently involve litigation or anticipated litigation, work product doctrine issues also frequently arise in that context. [22.1407]

- Chapter 43 discusses that issue.

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239 Bank of Am. v. Superior Court, 157 Cal. Rptr. 3d 526, 531 (Cal. Ct. App. 2013).

240 Shaheen v. Progressive Cas. Ins. Co., Case No. 5:08-CV-00034-R, 2012 U.S. Dist. LEXIS 27914, at *12 (W.D. Ken. Mar. 2, 2012).

241 United Heritage Prop. & Cas. Co. v. Farmers Alliance Mut. Ins. Co., Case No. 1:CV 10-456-BLW, 2011 U.S. Dist. LEXIS 20631, at *7 (D. Idaho Mar. 1, 2011).

CHAPTER 23

WAIVER OF THE PRIVILEGE

23.1 Introduction

Even if clients and their lawyers take all the necessary steps to assure their communications' attorney-client privilege protection, either clients or their lawyers can lose this protection by waiving it.

23.2 Privilege Can Be Unavailable or Lost

The privilege can be unavailable when clients or their lawyers communicate with third parties outside the attorney-client relationship, or when such third parties participate in otherwise privileged communications.

The privilege can fail to protect communications or be lost in several different settings.

- For example, the privilege does not protect clients' or lawyers' communications with outsiders; such outsiders' presence during otherwise privileged communications aborts the privilege; the privilege evaporates when clients intend to disclose otherwise privileged communications to outsiders; disclosing privileged communications expressly waives the privilege; clients can impliedly waive their privilege by relying on the fact of privileged communications rather than disclosing them.

23.3 No Client Intent to Waive

The term "waiver" might not be entirely appropriate in this setting, because clients can waive their privilege protection without intending to lose it.[242]

- In other legal contexts, "waivers" generally require an intent to forgo or lose some legal right.

23.4 Waiver Chapters of this Outline

Addressing waiver issues can be difficult, given the scope and subtlety of the waiver doctrine.

Chapter 24 discusses the power to waive the attorney-client privilege.

Chapter 25 discusses basic principles applicable to express waivers, which involve disclosure of privileged communications.

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[242] Mattel, Inc. v. MGA Entm't, Inc., Case No. CV 04-9049 DOC (RNBx), 2010 U.S. Dist. LEXIS 102461, at *25 (C.D. Cal. Sept. 22, 2010).

- Chapter 26 focuses on intentional express waivers, and Chapter 27 focuses on inadvertent express waivers.

Chapter 28 discusses implied waivers, which can occur without the disclosure of privileged communications.

- Chapter 29 focuses on the most extreme form of implied waiver, often called the "at issue" doctrine.

Chapter 30 discusses subject matter waiver, which can require the privilege's owner who discloses or relies on a privileged communication to disclose additional privileged communications on the same subject.

- Chapter 31 discusses such subject matter waivers' scope.

CHAPTER 24

POWER TO WAIVE THE PRIVILEGE

24.1 Introduction

Analyzing possible attorney-client privilege waiver necessarily begins with determining whether whoever acts or fails to act possesses authority to waive the privilege.

24.2 Individuals and Their Successors

Individual clients can waive their own privilege, but the issue becomes more complicated with bankrupt or deceased clients. [24.201]

Some courts analyzing authority to waive bankrupt individuals' privilege protection find that bankruptcy trustees can waive such individuals' privilege. [24.202]

- Some courts find that individuals' trustees do not have such authority.[243]
- This contrasts with the essentially per se rule that bankrupt corporations' trustees can waive such corporations' privilege (discussed below).

In most situations, deceased individual clients' executors control their privilege, and therefore can waive it.[244] [24.203]

Courts and bars sometimes recognize minor exceptions if executors' interests vary from those of the deceased clients.[245] [24.204]

- For instance, an abusive husband named as executor by an abused wife later driven to suicide probably would not gain the authority to waive his late wife's privilege.

Most courts find that the attorney-client privilege offers permanent protection that survives clients' death. [24.205]

However, some courts recognize what they call the "testamentary exception."

- Under that doctrine, lawyers who represent individuals may have to disclose privileged communications after their clients die -- if such disclosure would help resolve disputes among those taking under wills or other testamentary documents.

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243 In re Bounds, 443 B.R. 729, 734 (Bankr. W.D. Tex. 2010).

244 Clair v. Clair, Dkt. No. 10-1446-BLSI, 2011 Mass. Super. LEXIS 113, at *13-14 (Mass. Super Ct. May 16, 2011).

245 United States v. Yielding, 657 F.3d 688, 707 (8th Cir. 2011).

- The doctrine does not permit disclosure in the context of third parties such as creditors seeking estates' money.

24.3 Jointly Represented Clients

Because jointly represented clients each have power over privileged communications among them and their joint lawyer, waiver in that context can involve subtle issues. [24.301]

Most courts hold that each jointly represented client can waive privilege protection for his or her own communications with the joint lawyer.[246] [24.302]

In contrast, one jointly represented client usually cannot waive the privilege protecting communications among or involving other jointly represented clients.[247] [24.303]

- Jointly represented clients normally must unanimously agree to waive privilege protection covering communications among them.

If jointly represented clients later become adversaries, any of them usually can seek in discovery otherwise privileged communications between the former joint clients and their joint lawyer.[248] [24.304]

- Under this principle, one joint client usually can obtain access even to communications in which he or she did not participate at the time.

Courts disagree about the extent of adversity that triggers this principle.

- Some courts require litigation among former joint clients, while some courts require less acute adversity.

- Some courts indicate that this principle does not apply if lawyers improperly continued joint representations even after adversity developed.[249] [24.305]

Very few courts have dealt with the waiver impact of one former joint client's public use of privileged communications in its dispute with former joint clients. [24.306]

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246 Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 363 (3d Cir. 2007).

247 Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman, No. 01 Civ. 8539 (RWS), 2006 U.S. Dist. LEXIS 73272, at *8 (S.D.N.Y. Oct. 6, 2006).

248 In re Equaphor Inc., Ch. 7 Case No. 10-20490-BFK, 2012 Bankr. LEXIS 2129 (E.D. Va. May 11, 2012).

249 Eureka Inv. Corp., N.V. v. Chi. Title Ins. Co., 743 F.2d 932, 937-38 (D.C. Cir. 1984).

- The Restatement indicates that such use results in a general waiver, allowing other third parties access to the same communications[250] -- but one court has rejected that result.[251]

- It would seem that courts could review such evidence without a general public disclosure, thus preventing third parties from seeking access to those communications.

24.4 Joint Defense/Common Interest Participants

Joint defense/common interest participants' authority to waive their privilege protection parallels that of jointly represented clients, but with some important distinctions. [24.401]

- Chapter 20 discusses the common interest doctrine.

As with joint clients, each common interest participant normally can waive privilege protection for communications with its own lawyer, or another participant's lawyer. [24.402]

As with joint clients, common interest participants usually must unanimously vote to waive their privilege protecting privileged communications among them. [24.403]

In contrast to a joint representation context, common interest participants who have become adversaries generally cannot discover privileged communications between the other participants and their own lawyers that had not been shared with the other participants before the adversity.[252] [24.404]

- Thus, now-adverse common interest participants normally can only discover communications that participants shared with each other before the adversity developed.

Courts disagree about the degree of adversity that triggers this principle. [24.405]

- Some courts recognize that common interest participants can vary these "default" principles in their common interest agreements. [24.406]

24.5 Government Clients

The authority to waive privilege protection in the government context generally follows the rules applicable to other institutions. [24.501]

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250 Restatement (Third) of Law Governing Lawyers § 75 cmt. e (2000).

251 In re Crescent Res., LLC, 457 B.R. 506 (W.D. Tex. July 22, 2011).

252 Crispin Co. v. Petrotub-S.A., No. CIV-05-159 C, 2006 U.S. Dist. LEXIS 60639, at *7 (W.D. Okla. Aug. 24, 2006).

- High-level government officials generally can waive the government's privilege. [24.502]

Individual members of a multi-member government entity usually cannot unilaterally waive that entity's privilege. [24.503]

24.6 Corporate Clients

As with other privilege issues arising in the corporate context, assessing authority to waive corporations' privilege can involve subtle issues. [24.601]

Successor management usually gains the authority to waive corporations' privilege. [24.602]

- Such successor management can include purchasers of corporations' stock, and in some situations purchasers of corporations' assets. Chapter 6 discusses those issues.

As in other joint representation contexts, jointly represented corporations generally can waive their own privileged communications -- but not those of other joint clients. [24.603]

- The same principle generally applies to jointly represented corporations and their employees. [24.604]

Loyal current employees may or may not have the authority to waive their employers' privilege -- depending on their level in the corporate hierarchy. [24.605]

- Corporations' upper management usually can waive corporations' privilege.

Midlevel or lower-level employees may or may not possess authority to waive their employers' privilege.[253]

- Some courts hold that lower-level employees given authority to deal with privileged communications can waive their employers' privilege,[254] while some courts hold that such employees cannot waive their employers' privilege.[255]

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253 Pensacola Firefighters' Relief Pension Fund Bd. of Dirs. v. Merrill Lynch, Case No. 3:09cv53/MCR/MD, 2010 U.S. Dist. LEXIS 125018 (N.D. Fla. Nov. 10, 2010).

254 Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Court, 280 P.3d 240, 147 (Mont. 2012).

255 Williams v. Sprint/United Mgmt. Co., Case No. 03-2200-JWL-DJW, 2006 U.S. Dist. LEXIS 47853, at *31 (D. Kan. July 1, 2006).

- Loyal current employees who later become adverse to their former employers usually cannot waive corporations' privilege.[256] [24.606]

- Already-adverse current employees usually cannot waive their employers' privilege. [24.607]

Even loyal former employees generally cannot waive corporations' privilege. [24.608]

- One court recognized that such former employees can waive the privilege if their former employers acquiesce in their disclosure of privileged communications.[257]

Adverse former employees usually cannot waive corporations' privilege. [24.609]

Courts have dealt with former employees' desire to defend themselves using corporations' privileged communication. [24.610]

- In high-stakes criminal matters, some courts allow such former employees to defend themselves in that way.[258]

Courts disagree about whether corporations must give former now-adverse directors or employees access to privileged communications to which they had access when they worked at the corporation. [24.611]

- Chapter 6 discusses that issue.

24.7 Other Clients

Not many courts have assessed whether other institutional clients' constituents can waive privilege protection.

- For instance, courts disagree about whether accounting firms' partners can waive their firms' privilege protection.

24.8 Lawyers

Although lawyers do not own their clients' privilege, they may or may not be able to waive it. [24.801]

Lawyers acting with their clients' express authority normally can waive clients' privilege.[259] [25.802]

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256 Winans v. Starbucks Corp., No. 08 Civ. 3734 (LTS) (JCF), 2010 U.S. Dist. LEXIS 134136 (S.D.N.Y. Dec. 15, 2010).

257 Rowe Int'l Corp. v. Ecast, Inc., 241 F.R.D. 296, 300 (N.D. Ill. 2007).

258 United States v. W.R. Grace, 439 F. Supp. 2d 1125, 1145 (D. Mont. 2006).

- Most courts reach the same conclusion about lawyers acting with clients' implied authority. [24.803]

- Only a few courts have accepted clients' argument that lawyers' mistakes in the discovery process can never waive clients' privilege protection.[260]

Lawyers acting without client authority or acting in a way adverse to their clients usually cannot waive clients' privilege protection. [24.804]

- Other doctrines such as those in various ethics rules might allow lawyers' disclosure of privileged communications. [24.805]

Work product doctrine protection belongs jointly to clients and their lawyers, and therefore involves different waiver rules. [24.806]

24.9 Others

Non-clients generally cannot waive clients' privilege protection.

- For instance, hackers' dissemination of purloined privileged communications does not waive the owners' privilege. Chapter 25 discusses that issue.

24.10 Work Product

Because work product ownership differs from privilege ownership, the power to waive differs as well.

- Chapter 47 discusses that issue.

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[259] United States v. Health Care Mgmt. Partners, Ltd., Civ. A. No. 04-cv-02340-REB-BNB, 2006 U.S. Dist. LEXIS 58186, at *27-28 (D. Colo. Aug. 17, 2006).

[260] SunTrust Mortg., Inc. v. Busby, No. 2:09cv3, 2009 U.S. Dist. LEXIS 110316, at *8-9 (W.D.N.C. Nov. 3, 2009).

CHAPTER 25

EXPRESS WAIVER

25.1 Introduction

Express waiver involves disclosure of attorney-client privileged communications.

- Some principles apply to all express waivers, whether intentional or inadvertent.

25.2 Different Types of Express Waivers

Unfortunately, courts sometimes use confusing nomenclature when describing different types of waiver.

- For instance, some courts use the term "selective waiver" to mean a disclosure to one outsider that does not permit other outsiders access to the disclosed communication, and the term "partial waiver" to mean a disclosure of some portion of a privileged communication that does not require disclosure of the rest.

25.3 Disclosure Does Not Automatically Waive the Privilege

Disclosure of privileged communications does not automatically waive privilege protection.[261]

- For instance, paralegals' theft and disclosure on the Internet of lawyers' files does not waive any clients' privilege protection.

25.4 How Waiver Can Occur

An express waiver can occur through the disclosure of documents or oral communications.

25.5 Disclosure Versus Mere Access to a Communication

Courts have addressed whether an express waiver occurs only upon actual disclosure of a privileged communications, or upon giving third parties access to such privileged communications. [25.501]

Most courts hold that an express waiver can occur only upon actual disclosure of privileged communications.[262] [25.502]

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[261] Hamilton Cnty. v. Hotels.com, L.P., Case No. 3:11 CV 15, 2011 U.S. Dist. LEXIS 83520, at *10 (N.D. Ohio July 29, 2011).

- For instance, giving a litigation adversary access to one hundred boxes of documents generally does not waive the privilege for a protected document in box one hundred -- if the producing litigant retrieves the privileged document before the adversary starts to review documents in that box.

- A few courts hold that merely providing access causes a waiver.

In some situations, privilege protection essentially "evaporates" even before disclosure of privileged communications -- if clients form the intent to disclose them. [25.503]

- Chapter 21 discusses that issue.

Ethics issues can arise if producing litigants alert the receiving parties that they have inadvertently disclosed privileged communications. [25.504]

25.6 Disclosure of Non-Privileged Communications or Facts

An express waiver usually can occur only upon disclosure of a privileged communication. [25.601]

- Thus, an express waiver usually cannot occur upon disclosure of: a non-privileged communication or document [25.602]; the non-privileged fact that a privileged communication occurred [25.603]; non-protected historical facts[263] [25.604], including historical facts uncovered in an investigation.[264] [25.605]

This principle can help corporations avoid waiving their privilege when cooperating with the government.

- Courts properly analyzing waiver principles hold that disclosing historical facts to the government does not cause a waiver, because those facts do not deserve privilege protection.[265] [25.606]

- Unfortunately, some courts do not seem to understand this basic principle,[266] and some courts' ambiguous language makes it difficult to determine the approach they take.

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262 Laethem Equip. Co. v. Deere & Co., 261 F.R.D. 127, 135-36 (E.D. Mich. 2009).

263 Gruss v. Zwirn, 276 F.R.D. 115, 140 (S.D.N.Y. 2011).

264 Amco Ins. Co. v. Madera Quality Nut LLC, No. 1:04-cv-06456-SMS, 2006 U.S. Dist. LEXIS 21205, at *32-34 (E.D. Cal. Apr. 10, 2006).

265 Escue v. Sequent, Inc., Civ. A. No. 2:09-cv-765, 2012 U.S. Dist. LEXIS 9949, at *24-25, *25 (S.D. Ohio Jan. 25, 2012).

Disclosure of clients' position on some issue does not waive privilege protection, even if that position reflects advice clients have received from their lawyers. [25.607]

- Thus, clients submitting "position papers" to the government should not waive the privilege protecting underlying communications.[267] [25.608]

Ironically, clients' denial that they communicated with lawyers can sometimes cause a waiver. [25.609]

- Such waivers sometimes occur in criminal cases, when defendants deny learning something from a lawyer -- and then refuse to disclose communications that might contradict their assertion. Chapter 28 discusses that issue.

Although the danger of subject matter waivers has diminished under recent legal trends, the possibility of such subject matter waivers can color parties' express waiver analysis. [25.610]

- Among other things, parties disclosing communications in litigation might be inclined to argue that the communications did not deserve privilege protection, so that their production does not waive privilege protection -- or risk a subject matter waiver. [25.611]

- In an odd reversal of usual positions, the receiving party might be tempted to argue that such communications did deserve privilege protection -- so that their disclosure waived privilege protection, resulting in a subject matter waiver.

25.7 Disclosure of the "Gist" of a Privileged Communication

An express waiver generally occurs only upon disclosure of a privileged communications' "gist." [25.701]

Because privileged communications' general subject matter generally does not deserve privilege protection, disclosure of that subject matter usually does not cause a waiver. [25.702]

Under what some courts call the "gist" standard, courts assess whether a disclosure reveals a material substantive portion of a privileged communication.[268] [25.703]

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266 Love v. N.J. Div. of Youth & Family Servs., Civ. No. 07-3661 (JEI/JS), 2010 U.S. Dist. LEXIS 18259, at *3 (D.N.J. Mar. 2, 2010).

267 Billings v. Stonewall Jackson Hosp., 635 F. Supp. 2d 442, 445 (W.D. Va. 2009).

268 Garcia v. Progressive Choice Ins. Co., Case No. 11-CV-466-BEN (NLS), 2012 U.S. Dist. LEXIS 105932, at *12-13 (S.D. Cal. July 30, 2012).

- Courts normally conduct a fact-intensive analysis of this issue.[269] [25.704]

- Some courts analogize to the standard for privilege logs descriptions (discussed in Chapter 55) -- which obviously does not waive privilege protection. [25.705]

Because implied waivers can occur without any privileged communications' disclosure, analyzing possible implied waivers does not focus on what has been disclosed. [25.706]

- Chapter 28 discusses that issue.

25.8 Voluntary Versus Compelled Disclosure

An express waiver can occur only upon the voluntary, rather than compelled, disclosure of privileged communications. [25.801]

Although privileged communications become known either way, compelled disclosures do not risk a subject matter waiver. [25.802]

- Recent legal trends have reduced the subject matter waiver danger, which likewise diminish the stakes involved in this issue. Chapter 30 discusses that issue.

In some litigation contexts, courts must analyze whether disclosures are voluntary or compelled. [25.803]

- For instance, most courts find that litigants must object to discovery and be ordered to produce privileged documents before contending that they were compelled.[270]

In the context of depositions, some courts similarly hold that witnesses usually must refuse to answer deposition questions and be compelled to provide answers before contending that they were compelled.[271] [25.804]

- Given depositions' fast-paced nature, courts also seem fairly forgiving if lawyers don't immediately object.[272]

Courts disagree about the extent to which litigants must resist discovery. [25.805]

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269 Baptist Health v. BancorpSouth Ins. Servs., Inc., 270 F.R.D. 268, 276 (N.D. Miss. 2010).

270 Pac. Pictures Corp. v. United States Dist. Ct.., No. 11-71844, 2012 U.S. App. LEXIS 7643 (9th Cir. Apr. 17, 2012).

271 Nationwide Life Ins. Co. v. St. Clair Mobile Home Parks, LLC, Case No. 4:04CV01746 AGF, 2005 U.S. Dist. LEXIS 30348 (E.D. Mo. Dec. 1, 2005).

272 Flomo v. Bridgestone Ams. Holding, Inc., No. 1:06-cv-00627-WTL-JMS, 2010 U.S. Dist. LEXIS 58888, at *7 (S.D. Ind. June 14, 2010).

Some courts take what seem to be extreme positions on what steps litigants must take before contending that they were compelled.

- Examples include litigant must take such steps as seeking a sealing order or request in camera inspection, because "simply objecting to production is not enough"; third party whose privileged documents are in a litigant's possession must intervene in an effort to preserve those documents' privilege if they are sought in discovery; third party's production of a privileged document it had obtained from the owner caused a waiver even though the owner had demanded that the third party seek return of the privileged document, because the owner did not seek judicial intervention to retrieve the document; company waived the privilege by not taking judicial action to seek return of a privileged document that a former employee had taken; compliance with an order requiring the disclosure of privileged communications was voluntary unless the party appeals that order and loses; production of privileged documents was voluntary if the party makes a mere "token assertion of privilege."

In contrast, some courts analyzing waiver take a broad view of what amounts to compulsion. [25.806]

- Examples include company disclosing privileged documents to the government in an effort to avoid an indictment was coerced into the disclosure; party responding to a government request or demand for privileged communications was the subject of implied coercion and therefore was compelled to disclose the privileged communications; fired employee unable to take his personal privileged documents when he was ordered to leave the workplace was compelled to disclose privileged communications in the documents; court's suggestion or direction created coercion; bank that was required by regulations to disclose privileged communications to a bank examiner was compelled to disclose the communications; discovery order requiring a massive document production in a short period amounted to a compelled disclosure of privileged documents.

Orders compelling disclosure do not necessarily preclude a finding that litigants voluntarily disclosed privileged communications. [25.807]

- For instance, such orders might confirm that litigants intentionally rather than inadvertently produced privileged documents during litigation.

25.9 Disclosing Party's Disclaimer of a Waiver

An express waiver can occur despite the disclosing clients or lawyers disclaiming a waiver.[273]

25.10 Effect of a Confidentiality Warning

An express waiver can occur despite the disclosing clients' or lawyers' confidentiality warning.[274]

25.11 Effect of a Confidentiality Agreement

Because confidentiality agreements represent only private contracts, such agreements usually do not prevent non-signatories from successfully contending that privileged communications' disclosure under such agreements waives privilege protection. [25.1101]

Some courts hold that producing parties' confidentiality agreements with the government does not prevent a waiver when the parties disclose privileged communications to the government. [25.1102]

- Chapter 26 discusses that issue.

Such confidentiality agreements probably do no harm, unless the signatories overestimate their effect. [25.1103]

- Among other things, such agreements might prevent third parties from learning of the disclosure.

Such confidentiality agreements can make sense in one-off commercial litigation cases, in which no third parties are likely to claim a waiver. [25.1104]

- In contrast, such agreements make less sense in what could be called "pattern" litigation such as employment or product liability cases -- because other similarly situated adversaries might argue that there has been a waiver, and seek access to the same communications.

25.12 Court Orders Purporting to Allow Selective Waivers

Despite Rule 502's legislative history to the contrary, some court orders include selective waiver provisions.

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273 Curto v. Med. World Commc'ns, Inc., 783 F. Supp. 2d 373, 379 (E.D.N.Y. 2011).

274 Love v. N.J. Div. of Youth & Family Servs., Civ. No. 07-3661 (JFI/JS), 2010 U.S. Dist. LEXIS 18259, at *6 (D.N.J. Mar. 2, 2010).

- These provisions purport to allow producing parties to disclose privileged communications to litigation adversaries without resulting in waivers that allow other third parties access to the disclosed communications. Chapter 26 discusses that issue.

25.13 Normal Effect of an Express Waiver

Express waivers can have dramatic consequences. [25.1301]

Disclosing privileged communications to one third party generally destroys the privilege forever, and allows other third parties access to the disclosed communications.[275] [25.1302]

In some circumstances, express waivers may not have such disastrous effects. [25.1303]

- For instance, court orders requiring disclosure of privileged communications as a sanction might not permit third parties to access the same communications.[276]

[275] MPT, Inc. v. Marathon Labels, Inc., Case No. 1:04 CV 2357, 2006 U.S. Dist. LEXIS 4998, at *17 (N.D. Ohio Feb. 9, 2006).

[276] In re Papst Licensing GmbH & Co. KG Litig., 250 F.R.D. 55, 61 (D.D.C. 2008).

CHAPTER 26

INTENTIONAL EXPRESS WAIVER

26.1 Introduction

An express waiver can occur when someone authorized to waive the attorney-client privilege intentionally discloses privileged communications to someone outside the attorney-client relationship.

26.2 Analysis of the Effect of Disclosure

An intentional express waiver can occur upon pre-existing privileged communications' disclosure to third parties outside privilege protection.

- This contrasts with the absence of any privilege protection ab initio for communications between clients or their lawyers and such third parties, and otherwise privileged communications in which such third parties participate.

26.3 Disclosure in the Litigation Context

Intentional disclosure of privileged communications in a litigation context nearly always waives privilege protection. [26.301]

- Examples include to courts [26.302]; to a grand jury, despite the general secrecy of grand jury proceedings [26.303]; in publicly-filed pleadings [26.304]; during testimony in court or in a deposition. [26.305]

Disclosure of privileged communications to a testifying expert generally involves work product issues. [26.306]

- Chapter 49 discusses that issue.

Disclosure during litigation document productions can waive privilege protection. [26.307]

- The same issue sometimes arises in connection with other discovery. [26.308]

Disclosure to third party witnesses generally waives privilege protection.[277] [26.309]

Courts disagree about the waiver impact of disclosing privileged communications to adversaries during settlement negotiations. [26.310]

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[277] Roe v. Catholic Health Initiatives Colo., 281 F.R.D. 632, 638 (D. Colo. 2012).

- Most courts find a waiver, despite the law's general encouragement of such settlements.[278]

26.4 Statutory Disclosure to the Government

In some very specific contexts, disclosure to the government does not waive privilege protection. [26.401]

Certain industry-specific statutes and regulations governing financial institutions allow disclosure of privileged communications to the government -- without resulting in waivers that permit other third parties access to the same communications.[279] [26.402]

- Some similarly specific state statutes and case law have the same effect.[280] [26.403]

26.5 Common Law Principles

General common law waiver principles usually apply to privileged communications' disclosure to the government. [26.501]

If the government acts as a regular civil litigant, normal waiver rules generally apply. [26.502]

- For instance, governments can sometimes participate in valid common interest agreements. Chapter 20 discusses that issue.

Most courts find that intragovernmental disclosure does not waive the government's privilege protection.[281] [26.503]

Governments occasionally seize documents, some of which might deserve privilege protection. [26.504]

- Most courts allow governments to establish what they call "taint teams" to conduct privilege reviews of such seized documents -- lawyers screened from their government colleagues handling the underlying matter.

Most courts find that disclosing privileged communications to the government waives privilege protection.[282] [26.505]

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278 Oxyn Telecomms., Inc. v. Onse Telecom, No. 01 Civ. 1012 (JSM), 2003 U.S. Dist. LEXIS 2671, at *18-19 (S.D.N.Y. Feb. 25, 2003).

279 12 U.S.C. § 1828(x)(1).

280 Bickler v. Senior Lifestyle Corp., 266 F.R.D. 379, 382 (D. Ariz. 2010).

281 Rein v. United States PTO, 553 F.3d 353 (4th Cir. 2009).

282 Pac. Pictures Corp. v. United States Dist. Ct., No. 11-71844, 2012 U.S. Dist. LEXIS 7643 (9th Cir. Apr. 17, 2012).

- Under this majority view, confidentiality agreements do not prevent such waivers.[283]

- Only one old circuit court decision[284] and a few federal district court decisions[285] have held that disclosure to the government does not waive privilege protection. [26.506]

The same general rule applies to work product, despite its more robust protection. [26.507]

- Chapter 48 discusses that issue.

26.6 Federal Rule of Evidence 502: Selective Waivers

Federal Rule of Evidence 502 was initially intended to allow disclosure of privileged communications to the government without allowing other third parties access to those communications. [26.601]

However, the Rule's drafters dropped this proposed "selective waiver" provision. [26.602]

- Some courts ignore what seems to be Rules 502's clear legislative history, and enter orders permitting such selective waivers. [26.603] This is discussed below.

26.7 Facts Disclosed to the Government

Because historical facts do not deserve privilege protection, disclosing such facts to the government should not waive privilege protection.

- Chapter 25 discusses that issue.

26.8 Corporate Negotiations or Transactions

Intentional disclosure during corporate negotiations or transactions usually waives privilege protection, but with some possible exceptions. [26.801]

Corporations normally waive their privilege protection by disclosing privileged communications during transactional negotiations.[286] [26.802]

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283 SEC v. Berry, No. C07-04431 RMW (HRL), 2011 U.S. Dist. LEXIS 28301 (N.D. Cal. Mar. 7, 2011).

284 Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 604 n.1 (8th Cir. 1977).

285 Police & Fire Ret. Sys. v. SafeNet, Inc., No. 06 Civ. 5797 (PAC), 2010 U.S. Dist. LEXIS 23196, at *5 (S.D.N.Y. Mar. 11, 2010).

Corporations disclosing privileged communications during pre-acquisition due diligence usually waive their privilege protection.[287] [26.803]

- One court found that such a disclosure did not waive privilege protection, citing the societal benefits of due diligence.[288]

Corporations' acquisition of privileged communications upon buying another corporation usually does not waive privilege protection. [26.804]

- Such disclosure does not occur during an adversarial process -- but instead takes place upon the privilege's new owner's purchase.[289]

During corporate negotiations or transactions, corporations sometimes disclose privileged communications to other third parties such as agents or consultants. [26.805]

- Such disclosures usually waive privilege protection.

Other corporate transactions can result in the same waiver impact.[290] [26.806]

Because the work product doctrine provides more robust protection than the privilege, disclosing work product during corporate negotiations or transactions often does not waive that separate protection. [26.807]

- Chapter 48 discusses that issue.

26.9 Intracorporate Disclosure

Intracorporate disclosures can waive privilege protection, even if no outside third party gains access to privileged communications. [26.901]

Most courts hold that corporations' disclosures to affiliated corporations do not waive their privilege protection. [26.902]

- Most courts apply this basic principle to wholly owned affiliates,[291] but few courts have analyzed the effect of such disclosures to partially owned corporate affiliates.

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286 Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., Case No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 8690, at *9-10, *16 (D. Kan. Feb. 6, 2007).

287 Nidec Corp. v. Victor Co. of Japan, No. C-05-0686 SBA (EMC), 2007 U.S. Dist. LEXIS 48841 (N.D. Cal. July 3, 2007).

288 Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 311 (N.D. Cal. 1987).

289 Martinez-Hernandez v. Butterball, LLC, No. 5:07-CV-174-H(2), 2011 U.S. Dist. LEXIS 112043 (E.D.N.C. Sept. 29, 2011).

290 Soc'y of Prof'l Eng'g Emps. in Aerospace v. Boeing Co., Case Nos. 05-1251- & 07-1043-MLB, 2010 U.S. Dist. LEXIS 27093 (D. Kan. Mar. 22, 2010).

Disclosure to employees in the "control group" does not waive privilege protection in states following the "control group" standard. [26.903]

In Upjohn states, disclosure to employees with a "need to know" does not waive privilege protection.[292] [26.904]

- Chapter 6 discusses this "need to know" standard.

In contrast, intracorporate disclosure to employees with no "need to know" can waive corporations' privilege protection.[293]

- This "need to know" waiver standard parallels some courts' analysis of widespread intracorporate communication as evidence of the communications' primarily business rather legal nature. Chapter 15 discusses that issue.

Disclosure to loyal current employees with a "need to know" does not waive privilege protection even if they later become adverse. [26.905]

Most courts hold that disclosure to current adverse employees usually waives privilege protection. [26.906]

- This general rule usually applies in the context of lower-level adverse employees[294] and even adverse board members.[295]

Disclosure to employees' "functional equivalent" usually does not waive privilege protection. [26.907]

- Chapter 6 discusses this "functional equivalent" standard.

Courts disagree about the waiver impact of disclosure to loyal former employees. [26.908]

- The privilege usually protects corporations' lawyer's communications with loyal former employees from whom the lawyer needs facts. Chapter 6 discusses that issue.

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291 Guy v. United Healthcare Corp., 154 F.R.D. 172, 177-78 (S.D. Ohio 1993).

292 Currency Conversion Antitrust Litig. v. Bank of Am., N.A., MDL No. 1409 M-21-95, No. 05 Civ. 7116 (WHP) (THK), 2010 U.S. Dist. LEXIS 117008, at *17 (S.D.N.Y. Nov. 3, 2010).

293 Lolonga-Gedeon v. Child & Family Servs., No. 08-V-00300A(F), 2012 U.S. Dist. LEXIS 67843, at *11 (W.D.N.Y. May 15, 2012).

294 Scholtisek v. Eldre Corp., 441 F. Supp. 2d 459, 465 (W.D.N.Y. 2006).

295 Ryan v. Gifford, Civ. A. No. 2213-CC, 2008 Del. Ch. LEXIS 2, at *23 (Del. Ch. Jan. 2, 2008).

- Some courts hold that disclosure to such loyal former employees does not waive corporations' privilege protection,[296] while some courts find a waiver in that setting.[297]

Disclosure to adverse former employees usually waives corporations' privilege protection. [26.909]

- Adverse former employees' disclosure of privileged communications normally does not cause a waiver -- if the employees obtained the communications when they were not adverse. [26.910]

- Such adverse former employees generally lack authority to waive their former employers' privilege. Chapter 24 discusses that issue.

Courts disagree about the waiver impact of disclosing privileged communications to corporations' shareholders. [26.911]

- Some courts find a waiver,[298] while some courts find that such disclosure does not waive privilege protection.[299]

Disclosure to corporate agents or consultants usually waives privilege protection. [26.912]

- This is discussed immediately below.

26.10 Corporate and Other Client Agents

Disclosure to client agents or consultants usually waives corporations' privilege protection. [26.1001]

- Chapter 8 discusses communications with such client agents/consultants.

- Chapter 19 discusses the effect of such agents' or consultants' presence during otherwise privileged communications.

Client agents' roles can change from time to time, so courts sometimes examine their roles at the time of disclosure. [26.1002]

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296 WebXchange Inc. v. Dell Inc., 264 F.R.D. 123, 127 (D. Del. 2010).

297 DeFrees v. Kirkland, Nos. CV 11-4272 & -4574 GAF (SPx), 2012 U.S. Dist. LEXIS 52780, at *39 (C.D. Cal. Apr. 11, 2012).

298 Net2Phone, Inc. v. eBay, Inc., Civ. A No. 06-2469 (KSH), 2008 U.S. Dist. LEXIS 50451, at *41 (D.N.J. June 25, 2008) (not for publication).

299 Peacock v. Merrill, No. CA 05-0377-BH-C, 2008 U.S. Dist. LEXIS 24104, at *30 (S.D. Ala. Mar. 18, 2008).

Under the majority approach, disclosure to corporations' agents/consultants usually waives corporations' privilege protection.

- This basic principle usually applies to those agents/consultants with whom corporations most frequently deal, including auditors [26.1003]; accountants[300] [26.1004]; investment bankers[301] [26.1005]; public relations consultants.[302] [26.1006]

- The same approach usually applies to other agents/consultants who sometimes assist corporations [26.1007], including corporation's former law firm, whose member was accused of some misconduct; litigation funding company; financial advisor; business consultant; insurance agent; union representative; consultant; rating agency; outside landman assisting in title matters; co-venturer; transaction processing and computer services company; another company; non-employee individual.

Some courts take a more liberal approach, finding that disclosure to such agents/consultants does not waive privilege protection.

- Examples include real estate agent; secretary; actuarial consultant; demutualization agent; stenographer; secretary from another company; management consultant; business consultant; financial advisor.

Disclosing work product to corporations' agents/consultants usually does not waive that separate and more robust protection.

- Chapter 48 discusses that issue.

Disclosure of privileged communications in the insurance context may or may not waive privilege protection. [26.1008]

Some courts find that disclosing privileged communications to third parties in the insurance context waives privilege protection.

- Examples include reinsurer; insurance broker; auditor selected by an insurance company to audit bills submitted by law firms representing the insured.

Some courts find that disclosing privileged communications to third parties in the insurance context does not waive privilege protection.

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300 Green v. Beer, No. 06 Civ. 4146 (KMW) (JCF), 2010 U.S. Dist. LEXIS 87484, at *4 (S.D.N.Y. Aug. 24, 2010).

301 Dahl v. Bain Capital Partners, LLC, 714 F. Supp. 2d 225, 229 (D. Mass. 2010).

302 Cellco P'ship v. Nextel Commc'n, Inc., No. M8-85(RO), 2004 U.S. Dist. LEXIS 12717, at *4-5 (S.D.N.Y. July 7, 2004).

- Examples include client's liability insurer; actuarial consultant; demutualization agent assisting in an insurance company's demutualization process; insurance adjuster; reinsurer; insurance broker.

Waiver issues can arise in other insurance contexts.

- Chapter 20 discusses the common interest doctrine in the insurance context, and Chapter 22 discusses the availability of privilege protection in the insurance context.

- Chapter 43 discusses the separate work product doctrine protection in the insurance context.

In analyzing the waiver impact of disclosing privileged communications to agents/consultants, it is worth also considering other issues. [26.1009]

- Examples include the availability of privilege protection for direct communications with such agents/consultants (discussed in Chapter 8); the privilege impact of their presence during otherwise privileged communications (discussed in Chapter 19).

26.11 Disclosure to Lawyer Agents

Intentional disclosure of privileged communications to lawyer agents usually does not waive privilege protection -- but some courts take a very narrow view of what lawyer agents are inside privilege protection. [26.1101]

Most courts hold that disclosure to lawyers' staff does not waive privilege protection.[303] [26.1102]

Courts agree that disclosure to lawyers' agents assisting the lawyer in providing legal advice usually does not waive privilege protection. [26.1103]

- This involves what courts call the Kovel doctrine. Chapter 10 discusses that issue.

Some courts take an extremely narrow view of what agents meet the Kovel standard.[304]

- These courts extend privilege protection only to lawyers' agents who essentially translate or interpret raw information for lawyers who otherwise would not understand it.[305]

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303 United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc., Civ. A. No. 95-1231 (RCL), 2007 U.S. Dist. LEXIS 21192, *8 9 (D.D.C. Mar. 26, 2007).

304 In re Refco Sec. Litig., 280 F.R.D. 102, 105 (S.D.N.Y. 2011).

Some courts take a more liberal approach.[306]

Some courts analyzing the waiver impact of disclosure to lawyer agents assess whether lawyers really "needed" agents' assistance. [26.1104]

- Some courts find that the privilege only protects communications with lawyer agents "essential" to lawyers' legal services.[307]

26.12 Other Relationships

Intentional disclosure of privileged communications to other third parties can waive privilege protection, depending on their role. [26.1201]

Disclosure to some third parties usually does not waive privilege protection.

- Examples include jointly represented clients [26.1202]; participants in a valid common interest arrangement [26.1203]; other lawyers jointly representing a client. [26.1204]

Disclosure to those subject to the "fiduciary exception" (discussed in Chapter 7) generally does not waive privilege protection, because they are entitled to participate in privileged communications. [26.1205]

Disclosure in a bankruptcy setting can result in different conclusions. [26.1206]

- Some courts hold that bankruptcy's trustees' disclosure of privileged communications to creditors waives privilege protection.[308]

- Some courts find that pre-bankrupt debtors' disclosure to claimants does not waive privilege protection -- citing their common interest in maximizing insurance coverage.[309]

Absent some valid common interest agreement, trade association members disclosing privileged communications to one another usually waives privilege protection. [26.1207]

The waiver impact of disclosing privileged communications to family members highlights the privilege's fragility. [26.1208]

Some courts hold that disclosure to family members waives privilege protection.

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305 Ravenell v. Avis Budget Grp., Inc., No. 08-CV-2113 (SLT), 2012 U.S. Dist. LEXIS 48658 (E.D.N.Y. Apr. 5, 2012).

306 Cottillion v. United Ref. Co., 279 F.R.D. 290, 304-05 (W.D. Pa. 2011).

307 Parsons v. Jefferson-Pilot Corp., 141 F.R.D. 408, 417 (M.D.N.C. 1992).

308 Grochocinski v. Mayer Brown Rowe & Maw LLP, 251 F.R.D. 316 (N.D. Ill. 2008).

309 In re Leslie Controls, Inc., 437 B.R. 493 (Bankr. D. Del. 2010).

- Examples include sister; nephew; ex-wife; father (implying a waiver, but finding it unnecessary to decide); daughter;[310] spouse.[311]

- Such disclosure might not waive the privilege if the other family members play a necessary role in transmission of the communications, such as parents assisting minor children, adult children helping very elderly parents, etc.

Other courts find that disclosing privileged communications to family members does not waive privilege protection.[312]

The same waiver issues can arise when courts assess the availability of privilege protection for direct communications with such third parties (discussed in Chapter 8) and the privilege impact of their presence during otherwise privileged communications (discussed in Chapter 19).

Courts disagree about the waiver impact of disclosing privileged communications into other privileged relationships. [26.1209]

Some courts find that disclosure to some third parties does not waive privilege protection.

- Examples include a criminal defendant's lawyer's disclosure to his own lawyer; a corporate director and one-half owner of a corporation's disclosure to his own lawyer.[313]

26.13 Disclosure in Other Contexts

Intentional disclosure of privileged communications in other contexts can waive privilege protection. [26.1301]

Disclosure of privileged communications in public statements normally waives privilege protection. [26.1302]

- In such a context, the waiver analysis may focus on the disclosures' specificity. Chapter 25 discusses that issue.

Disclosing privileged communications to other third parties generally waives privilege protection. [26.1303]

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310 United States v. Stewart, 287 F. Supp. 2d 461, 464 (S.D.N.Y. 2003).

311 Wertenbaker v. Winn, 30 Va. Cir. 327, 330 (Va. Cir. Ct. 1993).

312 DeGeer v. Gillis, Case No. 09 C 6974, 2010 U.S. Dist. LEXIS 97457, *20-21 (N.D. Ill. Sept. 17, 2010).

313 Sobba v. Elmen, No. 4:06VCV00941 JLH, 2007 U.S. Dist. LEXIS 29172, at *7 (E.D. Ark. Apr. 19, 2007).

- Examples include former employer, to which a former employee returned a laptop with privileged communications; investor; creditor in bankruptcy proceeding; friend; bank's customer (with whom the bank shared legal advice); another "unprivileged party"; doctor; third parties.

26.14 Selective Waivers Pre- and Post-Rule 502

Both before and after Federal Rule of Evidence 502's adoption, some courts have attempted to allow selective waivers -- permitting clients to disclose privileged communications to one outsider without making those communications available to others. [26.1401]

Before Rule 502's adoption, some courts cleverly relied on traditional common law principles (discussed in Chapter 25) to enter orders allowing selective waivers. [26.1402]

- For instance, court orders compelling production of privileged documents prevented third parties' argument that such disclosure waived the privilege, allowing them access to the disclosed communications.[314]

After Rule 502's adoption, some courts have explicitly entered orders purportedly allowing selective waivers. [26.1403]

- On its face, Rule 502 contains a provision that would seem to allow a selective waiver order,[315] but the Rule's legislative history makes it crystal clear that the Rule does not envision such selective waiver orders.[316]

- However, some courts have either entered orders, or explained that they could enter orders, allowing such selective waivers.[317]

The true test comes when another court reviews such orders. [26.1404]

- Given Rule 502's legislative history, other courts presumably will not be bound by such orders.

- However, one court honored such a non-waiver order (admittedly before Rule 502),[318] and as a matter of comity or respect other courts might respect such selective waiver orders.

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314 Hopson v. Mayor & City Council of Balt., 232 F.R.D. 228, 246 (D. Md. 2005).

315 Federal Rule of Evidence 502(d).

316 154 Cong. Rec. H7817, H7818-19 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

317 Chevron Corp. v. Weinberg Grp., 296 F.R.D. 95, 101 (D.D.C. 2012); Greene v. Phila. Hous. Auth., 484 F. App'x 681 (3rd Cir. 2012).

26.15 Subject Matter Waiver

The intentional disclosure of privileged communications risks a subject matter waiver.

- Chapter 30 discusses that issue.

26.16 Work Product

Given the very different nature of work product protection, the intentional disclosure of work product does not always waive that separate and more robust protection.

- Chapters 47 and 48 discuss that issue.

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[318] IGT v. Alliance Gaming Corp., No. 2:04-cv-1676-RCJ-RJJ, 2007 U.S. Dist. LEXIS 62395, at *14 (D. Nev. Aug. 20, 2007).

CHAPTER 27

INADVERTENT EXPRESS WAIVER

27.1 Introduction

An inadvertent disclosure of privileged communications to third parties outside privilege protection can expressly waive the attorney-client privilege.

27.2 Presence of Third Parties Element

An express waiver can occur upon the disclosure of pre-existing privileged communications to third parties outside privilege protection.

- This contrasts with the absence of any privilege protection ab initio for communications between clients or their lawyers and such third parties, and otherwise privileged communications in which such third parties participate.

27.3 "Intent to Disclose" Element

An inadvertent express waiver can occur with the actual disclosure of privileged communications.

- In contrast, under what could be called the "intent to disclose" principle, the privilege essentially "evaporates" once the client forms the intent to disclose privileged communications to third parties outside privilege protection. Chapter 21 discusses that issue.

27.4 Ethics Issues

Inadvertent disclosure of privileged communications can implicate ethics issues. [27.401]

The current ABA Model Rules do not indicate whether recipients of inadvertently disclosed privileged communications may or may not read and use the communications. [27.402]

- From the early 1990s until 2002, the ABA explained that recipients must refrain from reading such communications.

States take differing positions on that issue. [27.403]

- Courts usually focus on such incidents' privilege implications, but some courts disqualify lawyers for having read such inadvertently disclosed communications.[319] [27.404]

Lawyers analyzing the ethics implications of inadvertent disclosures must consider ethics rules, state statutes, common law, and the pertinent judge's possible reaction. [27.405]

27.5 Unauthorized Disclosure

Inadvertent or intentional disclosure of privileged communications by someone without authority to waive the privilege usually does not waive privilege protection.

- Chapter 25 discusses that issue.

27.6 Post-Production Privilege Assertions

Under fairly recent federal rules changes, litigants may assert privilege protection for "information" produced during discovery, even after disclosing it. [27.601]

- As discussed in Chapters 16 and 17, "information" never deserves privilege protection, although Fed. R. Civ. P. 26(b)(5)(B) inexplicably uses that term.

Federal Rule of Civil Procedure 26(b)(5)(B) governs such post-production privilege assertions. [27.602]

- Some states have adopted similar rules. [27.603]

27.7 Meaning of "Inadvertent"

Analyzing inadvertent express waivers involves interpreting the term "inadvertent." [27.701]

The term "inadvertent" could refer to a nearly endless spectrum of possibilities. [27.702]

- Examples include the lawyer might have intended to withhold the document after recognizing its privilege protection, but accidentally put the document in the wrong box and sent it to the adversary; the lawyer might have reviewed the document, but missed an obvious privilege protection; the lawyer might have reviewed the document, but missed the available privilege protection by not researching the document's context (such as not recognizing that the recipient was a lawyer); the lawyer might have recognized the factual context of the document, but missed some legal principle that offered privilege protection (such as the "functional

[319] Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1099-1100 (Cal. 2007).

equivalent" doctrine discussed in Chapter 6); the lawyer might have recognized the factual context and known the applicable law, but mistakenly thought that the review would be governed by some unfavorable state's law (such as that of Illinois, which does not follow the Upjohn standard discussed in Chapter 6); the lawyer might have recognized the facts and the law, and deliberately produced the privileged document without realizing the risk of a subject matter waiver that required the production of additional privileged documents; the lawyer might have recognized the facts and the privilege and even the subject matter waiver, but did not appreciate the breadth of the subject matter waiver resulting from the document's production; the lawyer might have recognized the breadth of a subject matter waiver caused by the document's production, but not carefully enough checked the documents that would be ordered produced under a subject matter waiver and therefore missed some very damaging documents whose production was now required.

- Some courts take a surprisingly broad view of the term "inadvertent," essentially allowing litigants to avoid the implications of their inattention or even negligence.

Most courts hold that the term "inadvertent" refers to the physical act of disclosure, not a misunderstanding about its legal implications.[320] [27.703]

- In other words, litigants who intentionally disclose communications cannot rely on the "inadvertent" standard to claim that they did not realize the legal ramifications of such an intentional disclosure.

27.8 Document Productions Pre-Rule 502

Before Federal Rule of Evidence 502, most courts took one of three positions on the waiver effect of litigants' inadvertent production of privileged documents. [27.801]

- The vast majority of courts took a fact-intensive approach, often called the Lois Sportswear approach.[321] [27.802]

- Under that approach, courts examined whether litigants had a plan for withholding privileged documents from production; whether they carefully followed the plan; how many documents slipped through; and how quickly the litigants sought their return.

A few courts took different positions.

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320 N. Am. Rescue Prods., Inc. v. Bound Tree Med., LLC, Case No. 2:08-cv-101, 2009 U.S. Dist. LEXIS 118316, at *24 (S.D. Ohio Nov. 19, 2009).

321 Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103 (S.D.N.Y. 1985).

- Some courts held that any inadvertent disclosure automatically waived privilege protection.

- Some courts held just the opposite -- that lawyers' mistakes did not waive clients' privilege protection.

27.9 Federal Rule of Evidence 502

Federal Rule of Evidence 502 governs inadvertent express waivers in federal court litigation. [27.901]

Rule 502 applies to "disclosure of a communication or information covered by the attorney-client privilege or work-product protection."

- As discussed in Chapters 16 and 17, "information" never deserves privilege protection -- although Rule 502 inexplicably uses that term.

Most Rule 502 cases involve documents, although the Rule's provisions also apply to other communications.

- This Chapter primarily focuses on Rule 502's application to documents.

Rule 502 does not apply to other situations in which inadvertent disclosures might occur. [27.902]

- Examples include disclosures occurring before or after a federal "proceeding"; during a federal proceeding but not "in" a federal proceeding, such as communications to the adversary or to third parties; in adversarial settings that are not "proceedings," such as administrative actions, arbitrations, etc.; to federal employees other than those in an "office or agency"; to state offices, agencies, or other employees; in state proceedings that are the subject of a state court order "concerning waiver," presumably regardless of that order's provisions; during arbitrations.

- However, courts seem to be applying the general Rule 502 standard even where it does not apply by its terms.

27.10 Application of Rule 502

Rule 502 essentially follows the pre-Rule 502 majority view. [27.1001]

Rule 502's central provision mimics the Lois Sportswear factors.[322] [27.1002]

322 Fed. R. Evid. 502(b).

- Courts applying Rule 502 quickly realized this, and usually use the same standards they had relied upon before Rule 502.[323] [27.1003]

27.11 Inadvertence Factor

The first inquiry under Rule 502 focuses on whether disclosures were "inadvertent." [27.1101]

Some courts recognize that mistakes inevitably will occur in large document productions -- implicitly endorsing a fairly forgiving view of such mistakes' waiver impact.[324] [27.1102]

Most courts interpret Rule 502's "inadvertent" provision as requiring courts to determine if litigants accidentally disclosed privileged communications.[325] [27.1103]

27.12 Reasonable Steps to Prevent Disclosure

The next Rule 502 factor focuses on whether litigants took reasonable steps to prevent such accidental disclosures. [27.1201]

Most courts hold that relying on paralegals constitutes a reasonable step.[326] [27.1202]

Courts agree that having lawyers supervise initial privilege determinations constitutes a reasonable step. [27.1203]

Courts have analyzed "privilege" labels' effect on the waiver analysis. [27.1204]

- Some courts find that litigants allowing such labeled documents to be disclosed may not have taken reasonable steps to withhold them.[327]

Courts disagree about whether inadvertently produced documents' inclusion on a privilege log helps or hurts litigants. [27.1205]

- Some courts hold that such inclusion shows that the disclosures must have been accidental.[328]

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323 Pilot v. Focused Retail Prop. 1, LLC, 274 F.R.D. 212, 215 (N.D. Ill. 2011).

324 Tindall v. H&S Homes, LLC, Civ. A. No. 5:19-cv-044(CAR), 2011 U.S. Dist. LEXIS 29380, at *8 (M.D. Ga. Mar. 22).

325 Excel Golf Prods., Inc. v. MacNeill Eng'g Co., No. 11 C 1928, 2012 U.S. Dist. LEXIS 61788, at *6 (N.D. Ill. May 3, 2012).

326 Coburn Grp., LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1039 (N.D. Ill. 2009).

327 ePlus, Inc. v. Lawson Software, Inc., 280 F.R.D. 247 (E.D. Va. 2012).

328 Preferred Care Partners Holding Corp. v. Humana, Inc., 258 F.R.D. 684, 699 (S.D. Fla. 2009).

- In contrast, some courts hold that absence of a log weighs in favor of a waiver.[329]

Some courts expect litigants discovering their accidental production to re-review their production to catch any other errors. [27.1206]

Some courts look at other factors in determining whether litigants have acted reasonably. [27.1207]

- Examples include whether a litigant relied completely on a contractor to conduct the privilege review; whether the producing litigant's law firm had relied on another law firm to conduct a privilege review of document subpoenaed from the other law firm's client (who possessed some of the litigant's privileged documents); whether the producing litigant's lawyer reviewed the documents at all; whether the producing litigant reviewed a database before making it available to the adversary; whether a software glitch caused the inadvertent production; whether a clerical error resulted in the inadvertent production.

Litigants seeking to retrieve inadvertently produced documents usually must explain what steps they took to prevent such accidents.[330] [27.1208]

27.13 Number of Disclosures

Courts applying Rule 502 also look at the number of inadvertent disclosures. [27.1301]

Courts disagree about whether they should consider the number of disclosed documents or the number of accidents. [27.1302]

- For instance, a single accident might results in production of an entire file of privileged documents.

Some courts examine the percentage of produced documents litigants inadvertently disclosed. [27.1303]

- Some courts focus on the number of documents, while some courts focus on the number of pages.[331]

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329 Barnett v. Aultman Hosp., Case No. 5:11 CV 399, 2012 U.S. Dist. LEXIS 53733, at *9 (N.D. Ohio Apr. 16, 2012).

330 Excel Golf Prods., Inc. v. MacNeill Engi'g Co., No. 11 C 1928, 2012 U.S. Dist. LEXIS 61788, at *7-8 (N.D. Ill. May 3, 2012).

331 Heriot v. Byrne, 257 F.R.D. 645, 659 (N.D. Ill. 2009).

27.14 Promptness of Remedial Measures

Under Rule 502, courts also examine the promptness of litigants' remedial measures. [27.1401]

Most courts begin the calculation when producing litigants discover their accident, not when the accident occurred.[332] [27.1402]

Courts disagree about what producing litigants' actions comply with Rule 502's request to take prompt remedial measures. [27.1403]

- Some courts look at producing litigants' request for the documents' return,[333] while some courts expect producing litigants to seek court orders requiring the documents' return.[334]

Most courts require producing litigants to take some remedial steps within days of discovering their accidental disclosures. [27.1404]

27.15 Other Factors

Some courts examine other factors when applying Rule 502. [27.1501]

Some courts assess disclosures' breadth. [27.1502]

- The broader the disclosures, the more likely courts' finding of waiver.

Some courts assess prejudice to adversaries. [27.1503]

- The more adversaries have relied on inadvertently disclosed documents, the more likely courts' finding of waiver.

Some courts assess other factors. [27.1504]

- Examples include whether the interests of justice weighed in favor of a waiver; whether the inadvertently produced document was easy to miss because, for example, it contained only a lawyer's first name; whether there was sufficient time for the litigant to review the documents; whether the producing party had to review a large volume of material. Inexplicably, one court took exactly the opposite approach: that a large volume of material meant that the producing party should have been more careful,

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332 Ceglia v. Zuckerberg, No. 10-CV-00569A(F), 2012 U.S. Dist. LEXIS 55367, at *26 (W.D.N.Y. Apr. 19, 2012).

333 Pearce v. Coulee City, No.: 11-CV-0030-TOR, 2012 U.S. Dist. LEXIS 120658, at *2 (E.D. Wash. Aug. 24, 2012).

334 Luna Gaming -- San Diego, LLC v. Dorsey & Whitney, LLP, Case No. 06cv2804 BTM (WMc), 2010 U.S. Dist. LEXIS 3188 (S.D. Cal. Jan. 13, 2010).

so the court should be less forgiving in that context; whether there was a short timetable for the privilege review; whether the producing party engaged in what could be called a "document dump," including many irrelevant documents along with responsive documents; whether the producing party inadvertently produced more than one copy of the document at issue.

27.16 Non-Waiver: Clawback Agreements and Court Orders

Before and after Rule 502, some litigants entered into agreements, or sought court orders, precluding waivers or allowing clawback of inadvertently produced documents. [27.1601]

Before Rule 502, private agreements among litigants created contractual obligations to return such documents -- but did not prevent other third parties from claiming waivers. [27.1602]

Before Rule 502, court orders faced similar limitations. [27.1603]

- Some courts relied on common law principles to preclude waivers, such as compelling privileged documents' production. Chapter 26 discusses that issue.

Several relatively new Federal Rules of Civil Procedure govern such agreements and court orders. [27.1604]

- Among other things, Fed. R. Civ. P. 16(b)(6) and (26)(f) deal with "quick peek" productions and clawback provisions.

Under Rule 502, private non-waiver or clawback agreements do not bind third parties. [27.1605]

Under Rule 502, court orders can preclude waivers if producing litigants claw back inadvertently produced privileged documents. [27.1606]

- Inexplicably, some litigants seeking such court orders needlessly incorporate "inadvertent" and "prompt remedial measures" standards into their orders. Those are not necessary, because court orders can allow clawbacks regardless of the producing litigants' sloppiness, or even their failure to conduct any privilege reviews.

- Needlessly including such standards might cost litigants the opportunity to retrieve inadvertently produced documents.[335]

[335] ePlus, Inc. v. Lawson Software, Inc., 280 F.R.D. 247 (E.D. Va. 2012).

Some post-Rule 502 orders seem to allow selective waiver -- precluding waivers even if litigants producing inadvertently produced documents do not seek their return, but instead acquiesce in receiving parties' possession of those documents. [27.1607]

- Rule 502's legislative history explicitly rejected the permissibility of such orders, but some courts enter them nevertheless. Chapter 26 discusses that issue.

27.17 The Clawback Dilemma

Litigants finding that they have inadvertently produced potentially privileged documents face a dilemma.

- Seeking a clawback could spotlight the documents, which receiving parties might not otherwise carefully examine and seek to use. If unsuccessful, such clawback attempts might therefore prove counterproductive.

27.18 Other Inadvertent Disclosure

Although Rule 502 does not govern inadvertent disclosures outside litigation settings,[336] some courts apply the same basic standards in non-litigation contexts.

- For instance, some courts apply Rule 502 standard to inadvertent disclosures caused by lawyers' use of AutoFill[337] or Reply to All features.[338]

27.19 Effect of an Inadvertent Disclosure

Inadvertent express waivers' impact raises more subtle issues than intentional express waivers'.

In most situations, inadvertent disclosures destroy the privilege protection forever, and allow other third parties access to the disclosed communications.

However, some courts recognize exceptions.

- Given the waiver principles applicable in joint representations, one joint client's inadvertent disclosure normally does not waive the other joint clients' privilege.[339]

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336 Clarke v. J.P. Morgan Chase & Co., No. 08 Civ. 02400 (CM) (DF), 2009 U.S. Dist. LEXIS 30719 (S.D.N.Y. Apr. 10, 2009).

337 Multiquip, Inc. v. Water Mgmt. Sys. LLC, Case No. CV 08-403-S-EJL-REB, 2009 U.S. Dist. LEXIS 109148m at *15 n.4 (D. Idaho Nov. 23, 2009).

338 Charm v. Kohn, Dkt. No.: 08-2789-BLS2, 2010 Mass Super LEXIS 276, at *4, *5 (Mass. Sup. Ct. Sept. 30, 2010).

- The Restatement[340] and one court[341] indicate that inadvertent disclosure of privileged communications in one case does not preclude litigants' later privilege assertion in another case -- as long as no one other than the receiving adversary learned the inadvertently produced communications' content.

- Although it is difficult to imagine that litigants would fake an inadvertent disclosure and then attempt to affirmatively use the disclosed communications, one court suspected as much.[342] Of course, courts can thwart such plots by preventing litigants' use of the disclosed communications.

27.20 Subject Matter Waiver

Under Rule 502, inadvertent express waivers cannot result in subject matter waivers.

- This contrasts with some pre-Rule 502 case law. Chapter 30 discusses that issue.

27.21 Work Product

Because disclosing work product to adversaries generally waives that separate protection, inadvertent express waiver of work product normally causes the same impact as in the privilege context.

- Chapter 48 discusses that issue.

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339 Magnetar Tech. Corp. v. Six Flags Theme Park Inc., 886 F. Supp. 2d 466, 486 (D. Del. 2012).

340 Restatement (Third) of Law Governing Lawyers § 79 cmt. i (2000).

341 Leibel v. Gen. Motors Corp., 646 N.W.2d 179, 181 (Mich. Ct. App. 2002).

342 Murray v. Gemplus Int'l, S.A., 217 F.R.D. 362 (E.D. Pa. 2003).

CHAPTER 28

IMPLIED WAIVER

28.1 Introduction

An implied attorney-client privilege waiver can occur without the disclosure of any privileged communications.

- Instead, an implied waiver can occur if the privilege's owner relies on the fact of a privileged communication, or otherwise raises issues justifying examination of privileged communications.

28.2 Implied Versus Express Waiver

An implied waiver contrasts with an express waiver, which involves privilege owners' intentional or inadvertent disclosure of privileged communications.

28.3 Other Unintentional Disclosures

An implied waiver differs from the privilege's unavailability because third parties participate in otherwise privileged communications.

- Chapter 19 discusses that issue.

Similarly, an implied waiver differs from the privilege's "evaporation" once clients form the intent to disclose privileged communications to third parties outside the attorney-client relationship.

- Chapter 21 discusses that issue.

28.4 Difference Between Implied Waiver and a Litigant's Failure of Proof in Supporting a Privilege Claim

Some courts erroneously use the term "implied waiver" to describe litigants' failure to support their privilege claim in privilege logs or elsewhere.[343]

- Although the terminology may not matter, such failures of proof differ from classic implied waivers -- in which the privilege's owner relies on the fact of a privileged communication.

28.5 Rule 502

On its face, Rule 502 does not affect traditional implied waiver principles.

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[343] Chevron Corp. v. Salazar, 275 F. R.D. 437, 446 (S.D.N.Y. 2011).

28.6 The "At Issue" Doctrine

A classic implied waiver can occur when privilege owners rely on or otherwise refer to privileged communications.

- In contrast, the "at issue" doctrine can apply even if litigants do not explicitly rely on or refer to privileged communications. Chapter 29 discusses that issue.

28.7 Clients' Attacks on Lawyers and Legal Advice

Clients can impliedly waive their attorney-client privilege if they attack their lawyers or their lawyers' legal advice. [28.701]

Clients asserting malpractice claims against their lawyers normally waive their privilege, because lawyers can freely disclose privileged communications when defending themselves.[344] [28.702]

- A parallel ethics rule also relieves such lawyers from their ethics duty of confidentiality.

Criminal defendants claiming ineffective assistance of counsel usually waive their privilege protection. [28.703]

Clients' assertion of other claims against their lawyers can also waive privilege protection. [28.704]

28.8 Third Parties' Attacks on Lawyers

Even third parties' attacks on clients' lawyers can impliedly waive privilege protection. [28.801]

- This principle seems counterintuitive, given lawyers' confidentiality duties.

The ABA Model Rules and every state's parallel ethics rules contain a self-defense exception, which relieves lawyers of their duty of confidentiality if third parties attack them.[345] [28.802]

Most courts hold that lawyers can similarly defend themselves from third parties' attacks by disclosing otherwise privileged communications.[346] [28.803]

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344 MCC Mgmt. of Naples, Inc. v. Arnold & Porter LLP, Case No. 2:07-cv-387-FtM-29DPC & -420-FtM-29DNF, 2010 U.S. Dist. LEXIS 55460, at *9 (M.D. Fla. May 5, 2010).

345 ABA Model Rule 1.6(b)(5).

346 Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998 (1974).

- Courts disagree on when lawyers may initiate such self-defense disclosures, but most courts do not force lawyers to wait until third parties file lawsuits against them.[347]

28.9 Lawyers' Attacks on Clients

Lawyers' attacks on their clients can impliedly waive privilege protection. [28.901]

Lawyers suing their clients for unpaid legal fees normally can disclose privileged communications to the extent necessary. [28.902]

Although courts traditionally did not permit in-house lawyers to file wrongful termination claims against their employers if such suits would involve privileged communications' disclosure, most courts now permit such claims. [28.903]

28.10 Client Claims for Attorney Fees

Clients' efforts to recover their attorney's fees from third parties can create complicated implied waiver issues. [28.1001]

- Clients might assert such claims against third parties under fee-shifting contract provision or statutes.

Most courts hold that clients need not publicly disclose privileged communications while seeking attorney's fees from such third parties.[348] [28.1002]

- The issue usually involves clients' lawyers' bills, but can also extend to privileged communications.

In contrast, some courts require clients seeking attorney's fees from third parties to disclose privileged portions of their lawyers' bills or even underlying privileged communications.[349]

28.11 Reliance on Legal Advice as an Affirmative Defense

Clients' reliance on legal advice in asserting formal affirmative defenses can impliedly waive privilege protection. [28.1101]

The classic example involves clients asserting formal "advice of counsel" defenses. [28.1102]

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347 United States v. Schussel, 291 F. App'x 336, 346 (1st Cir. 2008).

348 Sommer v. United States, Civ. No. 09cv2093-WQH (BGS), 2011 U.S. Dist. LEXIS 113755, at *15 (S.D. Cal. Oct. 3, 2011).

349 Pillsbury Winthrop Shaw Pittman LLP v. Brown Sims, P.C., Civ. No. 4:09-mc-365, 2010 U.S. Dist. LEXIS 715 (S.D. Tex. Jan. 6, 2010).

- Most courts allow clients to withdraw such affirmative defenses if they wish to avoid this implied waiver impact.[350] [28.1103]

28.12 Reliance on Legal Advice in Other Contexts

Even without asserting formal affirmative defenses, clients can impliedly waive privilege protection by explicitly relying on legal advice. [28.1201]

Clients sometimes rely on legal advice in asserting some position or defense. [28.1202]

- The implied waiver impact raises more subtle issues if litigants explicitly refer to, but do not explicitly rely on, legal advice. [28.1203]

As with affirmative defenses, courts generally allow clients to avoid waivers by withdrawing their reliance on legal advice, or disclaiming any intent to seek some litigation advantage through such reliance. [28.1204]

28.13 Deposition References to Privileged Communications

In contrast to clients' affirmative defenses or explicit reliance on privileged communications to gain some advantage, clients' mere reference to legal advice generally does not impliedly waive privilege protection. [28.1301]

Of course, clients' express disclosure of privileged communications' "gist" can expressly rather than impliedly waive privilege protection. [28.1302]

- Chapters 25 and 26 discuss that issue.

Many courts hold that clients do not impliedly waive their privilege protection by simply referring to having sought legal advice, or disclosing a very general description of such advice. [28.1303]

Not surprisingly, courts seem most forgiving if clients offer such testimony during fast-paced depositions.[351]

- Examples include deponent relied on the lawyer's advice; deponent's employer's lawyer had issued a favorable opinion letter; deponent worded a termination notice on advice of a lawyer; deponent would not act without a lawyer's approval; deponent signed a document on advice of a lawyer; deponent's testimony was influenced by advice of a lawyer; deponent changed deposition testimony after speaking with a lawyer; deponent filed a complaint after talking with a lawyer.

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350 United States v. Hatfield, No. 06-CR-0550 (JS), 2010 U.S. Dist. LEXIS 4026, at *42-43 (E.D.N.Y. Jan. 8, 2010).

351 Alers v. City of Phila., Civ. A. No. 08 4745, 2011 U.S. Dist. LEXIS 137446, at *7 (E.D. Pa. Nov. 29, 2011).

Clients normally can avoid any waiver danger by explicitly disclaiming their intent to rely on privileged communications. [28.1304]

28.14 Clients' Denial of Communications with a Lawyer

Even clients' denial of having communicated with lawyers can impliedly waive privilege protection. [28.1401]

- This seems counterintuitive, because asserting the absence of communications should normally not have any waiver implications.

Courts finding an implied waiver in this context usually deal with criminal defendants claiming ignorance of some important fact, such as denying that their lawyers advised them of some key matter. [28.1402]

- When those clients then rely on the privilege to block discovery into communications about the matter, some suspicious courts use an implied waiver concept to force such disclosure.[352]

Clients' lack of memory about communications with lawyers can raise the same issue.[353] [28.1403]

Clients' denial of, or lack of memory about, communications with lawyers can result in an "at issue" waiver. [28.1404]

- Chapter 29 discusses that issue.

28.15 Clients' Designation of a Lawyer as a Witness

Clients' designation of their lawyer as witnesses does not necessarily impliedly waive privilege protection. [28.1501]

Because disclosure of non-privileged historical facts or communications usually does not waive privilege protection (discussed in Chapter 25), designating lawyers to testify about such matters normally does not waive privilege protection.[354] [28.1502]

- Designating lawyers to testify about other topics might or might not waive privilege protection, depending on the topics. [28.1503]

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352 Hawkins v. Stables, 148 F.3d 379, 381, 384 & n.4 (4th Cir. 1998).

353 In re Urethane Antitrust Litig., Case No. 04-MD-1616-JWL, 2011 U.S. Dist. LEXIS 9923, at *42 (D. Kan. Jan. 31, 2011).

354 Natural Res. Defense Council, Inc. v. Cnty. of Dickson, No. 3:08-0229, 2010 U.S. Dist. LEXIS 134568 (M.D. Tenn. Dec. 20, 2010).

Clients arranging for their lawyers to function as attesting witnesses generally cannot prevent discovery of such lawyers, and sometimes cannot prevent disclosure of privileged communications. [28.1504]

- Clients arranging for lawyers to verify discovery responses raise the same issue. [28.1505] Chapter 58 discusses that issue.

28.16 Reliance on Legal Advice Outside Court Proceedings

Clients' reliance on privileged communications outside of court proceedings can impliedly waive privilege protection.

- For instance, clients can impliedly waive their privilege protection by touting their lawyers' involvement in some internal investigation, in an effort to calm the stock market, deter governmental scrutiny, etc.[355]

28.17 Privileged Communications Used at Trial

Clients generally must produce privileged communications or documents they intend to use at trial.

- Chapter 21 discusses that issue.

28.18 "At Issue" Waiver

In extreme situations, clients can waive their privilege protection without relying on or referring to privileged communications.

- Chapter 29 discusses that issue.

28.19 Federal Rule of Evidence 612

Under Federal Rule of Evidence 612, courts can order production of privileged documents if witnesses rely on those documents while testifying or to refresh their recollection before testifying. [28.1901]

Because such court orders can destroy privilege protection without the previous disclosure of privileged documents, they can be considered a type of implied waiver. [28.1902]

Rule 612 can apply to deposition testimony. [28.1903]

Rule 612 can apply to pre-testimony review of privileged documents only if that review refreshed witnesses' recollection. [28.1904]

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355 In re Royal Ahold N.V. Sec. & ERISA Litig., 230 F.R.D. 433, 436 (D. Md. 2005).

- Courts sometimes point to witnesses' testimony to this effect.[356]

Under relatively recent changes in Rule 612's language, courts have the discretion to order production of such privileged documents if "justice requires." [29.1905]

- The previous language used the phrase "in the interests of justice."

Courts applying the "justice requires" standard take different approaches.

- Some courts assess whether privileged documents impacted witnesses' testimony.[357] [28.1906]

- Some courts apply essentially the same standard as that for overcoming litigants' fact work product protection -- that adversaries seeking discovery have substantial need for the privileged documents, and cannot obtain their substantial equivalent without undue hardship.[358] [28.1907]

In applying either standard, courts sometimes conduct in camera reviews of documents witnesses reviewed before testifying. [28.1908]

Some courts applying Rule 612 order production of such documents, while some do not. [28.1909]

Some courts rely on Rule 612 to order production of privileged documents.

- Examples include: plaintiff's lawyer's summary of the complaint; plaintiff's original draft interrogatory response; plaintiff's handwritten chronology of events; plaintiff's handwritten note to the EEOC; deposition preparation book the witness reviewed which contained information that "astonished" the witness.

Rule 612 only covers documents witnesses review, so there can be no subject matter waiver. [28.1910]

- Chapter 30 discusses that issue.

Rule 612 can also apply to work product protected documents. [28.1911]

- Chapter 44 discusses that issue.

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356 Audiotext Commc'ns Network, Inc. v. US Telecom, Inc., 164 F.R.D. 250, 254 (D. Kan. 1996).

357 In re Rivastigmine Patent Litig., 486 F. Supp. 2d 241, 243 (S.D.N.Y. 2007).

358 Weintraub v. Mental Health Auth. of St. Mary's, Inc., Civ. A. No. DKC 2008-2669, 2010 U.S. Dist. LEXIS 5131, at *22 (D. Md. Jan. 22, 2010).

28.20 Effect of Implied Waiver

Implied waivers requiring production of privileged communications essentially have the same effect as express waivers -- because courts finding implied waivers order their disclosure.

- Although litigants have not voluntarily disclosed such privileged communications, they cannot take advantage of the general rule precluding waivers upon compelled disclosure -- because the litigants have essentially forfeited their privilege protection through the implied waiver.

- Such disclosed communications generally lose their protection forever, and can be accessed by other third parties. Chapter 25 discusses that issue.

28.21 Scope of Implied Waiver

Courts finding implied waivers must then determine their scope.

- By definition, implied waivers result in subject matter waivers -- because there has been no previous disclosure of any privileged communications. Chapter 30 discusses that issue.

28.22 Work Product

As in other contexts, the implied waiver doctrine applies somewhat differently to work product than it does to privileged communications.

- Chapter 48 discusses that issue.

CHAPTER 29

THE "AT ISSUE" DOCTRINE

29.1 Introduction

The "at issue" doctrine represents the most extreme form of implied waiver.

29.2 Confusion about the "At Issue" Doctrine

Some courts use the term "at issue" in discussing intentional express waivers (discussed in Chapter 26) or classic implied waivers (discussed in Chapter 28).

- Any such confusion about terminology normally has little impact on courts' actual analysis.

29.3 Nature of the "At Issue" Waiver Doctrine

At issue waivers present an enormous danger, because they can arise even if clients and their lawyers do not disclose, rely on, or even refer to, privileged communications.

- Lawyers' instincts normally will cause them to recognize the possible waiver impact of express waivers or implied waivers, but they may not see at issue waivers coming until it is too late.

29.4 Spectrum of Judicial Approaches

Courts take varying approaches to at issue waivers. [29.401]

Some courts find at issue waivers only if litigants explicitly rely on privileged communications or the fact of such privileged communications. [29.402]

- This approach essentially mirrors the classic implied waiver doctrine.

- Many courts refer to this type of waiver using the names of the Third Circuit decision in Rhone-Poulenc[359] or the Second Circuit decision in Erie.[360]

In contrast, some courts apply what they call the "anticipatory waiver" doctrine. [29.403]

- Under this approach, courts examine whether litigants asserting a certain position will inevitably have to disclose and rely on privileged communications.[361]

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359 Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994).

360 Pritchard v. Cnty. of Erie (In re Cnty. of Erie), 546 F.3d 222, 229 (2d Cir. 2008).

The most extreme type of at issue doctrine waiver is usually called the Hearn doctrine, after an Eastern District of Washington case.[362] [29.404]

29.5 Hearn Doctrine and Relevant Factors

The Hearn doctrine represents the purest form of at issue waiver. [29.501]

Under the Hearn doctrine, litigants affirmatively raising some critical issue might cause an at issue waiver if fairness requires that adversaries be given access to otherwise privileged communication. [29.502]

- As explained below, the Hearn doctrine can apply when litigants seek some advantage in litigation by claiming certain knowledge, asserting ignorance of an important fact, or pointing to some action they took or to some relevant inaction.

The Hearn doctrine continues to cause controversy. [29.503]

- Some courts explicitly reject the Hearn approach.[363]

Courts applying the Hearn doctrine agree on certain basic prerequisites.

First, litigants must affirmatively raise an issue, not simply deny adversaries' assertions.[364] [29.504]

Second, the issue involving privileged communications must be more than just relevant. [29.505]

Courts have articulated various standards for assessing issues' importance.

- Examples include denial of discovery would prejudice the adverse party; the privileged communications represent important evidence, the denial of which would adversely affect the adversary's right to defend itself in a meaningful way; the adverse party has substantial need for the privileged communications; the privileged communications are vital; the privileged communications are crucial; the privileged communications are at the very heart of the affirmative relief sought; the privileged communications are integral to the outcome; the privileged communications are in all

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361 U.S. Fire Ins. Co. v. City of Warren, Case No. 2:10-CV-13128, 2012 U.S. Dist. LEXIS 82625, at *14 (E.D. Mich. June 14, 2012).

362 Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975).

363 Lindley v. Life Investors Ins. Co. of Am., Case No. 08-CV-0389- c/w 09-CV-0429-CVE-PJC, 2010 U.S. Dist. LEXIS 41798, at *23-24 (N.D. Okla. Apr. 28, 2010).

364 Shukh v. Seagate Tech., LLC, 872 F. Supp. 2d 851, 857 (D. Minn. 2012) ("[M]erely denying a plaintiff's allegations does not place privileged information at issue.").

probability outcome determinative and go to the very heart of the case; the privileged communications are probably outcome determinative; the privileged communications are outcome determinative.

Third, privileged communications must be the only source of the necessary information.[365] [29.506]

29.6 Hearn Doctrine: Assertions of Knowledge

Courts disagree about whether litigants' assertion of their knowledge results in at issue waivers. [29.601]

Some courts find that litigants' assertion of their knowledge results in at issue waivers. [29.602]

- Examples include transactional parties' intent and the client's understanding of the transaction; good faith and reasonable basis for the litigant's position; intent to comply with what the litigant understood to be the law; reliance on a "good faith immunity defense" under New York law; disclosure of their knowledge to a third party; denial of any criminal intent; good faith conveyance under the bankruptcy laws; assertion of "qualified immunity"; good faith reliance on a government representation.

In contrast, some courts find that litigants' assertion of their knowledge does not result in at issue waivers. [29.603]

- Examples include denial of willful violation of law; having taken action in good faith; reliance on a government position; having taken actions that were reasonable; appropriate and legal; denial that it acted in bad faith; confidence of victory in litigation; thoroughness of an investigation.

29.7 Hearn Doctrine: Ignorance

Courts disagree about whether litigants' assertion of their ignorance results in at issue waivers. [29.701]

This type of "at issue" waiver might arise in unexpected contexts.

- In 2008, the Southern District of New York found that a plaintiff suing its accountant for malpractice for allegedly providing bad advice about a transaction had caused an at issue waiver requiring plaintiff to disclose

[365] 1st Sec. Bank of Wash. v. Eriksen, No. CV06-1004RSL, 2007 U.S. Dist. LEXIS 4449, at *11 (W.D. Wash. Jan. 22, 2007).

advice it had simultaneously received on the same transaction from its law firm Akin Gump.[366]

Some courts find that litigants' assertion of their ignorance results in at issue waivers. [29.702]

- Examples include failure of a former lawyer to provide necessary information; concealment of material fact resulting in the client's waiver of its reservation of rights; mutual mistake and unilateral mistake coupled with the adversary's silence, which justified reformation; reliance on fraudulent concealment to avoid the running of the statute of limitations; ignorance of an injury and its cause; lack of knowledge about a document; consultant's failure to provide certain information; lack of memory about performing certain work; ignorance induced by the adversary's fraud; unawareness that a lawyer had filed pleadings without the client's review and approval; lack of understanding of a document drafted by the client's lawyer (supporting a mutual mistake claim); lack of understanding of a release; lack of intent to create a mortgage.

In contrast, some courts find that litigants' assertion of their ignorance does not result in at issue waivers. [29.703]

- Examples include reliance on the discovery rule to avoid the statute of limitations; failure to have received information about a product; ignorance induced by the adversary's fraud; equitable estoppel; fraudulent concealment sufficient to avoid the statute of limitations.

This type of waiver parallels some courts' finding of implied waivers when clients deny communicating with their lawyers. [29.704]

- Chapter 28 discusses that issue.

29.8 Hearn Doctrine: Action or Inaction

Courts disagree about whether litigants' assertion of their action or inaction results in at issue waivers. [29.801]

Some courts find that litigants' assertion of their action or inaction results in at issue waivers. [29.802]

- Examples include asserting that litigants lost consortium because of her husband's death, based on her testimony that she and her husband decided not to follow through with a divorce; changed its methodology in good faith to comply with the law; settled an underlying case on

366 Chin v. Rogoff & Co., P.C., No. 05 Civ. 8360 (NRB), 2008 U.S. Dist. LEXIS 38735, at *17-18 (S.D.N.Y. May 6, 2008).

unfavorable grounds because of its insurance carrier's bad faith; found that its law firm's "'investigation has revealed no instance of deliberate deletion to deny [the plaintiff] access to any information responsive to the allegations in the Complaint.'"; entered into a reasonable settlement, for which it seeks contributions from another person; found that its lawyer had acted without authority; signed a document under duress; been damaged because its insurance carrier hired an inefficient law firm to represent it; complied with FMLA provisions; not made an insurance coverage decision until it received written advice; given its insurance carrier timely notification of a claim; arranged a novation of employment agreements; complied with a condition precedent; arbitrated overseas, to avoid the arbitration being given preclusive effects; not been represented by a law firm at a certain time.

In contrast, some courts find that litigants' assertion of their action or inaction does not result in at issue waivers. [29.803]

- Examples include asserting that the litigants engaged in due diligence; complied with fair lending laws and regulatory requirements; asserted a legitimate defense; met with a third party at a lawyer's request; not exercised control over credit card companies; not committed a crime; engaged in inequitable conduct.

This type of waiver also parallels some courts' finding of an implied waiver when clients deny communicating with their lawyers. [29.804]

- Chapter 28 discusses that issue.

29.9 The Faragher/Ellerth Defense

Most courts find that corporate clients cause at issue waivers by defending themselves from hostile work environment claims by pointing to their investigation and remedial steps.

- Courts call this the Faragher/Ellerth defense, after two Supreme Court cases.[367]

Most courts hold that companies asserting Faragher/Ellerth defenses waive any privilege protection for otherwise protected communications that occurred during their investigation and their remedial steps' implementation.[368]

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[367] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. Boca Raton, 524 U.S. 775 (1998).

[368] Angelone v. Xerox Corp., No. 09-CV-6019, 2011 U.S. Dist. LEXIS 109407 (W.D.N.Y. Sept. 26, 2011).

- Companies involving lawyers in such investigations or remedial steps risk causing at issue waivers.[369]

29.10 Hearn Doctrine: Other Examples

Some courts find at issue waivers in other situations.

- Examples include litigants' claim of loss of consortium (which implicates the state of plaintiff's marriage); argument that another company's settlement was unreasonable; allegation that a jail superintendent destroyed evidence, thus inhibiting a defense; assertion of the absence of a condition precedent.

In contrast, some courts decline to find at issue waivers in other situations.

- Examples include litigants' promise to provide truthful testimony as part of a plea agreement; question to an expert based on the assumption that the client had declared bankruptcy; identification of its lawyer as a "non-retained expert" on the reasonableness of fees.

29.11 Ability to Abandon Assertions or Defenses

As with implied waivers, courts generally allow litigants to withdraw assertions or defenses to avoid at issue waivers.

Depending on the time when the issue arises, courts have taken various positions.

- Examples include holding that a litigant can disclaim any intent to rely on privileged matters; allowing a company to defend its actions, as long as it redacts any specific references to its law department; holding that a litigant can avoid an at issue waiver by agreeing not to rely on an affirmative defense; holding that a litigant would face an at issue waiver unless it dropped a claim that it had been compelled to participate in a foreign arbitration; holding that a litigant could have avoided an at issue waiver by simply denying criminal intent but caused such a waiver by affirmatively pleading good faith in the legality of its actions, presumably recognizing that a litigant has the power to shape its positions to avoid such waiver.

29.12 Effect of an "At Issue" Waiver

At issue waivers' impacts parallel that of implied waivers.

Courts have addressed several related Faragher/Ellerth defense issues.

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[369] EEOC v. Spitzer Mgmt., Case Nos. 1:06-CV-2337, 1:08-CV-1238 & -1542, 2010 U.S. Dist. LEXIS 34975, at *3 4 (N.D. Ohio Apr. 9, 2010).

- Courts have concluded that companies successfully obtaining summary judgment on hostile work environment claims may not preclude plaintiffs' use of privileged communications in asserting their remaining claims,[370] and that plaintiffs cannot obtain and use otherwise privileged documents that allegedly supported companies' previous Faragher/Ellerth affirmative defenses in earlier cases involving other plaintiffs.[371]

29.13 Scope of Possible Subject Matter Waiver

As with implied waivers, courts finding at issue waivers must then determine their scope.

- Chapters 30 and 31 discuss that issue.

29.14 Work Product Doctrine

The at issue waiver doctrine can also apply to work product.

- Chapter 48 discusses that issue.

370 Reitz v. City of Mt. Juliet, 680 F. Supp. 2d 888 (M.D. Tenn. 2010).

371 Traversie-Akers v. Sales Operating Control Servs. Inc., Civ. A. No. 08-cv-01206-PAB-MEH, 2009 U.S. Dist. LEXIS 7539 (D. Colo. Jan. 26, 2009).

CHAPTER 30

SUBJECT MATTER WAIVER

30.1 Introduction

Clients who expressly waive their attorney-client privilege might be compelled to disclose additional previously undisclosed privileged communications on the same subject matter.

- Courts call this a "subject matter" waiver.

Implied and "at issue" waivers necessarily result in subject matter waivers, because they do not involve the initial disclosure of privileged communications.

30.2 Fairness of a Subject Matter Waiver

The subject matter waiver doctrine rests on notions of fairness.

- Courts assess whether it is fair for a client who has waived privilege protection for some communications to withhold other communications on the same subject.[372]

- Federal Rule of Evidence 502 explicitly mentions fairness as the key factor.

30.3 Necessity of a Waiver

Because subject matter waivers can occur only if there has been a waiver, in some situations litigants undertake an odd reversal of normal positions. [30.301]

A subject matter waiver can occur only if there has been a waiver. [30.302]

- Chapter 25 discusses that issue.

This basic principle can generate strange scenarios. [30.303]

Because disclosing non-privileged communications does not waive privilege protection, it cannot result in a subject matter waiver.[373]

- This basic principle sometimes induces litigants to argue that communications they disclosed never really deserved privilege protection,

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372 Mills v. Iowa, 285 F.R.D. 411, 416 (S.D. Iowa 2012).

373 Pallares v. Kohn (In re Chevron Corp.), 659 F.3d 726 (3d Cir. 2011).

so that their disclosure did not waive privilege protection[374] -- thus precluding a possible subject matter waiver.

- Adversaries sometimes take exactly the opposite position, hoping to successfully argue for a subject matter waiver.

Litigants face a dilemma when considering whether to produce arguably privileged communications whose disclosure would not cause any harm. [30.304]

- Such litigants might worry that adversaries will argue that the litigants intentionally waived their privilege protection, resulting in a subject matter waiver. However, litigants withholding arguably privileged but harmless communications might frustrate or even anger judges.

- Rule 502 reduces this risk, as discussed below.

30.4 Intentional Express Waiver: Judicial Setting

Intentional express waiver of privileged communications in a judicial setting usually results in a subject matter waiver. [30.401]

Clients' testimonial use of privileged communications in a judicial setting usually results in a subject matter waiver.[375] [30.402]

- Even non-testimonial disclosures during litigation can result in such waivers. [30.403]

Rule 502 explicitly indicates that such use can result in subject matter waivers. [30.404]

- The rule's explanatory notes explain that a subject matter waiver can occur when "a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner."[376]

- Rule 502's legislative history reinforces this position.[377]

Rule 502 dramatically reduces the stakes in any dispute over whether discovery disclosure was intentional or inadvertent -- because either way litigants should be able to avoid subject matter waivers by disclaiming any use of the disclosed communication.

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374 Intervet, Inc. v. Merial Ltd., 252 F.R.D. 47, 52 (D.D.C. 2008).

375 QBE Ins. Corp. v. Jorda Enters., Inc., 286 F.R.D. 661, 666 (S.D. Fla. 2012).

376 Fed. R. Evid 502 Explanatory Note, subdiv. (a) (emphasis added).

377 154 Cong. Rec. H7817, H7818 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

Few cases deal with the subject matter implications of former joint clients using privileged communications in later disputes between them. [30.405]

- Chapter 24 discusses that issue.

Separate rules govern the impact of disclosure to testifying experts. [30.406]

- Chapter 49 discusses that issue.

30.5 Avoiding a Subject Matter Waiver

Not surprisingly, litigants often seek to avoid subject matter waivers. [30.501]

Litigants sometimes enter into agreements with adversaries under which litigants' disclosure of privileged communications does not result in a subject matter waiver.

- Litigants considering such agreements should carefully document the scope of any waivers to which the signatories agree -- ambiguity might require judicial interpretation, especially if litigants negotiate such agreements during fast-paced depositions.[378]

Litigants' agreements with adversaries precluding subject matter waivers bind those parties, but probably do not bind nonsignatories. [30.502]

- Chapter 25 discusses that issue.

Rule 502's legislative history indicates that court orders may not permit selective waivers --thus avoiding subject matter waivers. [30.503]

- Chapter 26 discusses that issue.

Some courts nevertheless enter such orders.

- Other courts presumably may honor such orders despite Rule 502's legislative history.

30.6 Intentional Express Waiver: Non-Judicial Setting

Starting with a 1987 Second Circuit decision, many courts have declined to find subject matter waivers when clients disclose privileged communications in non-judicial settings. [30.601]

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[378] JPMorgan Chase & Co. v. Pierce, Case No. 05-CV-74455-DT, 2007 U.S. Dist. LEXIS 25841, at *7 (E.D. Mich. Apr. 4, 2007).

In the von Bulow case,[379] the Second Circuit analyzed Harvard law professor Alan Dershowitz's book disclosing privileged communications with his client Claus von Bulow. [30.602]

- The court found that the non-judicial disclosure did not result in a subject matter waiver that would allow von Bulow's stepchildren access to other nondisclosed privileged communications between Dershowitz and von Bulow.

Rule 502 essentially adopts the von Bulow doctrine. [30.603]

Some courts applying the von Bulow doctrine assess whether express waivers occurred in "non-judicial" settings.

Some courts find that express waivers occurred in non-judicial settings, and therefore did not result in subject matter waivers. [30.604]

- Examples include patent owner's disclosure of a privileged opinion letter to an alleged infringer; potential buyer of a company's disclosure of the lawyer's privileged email to the potential seller; company's disclosure to its investor of the results of an internal corporate investigation into financial irregularities; disclosure during settlement discussions; company's letter to customers providing its lawyer's patent opinion; company's pre-litigation disclosure of privileged communications to adversaries; disclosure of privileged communications outside litigation by the parents of murdered child JonBenet Ramsey; company's public release of an internal investigation report; disclosure discussing pre-litigation settlement talks, which the court defined as "outside a trial setting."

In contrast, some courts find that express waivers occurred in a judicial setting, thus resulting in subject matter waivers. [30.605]

- Examples include company's disclosure of a patent opinion to its controlling shareholder; disclosure to the PTO; disclosure in an arbitration; testimony in a deposition, described by the court as a "judicial" proceeding; testimony before a United States Senate subcommittee, which the court described as a kind of "trial setting"; disclosure of privileged communications during litigation settlement discussions.

Some courts have rejected the common law von Bulow doctrine.[380] [30.606]

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379 In re von Bulow, 828 F.2d 94, 102 (2d Cir. 1987).

380 Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., Case No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 8690, at *12 (D. Kan. Feb. 6, 2007).

- Some of these courts presumably might reach a different result under Rule 502.

Some courts find that non-judicial disclosures resulted in subject matter waivers.

- Examples include disclosure of privileged communications in blogs and other electronic communications about a pending lawsuit; disclosure of a lawyer's patent opinion in communications to a company's controlling shareholder; disclosure of privileged communications to investment advisors during a bank merger; disclosure of a tax lawyer's opinions in public brochures and printed material.

Some courts seem to use an implied waiver analysis in such settings -- essentially equating such disclosure to clients' reliance on the fact of privileged communications to gain some advantage.[381]

- Chapter 28 discusses that issue.

Such frightening applications of the subject matter waiver doctrine presumably do not survive Rule 502's adoption, at least in settings governed by Rule 502.

30.7 Inadvertent Express Waiver Under Rule 502

Rule 502 indicates that inadvertent express waivers can never result in subject matter waivers. [30.701]

Before Rule 502, some courts found that even inadvertent express waivers result in subject matter waivers.[382] [30.702]

- This harsh approach never made any sense, because litigants inadvertently producing privileged communications were not seeking to unfairly use those communications to gain some litigation advantage (which has always been the subject matter waiver doctrine's basis).

Rule 502 explicitly rejects this possibility. [30.703]

- Some courts in those jurisdictions that formerly recognized subject matter waivers in that context seem to welcome this change.[383]

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381 Adams v. United States, Civ. No. 03-0049-E-BLW, 2008 U.S. Dist. LEXIS 53533, at *11-12 (D. Idaho July 3, 2008).

382 Williams v. D.C., 806 F. Supp. 2d 44, 48 (D.D.C. 2011).

383 Amobi v. D.C. Dep't of Corr., 262 F.R.D 45, 53 (D.D.C. 2009).

30.8 Implied Waivers, "At Issue" Waivers, and Rule 612

By definition, waivers that occur without any privileged communications' disclosure involve subject matter waivers.

- Courts assessing such waivers must decide from the beginning what communications must be disclosed, rather than analyzing previously-disclosed communications in deciding which additional communications must be disclosed.

This principle applies to implied waivers (discussed in Chapter 28). [30.801]

- Examples include implied waivers resulting from clients' attacks on their lawyers; reliance on advice of counsel; reliance on legal advice; criminal defendant's claim of ineffective assistance of counsel; reliance on the results of an otherwise privileged investigation.

This principle also applies to at issue waivers (discussed in Chapter 29). [30.802]

- Examples include at issue waivers resulting from asserting a "reasonable cause" defense "premised" on reliance of a law firm's tax opinion; client's assertion that it had a reasonable basis for taking a certain position in filing its tax return; client's denial that she talked to a lawyer about a certain topic.

Asserting a Faragher/Ellerth defense results in a subject matter waiver. [30.803]

- The main issue then becomes the waiver's scope -- especially whether the waiver extends to lawyers' advice following involvement in their corporation clients' investigation and remedial steps. Chapter 31 discusses issue.

Federal Rule of Evidence 612 focuses on documents witnesses review while or before testifying.[384] [30.804]

- Rule 612 disclosures do not result in subject matter waivers.

30.9 Work Product Doctrine

Subject matter waiver principles apply differently to work product than to privileged communications.

- Chapter 48 discusses that issue.

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384 Equity Residential v. Kendall Risk Mgmt., Inc., 246 F.R.D. 557, 564 (N.D. Ill. 2007).

CHAPTER 31

SCOPE OF A SUBJECT MATTER WAIVER

31.1 Introduction

Courts finding attorney-client privilege subject matter waivers must then determine their scope.

31.2 General Approach

As with application of the subject matter waiver doctrine itself, basic notions of fairness guide courts' determination of waivers' scope.[385]

- Rule 502 explicitly directs courts to focus on fairness.

31.3 Types of Scope: Horizontal and Temporal

Courts assessing waivers' scope examine two elements. [31.301]

First, courts determine what could be called waivers' "horizontal" scope. [31.302]

- This analysis looks at the withheld communications' context, to see if they concern the same topic as the disclosed communications, or the issues implicated in implied or at issue waivers.[386]

Second, courts determine what could be called waivers' "temporal" scope. [31.303]

- This analysis focuses on the withheld communications' timing.[387]

31.4 Scope of Intentional Express Waivers

Most intentional express waiver cases involve patents, which can paint a somewhat misleading picture. [31.401]

The few decisions in nonpatent cases take a fairly narrow view of intentional express waivers' horizontal and temporal scope.[388] [31.402]

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385 Mills v. Iowa, 285 F.R.D. 411, 416 (S.D. Iowa 2012).

386 United States v. Skeddle, 989 F. Supp. 917, 919 (N.D. Ohio 1997).

387 Mattel, Inc. v. MGA Entm't, Inc., Case No. CV 04-9049 DOC (RNBx), 2010 U.S. Dist. LEXIS 102461, at *32-33 (C.D. Cal. Sept. 22, 2010).

388 Original Rex, L.L.C. v. Beautiful Brands Int'l, LLC, Case. No. 10-CV-424-GKF-FHM, 2011 U.S. Dist. LEXIS 42528, at *5 (N.D. Okla. Apr. 19, 2011).

In patent cases, most courts assessing waivers find a narrow horizontal scope, but a broad temporal scope.[389] [31.403]

- This results from judicial recognition that patent infringement amounts to a continuing wrong -- so infringers learning at any time that they are violating another's patent must stop. This often renders relevant otherwise privileged communications demonstrating infringement, regardless of when they occur.

31.5 Scope of Inadvertent Express Waivers

Under Rule 502, inadvertent express waivers do not result in subject matter waivers.

31.6 Scope of Implied Waivers

Courts disagree about the scope of various types of implied waivers. [31.601]

Unlike the intentional waiver context, courts assessing implied waivers' scope do not start with already disclosed privileged communications. [31.602]

- Thus, courts must select all of the privileged communications to be disclosed.

In clients' malpractice actions against their former lawyers, courts disagree about whether implied waivers should extend to clients' communications with their new lawyers.[390] [31.603]

Most courts narrowly construe implied waivers resulting from criminal defendants' ineffective assistance of counsel claims. [31.604]

Courts sometimes assess the scope of implied waivers resulting from clients' advice of counsel defense.[391] [31.605]

Rule 612's application does not result in a subject matter waiver. [31.606]

- Instead, Rule 612 at most mandates disclosure of "writings" that refreshed witnesses' recollection and whose production "justice requires."

Courts must undertake similar analyses with other implied waivers. [31.607]

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389 Net2Phone, Inc. v. eBay, Inc., Civ. A No. 06-2469 (KSH), 2008 U.S. Dist. LEXIS 50451, at *45 (D.N.J. June 25, 2008) (not for publication).

390 Sann v. Mastrian, No. 1:08-cv-01182-JMS-MJD, 2011 U.S. Dist. LEXIS 147738, at *10 (S.D. Ind. Dec. 21, 2011); Lyon Fin. Servs., Inc. v. Vogler Law Firm, P.C ., Case No. 10-cv-565-JPG-DGW, 2011 U.S. Dist. LEXIS 99353 (S.D. Ill. Sept. 2, 2011).

391 Lee v. Med. Protective Co., 858 F. Supp. 2d 803, 807 (E.D. Ky. 2012).

Specific rules govern the waiver effect of disclosing privileged communications to a testifying expert. [31.608]

- Chapters 26 and 49 discuss that issue.

31.7 Scope of "At Issue" Waivers

Courts assessing at issue waivers' scope face essentially the same task as with implied waivers. [31.701]

Courts disagree about whether the Faragher/Ellerth doctrine waivers include legal advice from lawyers who conducted companies' investigations or directed their remedial steps. [31.702]

- Some courts extend waivers' scope to such legal advice,[392] and some do not.[393]

Courts undertake similar analyses in other at issue waiver contexts. [31.703]

- These include litigants' assertion of "good faith" in connection with some action,[394] and fraudulent concealment claims.[395]

31.8 Work Product Doctrine

Just as the subject matter waiver doctrine applies differently in the work product context, courts' analyses of work product waivers' scope differs from that in the privilege context.

- Chapter 50 discusses that issue.

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392 Johnson v. Rauland-Borg Corp., 961 F. Supp. 208, 211 (N.D. Ill. 1997).

393 Johnston v. Bergin Fin., Inc., Civ. A. No. 07-CV-13871-DT, 2008 U.S. Dist. LEXIS 59938 (E.D. Mich. Aug. 7, 2008).

394 Doe v. Archdiocese of Portland, No. CV 08-691-PK, 2010 U.S. Dist. LEXIS 94656, *10-11 (D. Or. Sept. 10, 2010).

395 Landmark Screens, LLC v. Morgan, Lewis & Bockius LLP, No. C08-02581 JF (HRL), 2009 U.S. Dist. LEXIS 102579 (N.D. Cal. Oct. 21, 2009).

CHAPTER 32

WAIVER: NEW RULES AND PUBLIC POLICY DEBATES

32.1 Introduction

Several new rules and public policy debates focus on attorney-client privilege waivers.

32.2 Federal Rules and Post-Production Privilege Claims

Relatively recent federal rules changes permit post-production privilege claims.

- Chapter 27 discusses that issue.

32.3 Federal Rule of Evidence 502

Federal Rule of Evidence 502 adopted the previous majority common law approach to inadvertent express waivers.

- Under Rule 502, inadvertent express waivers do not result in subject matter waivers. Chapter 27 discusses that issue.

32.4 Federal Rules Governing Testifying Experts

Several relatively recent federal rules changes materially expand protection for testifying experts' draft reports and communications with lawyers.

- Chapters 34, 44, and 49 discuss that issue.

32.5 Governmental Requests for Waiver of Protections

During the Bush Administration, some complained of the federal government's perceived "bullying" of corporations into waiving their privilege protection. [32.501]

- Such arguably partisan critics condemned the government's more lenient treatment of corporations relinquishing their privilege protection. [32.502]

Successive Department of Justice policies eventually backed off any arguable quid pro quo between corporations' waivers and some government benefit such as forbearance of prosecution. [32.503]

Various proposed statutes would memorialize this retreat from the alleged bullying, but Congress has not enacted any yet. [32.504]

32.6 Proposals on Selective Waiver by Corporations

One interesting public policy debate involves efforts to allow corporations to use selective waiver. [32.601]

Corporations frequently resist disclosing privileged communications to the government by arguing that such disclosures would waive privilege protection, thus permitting private plaintiffs access to the same communications. [32.602]

- Some argued for explicitly permitting selective waivers allowing corporations to disclose protected communications to the government while withholding them from other third parties.

- This presumably would have encouraged corporate cooperation with the government, by eliminating the risk of private plaintiffs later using the protected communications.

This issue came to a head during the debate over proposed Federal Rule of Evidence 502. [32.603]

- The original proposed rule contained such a selective waiver provision, but the Association of Corporate Counsel and others condemned it. Presumably, the ACC wanted to preserve the dramatically deleterious effect of corporations' disclosing privileged communications to the government, to preserve corporations' ability to resist calls for such disclosure.

- Rule 502's drafters eventually dropped the selective waiver provision.

On the other hand, other very specific federal and state statutes and regulations permit financial institution's disclosure of privileged communications to the government without resulting in waivers permitting others access to the same communications. [32.604]

- Chapter 26 discusses that issue.

32.7 Conclusion

Given the attorney-client privilege's importance, these and other public policy issues will undoubtedly continue to generate substantial attention.

CHAPTER 33

WORK PRODUCT DOCTRINE: HISTORIC PERPECTIVE

33.1 Introduction

The work product doctrine differ dramatically from the attorney-client privilege in many important ways.

33.2 Common Law Antecedents

A few early cases hinted at common law protection for lawyers' non-privileged pre-trial work.

33.3 First Recognized in Hickman v. Taylor

In Hickman v. Taylor, 329 U.S. 495 (1947), the Supreme Court recognized such a protection -- which differs from the attorney-client privilege covering communications between clients and their lawyers motivated by legal advice and meant to be kept confidential.

33.4 Federal Rules of Civil Procedure

The federal rules eventually codified such work product protection. [33.401]

Federal Rule of Civil Procedure 26(b)(3) provides qualified protection to documents that clients or their lawyers (or representatives of either) prepare in preparation for anticipated litigation or trial. [33.402]

- In 2007, Congress adopted some purely stylistic changes. [33.403]

The Federal Rules of Civil Procedure and Evidence continue to evolve. [33.404]

- Among other things, relatively recent rules changes affect inadvertent express waivers (discussed in Chapter 27), subject matter waivers (discussed in Chapter 30), and testifying experts' reports and communications (discussed in Chapters 34 and 44).

33.5 Continuing Federal Common Law Principles

Although federal rules codify much of the work product doctrine, courts still recognize parallel federal common law protection supplementing those rules.

- Among other things, this federal common law work product protection can extend to non-parties' work product, and to non-documentary intangible work product.

- Chapters 34 and 39 discuss those issues.

33.6 Naming the Doctrine

The work product doctrine provides only a qualified immunity from discovery, and technically does not amount to a "privilege."

- Some courts note this distinction, but most courts use the word "privilege" when discussing either the attorney-client privilege or the work product doctrine protection.[396]

33.7 Comparison to the Attorney-Client Privilege

The work product doctrine differs dramatically from the attorney-client privilege. [33.701]

Courts recognize many differences. [33.702]

- The attorney-client privilege developed in the common law, while the work product doctrine comes from a rule. [33.703]

- The attorney-client privilege developed centuries ago, while the work product doctrine developed only in the 1940s. [33.704]

- The attorney-client privilege reflects the grand societal purpose of encouraging clients to provide their lawyers full and complete facts, while the work product doctrine serves the more modest purpose of requiring each litigant to perform its own trial preparation work rather than piggy-back on the other side's work. [33.705]

- The work product doctrine is both broader and narrower than the attorney-client privilege. Anyone can create protected work product, but the protection arises only at certain specific times and offers only qualified protection. [33.706]

- The attorney-client privilege protects communications within the attorney-client relationship, while the work product doctrine can protect documents created or shared outside that relationship. [33.707]

- The attorney-client privilege can apply at any time, while the work product doctrine applies only at certain times. [33.708]

- The attorney-client privilege primarily focuses on communications' content, while the work product doctrine primarily focuses on context. [33.709]

396 United States v. Ghavami, 882 F. Supp. 2d 532, 535 n.1 (S.D.N.Y. 2012).

- The attorney-client privilege protects communications between clients and their lawyers, while the work product doctrine does not require such communication. [33.710]

- The attorney-client privilege rests on confidentiality, while the work product doctrine does not. [33.711]

- The attorney-client privilege can provide absolute protection, while the work product doctrine's qualified protection can be overcome. [33.712]

- The attorney-client privilege lasts forever, while the work product doctrine may not. [33.713]

33.8 Availability of the Protections

Communications or documents might deserve protection under both the attorney-client privilege and the work product doctrine.

- If there is no ongoing or anticipated litigation, communications or documents usually will either deserve protection under the attorney-client privilege or be unprotected -- the work product doctrine protection will not be available.

- If the communications or documents involve participation by, or later disclosure to, someone outside attorney-client privilege protection, the communications or documents usually will deserve work product protection or be unprotected -- the attorney-client privilege protection normally will not be available.

- Both the attorney-client privilege and the work product doctrine can protect communications or documents transmitted between clients and their lawyers during or in anticipation of litigation.

Lawyers and their clients usually should consider both protections.

- The attorney-client privilege provides absolute but very fragile protection, which can be difficult to properly create and can be easily lost when disclosed to third parties.

- The work product doctrine can provide protection to any litigants' or prospective litigants' representatives, and its robust protection generally survives disclosure to friendly third parties -- but an adversary can overcome that protection.

33.9 Differing Applications of the Work Product Doctrine

Ironically, courts applying a single sentence fragment from the federal rules (or state parallel rules) show an enormous variation in applying work product doctrine protection.

- In fact, courts exhibit more variation in applying the rule-based work product doctrine than the attorney-client privilege, although the latter developed organically in every United States jurisdiction.

- Chapter 53 discusses that issue.

CHAPTER 34

CREATING AND ASSERTING WORK PRODUCT PROTECTION

34.1 Introduction

Any potential litigants or their "representatives" can create protected work product, and both clients and lawyers have some power to assert that protection.

- This contrasts with the attorney-client privilege's client-centric principles.

34.2 Creation of Protected Work Product

The work product rule could not be any clearer in explaining who can create protected work product.

- The protection can extend to "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."[397]

34.3 Lawyer Need Not Be Involved

Despite this crystal-clear rule language, some courts inexplicably protect only lawyer-created or lawyer-directed work product.[398]

Most courts properly apply the rule as written.[399]

- Even pro se parties can create protected work product.[400]

34.4 Advantages of a Lawyer's Involvement

Although work product protection does not depend on lawyers' involvement, such involvement can provide some advantages.

- Among other things, lawyers' involvement might provide separate attorney-client privilege protection; help establish that the litigants anticipated litigation (and thus involved lawyers); help demonstrate that the withheld documents were motivated by litigation rather than prepared

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397 Fed. R. Civ. P. 26(b)(3) (emphasis added).

398 NXIVM Corp. v. Sutton, Civ. A. No. 06-CV-1051 (DMC), 2010 U.S. Dist. LEXIS 57721, at *10 (D.N.J. June 9, 2010).

399 Goff v. Harrah's Operating Co., 240 F.R.D 659, 660 (D. Nev. 2007).

400 Moore v. Kingsbrook Jewish Med. Ctr., Nos.11-CV-3552 & -3624 (KAM) (JO), 2012 U.S. Dist. LEXIS 45738, at *26 (E.D.N.Y. Mar. 30, 2012).

in the ordinary course of business or for some other non-litigation purpose; bolster an opinion work product protection claim (discussed in Chapter 41).

34.5 Client and Lawyer Representatives

On its face, the work product rule can protect documents created by litigants, prospective litigants or their representatives. [34.501]

Client representatives can create protected work product. [34.502]

- Examples include nonlawyer company employee, including risk management department employee; union official assisting a company employee at an arbitration; potential witness who participated in an email chain communication with the party's lawyer; consultant; investigator; other company assisting the party; forensic accountant; accountant; insurance carrier; insurance claims adjuster; public relations consultant; investment banker.

Lawyer representatives can create protected work product. [34.503]

- Examples include computer forensic company; investigator; accountant; paralegal; public relations consultant; FBI agent; litigation consultants assisting in witness preparation; claims adjuster; cameramen preparing surveillance videotape.

Given the broad work product doctrine protection for either clients' or lawyers' representatives, it should not matter who retains or pays such representatives.[401] [34.504]

34.6 Friendly Third Parties' Role

The difference between attorney-client privilege and work product doctrine protection involving third parties becomes most acute when considering friendly third parties.

Even friendly third parties' participation in, or later sharing of, privileged communications normally forfeits or waives that fragile privilege.

- Chapters 19 and 26 discuss those issues.

In contrast, such friendly third parties generally can create protected work product if acting as litigants' "representatives"; participate in work product-protected documents' creation; receive protected work product doctrine-protected documents without waiving that robust protection.

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401 Westernbank P.R. v. Kachkar, Civ. No. 07-1606 (ADC/BJM), 2009 U.S. Dist. LEXIS 16356, at *17-18 (D.P.R. Feb. 9, 2009).

- A third party's presence during otherwise privileged communications normally aborts privilege protection, even though that third party may count as a client "representative" capable of creating protected work product -- ironically even while participating in communications whose privilege protection her presence has destroyed.[402]

34.7 Non-Testifying Experts

Analyzing work product protection for non-testifying experts' documents involves an unusual and complicated analysis. [34.701]

A unique rule, rather than the general work product rule, governs non-testifying experts' documents.[403] [34.702]

- Fed. R. Civ. P. 26(b)(4)(B) supplies the protection.

To deserve such protection, non-testifying experts must be retained in "anticipation of litigation."[404] [34.703]

- Such non-testifying experts must also be "specially employed" -- which normally precludes regular corporate employees from playing that protected role.[405] [34.704]

Non-testifying experts with underlying factual knowledge cannot claim immunity from discovery about such factual knowledge. [34.705]

Similarly, non-testifying experts later playing a testifying expert role normally face discovery of materials created or considered in the latter role. [34.706]

- In contrast to the law firm context, courts generally do not recognize imputation of knowledge among testifying and non-testifying experts working at the same consulting organization.[406] [34.707]

- Non-testifying experts might have to disclose factual knowledge they gained in entirely different situations. [34.708]

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402 Nat'l Educ. Training Grp., Inc. v. Skillsoft, No. M8-85 (WHP), 1999 U. S. Dist. LEXIS 8680 (S.D.N.Y. June 10, 1999).

403 Coffeyville Res. Ref. & Mktg. v. Liberty Surplus Ins. Corp., Case No. 08-1204-WEB, 2009 U.S. Dist. LEXIS 24803, at *13 n.7 (D. Kan. Mar. 24, 2009).

404 QBE Ins. Corp. v. Interstate Fire & Safety Equip. Co., Inc., No. 3:07cv1883 (SRU), 2011 U.S. Dist. LEXIS 16406, at *14 (D. Conn. Feb. 18, 2011).

405 ZCT Sys. Grp., Inc. v. FlightSafety Int'l, Case No. 08-CV-JHP-PJC, 2010 U.S. Dist. LEXIS 29298, at *9 (N.D. Okla. Mar. 26, 2010).

406 W.W. Transp., Inc. v. Gem City Ford, Inc., Case No. 2:07CV46 JCH, 2009 U.S. Dist. LEXIS 70040 (E.D. Mo. Aug. 11, 2009).

Non-testifying experts later designated as testifying experts may have to disclose documents created in their previous role. [34.709]

- Chapter 49 discusses that issue.

Courts disagree about discovery of non-testifying experts designated as testifying experts, but later "de-designated." [34.710]

- Some courts hold that such experts regain their protected status, while some courts take the opposite approach.

Courts disagree about whether litigants can withhold non-testifying experts' existence and identity. [34.711]

- Some courts hold that such non-testifying experts' existence and identity are off-limits as irrelevant,[407] but some courts find that litigants must provide such basic information.

34.8 Testifying Experts

Testifying experts' documents also involve several work product issues, which were dramatically altered in the 2010 changes to the Federal Rules of Civil Procedures. [34.801]

Before the 2010 rules changes, most courts held that testifying experts' documents fell under the specific rule covering experts, rather than the work product rule. [34.802]

After the 2010 rules changes, litigants can withhold as work product testifying experts' draft reports and communications with the litigants' lawyers (other than such communications' factual components underlying the testifying experts' opinions).[408] [34.803]

- Because the 2010 federal rules changes at most extend qualified work product protection to testifying experts' draft reports, those experts presumably have to save and log such drafts. [34.804]

The work product doctrine can protect clients' and lawyers' own documents created during their dealings with testifying experts, but not shared with such experts. [34.805]

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[407] Ludwig v. Pilkington N. Am., Inc., No. 03 C 1086, 2003 U.S. Dist. LEXIS 17789, at *10 (N.D. Ill. Sept. 30, 2003).

[408] United States v. Sierra Pac. Indus., No. Civ. S-09-2445 KJM EFB, 2011 U.S. Dist. LEXIS 60372, at *8-9 (E.D. Cal. May 26, 2011).

34.9 Parties' Assertion of Work Product Protection

Unlike the attorney-client privilege, both clients and their lawyers possess some ownership rights in work product and therefore usually can assert that protection.[409]

34.10 Non-Parties' Assertion of Work Product Protection

On its face, the work product rule can protect documents created "by or for another party or its representative." [34.1001]

- This Fed. R. Civ. P. 26(b)(3) language has created complicated situations, and could result in great mischief.

The rule makes it clear that any party's representative can create protected work product in the right circumstances. [34.1002]

- However, unless a non-party acted as a party's representative, it cannot generally create protected work product based on someone else's anticipation of litigation. [34.1003]

If applied logically, the rule should allow non-parties to create protected work product if they anticipate litigation, even if they do not later become parties.[410] [34.1004]

- Many courts recognize this common sense rule interpretation.[411]

- Otherwise, plaintiffs could threaten several potential defendants with litigation, but not sue all of them -- and then discover materials created by the threatened but unsued non-party.[412]

Despite such a strategy's obvious mischief, some courts inexplicably limit work product protection to documents created by parties to the litigation in which adversaries seek discovery.[413]

- This approach does not make much sense. [34.1005]

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409 Edelstein v. Optimus Corp., No. 8:10CV61, 2012 U.S. Dist. LEXIS 82340, at *11 (D. Neb. June 14, 2012).

410 Allied Irish Banks, p.l.c. v. Bank of Am., N.A., 252 F.R.D. 163, 175 (S.D.N.Y. 2008).

411 Tankleff v. Cnty. of Suffolk, No. 09-CV-1207 (JS)(WDW), 2011 U.S. Dist. LEXIS 135691, at *4-5, *5-7 (E.D.N.Y. Nov. 22, 2011).

412 Zagklara v. Sprague Energy Corp., No. 2:10-cv-445-JAW, 2011 U.S. Dist. LEXIS 56782 (D. Me. May 26, 2011).

413 Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co., No. 93-3084, 1994 U.S. App. LEXIS 3828, at *11, *12 n.3 (6th Cir. Feb. 25, 1994) (unpublished opinion).

34.11 Ownership of Lawyers' Files

Ownership of lawyers' files raises both ethics and privilege issues. [34.1101]

In applying the ethics rules, some states require lawyers to provide their former clients only the "final" version of documents in lawyers' files, while some courts require lawyers to relinquish their entire file to former clients. [34.1102]

In litigation between lawyers and their former clients, normal discovery rules might grant more access to such files than that mandated by the ethics rules. [34.1103]

CHAPTER 35

CONTEXT AND TIMING OF WORK PRODUCT

35.1 Introduction

The work product doctrine differs dramatically from the attorney-client privilege in several key ways.

35.2 Primacy of Context Over Content

The work product doctrine primarily focuses on context, while the attorney-client privilege focuses almost entirely on communications' content.

35.3 Irrelevance of an Attorney-Client Relationship

The work product doctrine can apply in the absence of an attorney-client relationship, while the privilege necessarily depends on such relationships.

35.4 Irrelevance of Communication

The work product doctrine can protect documents that were not communicated between clients and their lawyers,[414] while the attorney-client privilege generally does not.

35.5 Irrelevance of Confidentiality

The work product doctrine can protect documents that are not based on confidential communications,[415] while the attorney-client privilege generally limits its protection to confidential communications.

- Examples include translation of a foreign language document; a party's sequential numbering system on documents that it had produced; photographs of an accident scene; a transcript of a public meeting; videotape of an accident scene; a court reporter's transcript of a court hearing.

35.6 Presence of Non-Adverse Third Parties

The work product doctrine can apply despite the presence of third parties, while the attorney-client privilege generally does not.[416]

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414 Massiello v. Roadway Express, Inc., Civ. No. 3:03CV02185 (CFD) (TPS), 2006 U.S. Dist. LEXIS 33801, at *4 (D. Conn. May 26, 2006).

415 S.N. Phelps & Co. v. Circle K Corp. (In re Circle K Corp.), 199 B.R. 92, 100 (Bankr. S.D.N.Y. 1996), aff'd, Nos. 96 Civ. 5801 & 6479 (JFK), 1997 U.S. Dist. LEXIS 713 (S.D.N.Y. Jan. 27, 1997).

35.7 Joint Defense/Common Interest Agreements

The joint defense/common interest doctrine applies differently in the work product context than in the attorney-client privilege context. [35.701]

- Chapter 20 discusses the joint defense/common interest doctrine in the privilege context.

While common interest agreements usually must be in place to avoid waiving attorney-client privilege protection for communications between clients and most third parties, work product protection can survive disclosure to many third parties -- depending on whether they are adversaries or might disclose the work product to adversaries. [35.702]

- However, litigants might still decide to enter into common interest agreements, to avoid the effect of some courts' misunderstanding about this principle, and to memorialize other useful provisions such as prospective consents allowing each participant's lawyer to represent his or her client against the other participants if adversity develops. [35.703]

The work product doctrine can protect common interest agreements themselves. [35.704]

- Chapter 20 discusses that issue.

35.8 Critical Role of Timing

Among other key differences between the work product doctrine and the attorney-client privilege, the former protection often depends on timing. [35.801]

Because the work product doctrine protects documents motivated by litigation or anticipated litigation, tension frequently develops between the rules' extension of confidentiality to such materials and their focus on open and transparent pre-trial discovery.[417] [35.802]

In many situations, litigants will inevitably disclose some of their work product.[418] [35.803]

However, some rules deliberately postpone adversaries' right to discover such work product. [35.804]

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[416] Bernard v. Brookfield Props. Corp., No. 107211/08, 2012 N.Y. Slip Op. 31654U (N.Y. Sup. Ct. June 15, 2012).

[417] United States v. Salyer, No. CR. S-10-0061 LKK (GGH), 2010 U.S. Dist. LEXIS 77617, at *3 (E.D. Cal. Aug. 2, 2010).

[418] United States v. Dist. Council, No. 90 Civ. 5722 (CSH), 1992 U.S. Dist. LEXIS 12307, at *37-38 (S.D.N.Y. Aug. 14, 1992).

- The contention interrogatory rule explicitly invites courts to delay adversaries' entitlement to contention interrogatory answers until late in the discovery process.[419] [35.805]

- On the other hand, no similar rule authorizes courts to postpone Rule 30(b)(6) depositions. [35.806]

Courts frequently fashion their own timing requirements, relying on local court rules or case-specific pre-trial orders. [35.807]

35.9 Work Product Intended for Use at Depositions

Most courts do not require litigants to disclose in advance what documents the litigants intend to use in depositions.

- Chapter 42 discusses possible opinion work product protection for such documents' identity.

35.10 Work Product Intended for Use at Trial

In contrast, courts usually require litigants to disclose work product they intend to use at trial.[420]

Most courts apply this general rule to impeachment material, such as surveillance videotapes.

- Most courts allow adversaries to depose videotaped litigants before requiring disclosure of such videotapes. Chapter 45 discusses that issue.

Some courts set deadlines for litigants to identify work product they intend to use at trial, sometimes coupled with warnings that the litigants cannot use work product absent disclosure during discovery.[421]

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419 Fed. R. Civ. P. 33(a)(2).

420 Huet v. Tromp, 912 So. 2d 336, 339 (Fla. Dist. Ct. App. 2005).

421 Dangler v. N.Y.C. Off Track Betting Corp., No. 95 Civ. 8495 (DAB)(DFE), 2000 U.S. Dist. LEXIS 14938, at *17 (S.D.N.Y. Oct. 10, 2000).

CHAPTER 36

"LITIGATION" ELEMENT

36.1 Introduction

Work product doctrine protection depends on ongoing or anticipated "litigation."

- In the absence of ongoing litigation, work product protection also depends on reasonable "anticipation" of such litigation. Chapter 37 discusses that issue.

- Work product protection also depends on litigants creating such documents being motivated by that litigation rather than by something else. Chapter 38 discusses that issue.

36.2 Relationship of Litigation, Anticipation, and Motivation

Work product doctrine protection rests on litigation, anticipation, and motivation.

- Chapter 37 discusses the "anticipation" element, and Chapter 38 discusses the "motivation" element.

36.3 Judicial Proceedings

Civil and criminal judicial proceedings satisfy the work product doctrine's litigation element.

36.4 Bankruptcy Proceedings

Most courts find that bankruptcy proceedings count as litigation for work product purposes.[422]

- However, some courts inexplicably find that such proceedings do not satisfy the litigation element.[423]

36.5 Non-Judicial Proceedings

Determining whether non-judicial proceedings satisfy the litigation element generally focuses on whether such proceedings involve sufficient adversity. [36.501]

Most courts hold that adverse non-judicial proceedings such as arbitrations, contentious administrative proceedings, etc., count as litigation.[424] [36.502]

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422 Osherow v. Vann (In re Hardwood P-G, Inc.), 403 B.R. 445, 460 (W.D. Tex. 2009).

423 United States v. Naegele, 468 F. Supp. 2d 165, 173 (D.D.C. 2007).

- Examples include workers' compensation proceedings; state bar proceeding against the lawyer; foreclosures; adversarial arbitration; adversarial administrative proceeding; adversarial proceedings before a government agency; patent interference proceeding; adversarial rule making proceeding; alternative dispute resolution proceeding; grand jury proceeding; Claims Commission proceeding; investigative legislative hearing; coroner's inquiry; adversarial patent proceeding.

In contrast, non-adverse non-judicial proceedings usually do not satisfy the litigation element. [36.503]

- Examples include patent applications; FDA questions posed to a drug company; a non-adversarial administrative proceeding; mediation; efforts to seek a Presidential pardon.

36.6 Government Investigations

Government investigations do not themselves count as litigation.

- However, ongoing or anticipated government investigations can trigger reasonable anticipation of later civil or criminal litigation.[425]

36.7 Attorney-Client Privilege

In contrast to the work product doctrine, the attorney-client privilege can protect communications regardless of any litigation or anticipated litigation.

- Chapter 13 discusses that issue.

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424 Pac. Gas & Elec. Co. v. United States, 69 Fed. Cl. 784 (Fed. Cl. 2006).

425 In re Trasylol Prods. Liab. Litig., Case No. 08-1928 - MDL-MIDDLEBROOKS, 2009 U.S. Dist. LEXIS 85553, at *82 (S.D. Fla. Aug. 12, 2009).

CHAPTER 37

"ANTICIPATION OF LITIGATION" ELEMENT

37.1 Introduction

In the absence of ongoing litigation, work product doctrine protection depends on reasonable "anticipation" of such litigation.

- Work product protection also depends on the type of "litigation" covered by the rule. Chapter 36 discusses that issue.

- Work product protection also depends on litigants creating such documents being motivated by that litigation rather than by something else. Chapter 38 discusses that issue.

37.2 Litigation and "Anticipation" of Litigation

It can be reasonable to anticipate litigation that never occurs.

- Conversely, it can be unreasonable to anticipate litigation that eventually ensues.

37.3 Subjective and Objective Anticipation

The work product doctrine's anticipation element generally requires a subjective anticipation of litigation that is objectively reasonable.[426]

37.4 Motivation to Settle or Avoid Litigation

The work product doctrine usually can protect documents motivated by the desire to settle ongoing litigation.

- The same rules should apply to the desire to avoid reasonably anticipated litigation.

However, the protection usually does not extend to documents created to avoid litigation -- if the preparer does not at that time satisfy the required anticipation element.[427]

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[426] Pilgrim's Pride Corp. v. Burnett, No. 12 10 00037 CV, 2012 Tex. App. LEXIS 964 (Tex. Ct. App. Feb. 3, 2012).

[427] Rockies Express Pipeline LLC v. 58.6 Acres, Case No. 1:08-cv-0751-RLY-DML, 2009 U.S. Dist. LEXIS 121618, at *13-14 (S.D. Ind. Dec. 31, 2009).

37.5 Requirement of a Specific Identifiable Claim

Courts disagree about the requirement for a specific identifiable claim before extending work product protection. [37.501]

- This issue can have dramatic consequences for corporations trying to plan ahead.

Some courts extend work product protection even if the preparer cannot point to a specific identifiable claim.[428] [37.502]

- In contrast, some courts do not protect generic process or logistical documents describing how corporations will respond to any future claims they receive, litigation they may face, etc.

37.6 Degree of Anticipation of Litigation

Remarkably, federal courts examining the same "anticipation" element in a single federal rule sentence fragment adopt widely varying requirements.

- Courts' approaches range from requiring that litigation be "imminent"[429] to requiring only that there be "more than the mere possibility of litigation"[430] -- and nearly any degree of anticipation in between.

This uncertainty can create problems for those contemporaneously documenting their anticipation of litigation.

- Because the potential litigant may not know where litigation will occur, it usually will not know what standard some court may later apply.

Parties to ongoing litigation can determine their court's requirement, and must satisfy it with evidence.

- An affidavit or other evidence falling short of the required standard probably will doom litigants' work product claims.[431]

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428 AMCO Ins. Co. v. Madera Quality Nut LLC, No.1:04-cv-06456-SMS, 2006 U.S. Dist. LEXIS 21205, at *48 (E.D. Cal. Apr. 10, 2006).

429 ServiceMaster of Salina, Inc. v. United States, Case No. 11-1168-KHV-GLR, 2012 U.S. Dist. LEXIS 53399 (D. Kan. Apr. 17, 2012).

430 Moe v. Sys. Transp., Inc., 270 F.R.D. 613, 624 (D. Mont. 2010).

431 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).

37.7 Date and Duration of Anticipation

Some courts analyzing work product claims focus on when litigants first anticipated litigation, and how long their anticipation can last. [37.701]

Theoretically, litigants must be able to identify the exact moment at which they first anticipated litigation.[432] [37.702]

Litigants' anticipation of litigation can ebb and flow. [37.703]

- Such anticipation might last for several years.
- The anticipation might evaporate if litigation suddenly looks unlikely, but then begin again after failed efforts to resolve disputes, etc.

37.8 Triggering Events for Requiring Anticipation

Litigants claiming work product protection usually must point to what might be called a "trigger" event that initiated their anticipation of litigation. [37.801]

Some courts find that outside incidents trigger anticipation of litigation. [37.802]

- Examples include serious automobile or other accident; rogue employee's action that caused a $691 million bank loss; press articles about possible litigation or events that could result in litigation.

Some courts find that outside incidents do not trigger anticipation of litigation.

- Examples include jailed inmate's suicide; discovery of environmental contamination; serious automobile or other accident; questions the FDA poses to a pharmaceutical company; possibly large claim arising between the parties.

Some courts find that adversaries' actions trigger anticipation of litigation. [37.803]

- Examples include receipt of a formal request for mediation; receipt of an email from another company, which indicated that a dispute should be resolved among lawyers; receipt of an adversary's threat to sue; receipt of a threat letter mentioning damages caused by misuse of a patent; receipt of a letter from an adversary's lawyer; receipt of a resignation letter conveying the threat of litigation; receipt of complaint from representatives or family members of the expected plaintiff; receipt of a demand for payment from another company; adversary's submission of a claim; receipt of a draft complaint; receipt of an adversary's severe accusation;

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[432] In re Energy XXI Gulf Coast, Inc., No. 01-10-00371-CV, 2010 Tex. App. LEXIS 10117 (Tex. App. Dec. 23, 2010).

receipt of communication from the adversary's lawyer; receipt of a pleading from an existing adversary that hints at another claim; receipt of an insurance company's reservation of rights letter; receipt of complaints about a product; awareness that an employee had refused to sign separation documents; notice of an IRS audit; receipt of a notice that someone had filed FOIA requests for records; filing of a bankruptcy by another entity; receipt of an employee's internal corporate complaint; receipt of an SEC subpoena; receipt of an informal SEC inquiry; litigation by another adversary against a litigant; receipt of SEC inquiries; company's receipt of notification that another company planned to market a generic drug that competed with the company's drug; state attorney general's receipt of a notice of claim against the state; communication from an adversary discussing liability; notice from the government that the litigant is not in compliance with a legal obligation; insurance adjuster's request for a witness statement; adversary's filing of litigation against a third party; notice that the federal government was investigating the litigant for criminal wrongdoing; receipt of a subpoena from a government agency; receipt of an adversary's statement that it intended to retain a lawyer; receipt of a letter from an adversary that took a litigious tone; litigation by the adversary against the litigant on slightly different grounds; receipt of an OSHA complaint filed by an adversary; receipt of an employee's EEOC filing of discrimination; receipt of a federal grand jury subpoena; receipt of an EPA order relating to an environmental cleanup and identification of potentially responsible parties; receipt of an IRS notice disputing a taxpayer's valuation.

Some courts find that adversaries' actions do not trigger anticipation of litigation.

- Examples include company's compilation of statistics apparently based on claims of racial discrimination; patient's statement that he would consult with a lawyer; receipt of an email from an adversary that does not specifically indicate a threat to litigate; accounting firm's receipt of an anonymous report that a client was lying; receipt of a customer complaint by a stockbroker; notice of an IRS audit; litigant's and an adversary's negotiations over a claim.

Some courts find that litigants' ordinary course of business actions trigger anticipation of litigation. [37.804]

- Examples include company's signing of an employment agreement that involved an indemnification issue; company's discussion of terminating an employee.

- However, such ordinary course of business actions usually cannot satisfy the anticipation element. Chapter 38 discusses that issue.

Some courts find that litigants' ordinary course of business actions do not trigger anticipation of litigation.

- Examples include company's preparation for a possible OSHA criticism of the company's industrial process; trade association's discussion of rulemaking; bank's investigation of a scam in which one of the bank's clients (a lawyer) lost money in a scam; bank's analysis of an employee's possible misconduct, which resulted in the bank's reimbursement of investors, which "presumably decreas[ed] the likelihood of litigation."; company's work to bring its "financials up to snuff"; company's inclusion of clauses in transactional documents such as indemnification choice of law and choice of remedy clauses; company's marketing of a drug that showed promise; company's prosecution of a patent.

Some courts find that litigants' litigation-related actions trigger anticipation of litigation. [37.805]

- Examples include retention of PWC to conduct an investigation; institution of a document preservation "litigation hold"; litigant's transmission of threatening letter to an adversary. retention of or consultation with a lawyer; company's recall of its products; retention of an investigator; preparation for an EEOC proceeding after suspending an employee; correspondence remarking on the adversary's litigious nature; creation of a memorandum mentioning the possibility of litigation.

Some courts find that litigants' litigation-related actions do not trigger anticipation of litigation.

- Examples include litigant's consultation with a lawyer; in-house lawyer's involvement in the investigation of possible employee fraud (considered "highly relevant" but not dispositive in determining the anticipation of litigation standard); investigation of alleged sexual harassment.

37.9 Risk of Possible Spoliation Claims

Litigants claiming work product protection might prompt adversaries' spoliation allegations. [37.901]

- Most courts require potential litigants to preserve pertinent documents when they anticipate litigation. [37.902]

Some courts have roughly equated the anticipation element underlying work product protection claims and the anticipation of litigation triggering such preservation duties.[433] [37.903]

- One court imposed an adverse inference based on this reasoning.[434]

Claiming work product protection might also trigger other statutes' or regulations' application. [37.904]

[433] 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); Anderson v. Sotheby's Inc. Severance Plan, No. 04 Civ. 8180 (SAS), 2005 U.S. Dist. LEXIS 23517 (S.D.N.Y. Oct. 11, 2005).

[434] Sanofi-Aventis Deutschland GMBH v. Glenmark Pharms. Inc., USA, Civ. A. No. 07-CV-5855 (DMC-JAD), 2010 U.S. Dist. LEXIS 65323 (D.N.J. July 1, 2010).

CHAPTER 38

"MOTIVATION" ELEMENT

38.1 Introduction

Work product doctrine protection depends on litigants creating documents being motivated by litigation rather than by something else.

- Work product protection also depends on the type of "litigation" covered by the rule. Chapter 36 discusses that issue.

- Work product doctrine protection also depends on ongoing or anticipated "litigation." Chapter 37 discusses that issue.

This third work product element is perhaps the most important -- focusing on the "motivation" for documents' creation.

38.2 Relationship to Anticipation of Litigation Element

The work product doctrine protects only those documents motivated by litigation or anticipated litigation.

38.3 Necessity of Meeting the Motivation Standard

Even if litigants create documents during ongoing litigation (or while reasonably anticipating litigation), the work product doctrine usually will not protect those documents unless they were motivated by the litigation (or anticipated litigation).[435]

38.4 Documents Created After Litigation Ends

Some courts hold that the work product doctrine can protect documents created after litigation ends, such as post-mortem analyses.

38.5 Dual Meaning of the "Primary Purpose" Test

Most courts usually apply what they call the "primary purpose" test when analyzing the motivation element. [38.501]

However, this primary purpose standard could focus either on the reason for documents' creation or the use to which they will be put. [38.502]

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[435] Goldfaden v. Wyeth Lab., Inc., Case No. 08-10944, 2009 U.S. Dist. LEXIS 54022, at *5 (E.D. Mich. June 25, 2009).

- These two possible approaches to the primary purpose test appear in a split among the circuits about that issue. [38.503]

38.6 Limiting Protection to Documents that Aid in Litigation

The narrowest work product approach protects only documents that litigants use or plan to use to aid or assist their litigation effort. [38.601]

A 2009 First Circuit decision articulated this approach.[436] [38.602]

- In contrast, the broader "because of" standard (discussed below) can extend work product protection to documents that will not be used to aid or assist in litigation. [38.603]

Ironically, in at least one respect, this "aid or assist" standard provides a broader protection than the normally more expansive "because of" standard. [38.604]

- The former presumably can cover logistical documents with no substantive content, such as emails scheduling deposition preparation sessions, etc. Chapter 39 discusses that issue.

38.7 Documents Created to Satisfy External Requirements

The work product doctrine usually does not protect documents created to comply with external requirements such as government statutes or regulations.

- Examples include Fair Labor Standards Act audit requirements; federal environmental rules; OCC requirements; SEC requirements; ICC regulations.

Such documents are not motivated by litigation, but instead are motivated by the external requirements.

Some courts take a broader view, and protect such documents.[437]

38.8 Documents Created to Satisfy Internal Requirements

The work product doctrine usually does not protect documents created to comply with internal corporate requirements. [38.801]

Although corporations preparing documents pursuant to internal requirements have a greater chance of successfully claiming work product protection than when complying with external requirements, such situations present the same conceptual hurdle for satisfying the motivation element. [38.802]

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436 United States v. Textron Inc., 577 F.3d 21 (1st Cir. 2009), cert. denied, 130 S. Ct. 3320 (2010).

437 Cal. Earthquake Auth. v. Metro. W. Sec., LLC, 285 F.R.D. 585, 593 (E.D. Cal. 2012).

- Ironically, this means that corporations laudably requiring investigations of each accident, employee discrimination claim, etc., face a high (and sometimes insurmountable) burden in seeking work product protection. [38.803]

Some courts have applied this intellectually defensible but counterintuitive approach to several such internal requirements. [38.804]

- Examples include internal policy requiring investigation of any sexual harassment complaint; internal safety manual requiring investigation of an ammonia release; internal company Statement of Safety Policy requiring that "[a]ll accidents involving a Company vehicle will be reviewed by the Accident Review Board"; internal postal service requirement mandating an investigation of any accident "'no matter how minor'"; internal prison requirement mandating investigations into any prisoner's death; internal hospital requirements for an incident report; contract; internal corporate rules governing sexual harassment claims; internal police department rules.

In contrast, some courts take a broader view, protecting documents created pursuant to such internal requirements. [38.805]

- Examples include materials created after a trucking accident; incident report following a deadly accident on a tour; post-accident investigation that a cruise line prepared after every accident; employment survey that FedEx apparently conducted every year; incident report prepared after a slip and fall accident.

Corporations facing loss of their work product claims because they are complying with some internal requirements might consider parallel or successive actions or investigations. [38.806]

- Such corporations would prepare bare-bones documents in compliance with the internal requirements, but undertake a more extensive investigation only when they anticipate litigation.

38.9 Documents Created in the Ordinary Course of Business

One commonly-stated approach precludes work product protection for documents that companies create in the "ordinary course of business." [38.901]

However, such a statement is both underinclusive and overinclusive.

- Documents prepared by professionals such as lawyers often deserve work product protection even though created in those lawyers' "ordinary course of business," and documents not prepared in the ordinary course of business might nevertheless fail to satisfy the motivation element. [38.902]

Despite these conceptual issues, most courts recite the familiar refrain.[438] [38.903]

This basic principle can apply to government documents. [38.904]

- Examples include government appraisal; state police report; state's computer database.

The principle can also apply to corporate documents. [38.905]

- Examples include bank's investigation of a bad check; surveillance videotape taken by a store in the ordinary course of its business; claims manuals; document relating to a company's public relations and press strategy; company's periodic safety audit; company policy; employee exit interview notes; company's analysis of business opportunities; company's document retention policy; routine patent search document; company's document relating to an employee's claim of severance benefits; company's analysis of contractual obligations; company's periodic status report to an insurance broker; board of directors and committee minutes, even if they discuss litigation; results of a regular audit.

This ordinary course of business principle differs from the rule usually precluding work product protection for documents motivated by external or internal requirements, but yields the same result. [38.906]

Many courts decline to protect post-accident documents, finding them created in companies' ordinary course of business.[439] [38.907]

- Examples include accident report after a fatal slip and fall accident; report prepared after an accident; hospital incident report following an accident; documents prepared after a serious trucking accident.

In contrast, some courts protect such post-accident documents.[440] [38.908]

38.10 Courts' Review of a Document's "Four Corners"

In assessing the motivation element, some courts erroneously focus almost exclusively on documents' four corners.[441]

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438 Bonneau v. F&S Marine, Inc., Civ. A. No. 09-3336 SECTION "J" (3), 2010 U.S. Dist. LEXIS 38340, at *4 (E.D. La. Mar. 25, 2010).

439 Fulmore v. Howell, 657 S.E.2d 437 (N.C. Ct. App. 2008).

440 Gruenbaum v. Werner Enters., Inc., 270 F/R/D. 298 (S.D. Ohio 2010).

441 Lightguard Sys., Inc. v. Spot Devices, Inc., 281 F.R.D. 593, 602-03 (D. Nev. 2012).

38.11 Extrinsic Evidence Such as Affidavits

Some courts look at extrinsic evidence such as affidavits explaining what motivated documents' creation.

38.12 Protection for Qualitatively Different Documents

Given the widespread application of the ordinary course of business standard, litigants hoping to successfully seek work product protection generally must point to documents that are qualitatively different from those prepared in the ordinary course of their business.

- In essence, litigants usually must prove that they did something special or different because they anticipated litigation.[442]

38.13 "Morphed" Investigations with Changing Motivations

Theoretically, investigations begun in a company's ordinary course of business can "morph" into investigations primarily motivated by litigation.

- Chapter 43 discusses that issue.

38.14 Separate Parallel or Successive Investigations

Companies might also consider separate parallel or successive investigations.

- Chapter 43 discusses that issue.

38.15 The Adlman "Because of" Test

The broadest work product doctrine approach applies what some call the "because of" test. [38.1501]

The "because of" test is also known as the Adlman test, named for a 1998 Second Circuit decision.[443] [38.1502]

- The standard actually appeared first in a treatise: Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice & Procedure § 2024, at 343.

This "because of test has spread to many courts outside the Second Circuit.[444] [38.1503]

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442 Schlicksup v. Caterpillar, Inc., No. 09-CV-1208, 2011 U.S. Dist. LEXIS 75299 (C.D. Ill. July 13, 2011).

443 United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998).

- The 2009 First Circuit's Textron decision created a clear circuit split that might eventually draw the Supreme Court's attention. [38.1504]

Under the "because of" test, the work product doctrine extends to documents motivated by anticipated litigation -- even those not intended for use to aid or assist litigants in such litigation. [38.1505]

- For example, the "because of" standard can protect documents analyzing how litigants might pay for adverse litigation judgments -- which were motivated by litigation but would not be used in it.

However, the standard does not protect documents which would have been created in "substantially similar form" absent anticipated litigation.[445]

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[444] Am. Piledriving Equip., Inc. v. Travelers Cas. & Sur. Co. of Am., Civ. No. ELH-11-01404, 2011 U.S. Dist. LEXIS 128407, at *8 (D. Md. Nov. 7, 2011); Lopes v. Vieira, 719 F. Supp. 2d 1199 (E.D. Cal. 2010).

[445] Hallmark Cards, Inc. v. Murley, No. M8-85, 2010 U.S. Dist. LEXIS 120186, at *12 n.2 (S.D.N.Y. Nov. 10, 2010).

CHAPTER 39

WORK PRODUCT CONTENT

39.1 Introduction

In contrast to the attorney-client privilege, the work product doctrine focuses primarily on context rather than content.

- However, some courts also address work product's content -- often disagreeing about key issues.

39.2 Intangible Work Product

Courts disagree about whether the work product doctrine can protect intangible (non-documentary) work product. [39.201]

- Examples include: oral communication; unwritten mental impressions.

The debate arises because the work product rule explicitly refers only to "documents and tangible things." [39.202]

- However, the common law work product doctrine articulated in Hickman v. Taylor[446] did not seem limited to documents and tangible things.

Many courts extend work product protection to intangible work product. [39.203]

- These courts either point to the parallel federal common law work product protection[447] or just ignore the rule's explicit language.[448]

Federal Rule of Evidence 502 supports this extension.

- Although explicitly disclaiming any intent to change substantive work product law, Rule 502 defines "work-product protection" as applying to "tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."[449]

Some courts decline to protect intangible work product, relying on the rule's explicit language. [39.204]

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446 Hickman v. Taylor, 329 U.S. 495 (1947).

447 United States v. Deloitte LLP, 610 F.3d 129, 136 (D.C. Cir. 2010).

448 Giraldo v. Drummond Co., Inc., Case No. 2:09-CV-1041-RDP, 2012 U.S. Dist. LEXIS 53759, at *9 n.1 (N.D. Ala. Apr. 17, 2012).

449 Fed. R. Evid. 502(g)(2) (emphasis added).

- This narrow approach can have dramatic effects -- such as allowing adversaries to depose litigants' investigators and asking what they did, what they observed, and what conclusions they reached.[450]

It makes sense to extend work product protection to intangible work product. [39.205]

39.3 Background Facts about the Creation of Work Product

As with other issues, analyzing protection for background facts about work product's creation involves more subtle issues than in the privilege context. [39.301]

Some special rules provide protection for background facts. [39.302]

- For instance, a specific federal rule provides protection for information about specially-retained litigation-related non-testifying experts.[451] Chapter 34 discusses that issue.

Some courts extend fact work product protection to background facts about the work product's creation. [39.303]

- Some courts even extend the higher level of opinion work product protection (discussed in Chapter 41) to such background facts.[452] [39.304]

These courts protect facts that might provide adversaries insight into litigants' opinions or strategy.

- Examples include whether a witness interview was recorded; role of lawyers in deciding whom to sue and when; who conducted an interview of a witness; date that a party in a patent case "first considered filing" a certain pleading; identity of a meeting attendee who took notes of the meeting; existence or non-existence of documents.

Some courts decline to protect background facts about work product's creation.[453] [39.305]

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450 Bross v. Chevron U.S.A. Inc., No. Civ. A. 06-1523, 2009 U.S. Dist. LEXIS 25391, at *18-19 (W.D. La. Mar. 25, 2009).

451 Fed. R. P. 26(b)(4)(D).

452 Turkmen v. Ashcroft, Nos. 02-CV-2307 (JG) & 04-CV-1809 (JG), 2006 U.S. Dist. LEXIS 40675, at *23-24 (E.D.N.Y. May 30, 2006), vacated in part on other grounds, 589 F.3d 542 (2d Cir. 2009).

453 Gipson v. Sw. Bell Tel. Co., Civ. A. No. 08-2017-EFM-DJW, 2009 U.S. Dist. LEXIS 25457, at *54 (D. Kan. Mar. 24, 2009).

39.4 Work Product Protection for Non-Substantive Documents

Courts disagree about whether the work product doctrine can protect non-substantive documents. [39.401]

- The attorney-client privilege rarely if ever protects non-substantive communications, such as those scheduling meetings, etc. Chapter 15 discusses that issue.

Some courts protect non-substantive work product, relying on the rule's literal language.[454] [39.402]

- Examples include documents that "are primarily administrative in nature" (such as emails "coordinating witness schedules"); documents reflecting the date information was transmitted to counsel; fax coversheets and cover letters; "merely communications regarding deposition dates and schedules."

Some courts do not protect non-substantive work product.[455] [39.403]

- Examples include emails setting up meetings; memorandum that "proposes an in person meeting the following day"; list of witnesses' names and telephone numbers; fax coversheets; cover email; a "transmittal letter forwarding a court reporter's fee bill to the plaintiff"; documents reflecting scheduling, faxes, coversheets, invoices for travel expenses, and a "things to do" list.

Some litigants face a discovery dilemma in determining whether the pertinent court protects non-substantive work product. [39.404]

- Courts might be frustrated by litigants' withholding of essentially meaningless but technically protected documents such as emails setting up deposition preparation meetings, etc.[456]

- Given the diminished risk of subject matter waiver upon disclosure of work product (discussed in Chapter 50), litigants worried about such judicial reactions may decide to produce such documents.

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454 In re LDK Solar Sec. Litig., No. C07-5182 WHA (BZ), 2010 U.S. Dist. LEXIS 6474 (N.D. Cal. Jan. 7, 2010).

455 Chevron Corp. v. Salazar, No. 11 Civ. 3718 (LAK) (JCF), 2011 U.S. Dist. LEXIS 92628, at *3-4 (S.D.N.Y. Aug. 16, 2011).

456 In re Veiga, 746 F. Supp. 2d 27, 43 (D.D.C. 2010).

39.5 Types of Work Product

Some courts seem to misunderstand the work product protection implications of documents' form. [39.501]

Work product can essentially take any form. [39.502]

- For instance, in a simple encounter between a client's lawyer and a third-party witness, the work product doctrine could arguably protect the witness's identity; the lawyer's identity; the list of questions for the witness that the lawyer prepares before the meeting; words spoken by the lawyer to the witness (sought by the adversary in interrogatories or depositions of the witness or the lawyer); words spoken by the third-party witness to the lawyer (sought by the adversary in interrogatories or depositions of the witness or the lawyer); documents the lawyer gives the witness; documents the witness gives the lawyer; the witness's notes of the communication; the lawyer's notes of the communication; a videotape of the communication; an audiotape of the communication; a verbatim transcript of the communication prepared by a court reporter; the lawyer's attempt to record a verbatim transcript of the communication; an affidavit the lawyer prepared for the witness's signature, which paraphrases the witness's communications; a document the lawyer prepares during or after the meeting that attempts to record the verbatim communication, but adds commentary; a document the lawyer prepares during or after the meeting, in which the lawyer summarizes the communication but not in verbatim fashion; a document the lawyer prepares during or after the meeting, in which the lawyer provides his or her observations, such as analysis of the witness's demeanor and usefulness as a witness.

Some courts inexplicably hold that the work product doctrine can never protect certain types of documents, such as verbatim witness interview recordings or transcripts.[457] [39.503]

- In such situations, the type of work product protection available (such as opinion work product, discussed in Chapter 41) should not depend on whether the transcript is verbatim, but rather on the specificity of lawyers' questions -- and whether they reflect lawyers' opinions or strategy.

39.6 Fiduciary and Crime-Fraud Exceptions

The fiduciary exception and the crime-fraud exception focus on work product's content.

- Chapter 44 discusses that issue.

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457 Schipp v. GMC, 457 F. Supp. 2d 917, 924 (E.D. Ark. 2006).

CHAPTER 40

FACT WORK PRODUCT

40.1 Introduction

Unlike the attorney-client privilege, work product doctrine protection comes in two types.

- The most common type of work product protection can cover a nearly endless variety of items, but only with a qualified immunity from discovery.

40.2 Intangible and Non-Substantive Work Product

Courts disagree about extending work product protection to intangible (non-documentary) work product, and to non-substantive work product such as communications scheduling meetings, etc.

- Chapter 39 discusses that issue.

40.3 Naming the Protection

Courts choose various names for this most common type of work product.

- Most courts use the term "fact" work product, while some courts use names such as "ordinary" or "non-opinion" work product.

40.4 Historical Facts in the Work Product Context

As with the attorney-client privilege, the work product doctrine does not protect historical facts.

However, as with other issues, this basic axiom applies in far more subtle ways in the work product context than in the attorney-client privilege context.

- Given the importance of timing in the work product context, adversaries might be precluded from seeking discovery of historical facts that litigants possess until later phases of discovery.[458]

40.5 Facts Obtained From or Given To Clients

Courts have addressed work product protection for historical facts and documents that lawyers obtain from or give to their clients. [40.501]

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458 Restatement (Third) of Law Governing Lawyers § 87 cmt. g (2000).

As with the attorney-client privilege, the work product doctrine does not protect historical facts from discovery simply because clients discuss those facts with their lawyers. [40.502]

- The work product doctrine might protect documents articulating such historical facts, but the facts themselves do not deserve protection -- although adversaries must obtain those facts through other discovery means such as interrogatories or deposition questions.[459]

Similarly, the work product doctrine normally does not protect facts that lawyers give their clients. [40.503]

- Although clients responding to discovery might be able to protect the source of such historical facts, clients generally cannot pretend that they don't know something that their lawyers told them.

The discoverability of facts that lawyers have not shared with their clients depends on adversaries' discovery mode. [40.504]

- Clients being deposed can honestly claim ignorance of historical facts that lawyers have not shared with them, but usually must disclose even those facts in responding to interrogatories or requests for admissions,[460] or when serving as Rule 30(b)(6) deponents.

As with the attorney-client privilege, the work product doctrine generally does not protect pre-existing documents that clients give their lawyers. [40.505]

Courts properly analyzing the work product doctrine protect even the factual portions of contemporaneous documents that lawyers give their clients, as long as those documents satisfy the doctrine's requirements.[461] [40.506]

- As in the privilege context, some courts inexplicably find such portions discoverable.

The Sporck doctrine can protect the identity of pre-existing documents lawyers give their clients. [40.507]

- Chapter 42 discusses that issue.

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459 Pastrana v. Local 9509, Commc'ns Workers of Am., Civ. No. 06cv1779 W (AJB), 2007 U.S. Dist. LEXIS 73219, at *14-15 (S.D. Cal. Sept. 28, 2007).

460 Gen Probe Inc. v. Becton, Dickinson & Co., Beckson Dickinson and Co. v. Gen Probe Inc., Civ. Nos. 09cv2319 & 10cv0602 BEN (NLS), 2011 U.S. Dist. LEXIS 129, at *304 (S.D. Cal. Jan. 3, 2011).

461 SEC v. Merkin, Case No. 11-23585-CIV-GRAHAM/GOODMAN, 2012 U.S. Dist. LEXIS 103667, at *6 (S.D. Fla. June 29, 2012).

40.6 Facts Obtained From or Given To Third Parties

Courts have addressed work product protection for historical facts and documents clients or their lawyers obtain from or give to third parties. [40.601]

- Given the attorney-client privilege's general inapplicability to such communications, these issues rarely if ever arise in the privilege context.

The discoverability of facts that lawyers obtain from third parties largely depends on the adversaries' discovery mode. [40.602]

- Clients being deposed can honestly claim ignorance of historical facts their lawyers have not shared with them, but usually must disclose even those facts in responding to interrogatories or requests for admissions, or when serving as Rule 30(b)(6) deponents.[462]

The Sporck doctrine can protect facts clients' lawyers give to third parties, if the lawyers' selection of those facts reflects the lawyers' opinions. [40.603]

- Chapter 42 discusses that issue.

As in other areas, the work product doctrine applies with complex subtlety to the discoverability of documents clients' lawyers obtain from third parties. [40.604]

- Litigants normally must produce responsive documents in their or their lawyers' possession, which presumably include documents their lawyers have obtained from third parties.[463]

However, a lawyer who has combed through a third party's documents and selected certain ones might argue that the selection reflects her opinion -- and that the adversary must search through the same documents rather than "piggyback" on the lawyer's work.

- On the other hand, an adversary could argue that such a process would be inappropriate -- unless the litigant's lawyer guarantees that all of the third party's documents are still available for the adversary's review.

If such a third party selects certain documents to give the litigant's lawyer, the opinion work product doctrine can apply only if the third party can be considered the litigant's "representative."

The identity of documents lawyers provide to third parties might be protected, if the identity reflects the lawyers' opinion. [40.605]

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462 Axler v. Scientific Ecology Grp., Inc., 196 F.R.D. 210, 212 (D. Mass. 2000).

463 Chevron Corp. v. Donziger, No. 11 Civ. 0691 (LAK), 2012 U.S. Dist. LEXIS 125259, at *7 (S.D.N.Y. Aug. 24, 2012).

Most courts find discoverable documents that a client's lawyer obtains from other clients' lawyers.[464] [40.606]

- Most of the case law focuses on document collections that advocacy groups share with other lawyers pursuing the same target or interest.

40.7 Contemporaneous Documents

Contemporaneous documents that clients and their lawyers send each other can deserve privilege protection if they otherwise meet the doctrine's requirements.[465]

- As in the privilege context, some courts erroneously deny protection for such documents' factual portions.

40.8 Lawyers' Communications with Third Parties

Unlike the attorney-client privilege, the work product doctrine can protect lawyers' communications with third parties outside privilege protection, or documents memorializing such communications.

- This protection usually involves the opinion work product protection, under the theory that the communications reflect the lawyers' opinion or litigation strategy. Chapter 41 discusses that issue.

40.9 Examples of Protected Fact Work Product

The work product doctrine can protect a nearly endless variety of documents, and sometimes intangible (non-documentary) work product. [40.901]

Unfortunately, some courts fail to specify whether protected work product deserves fact or opinion work product protection (discussed in Chapter 41). [40.902]

- This distinction can make a difference, because the latter provides a higher level of protection. Chapter 46 discusses that issue.

Work product protection can apply to essentially any type of document or other "tangible thing" (such as photographs). [40.903]

- Most courts also extend protection to intangible work product. Chapter 39 discusses that issue.

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464 Johnson Matthey, Inc. v. Research Corp., No. 01 Civ. 8115(MBM)(FM), 2002 U.S. Dist. LEXIS 13560, at *24-25 (S.D.N.Y. July 23, 2002).

465 Craig v. Rite Aid Corp., Civ. A. No. 4:08-CV-2317, 2012 U.S. Dist. LEXIS 16418, at *42 (M.D. Pa. Feb. 9, 2012).

- Some work product deserves the higher level of opinion work product. Chapter 41 discusses that doctrine generally, and Chapter 42 discusses a subset of opinion work product protection courts call the Sporck doctrine. [40.904]

40.10 Retainers/Fee Agreements

Most courts do not extend work product protection to retainers or fee agreements.[466]

- It would seem that litigants' retainer or fee agreements would normally deserve work product protection.

40.11 Lawyers' Bills

Most courts do not extend work product protection to lawyers' bills,[467] except for portions that reflect opinion or strategy.[468]

- One would think that litigators' bills would normally deserve work product protection.

40.12 Witness Interview Notes and Summaries

Most courts extend work product protection to lawyers' witness interview notes and summaries.

- A few courts do not extend such protection, while some courts provide the higher level of opinion work product protection. Chapter 41 discusses the latter issue.

40.13 Witness Statements

Most courts extend work product protection to witness statements.

- A few courts find the work product doctrine inapplicable, while some courts provide the higher level of opinion work product protection. Chapter 41 discusses that issue.

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466 JP Morgan Chase Bank, N.A. v. PT Indah Kiat Pulp & Paper Corp Tbk, No. 02 C 6240, 2011 U.S. Dist. LEXIS 147176 (N.D. Ill. Dec. 22, 2011).

467 Max-Planck-Gesellschaft Zur Forderung Der Wissen-Schaften E.V. v. Whitehead Instit. for Biomed. Research, Civ. A. No. 09-11116-PBS, 2010 U.S. Dist. LEXIS 119953, at *8 (D. Mass. Nov. 2, 2010).

468 Lay v. Burley Stabilization Corp., No. 3:09-CV-252, 2010 U.S. Dist. LEXIS 88619 (E.D. Tenn. Aug. 26, 2010).

40.14 Witness Affidavits

Courts disagree about work product protection for witnesses' affidavits.

- Some courts decline to protect such affidavits, while some are more generous.[469]

- Most courts protect draft witness affidavits.[470]

40.15 Surveillance Videotapes

Courts disagree about work product protection's applicability to surveillance videotapes.

- Some courts find that such surveillance videotapes do not deserve protection if litigants prepared them in the ordinary course of business.

- If lawyers or other client representatives arrange for surveillance videotapes for litigation-motivated purposes, most courts protect such videotapes. The debate then focuses on whether adversaries can overcome such work product protection. Chapter 45 discusses that issue.

40.16 Corporations' Loss Reserve Figures

Courts disagree about work product protection for corporations' loss reserve figures.[471]

- Some courts decline to protect such figures, reasoning that corporations calculate the figures in the ordinary course of their business.

- Some courts find that such figures deserve fact[472] or even opinion[473] work product protection. Chapter 41 discusses the latter protection.

- Some courts find that work product protection extends to case-specific loss reserve figures, but not to aggregate loss reserve figures.[474]

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469 Lujan v. Cabana Mgmt., Inc., 284 F.R.D. 50, 60-61 (E.D.N.Y. 2012).

470 Carpenter v. Churchville Greene Homeowner's Ass'n, No. 09-CV-6552T, 2011 U.S. Dist. LEXIS 115948, at *23 (W.D.N.Y. Sept. 29, 2011).

471 Salem Fin., Inc. v. United States, 102 Fed. Cl. 793, 796 (Fed. Cl. 2012).

472 Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 237 F.R.D. 176, 185 (N.D. Ill. 2006).

473 Simon v. G.D. Searle & Co., 816 F.2d 397, 401-02 (8th Cir. 1987), cert. denied, 484 U.S. 917 (1987).

474 State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone, 648 S.E.2d 31, 42 (W. Va. 2007).

40.17 Other Examples of Work Product

Courts have addressed work product protection for a nearly endless variety of documents and intangible communications. [40.1701]

Some courts protect as fact work product documents that other courts decline to protect at all. [40.1702]

- Examples include claims manual; companies' "document hold" or "suspension" memoranda; lawyer's compilation of important reported cases; litigant's list of confidential witnesses; material gathered for litigation purposes; company's litigation-related public relations documents; health facility's incident report; company's draft description of litigation for a securities filing.

Some courts protect as fact work product documents that no courts seem to find deserving of opinion work product protection. [40.1703]

- Examples include translation of a foreign document into English; client's contemporaneous document recording the client's recollection of an incident; court reporter's transcript; videotape of a compulsory medical examination; general factual chronology; document containing logistical information, such as deposition dates; completed questionnaire returned by prospective EEOC claimants; general index to a client's documents; contemporaneous diary prepared by the plaintiff.

Some courts protect as fact work product documents that other courts protect as opinion work product. [40.1704]

- Examples include timeline; incident report of alleged police brutality; companies' "document hold" or "suspension" memoranda; draft complaint; identity of witnesses a party has interviewed; draft letter to allies; documents relating to a litigant's preservation of documents during pending litigation; transcript of a witness interview; tape recorded statement of the adversary's former employee; selection of facts by a litigant's lawyer; material created by a public relations consultant; document prepared by a litigation consultant assisting in witness preparation; compilation of information about a plaintiff compiled by the defendant's insurance carrier; notes prepared by participants at a proffer meeting with the SEC; investigation report; insurance adjuster's loss reserve for a particular case; document reciting facts in anticipation of filing a lawsuit; material obtained or prepared by a lawyer or other client representative; memoranda prepared by a client to assist the lawyer in litigation; laboratory test results; material generated during a law firm's investigation; index of a client's files; investigation report based on witness interviews that do not deserve attorney-client privilege because of the

particular state's law; draft pleadings; computer database of information prepared for use in litigation; accounting firm's audit for use in litigation; recording of witness interviews; lawyer's compendium of relevant evidence.

Some courts protect as fact work product other documents. [40.1705]

- Examples include pro se plaintiff's notes taken during her deposition; client's document estimating its damages; timeline for use in a litigation; handwritten numbering on pre-existing documents; draft presentation to the FDA; appraisal prepared by a third party for the lawyer's use; insurer's reservation of rights letter; investigator's bill; state's sentencing manual; agenda of meeting relating to litigation; lawyer's handwritten notes listing actions taken; documents providing suggestions about public relations positions to take with the media.

40.18 Documents Not Deserving Work Product Protection

Some courts reject fact work product protection for other documents.

- Examples include email with a public relations consultant.

CHAPTER 41

OPINION WORK PRODUCT

41.1 Introduction

In addition to protecting fact work product, the work product doctrine can offer a higher level of protection to work product reflecting client representatives' opinion.

41.2 Comparison to Other Protections

If lawyers communicate opinion work product to clients, the communications might also deserve attorney-client privilege protection.

Clients and their lawyers should always consider the possible applicability of opinion work product protection, because it can offer a higher level of protection from discovery than that given fact work product.

- Chapter 46 discusses that issue.

41.3 Erroneous Limitation of Protection

Some courts erroneously seem to limit work product protection to work product that reflecting client representatives' opinion.

- There is a "no harm, no foul" aspect to such courts' incorrect articulation of the doctrine, as long as they apply it properly -- but some courts deny any protection absent evidence that the documents reflect client representatives' opinion.

41.4 Participants Whose Opinion Can Be Protected

Many lawyers and even some judges misunderstand the identity of those who can create protected opinion work product. [41.401]

Lawyer-created opinion work product can clearly deserve the higher level of protection. [41.402]

The federal work product rule and states' parallel rules explicitly indicate that "a party's attorney or other representative" can create opinion work product.[475] [41.403]

- Some courts inexplicably ignore this language, and find that only lawyers can create such opinion work product.[476]

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[475] Fed. R. Civ. P. 26(b)(3)(B) (emphasis added).

On its face, the work product rule apparently does not extend the higher level opinion work product protection to a party's own opinion. [41.404]

- One court nevertheless extended opinion work product protection to a party's own opinion.[477]

- This issue might become important if courts analyze what would otherwise be opinion work product created by a corporate employee -- who could be considered either a "party" or a party's "representative." The former might not be capable of creating opinion work product, while the latter clearly can.

41.5 Documents Containing Opinion

The clearest example of opinion work product involves documents and sometimes intangible work product that contain client representatives' opinion. [41.501]

Courts have extended opinion work product protection to several types of such documents. [41.502]

- Examples include personal investigator's retainer letter and invoice, which conveyed legal strategy; lawyer's billing record; recording of a lawyer's impressions; lawyer's notes about litigation; lawyer's memorandum reflecting legal opinion, strategy, or analysis; lawyer's audit opinion letter; lawyer's transmittal communication discussing a letter; lawyer's letter to the client about litigation; emails between lawyers and clients discussing litigation; lawyer's notes about a witness interview; lawyer's notes containing opinion about a communication between the client and the government; lawyer's memorandum containing the lawyer's opinion about a witness interview; communications between a lawyer and a client about issuing a press release relating to litigation.

41.6 Documents Reflecting Opinion

The work product doctrine can protect documents that reflect, rather than contain, client representatives' opinion. [41.601]

Most of the case law focuses on witness interview notes, statements and affidavits. [41.602]

- Some courts hold that client representatives' (usually lawyers') interview notes, statements, and draft affidavits necessarily reflect the

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476 Nelsen v. Geren, No. 08-CV-1424-ST, 2010 U.S. Dist. LEXIS 89039, at *10-11 (D. Or. Aug. 27, 2010).

477 Brockmeyer v. Solano Cnty. Sheriff's Dept., No. CIV S-05-2090 MCE EFB, 2010 Dist. LEXIS 7992, at *129 (E.D. Cal. Jan. 11, 2010).

representatives' opinion -- because the representatives memorialize what they consider important.[478]

- Other courts are not convinced by this argument, and extend only fact work product protection to such documents.[479]

Courts have extended opinion work product protection to other types of documents. [41.603]

- Examples include database containing data that can be "entered and manipulated to determine whether various settlement opinions were beneficial"; metadata reflecting changes in draft documents; draft pleadings; draft press releases; studies, tests, or analyses ordered by a lawyer; draft complaint; draft speech; Litigation Support Model; aggregate and particular loss reserve figures; draft letter prepared in anticipation of litigation; draft affidavits; draft response to interrogatories; figure at which a party would settle litigation; company's annual litigation budget figures; agenda for a meeting at which litigation will be discussed; list of documents a litigant selected for copying from the other side's production; details of and results of laboratory tests; draft correspondence prepared by a lawyer and sent to the client for review; nursing home incident report; testifying expert's draft report that contains a lawyer's suggested changes but which the lawyer did not give back to the testifying expert; lawyer's contemporaneous documents collecting historical facts that are "collated or categorized" by a lawyer; draft settlement agreement; draft of a section of a company's annual report describing litigation.

Lawyer or other client representatives preparing interview notes, draft statements, or draft affidavits can take one of two tactical approaches. [41.604]

- Infusing the entire document with their opinion maximizes the chances of successfully withholding the entire document, while segregating and clearly labeling just a portion of the document as reflecting the representatives' opinion reduces the risk of courts' denying protection for the entire document.

41.7 Intangible Opinion Work Product

Courts extending work product protection to intangible (non-documentary) work product provide the heightened opinion work product protection if it reflects client representatives' opinion.

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478 SEC v. Nadel, No. CV 11-215 (WFK) (AKT), 2012 U.S. Dist. LEXIS 53173, at *21-22, *22-23 (E.D.N.Y. Apr. 16, 2012).

479 United States v. Hatfield, No. 06-CR-0550 (JS), 2010 U.S. Dist. LEXIS 4026, at *34 (E.D.N.Y. Jan. 8, 2010).

- The issue often comes up in connection with lawyers' depositions, or clients' communications with their lawyers.

Opinion work product protection should preclude deposition questions seeking lawyers' opinion about the strength of their clients' cases, etc.[480]

Courts disagree about deposition questions that might not as directly implicate lawyers' opinion.

- For instance, lawyers probably cannot claim that opinion work product protection prevents questioning about some non-privileged event, because their answers will necessarily reflect their opinion.[481]

41.8 Lawyers' Communications with Third Parties

Some courts have extended opinion work product protection to lawyers' or other client representatives' communications with third parties, or documents memorializing such communications.

- Courts have extended such protection to corporations' lawyers' communications with a former employee,[482] and witnesses during an investigation.[483]

Lawyers' interviews of third-party witnesses to some event presumably can deserve opinion work product protection if the interview consists of pointed and specific questions reflecting the lawyers' opinion or litigation strategy.

- On the other hand, the opinion work product protection presumably would not apply to such communications if lawyers simply ask "What did you see?"

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480 Harris v. Koenig, Civ. A. No. 02-618 (GK/JMF), 2010 U.S. Dist. LEXIS 127057, at *12 (D.D.C. Dec. 2, 2010).

481 In re Grand Jury Proceedings, 616 F.3d 1172, 1186-87 (10th Cir. 2010).

482 Salvation Army v. Bryson, 273 P.3d 656, 659 (Ariz. Ct. App. 2012).

483 Lake Shore Radiator, Inc. v. Radiator Express Warehouse, Case No. 3:05-cv-1232-J-12MCR, 2007 U.S. Dist. LEXIS 19028, at *16 (M.D. Fla. Mar. 19, 2007).

CHAPTER 42

FACTS REFLECTING THE LAWYER'S OPINION

42.1 Introduction

The opinion work product doctrine protection can sometimes extend to the identity of intrinsically non-protected documents, witnesses, or facts.

- Courts often call this the Sporck doctrine.

42.2 Intrinsically Unprotected Documents Reflecting Opinion

The Sporck doctrine contrasts with the opinion work product protection's applicability to contemporaneous documents.

- The former focuses on the identity of items that do not themselves deserve any intrinsic privilege or work product protection.

42.3 Client Representatives Covered

Courts disagree about the type of client representatives whose selection can deserve opinion work product protection.

- This reflects the same debate involving traditional opinion work product protection. Chapter 41 discusses that issue.

42.4 History of the Sporck Doctrine

Surprisingly, attorney-client privilege jurisprudence never developed a parallel to the Sporck doctrine. [42.401]

- Until very recently, few if any courts extended attorney-client privilege protection to clients' or lawyers' selection of historical documents or other intrinsically non-protected items. [42.402]

- A few recent cases have extended such privilege protection to email strings forwarded to lawyers, even though such strings' earlier parts do not themselves deserve privilege protection. Chapter 16 discusses that issue.

The Sporck doctrine comes from a series of cases culminating in a 1984 Third Circuit case.[484] [42.403]

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484 Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985).

- That case involved extension of opinion work product protection to historical documents a lawyer used in preparing a client to be deposed.

Not every court adopts the Sporck doctrine. [42.404]

- Some courts explicitly reject it,[485] while some courts question it.[486]

- If anything, the trend seems to be running against a broad application of the Sporck doctrine.

42.5 General Rules: Introduction

Courts adopting the Sporck doctrine recognize several prerequisites to its application.

- Courts apply the doctrine most frequently to lawyers' or other client representatives' selection of documents, witnesses and helpful facts.

42.6 Equal Availability to the Adversary

First, adversaries must have equal access to the pertinent universe of documents, witnesses, facts, etc.[487]

- For instance, litigants probably cannot claim Sporck protection for the identity of documents they select for copying from a third party's collection, unless the litigants establish that adversaries can search the same collection.

42.7 Selection as Reflecting Protected Opinion

Second, client representatives' selection must reflect their opinion.[488]

- For instance, lawyers copying 10,000 out of 15,000 documents in a third party's collection generally cannot claim Sporck protection -- because such wholesale copying does not reflect any meaningful opinion.

- On the other hand, lawyers presumably can seek Sporck protection for the identity of 100 documents they copy out of a third party's collection of 15,000 documents.

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485 Brokaw v. Davol, Inc., C.A. Nos. 07-5058, -4048, -1706, & -3666, 2008 R.I. Super. LEXIS 154, at *14 (R.I. Super. Ct. Dec. 8, 2008).

486 In re Grand Jury Subpoenas, No. M 11 189, 2002 U.S. Dist. LEXIS 17079 (S.D.N.Y. Sept. 11, 2002).

487 Lang v. Intrado, Inc., Civ. A. No. 07-cv-00589-REB-MEH, 2007 U.S. Dist. LEXIS 95556, at *4-5 (D. Colo. Dec. 26, 2007).

488 S.E.C. v. Collins & Aikman Corp., 256 F.R.D. 403, 411 (S.D.N.Y. 2009).

42.8 Timing of Disclosure

Third, client representatives usually cannot withhold forever the identity of such documents, witnesses, facts, etc.

- At some point, such representatives normally must disclose their identity, during pre-trial discovery or court-mandated disclosures. Chapter 35 discusses that issue.

42.9 Lawyers' Selection of Documents

The Sporck doctrine applies most commonly to lawyers' selection of documents. [42.901]

- One court found that the Sporck doctrine protected a lawyer's entire file.[489] Most courts do not go that far.

Courts disagree about the Sporck doctrine's applicability to lawyers' selection of certain client documents as important, or useful in preparing witnesses to testify. [42.902]

- Some courts apply the Sporck doctrine in such a context,[490] while some courts reject such protection.[491]

- Federal Rule of Evidence 612 can also affect this analysis. Chapter 44 discusses that issue.

Courts disagree about the Sporck doctrine's applicability to lawyers' selection of certain documents from adversaries as important, or useful in preparing witnesses to testify. [42.903]

This issue sometimes arises in connection with lawyers' designation of adversaries' documents that the lawyers reviewed in hardcopy, because the lawyers necessarily need to designate those specific documents for copying.

- This concern has faded as adversaries make their document collections available electronically -- although the same issue might arise if adversaries place their documents on the Internet and can track which specific documents litigants review or download.

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489 Pankiw v. Fed. Ins. Co., Case No. 1:04 CV 2334, 2006 U.S. Dist. LEXIS 35400, at *23-24 (N.D. Ohio May 31, 2006).

490 Briese Lichttechnik Vertriebs GmbH v. Langton, 272 F.R.D. 369 (S.D.N.Y. 2011).

491 Cooper v. Old Dominion Freight Line, Inc., Case No. 09-CV-2441 JAR, 2011 U.S. Dist. LEXIS 6755 (D. Kan. Jan. 25, 2011).

Courts disagree about the Sporck doctrine's applicability to lawyers' selection of documents obtained from third parties as important, or useful in preparing witnesses to testify. [42.904]

- Lawyers clearly cannot withhold from discovery the originals of such documents,[492] and presumably must alert adversaries that the lawyers have obtained copies of such documents.[493]

- Courts normally require clients and their lawyers to disclose responsive documents in their possession, which generally include such documents.

Courts disagree about the Sporck doctrine's applicability to lawyers' selection of public documents as important, or useful in preparing witnesses to testify. [42.905]

- Because publicly available documents by definition are equally available to adversaries, clients and their representatives usually can claim Sporck protection for their selection of such public documents.[494]

- Most courts protect the identity of publicly available case law that lawyers select,[495] but a few courts inexplicably refuse to protect the identity of such cases.

At some point in the discovery or trial preparation process, clients and their lawyers generally must identify documents supporting their contentions. [42.906]

- Chapter 58 discusses that issue.

The same approach normally applies to documents lawyers intend to use at trial. [42.907]

- Chapter 35 discusses that issue.

- Only a few courts have applied this approach to lawyers' selection of documents to use in depositions.

Lawyers claiming Sporck doctrine protection for the identity of certain documents obviously resist logging each specific document -- because that would necessarily eliminate the protection. [42.908]

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492 In re Method of Processing Ethanol Byproducts ('858) Patent Litig., 280 F.R.D. 441, 445 (S.D. Ind. 2011).

493 Hunter's Ridge Golf Co. v. Georgia-Pacific Corp., 233 F.R.D. 678 (M.D. Fla. 2006).

494 Wollam v. Wright Med. Grp., Inc., Civ. A. No. 10-cv-03104-DME-BNB, 2011 U.S. Dist. LEXIS 106768, at *2-3 & *5-6 (D. Colo. Sept. 20, 2011).

495 Kendall State Bank v. W. Point Underwriters, LLC, Case No. 10-2319-JTM/KGG, 2012 U.S. Dist. LEXIS 5509, at *9 (D. Kan. Jan. 18, 2012).

- Such lawyers instead include only a general categorical description on their logs. Chapter 55 discusses that issue.

42.10 Lawyers' Selection of Witnesses

The Sporck doctrine can apply to lawyers' selection of specific witnesses to interview or call at trial. [42.1001]

Most courts' rules require clients to identify all witnesses with pertinent knowledge.[496] [42.1002]

Courts disagree about the Sporck doctrine's applicability to the identity of witnesses who have confidentially supplied information to support litigants' complaints or contentions. [42.1003]

- Most courts do not apply Sporck protection to such witnesses' identity.[497]

Courts disagree about the Sporck doctrine's applicability to the identity of witnesses lawyers choose to interview. [42.1004]

- Some courts extend the Sporck doctrine to such identity if the selection reflects lawyers' opinions.[498]

As with litigants' trial exhibits, court rules usually require litigants to eventually identify witnesses they intend to call at trial. [42.1005]

- Chapter 35 discusses that issue.

Some courts apply Sporck protection to lawyers' questions posed to third parties, and the third parties' responses. [42.1006]

- Chapter 41 discusses that issue.

Either fact or opinion work product protection can apply to documents lawyers create before, during, or after interviewing witnesses. [42.1007]

- The attorney-client privilege can protect lawyers' communications to their clients about such interviews.

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496 Fed. R. Civ. P. 26(a)(1)(A)(i).

497 In re Am. Int'l Grp., Inc. 2008 Sec. Litig., Master File 08 Civ. 4772 (LTS) (DF), 2012 U.S. Dist. LEXIS 54099, at *15 (S.D.N.Y. Mar. 6, 2012).

498 Seven Hanover Assocs., LLC v. Jones Lang LaSalle Ams., Inc., No. 04 Civ. 4143 (PAC) (MHD), 2005 U.S. Dist. LEXIS 32016, at *3 & n.1 (S.D.N.Y. Dec. 7, 2005).

Although historical facts lawyers obtain from third parties do not deserve privilege protection, adversaries' ability to discover those facts depends on their discovery mode. [42.1008]

- Deposition witnesses unaware of such facts can honestly express ignorance, but interrogatories or requests for admissions normally require disclosure of such facts in lawyers' possession. Chapter 40 discusses that issue.

42.11 Lawyers' Selection of Information for Databases

The Sporck doctrine can apply to lawyers' selection of data to include in a database.

An entire database can deserve such protection if all of its data reflects lawyers' opinion.[499]

- In contrast, the Sporck doctrine might apply only to the portion of such a database reflecting lawyers' opinion.[500]

42.12 Contention Interrogatories and Rule 30(b)(6) Depositions

Courts disagree about the Sporck doctrine's applicability to lawyers' selection of helpful historical facts. [42.1201]

Historical facts do not themselves deserve protection, but either fact or opinion work product protection might extend to compilations of such facts. [42.1202]

- Adversaries might seek those facts in contention interrogatories [42.1203] or Rule 30(b)(6) depositions. [42.1204] Chapter 58 discusses those issues.

42.13 Other Examples

Some courts extend the Sporck doctrine to other lawyer selections.

- Examples include lawyers' selection of important deposition excerpts; lawyers' selection of which products to test during an investigation.[501]

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499 Everbank v. Fifth Third Bank, Case No. 3:10-cv-1175-J-12TEM, 2012 U.S. Dist. LEXIS 63212, at *9 (M.D. Fla. May 4, 2012).

500 Minter v. Liberty Mut. Fire Ins. Co., Civ. A. No. 3:11CV-249-S, 2012 U.S. Dist. LEXIS 88199, at *9-10 (W.D. Ky. June 25, 2012).

501 In re Toyota Motor Corp., 94 S.W.3d 819, 826 (Tex. Crim. App. 2002).

CHAPTER 43

PROTECTION FOR INTERNAL CORPORATE INVESTIGATIONS

43.1 Introduction

Courts have extensively analyzed work product protection for internal corporate investigations and insurance-related documents.

43.2 Internal Corporate Investigations

Corporations can sometimes claim attorney-client privilege protection for investigation-related communications.

- Chapter 22 discusses that issue.

Corporations can sometimes also claim separate work product doctrine protection.

- Such corporations must satisfy the "litigation," "anticipation," and "motivation" work product elements. Chapters 36, 37 and 38 discuss those issues.

Courts assessing corporations' work product claims examine internal corporate investigations' initiation, course, and use.

43.3 Initiation of the Investigation

First, courts examine internal corporate investigations' initiation. [43.301]

The work product doctrine usually does not protect investigations initiated by some external or internal requirement, because those usually do not satisfy the motivation element.[502] [43.302]

Similarly, the work product doctrine usually does not protect investigations undertaken in corporations' ordinary course of business, for the same reason.[503] [43.303]

- Even investigations undertaken in extraordinary circumstance, rather than in the ordinary course of business, will not deserve work product protection unless they satisfy the motivation element.[504] [43.304]

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502 Freedman & Gersten, LLP v. Bank of Am., N.A., Civ. A. No. 09-5351 (SRC)(MAS) 2010 U.S. Dist. LEXIS 130167, at *15-16 (D.N.J. Dec. 8, 2010).

503 First Fin. Bank, N.A. v. Citibank, N.A., Case No. 1:11-cv-0226-WTL-DML, 2012 U.S. Dist. LEXIS 23800 (S.D. Ind. Feb. 24, 2012).

504 SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC, No. 01 Civ. 9291(JSM), 2002 U.S. Dist. LEXIS 11949 (S.D.N.Y. July 3, 2002).

The work product doctrine only applies to investigations motivated by litigation or anticipated litigation, not those which result in such anticipation.[505] [43.305]

Corporations seeking work product protection normally must prove that they undertook a qualitatively different type of investigation than they otherwise would have, because they anticipated litigation.[506] [43.306]

Any client "representatives" can initiate work product-protected investigations, but lawyers' involvement increases the chance of successfully asserting work product protection. [43.307]

Some courts review documents articulating why corporations initiated their internal corporate investigations. [43.308]

- Some courts myopically look only at such initiating documents' "four corners."[507]

Some courts appropriately allow corporations to also rely on affidavits or testimony demonstrating that anticipated litigation motivated their investigations. [43.309]

- However, some courts view such post-act evidence skeptically.[508]

43.4 Course of the Investigation

Second, courts examine internal corporate investigations' course. [43.401]

Lawyers' intensive involvement increases corporations' likelihood of successfully asserting work product protection. [43.402]

- Ironically, corporations which always involve their lawyers in such internal corporate investigations may face difficulty proving that they undertook a qualitatively different investigation because they anticipated litigation.[509]

Courts also examine how corporations generate documents during internal investigations. [43.403]

Some courts review the fruits of such corporate investigations, looking for some evidence of corporations' motivation in those investigations' reports. [43.404]

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505 Guardsmark, Inc. v. Blue Cross & Blue Shield of Tenn., 206 F.R.D. 202, 210 (W.D. Tenn. 2002).

506 Sullivan v. Warminster Twp., 274 F.R.D. 147, 152 (E.D. Pa. 2011).

507 LightGuard Sys., Inc. v. Spot Devices, Inc., 281 F.R.D. 593, 600 (D. Nev. 2012).

508 Craig v. Rite Aid Corp., Civ. A. No. 4:08-CV-2317, 2012 U.S. Dist. LEXIS 16418 (M.D. Pa. Feb. 9, 2012).

509 Carroll v. Praxair, Inc., No. 2:05-cv-307, 2006 U.S. Dist. LEXIS 43991, at *11 (W.D. La. June 28, 2006).

43.5 Use of the Investigation

Third, courts examine internal corporate investigations' use.

- Corporations' business-oriented use of such results undercuts their work product claims.[510]

43.6 "Morphed" Investigations with Changing Motivations

In some situations, corporations might initiate investigations in the ordinary course of their business, but later begin to anticipate litigation -- then claim that the investigations "morphed" into work product-protected investigations.

- Some courts accept such arguments,[511] while some courts express skepticism.[512]

43.7 Separate or Successive Internal Investigations

Corporations might consider parallel or successive investigations. [43.701]

Corporations can sometimes claim work product protection for an investigation which parallels a separate investigation required by some external or internal mandates or undertaken in the ordinary course of their business.[513] [43.702]

Similarly, corporations can sometimes claim that a separate later investigation deserves work product protection, although an initial investigation was not motivated by litigation or anticipated litigation.[514] [43.703]

In either scenario, initiating another investigation may provide corporations' only realistic chance to assure work product protection.

- Of course, such parallel or successive investigations may involve substantial expense.

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510 Warner v. United States, C.A. No. 09-036ML, 2009 U.S. Dist. LEXIS 101688, at *7-8 (D.R.I. Nov. 2, 2009).

511 Welland v. Trainer, No. 00 Civ. 0738 (JSM), 2001 U.S. Dist. LEXIS 15556, at *6 (S.D.N.Y. Sept. 28, 2001).

512 Drayton v. Pilgrim's Pride Corp., Civ. A. Nos. 03-2334, 03-3500, 04-3577, & 04-3974, 2005 U.S. Dist. LEXIS 18571, at *8 (E.D. Pa. Aug. 30, 2005).

513 Laney v. Schneider Nat'l Carriers, Inc., Case No. 09-CV-389-TCK-FHM, 2010 U.S. Dist. LEXIS 35892, at *2-3 (N.D. Okla. Apr. 12, 2010).

514 McCann v. Miller, Civ. A. No. 08-561, 2009 U.S. Dist. LEXIS 63162, at *7 (E.D. Pa. July 6, 2009).

43.8 Examples of Internal Corporate Investigations

Courts have reached different conclusions about internal corporate investigations' work product protection. [43.801]

Some courts find that internal corporate investigations deserve work product protection. [43.802]

- Examples include investigation by PWC (supervised by the general counsel) into a structured investment by a public authority; investigation into possible Fair Labor Standards Act violations at Rite-Aid; investigation by Gibson Dunn and Schulte Roth into alleged financial irregularities at several hedgefunds; investigation by the general counsel of Boston Scientific Corporation into a product recall; investigation by Howery into possible illegal activity at Caterpillar; investigation into an employee's termination; investigation by KPMG (working under the direction of an in-house Morgan Stanley lawyer) into a former Morgan Stanley's employee's employment and whistle-blower claims; investigation by Sidley Austin into possible sexual molestation by a school district teacher; investigation by a consultant into alleged sexual misconduct at a YMCA; investigation by Zuckerman Spaeder into Bayer's delay in disclosing facts to the FDA; investigation by Covington & Burling into Adelphia Communications dealings with the Rigas family; investigation by Skadden Arps and forensic accountant LECG into option backdating at a company; investigation by Haynes and Boone and a forensic accountant on behalf of a committee of unsecured creditors into a bankrupt company; investigation by law firm and forensic accountant KPMG into possible financial irregularities at a company; investigation by Wilmer Cutler into alleged misconduct at Credit Suisse; investigation by Howrey into possible wrongdoing at McAfee; investigation by Davis Polk into possible wrongdoing at Stone Energy; investigation by Vinson & Elkins into alleged fraudulent activity at Suprema Specialties, Inc; investigation by Kaye Scholer into possible wrongdoing at a company; investigation by Debevoise & Plimpton into Merck's development of Vioxx; investigation by Simpson Thacher into alleged tax fraud at Levi Strauss; investigation by WilmerHale and E&Y of possible financial misconduct at Household; investigation by Morrison & Foerster and Wilson Sonsini into alleged wrongdoing at Brocade; investigation by Baker Botts and KPMG into alleged wrongdoing at a company; investigation by WilmerHale of possible financial misconduct by the retailer Saks; investigation by Paul, Weiss and KPMG into alleged wrongdoing at Woolworth.

In contrast, some courts find that internal corporate investigations do not deserve work product protection. [43.803]

- Examples include investigation by Goodwin Procter and Deloitte into possible financial irregularities; city's internal investigation into possible employment discrimination (because the city's "antiharassment policy calls for an investigation into any harassment claim"); investigation by Andrews Kurth and forensic accountant Grant Thornton into options backdating at Microtune; investigation by an IBM ombudsman investigator into IBM's termination of a contract; investigation into possible wrongdoing by a company that dealt with human tissue products; investigation into a Phoenix company's sales office irregularities; investigation by Wachtell Lipton into alleged wrongdoing at Allied Irish Bank; investigation by the city of Madison, Wisconsin; investigation by White & Case and PricewaterhouseCoopers into alleged wrongdoing at Royal Ahold; investigation by Weil, Gotshal and forensic accountant Ten Eyck into alleged wrongdoing at OMG; lawyer-run investigation by GMAC, which followed the terrorist attack on the World Trade Center; investigation by Jenner & Block into the City of Highland Park's police department; investigation by Gibson, Dunn into alleged wrongdoing at KPMG; investigation by Winston & Strawn into possible bank fraud; investigation by Willkie Farr into alleged wrongdoing at Sensormatic; investigation by Davis Polk into alleged fraud at Kidder Peabody; investigation by Weil, Gotshal and Arthur Andersen into accounting irregularities at Leslie Fay.

43.9 Waiver in the Investigation Context

Given the work product protection's robust protection, that protection often survives disclosures to third parties that would waive the fragile attorney-client privilege protection.

- Chapters 47 and 48 discuss that issue.

43.10 Insurance Context: Introduction

Some courts address work product protection in the insurance context.

43.11 First- and Third-Party Insurance Contexts

The work product doctrine can apply differently in first-party and third-party insurance contexts.

- In the former, an insured sues its insurance company for coverage.

- In the latter, an insured seeks its insurance company's help in defending, or paying for liability in, a third-party's lawsuit against the insured.

43.12 First-Party Insurance Context

In the first-party insurance context, work product protection usually depends on whether insurance companies' anticipated litigation with its insureds usually motivated the insurance companies' investigations. [43.1201]

At some point, insurance companies might anticipate litigation by or against their insureds. [43.1202]

- Some courts conclude that insurance companies anticipate such litigation when they deny coverage or when litigation begins.[515]

- Some courts take a more nuanced approach.[516] [43.1202]

Some courts undertake essentially the same analysis when insureds file bad faith claims against insurance companies for not covering their losses. [43.1203]

43.13 Third-Party Insurance Context

In the third-party insurance context, courts' analyses usually focus on third parties' discovery of insurance companies' investigation of the underlying incidents. [43.1301]

Some courts find that insurance companies prepare such documents in the ordinary course of their business, while some courts focus on insurance companies' anticipation of third parties' litigation against their insureds.[517] [43.1302]

Some courts have dealt with the work product doctrine's possible applicability when third parties file bad faith claims against insurance companies for not having covered their insureds' claims. [43.1303]

Some Illinois courts have held that insureds cannot rely on work product protection to withhold their litigation-related document from discovery by their insurance companies in a dispute with them -- even if the insurance companies had refused to defend the insureds in the underlying litigation. [43.1304]

- Courts call this the Waste Management doctrine.[518]

Some courts analyze work product protection when insurance companies file lawsuits as plaintiffs rather than defend lawsuits as defendants. [43.1305]

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515 Compton v. Allstate Prop. & Cas. Ins. Co., 278 F.R.D. 193, 196 (S.D. Ind. 2011).

516 Pleasant Grove Missionary Baptist Church of Randolph Cnty., Inc. v. State Farm Fire & Cas Co., Case No. 4:11-CV-157 (CDL), 2012 U.S. Dist. LEXIS 77066, at *11 (M.D. Ga. June 4, 2012).

517 Graves v. Southland Corp., No. 4:99CV00036, slip op. (E.D. Va. July 14, 1999).

518 Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991).

CHAPTER 44

OVERCOMING WORK PRODUCT PROTECTION

44.1 Introduction

Adversaries can sometimes overcome litigants' work product protection.

44.2 Comparison with the Attorney-Client Privilege

The work product doctrine's qualified protection highlights one dramatic difference between that doctrine and the absolute attorney-client privilege.

44.3 Duration of the Protection

Courts disagree about work product protection's duration. [44.301]

- This contrasts with courts' recognition that the attorney-client privilege lasts forever.

Courts' disagreement about the work product doctrine's duration can be troubling. [44.302]

- Litigants often do not know which court might ultimately analyze protection for work product they prepared in an earlier case.

Some courts take an expansive view, essentially finding that work product prepared in connection with litigation always deserves protection in later, even unrelated, litigation.[519] [44.303]

Some courts take a somewhat narrower view, extending such protection only if the later litigation bears some relation to the earlier litigation.[520] [44.304]

- Litigants frequently satisfy this standard, because the later litigation adversaries' efforts to prove relevance often helps establish that necessary relationship.

In one recurring scenario, some courts decline to protect government's work product generated during a criminal case when an exonerated criminal defendant seeks the work product in a later civil case.[521] [44.305]

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519 United States Fire Ins. Co. v. City of Warren, Case No. 2:10-CV-13128, 2012 U.S. Dist. LEXIS 82625, at *21 (E.D. Mich. June 14, 2012).

520 Turner v. Grumpy, LLC, Civ. A. No. 2:08-CV-49-P-A, 2009 U.S. Dist. LEXIS 13286, at *4 (N.D. Miss. Feb. 2, 2009).

44.4 Overcoming Protection for Statements

Specific rules normally require litigants to provide parties or other persons' earlier statements.[522]

44.5 Federal Rule of Evidence 612

Federal Rule of Evidence 612 sometimes requires witnesses to disclose documents they used while testifying or relied upon to refresh their recollection before testifying. [44.501]

Rule 612 requires such disclosure if the court decides that "justice requires it." [44.502]

In some respects, Rule 612 applies in the same way to work product as to privileged documents. [44.503]

- For example, Rule 612: applies to testimony during a deposition or at trial; does not automatically require disclosure; might require disclosure only if the document refreshed the witness's recollection (which sometimes calls for a review of the witness's testimony);[523] often requires the court to examine the witness's testimony; never requires the disclosure of documents other than those the witness reviewed.[524]

In other respects, Rule 612 applies differently to work product than to privileged documents. [44.504]

- Pro se litigants can themselves create work product-protected documents, so Rule 612 might apply to them.

- Rule 612 can apply to work product if litigants earlier shared the work product with third parties, because such disclosure may not have waived work product protection, although it would have waived privilege protection -- so litigants can still withhold such documents absent Rule 612's application.

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521 Ostrowski v. Holem, No. 02 C 50281, 2003 U.S. Dist. LEXIS 794, at *13 n.2 (N.D. Ill. Jan. 21, 2003).

522 Fed. R. Civ. P. 26(b)(3)(C).

523 Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res., Inc., Civ. A. No. 03-1496 c/w 03-1664 SECTION: "A" (4), 2004 U.S. Dist. LEXIS 10048, at *21 (E.D. La. June 2, 2004).

524 In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., No. Civ. 4968, MDL No. 1358 (SAS), 2012 U.S. Dist. LEXIS 79349, at *12-13 (S.D.N.Y. June 5, 2012).

- Some courts equate the "justice requires" standard to the "substantial need" standard under which adversaries can overcome litigants' work product protection.[525] Chapter 45 discusses that issue.

- The Sporck doctrine (discussed in Chapter 42) can also complicate Rule 612 analyses, because it can protect the identity of otherwise intrinsically non-protected documents witnesses review.

Some states have adopted evidence rules paralleling Rule 612, while some states have not. [44.505]

44.6 Exculpatory Evidence in a Criminal Case

Criminal defendants can sometimes overcome governments' work product protection by relying on the Brady doctrine, which requires governments to disclose certain exculpatory evidence.

44.7 Application of the Fiduciary Exception

Courts disagree about the fiduciary exception's applicability to work product. [44.701]

- Chapter 7 discusses the fiduciary exception's application to privileged communications.

Some courts apply the fiduciary exception to work product. [44.702]

Some courts seem to decline such an application.[526] [44.703]

- However, those courts usually address work product generated during disputes between fiduciaries and beneficiaries -- rather than work product created in anticipation of unrelated litigation.

44.8 Application of the Crime-Fraud Exception

The crime-fraud exception applies to work product, but in ways different from the doctrine's application to privileged communications. [44.801]

- Chapter 18 discusses the crime-fraud exception's application to privileged communications.

With most crime-fraud exception issues, courts apply the doctrine the same way to work product as to privileged communications. [44.802]

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525 Medtronic Xomed, Inc. v. Gyrus ENT LLC, Case No. 3:04-cv-400-J-32MCR, 2006 U.S. Dist. LEXIS 17202, at *13 (M.D. Fla. Mar. 27, 2006).

526 Herrmann v. Rain Link, Inc., Case No. 11-1123-RDR, 2012 U.S. Dist. LEXIS 50553, at *31 (D. Kan. Apr. 11, 2012).

- However, courts analyzing the crime-fraud exception's applicability to work product focus on the lawyer's intent -- an irrelevant factor in the privilege context.[527] [44.803]

Most courts take the same approach to opinion work product. [44.804]

44.9 Wrongfully Created Fact Work Product

Some courts deny work product protection for documents created through wrongful methods, such as wiretapping.[528]

44.10 Overcoming Protection for Non-Testifying Experts

Adversaries can sometimes overcome the protection applicable to non-testifying experts. [44.1001]

The federal rules allow adversaries to discover "facts known or opinions held" by such non-testifying experts in "exceptional circumstances."[529] [44.1002]

Some courts even protect non-testifying experts' identities. [44.1003]

- Chapter 34 discusses that issue.

Courts applying the "exceptional circumstances" standard normally demand that adversaries demonstrate the unavailability of other experts,[530] or pertinent objects' unavailability or destruction during testing.[531] [44.1004]

Courts also analyze the waiver impact of disclosures to and by non-testifying experts. [44.1005]

- Chapter 49 discusses that issue.

44.11 Overcoming Protection Applicable to Testifying Experts

Relatively new federal rules can extend work product protection to testifying experts' documents and communications.

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527 Tri-State Hosp. Supply Corp v. United States, 238 F.R.D. 102, 104-05 (D.D.C. 2006).

528 Mumford v. Ingram (In re Katrina Canal Breaches), Civ. A. No. 05-4182 "K" (2), 2008 U.S. Dist. LEXIS 39774 (E.D. La. May 14, 2008).

529 Fed. R. Civ. P. 26(b)(4)(D).

530 Crouse Cartage Co. v. Nat'l Warehouse Inv. Co., Cause No. IP 02-071 C T/K, 2003 U.S. Dist. LEXIS 478, at *10 (S.D. Ind. Jan. 13, 2003).

531 Fast Memory Erase, LLC v. Spansion, Inc., No. 3-08-CV-0977-M, 2009 U.S. Dist. LEXIS 117462, at *9 (N.D. Tex. Dec. 16, 2009).

- Chapter 34 discusses that issue.

The rules at most apparently extend fact work product protection, thus allowing adversaries to sometimes overcome that protection.

44.12 Procedural Issues

Adversaries' attempts to overcome litigants' work product protection often involve procedural issues. [44.1201]

Because such adversaries' attempts require fact-intensive analyses, changing facts might allow adversaries to "try again" if they fail the first time.[532] [44.1202]

Adversaries might overcome work product protection for portions of litigants' documents, thus requiring those portions' production and allowing the protected portions' redaction. [44.1203]

- However, redaction seems more likely in the privilege context. That protection focuses on content, in contrast to the work product doctrine's emphasis on context -- which tends to provide protection for the entire document or not at all.

Some courts find that adversaries can overcome litigants' work product protection, but require the successful adversaries to defray litigants' cost of creating the work product.[533] [44.1204]

- Courts have dealt with a number of other procedural issues. [44.1205]

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532 Broussard v. Tetra Applied Techs., L.P., Civ. A. No. 09-1422, 2010 U.S. Dist. LEXIS 89480, at *7 (W.D. La. Aug. 25, 2010).

533 Portis v. City of Chi., No. 02 C 3139, 2004 U.S. Dist. LEXIS 12640, at *3-4, *9, *10, *14 (N.D. Ill. July 6, 2004).

CHAPTER 45

OVERCOMING FACT WORK PRODUCT PROTECTION

45.1 Introduction

Adversaries can sometimes overcome litigants' work product protection.

45.2 Compared with the Attorney-Client Privilege and General Rules

The work product doctrine provides only qualified protection. [45.201]

- This contrasts with the absolute attorney-client privilege protection. Chapter 2 discusses that issue. [45.202]

Under the federal work product rule, adversaries can overcome litigants' fact work product protection if they establish "substantial need" for the work product, and cannot obtain its "substantial equivalent" without "undue hardship."[534] [45.203]

- Some courts use the term "substantial need" as a shorthand for all three elements. [45.204]

45.3 "Substantial Need" Factor

To overcome litigants' work product protection, adversaries must first show that they have "substantial need" for the litigants' work product. [45.301]

The "substantial need" element focuses on the work product's importance to the adversaries' case or defense. [45.302]

- Some courts seem to use the term "substantial need" incorrectly, erroneously referring to one of the other two elements.[535] [45.303]

- If courts use the term "substantial need" as a shorthand for all three elements, their analysis may nevertheless properly apply the rule.

In examining the "substantial need" element, courts examine work product's substance, nature, and the type of materials involved. [45.304]

- The "substantial need" element looks for a relationship between withheld work product's content and the litigation's central issues.

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534 Fed. R. Civ. P. 26(b)(3)(A).

535 Silverman v. Hidden Villa Ranch (In re Suprema Specialties, Inc.), Ch. 7 Case No. 02-10823 (JMP), Adv. No. 04-01078 (JMP), 2007 Bankr. LEXIS 2304, at *11 (Bankr. S.D.N.Y. July 2, 2007) (not for publication).

- Some courts examine the withheld work product in camera when assessing the "substantial need" element.

Courts defining the "substantial need" element use terms ranging from "unique"[536] to "more than just helpful"[537] -- and many gradations in between. [45.305]

Some courts assessing the "substantial need" element consider adversaries' argument that they need litigants' work product for impeachment purposes. [45.306]

- Most courts do not find adversaries' general desire to impeach litigants' witnesses as sufficient,[538] but might order production of litigants' work product if adversaries provide more specific grounds, rather than speculative or conclusory statements that there might be impeachment material in withheld work product.[539]

Some courts find that adversaries can satisfy the "substantial need" element. [45.307]

- Examples include adversaries' argument that they need litigants' work product to understand the scope and breadth of an investigation, which would reflect the "vigor" with which the investigation was conducted; develop the essential elements of the adversary's case; explore an inconsistency between a witness's interview and deposition; support a patent infringement claim; identify exculpatory witnesses; establish falsity, scienter and materiality in a securities case; explore the litigant's statute of limitations defense; show that a qui tam relator is the original source of information; understand the factual basis for a litigant; establish malpractice by a former lawyer; translate from one language to another; sort out differing accounts of a historical event.

Some courts find that adversaries cannot satisfy the "substantial need" element. [45.308]

- Examples include adversaries' argument that they need litigants' work product to obtain evidence that is likely to shed light on facts; have the documents "just for the sake of having them"; explore inconsistencies between an investigation report and witnesses' depositions; explore inconsistencies between testimony and a lawyer's notes; assist in cross-examining a witness; test the accuracy of a witness's statements; prepare for trial; improve the chance of success in the case; explore whether the government had bullied witnesses; challenge witnesses or errors in an

536 Fletcher v. Union Pac. R.R., 194 F.R.D. 666, 671, 674-75 (S.D. Cal. 2000).

537 Jinks-Umstead v. England, 232 F.R.D. 142, 147 (D.D.C. 2005).

538 McPeek v. Ashcroft, 202 F.R.D. 332, 339 (D.D.C. 2001).

539 Roe v. Catholic Health Initiatives Colo., 281 F.R.D. 632 (D. Colo. 2012).

investigator's report; fill gaps in a witness's testimony; obtain evidence that the court had reviewed in camera and determined to be unimportant; discover information about a relatively unimportant matter; corroborate other evidence; better frame the adversary's discovery requests; check a litigant's document production for completeness.

45.4 "Substantial Equivalent" Factor

If adversaries establish their "substantial need" for litigants' work product, they must then prove that they cannot obtain the "substantial equivalent" without "undue hardship." [45.401]

The "substantial equivalent" element focuses on what alternatives adversaries might employ in obtaining facts they need. [45.402]

Some courts assessing the "substantial equivalent" standard compare different information sources. [45.403]

- For instance, courts might find that written descriptions of accident scenes are not the "substantial equivalent" of pictures.

Courts' most frequent analyses focus on contemporaneous memorializations following accidents or other incidents. [45.404]

- Some courts adopt almost a per se test, finding that contemporaneous memorializations provide unique insights -- so there really is no "substantial equivalent" available to the adversaries.[540]

- Some courts recognize the superiority of contemporaneous memorializations, but apply a fact-intensive analysis examining adversaries' other options.[541]

Courts assessing contemporaneous memorializations focus on one or both of the time periods between (1) the incident and the memorialization; and (2) the memorialization and the adversaries' effort to discover the memorialization. [45.405]

- The shorter the first time period, the more likely adversaries are to satisfy the "substantial equivalent" element.

- The longer the second time period, the more likely adversaries are to satisfy the "substantial equivalent" element.

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[540] Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 985 (4th Cir. 1992).

[541] Bridgewater v. Carnival Corp., 286 F.R.D. 636, 643 (S.D. Fla. 2011).

Adversaries are less likely to satisfy the "substantial equivalent" element if they can rely on other documents or witnesses for facts they need.[542] [45.406]

45.5 "Undue Hardship" Factor

If adversaries establish their "substantial need" for litigants' work product, they must then prove that they cannot obtain the "substantial equivalent" without "undue hardship." [45.501]

The "undue hardship" element focuses on adversaries' difficulty in obtaining the "substantial equivalent" of litigants' work product. [45.502]

- Some courts erroneously examine the "undue hardship" adversaries might suffer without access to litigants' work product.[543] [45.503]

Courts correctly assessing the "undue hardship" element focus on the cost or time involved in adversaries obtaining the withheld work product's "substantial equivalent." [45.504]

- The more difficult adversaries' task in obtaining the "substantial equivalent" of withheld work product, the more likely adversaries are to satisfy the "undue hardship" element.

Courts applying the "undue hardship" element to witnesses assess several factors. [45.505]

- Examples include the availability of the witness (whether she is alive and can be located); the availability of other witnesses with the same knowledge; whether the adversary will be able to find a particular witness out of a universe of witnesses with knowledge; whether such witness will be willing to provide the information the adversary needs; whether such witness still remembers the important facts.

Courts applying the "undue hardship" element to documents assess several factors. [45.506]

- Examples include when the documents were created; the availability of particular documents the adversary needs; whether the adversary can obtain the same information through less expensive means such as depositions; the volume of documents that an adversary must examine to obtain the "substantial equivalent" of the withheld work product.

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542 Pleasant Grove Missionary Baptist Church of Randolph Cnty., Inc. v. State Farm, Case No. 4:11-CV-157 (CDL), 2012 U.S. Dist. LEXIS 77066, at *14 (M.D. Ga. June 4, 2012).

543 Costabile v. Cnty. of Westchester, 254 F.R.D. 160 (S.D.N.Y. 2008).

45.6 Application to Databases

Courts assessing adversaries' attempts to overcome litigants' databases' work product protection focus mostly on the "undue hardship" element, examining adversaries' difficulty in recreating the databases.

45.7 Application to Surveillance Videotapes

Courts assess several factors in analyzing adversaries' attempts to overcome litigants' surveillance videotapes' work product protection.

- Some courts find that by definition adversaries do not have "substantial need" for surveillance videotapes memorializing their own actions.[544]

- Some courts take the opposite approach.[545]

Courts' analyses and conclusions frequently reflect this issue's obvious but sometimes unstated context.[546]

- Thus, some courts acknowledge litigants' obligation to produce any videotapes they intend to use at trial, but allow litigants to depose the videotaped adversary before doing so.

45.8 Withholding Litigant's Burden of Producing Documents

Courts properly applying the work product doctrine do not consider how easily litigants can produce their work product to adversaries.

- Adversaries cannot automatically overcome litigants' work product protection even if litigants can produce such work product with a single keystroke -- courts properly require adversaries to satisfy the elements necessary to overcome litigants' protection.

45.9 Role of the Adversary's Diligence

Some courts analyze adversaries' diligence in undertaking discovery when they had the chance.

- Courts might not be sympathetic to adversaries' "undue hardship" argument if they could have obtained the needed information or its "substantial equivalent" if they had acted earlier.[547]

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544 Ex parte Doster Constr. Co., 772 So. 2d 447, 452 (Ala. 2000).

545 S. Scrap Material Co. v. Fleming, No. 01-2554 SECTION "M" (3), 2003 U.S. Dist. LEXIS 10815, at *56 (E.D. La. June 18, 2003).

546 Bryant v. Trexler Trucking, Civ. A. No. 4:11-cv-2254-RBH, 2012 U.S. Dist. LEXIS 6055, at *14, *15 (D.S.C. Jan. 18, 2012).

CHAPTER 46

OVERCOMING OPINION WORK PRODUCT PROTECTION

46.1 Introduction

Courts agree that opinion work product deserves a higher level of protection than fact work product, but disagree on the standard.

46.2 Federal and State Rules

Under the federal work product rule and states' parallel rules, courts "must protect" opinion work product even if they order fact work product produced.[548]

46.3 Degree of Protection

In another example of courts' surprisingly varied application of a single federal rule phrase, they disagree about the exact level of opinion work product protection. [46.301]

- Some courts provide opinion work product absolute protection[549] [46.302] or the oddly-phrased "almost absolute" protection.[550] [46.303]

- Some courts provide only a "high degree of protection," [46.304] or even a lower level of protection providing barely more immunity from discovery than given fact work product. [46.305]

Some courts take a logical approach, applying a "sliding scale" for opinion work product that links the level of protection to the opinion's content.[551] [46.306]

46.4 Application of the Protection

Despite courts' articulation of varied protection levels for opinion work product, most courts deny adversaries' attempts to overcome litigants' opinion work product protection.

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547 SEC v. Jasper, No. C07-06122 JW (HRL), 2010 U.S. Dist. LEXIS 12500, at *5-6 (N.D. Cal. Jan. 25, 2010) (not for citation).

548 Fed. R. Civ. P. 26(b)(3)(B).

549 Fisher v. Kohl's Dept. Stores, Inc., No. 2:11-cv-3396 JAM GGH, 2012 U.S. Dist. LEXIS 86989 (E.D. Cal. June 22, 2012).

550 Jo Ann Howard & Assocs., P.C. v. Cassity, Case No. 4:09CV01252 ERW, 2012 U.S. Dist. LEXIS 87558, at *19 (E.D. Mo. June 25, 2012).

551 SEC v. Sentinel Mgmt. Grp., Inc., No. 07 C 4684, 2010 U.S. Dist. LEXIS 127355, at *27 (N.D. Ill. Dec. 2, 2010).

46.5 Federal Rule of Evidence 612

Because Federal Rule of Evidence 612 can trump even the absolute attorney-client privilege protection (discussed in Chapter 28), the rule presumably can overcome opinion work product protection.

CHAPTER 47

POWER TO WAIVE WORK PRODUCT PROTECTION

47.1 Introduction

One of the most important differences between the attorney-client privilege and the work product doctrine involves the protections' waiver.

47.2 Clients' and Lawyers' Ability to Waive Protection

Determining who can waive work product doctrine protection requires a subtle analysis. [47.201]

As with the attorney-client privilege, clients clearly can waive work product doctrine protection. [47.202]

- Similarly, lawyers acting with their clients' authority can waive the protection. [47.203]

But unlike the attorney-client privilege, work product doctrine protection belongs at least in part to lawyers -- which can lead to conflicts between lawyers and their clients. [47.204]

- Most courts hold that clients' decision to waive work product protection trumps their lawyers' view.[552]

- However, some courts hold that lawyers may continue to assert work product protection even if their clients want to waive it.

Most courts hold that lawyers may not withhold work product from their clients. [47.205]

- Chapter 34 discusses that issue.

47.3 Third Parties' Power to Waive Protection

Some courts analyze third parties' power to waive litigants' work product protection. [47.301]

- This issue rarely arises in the attorney-client privilege context, because privilege owners' initial disclosure of privileged communications to most third parties normally waives that fragile privilege. Chapter 26 discusses

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[552] In re Grand Jury Subpoena, Nos. 99-41150 Cons/w 99-41179 & 99-41308, 2000 U.S. App. LEXIS 17766, at *5, *7 (5th Cir. July 25, 2000).

that issue. Thus, privilege protection normally disappears before third party recipients can disclose privileged communications to someone else.

As discussed below, disclosing work product to non-adverse third parties normally does not waive work product protection, but courts disagree about the effect of such third parties' later disclosure to adversaries. [47.302]

Some courts analyze only the work product owners' original disclosure to the non-adverse third parties. [47.303]

- Under this approach, third parties' later disclosure even to adverse strangers does not waive litigants' work product protection.[553]

- If the work product's owner had entered into a confidentiality agreement with the original third-party recipient, this approach seems logical -- because the recipient's later disclosure would violate that agreement.

In contrast, some courts hold that friendly third parties' later disclosure to adversaries can waive litigants' work product protection.[554]

- This approach does not make as much sense as focusing on work product owners' original disclosure to non-adverse third parties.

47.4 Similarities to the Attorney-Client Privilege

Some waiver principles apply in the same way to work product as they do to privileged communications. [47.401]

- Examples include a compelled disclosure does not waive the work product doctrine protection [47.402]; a compelled disclosure in one case normally does not automatically result in a waiver in other cases [47.403]; disclaiming an intent to waive work product protection does not prevent a waiver [47.404]; litigants can waive work product protection by not objecting to its disclosure [47.405]; disclosing facts does not usually waive work product protection[555] [47.406]; litigants generally waive work product protection only if they actually disclose work product [47.407]; waiver can occur only upon disclosure of the work product "gist" [47.408]; disclosing of work product to adversaries waives work product protection [47.409]; such disclosure normally waives the protection as to all other adversaries. [47.410]

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553 United States v. Ghavami, 882 F. Supp. 2d 532 (S.D.N.Y. 2012).

554 Gerber v. Down E. Cmty. Hosp., 266 F.R.D. 29 (D. Me. 2010).

555 In re Adelphia Commc'ns Corp. Sec. & Derivative Litig., Nos. 03 MDL 1529 (LMM) & 05 Civ. 9050, 2009 U.S. Dist. LEXIS 55863, at *13 n.3 (S.D.N.Y. July 1, 2009).

47.5 Differences from the Attorney-Client Privilege

In contrast, waiver in the work product context differs dramatically in some ways from waiver in the attorney-client privilege context. [47.501]

Non-adverse third parties' presence usually does not abort work product protection, in contrast to the normal rule in the attorney-client privilege context. [47.502]

- Chapter 35 discusses that issue.

Disclosing work product to friendly third parties usually does not waive work product protection, in contrast to the more fragile attorney-client privilege. [47.503]

- This enormous difference rests on the contrasting purposes of the work product doctrine and the attorney-client privilege. The former protects the adversarial system, while the latter protects confidentiality between clients and their lawyers.[556]

Thus, unlike nearly every disclosure in the privilege context, determining the waiver impact of disclosing work product to third parties usually requires characterizing those third parties as friends or adversaries. [47.504]

- Third parties' role might change from time to time, which obviously can affect this waiver analysis. [47.505]

Most courts hold that disclosing work product to third parties waives work product protection if it "substantially increases" the chance that adversaries might obtain the work product.[557] [47.506]

- Thus, disclosure even to non-adverse third parties can waive work product protection if it increases the chance that such work product might "fall into enemy hands."

- For example, disclosure to a friendly governmental entity can waive the work product doctrine if adversaries can rely on FOIA requests to obtain such work product.

In contrast to the privilege context, confidentiality agreements or understandings play a critical role in analyzing work product waiver. [47.507]

- Such agreements are irrelevant in the privilege context. Chapter 25 discusses that issue.

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556 Baptist Health v. Bancorpsouth Ins. Servs., Inc., 270 F.R.D. 268, 274 (N.D. Miss. 2010).

557 Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Case No. 08 Civ. 7508 (SAS), 2011 U.S. Dist. LEXIS 116850, at *21 (S.D.N.Y. Sept. 30, 2011).

Such agreements or understandings play a key role in analyzing work product waiver, because they can demonstrate that the work product's owner took reasonable steps to keep the work product "out of enemy hands."

- Chapter 48 discusses that issue.

Disclosing work product to friendly third parties generally does not waive that protection, even in the absence of joint defense or common interest agreements -- which usually are prerequisites for avoiding waiver of the fragile attorney-client privilege. [47.508]

- Chapter 20 discusses common interest agreements in the attorney-client privilege context. Chapter 48 discusses common interest agreements in the work product context.

CHAPTER 48

INTENTIONAL, INADVERTENT, OR IMPLIED WAIVER

48.1 Introduction

As in the attorney-client privilege context, work product protection can be waived expressly (through intentional or inadvertent disclosure) or impliedly.

48.2 Intentional Disclosure in the Corporate Context

Disclosing work product in the corporate setting rarely waives work product protection. [48.201]

Most courts hold that disclosure to other corporate affiliates or constituents does not waive work product protection. [48.202]

- Examples include: other company owned by the same person; shareholder non-control group employee in a control group state member of the corporate board of directors former employee; employee of a wholly owned subsidiary.

- In certain rare situations, adversity among corporate constituents might change this analysis.

In contrast to the great risk of waiving privilege protection upon disclosure to corporate agents or consultants (Chapter 26 discusses that issue), disclosing work product to such third parties usually does not waive that separate robust protection. [48.203]

Most courts hold that disclosure to corporate agents or consultants does not waive work product protection.

- Examples include public relations consultant; advertising agency; insurance broker; prospective consultant; investment banker; consultant; accountant acting as a consultant.

- Most courts apply the same rule to corporations disclosing work product to their auditors.[558] [48.204]

Some courts find that disclosing work product to other third parties in a corporate setting does not waive work product protection. [48.205]

- Examples include potential investors; potential purchaser of a patent; trademark assignee; business allies; non-party aligned in interest in a

[558] United States v. Deloitte LLP, 610 F.3d 129, 140 (D.C. Cir. 2010).

patent case; customer; reinsurance company; liability insurance company (by an insured); non-adverse company; company bondholder.

In contrast, disclosing work product to adversaries in a corporate context can waive corporations' work product protection.

- Examples include employer, to which a worker's compensation carrier disclosed work product; employee of a corporate adversary, who later shared the work product with the company's executives; reinsurance company with whom insurance company had a dispute; hostile former employee of another party.

Unlike the general rule finding that disclosures during merger transactions usually waive privilege protection, disclosing work product in such settings requires a more subtle analysis.[559] [48.206]

- For instance, corporations disclosing work product to potential acquiring companies (which might inherit their litigation) do not usually waive that protection, because it does not substantially increase the chance that underlying adversaries might obtain the work product.

Most courts hold that corporations' disclosure to other companies in such settings does not waive their work product protection.

- Examples include a company that ultimately acquired it; a company during merger negotiations that ultimately proved unsuccessful.

48.3 Intentional Disclosure to the Government

Disclosing work product to the government usually waives work product protection, despite some exceptions and efforts to change the basic rule. [48.301]

Certain very specific federal statutes and regulations allow financial institutions to share privileged communications and work product with their regulators, without waiving those protections. [48.302]

- Chapter 26 discusses that issue.

Federal Rule of Evidence 502 originally included a proposed provision allowing disclosure of work product to the government -- without automatically permitting other third parties access to that work product. [48.303]

- However, the rule's drafters deleted that selective waiver provision from the final rule. Chapter 26 discusses that issue.

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559 Nidec Corp. v. Victor Co., No. C-05-0686 SBA (EMC), 2007 U.S. Dist. LEXIS 56429, at *6-8 (N.D. Cal. July 26, 2007).

As in the privilege context, disclosing historical facts to the government usually does not waive work product protection. [48.304]

Determining the waiver impact of disclosing work product to the government has generated a public policy debate. [48.305]

- Some have argued that public interest in favor of corporate cooperation with government investigations should allow selective waivers -- permitting corporations to disclose work product to the government without making it vulnerable to third parties' discovery.

- However, that argument has not generated substantial case law support or legislative enactments allowing such selective waivers. Chapter 32 discusses the latter.

Under the majority view, disclosing work product to the government waives that protection, just as it waives the attorney-client privilege protection.[560] [48.306]

- Most courts apply this general rule despite the existence of confidentiality agreements with the government.[561] [48.307]

A few courts (mostly in the Southern District of New York) have held that disclosing work product to the government pursuant to confidentiality agreements does not waive work product protection.[562] [48.308]

- However, those cases can properly be considered aberrational.

Some courts have tempered this harsh majority waiver rule by holding that disclosing work product to the government waives fact work product protection -- but not opinion work product protection.[563] [48.309]

In certain very limited circumstances, government entities can be characterized as friendly third parties -- so disclosing work product to those entities does not waive work product protection.[564] [48.310]

- These rare situations usually involve government entities acting as normal litigants or interested third parties who can enter into common interest agreements, etc.

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560 In re Quest Commc'ns Int'l Inc., 450 F.3d 1179, 1185 (10th Cir. 2006).

561 Church & Dwight Co., Inc. v. Mayer Lab., Inc., No. C10-4429 EMC (JSC), 2011 U.S. Dist. LEXIS 133762, at *9 (N.D. Cal. Nov. 18, 2011).

562 Police & Fire Ret. Sys. v. SafeNet, Inc., No. 06 Civ. 5797 (PAC), 2010 U.S. Dist. LEXIS 23196, at *5-6 (S.D.N.Y. Mar. 12, 2010).

563 In re Qwest Commc'ns Int'l Inc., 450 F.3d 1179 (10th Cir.). cert. denied, 549 U.S. 1031 (2006).

564 Costabile v. Cnty. of Westchester, 254 F.R.D. 160, 164, 165, 166 (S.D.N.Y. 2008).

- Even courts acknowledging this approach usually do not apply it to corporations disclosing work product to the government to induce its action against competitors or adversaries. [48.311]

As in the corporate setting, one government agency's disclosure of work product to other government agencies usually does not waive the agency's work product protection. [48.312]

48.4 Intentional Disclosure to Other Third Parties

Intentional disclosure of work product to other third parties follows the general rule, focusing on those third parties' role as friends or adversaries. [48.401]

Disclosure to the public normally waives work product protection. [48.402]

- Examples include public in public pleadings; public through use at a trial; public (through disclosure to a public relations consultant); public (generally); grand jury (although this disclosure is not necessarily to the public, it generally waives the work product protection).

Disclosure to adversaries normally waives work product protection. [48.403]

- Examples include direct adversary; arbitration adversary; lawyer for an adversary; someone with a tangible adversarial relationship; litigation adversary in a different legal proceeding; litigation adversary that is producing documents and to whom the litigant provides a list of documents that the litigant wants copied; claims representative for another insurance company with whom the litigant (an insurance company) has a dispute; agent of an adversary.

Disclosure to unfriendly third parties normally waives work product protection. [48.404]

- Examples include friend of the litigant's adversary, who might be expected to share it with the adversary; third party known to be a possible adversary; former client with whom the lawyer had a strained relationship.

Disclosure to neutral parties from whom adversaries might obtain the work product normally waives work product protections. [48.405]

- Examples include court-appointed damages expert; third party likely to be a witness; doctor who is likely to disclose the work product to the health insurance company with whom the litigant has a dispute; independent witness who is not bound by a confidentiality agreement; insurance company that might make the material available to the adversary.

Courts disagree about whether disclosing work product during settlement negotiations waives work product protection.[565] [48.406]

- Some courts find that such disclosure does not waive work product protection, but most courts find a waiver.

Disclosure to family members usually does not waive work product protection.[566] [48.407]

Disclosure to other friendly third parties usually does not waive work product protection. [48.408]

- Examples include friendly witness; reinsurer; insurance broker; criminal lawyer's own lawyer; replacement counsel; union official assisting a former union member; union official; other party suing the same adversary; litigation ally who is not a common interest participant; third party "aligned in interest"; joint defense agreement participant; third party who is not likely to disclose work product to the adversary; codefendant; political ally.

48.5 Importance of Confidentiality Agreements

Confidentiality agreements play a dramatically different role in the work product context than in the privilege context. [48.501]

- Chapter 25 discusses that issue in the privilege context.

Disclosure to third parties pursuant to confidentiality agreements generally does not waive work product protection.[567] [48.502]

- Such agreements demonstrate work product owners' intent to keep the work product "out of enemy hands."

Disclosure to third parties with pre-existing duties of confidentiality generally does not waive work product protection. [48.503]

- Such confidentiality duties can rest on contractual arrangements such as that between auditors and their clients, or on some obvious expectation of confidentiality (as in families).

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565 Ken's Foods, Inc. v. Ken's Steak House, Inc., 213 F.R.D. 89, 96, 97 (D. Mass. 2002).

566 United States v. Stewart, 287 F. Supp. 2d 461, 469 (S.D.N.Y. 2003).

567 Mondis Tech., Ltd. v. LG Elecs., Inc., Civ. A. No. 2:07-CV-565- c/w 2:08-CV-478-TJW, 2011 U.S. Dist. LEXIS 47807, at *16-17 (E.D. Tex. May 4, 2011).

Third parties' disclosure of work product in breach of such confidentiality agreements should not waive work product protection, because it would amount to unauthorized disclosures. [48.504]

- Chapter 47 discusses that issue.

48.6 Role of the Common Interest Doctrine

The common interest doctrine plays a different role in the work product context than in the attorney-client privilege context. [48.601]

- Chapter 20 discusses the common interest doctrine in the attorney-client privilege context.

Some courts articulating general work product waiver principles mention the need for a commonality of interest between disclosing work product owners and third parties. [48.602]

- These references could refer to such third parties' friendliness, and the likelihood that they would not share work product with litigants' adversaries.

Courts properly analyzing work product waiver principles do not require common interest agreements between disclosing work product owners and third parties.[568] [48.603]

- Some courts do not understand this general principle, but most do.[569]

48.7 Attorney-Client Privilege More Easily Waived

Given the very different waiver principles applicable in the work product context and the attorney-client privilege context, disclosing documents or communications covered by both protections often waives privilege protection but not the separate robust work product protection.

- A third party's presence during otherwise privileged communications normally aborts privilege protection, even though that third party may count as a client "representative" capable of creating protected work

[568] 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, at *27 (E.D. Tex. Oct. 18, 2010).

[569] Pecover v. Elec. Arts Inc., No. C08-2820 CW (BZ), 2011 U.S. Dist. LEXIS 138926, at *5-6 (N.D. Cal. Dec. 1, 2011).

product -- ironically even while participating in communications whose privilege protection her presence has destroyed.[570]

Some courts hold that disclosure to third parties waives attorney-client privilege protection, but not the separate work product protection.

- Examples include insurance broker; outside auditor; two companies that had a commercial arrangement that was insufficient to establish a valid common interest agreement between them; friend/sometimes business partner; advertising agency; daughter;[571] corporate employee outside the control group (which would otherwise result in a waiver under Illinois law); public relations consultant; investment banker; accountant acting as consultant; independent accountant.

Litigants can rely on the surviving work product protection in continuing to withhold such documents from adversaries.

- But because the work product doctrine usually provides only a qualified protection, adversaries can seek to overcome surviving work product protection.

48.8 Effect of Rule 502 on Intentional Express Waiver

Because disclosure to adversaries usually results in the same waiver impact in the work product and the privilege contexts, Rule 502 applies in the same way to work product as to privileged communications.

48.9 Inadvertent Express Waiver

Inadvertent express disclosure to adversaries results in the same waiver impact in the work product context as in the privilege context.

48.10 Implied Waiver

Litigants can impliedly waive work product protection.

- Examples include relying on a document filed in camera to avoid sanctions; relying on an accountant's advice; relying on an outline protected by the work product doctrine in a rule 30(b)(6) deposition; claiming reliance on counsel's advice; arguing that a lawyer hired by an insurance company had wasted money; relying on information from an investigation to improve the client's position with investors, financial institutions, and regulatory agencies; seeking attorney fees incurred in

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570 Nat'l Educ. Training Grp., Inc. v. Skillsoft, No. M8-85 (WHP), 1999 U. S. Dist. LEXIS 8680 (S.D.N.Y. June 10, 1999).

571 United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

earlier litigation; merely including in a claim for attorney's fees in a pleading, thus impliedly waiving the work product doctrine covering even the substance of the lawyer's later work; claiming that a lawyers' assistance was defective; filing a malpractice action against a lawyer; arguing good faith -- evidenced by consultation with a lawyer; designating a lawyer as a trial witness in some circumstances, and not dropping a lawyer from the witness list.

48.11 "At Issue" Doctrine

The "at issue" doctrine can apply in the work product context.

Litigants most commonly cause "at issue" waivers when they assert what courts call the Faragher/Ellerth affirmative defense -- under which companies seek to dismiss hostile work environment claims by relying on their investigations and remedial steps.

- Most courts hold that such defense waives any work product protection otherwise covering work product created during the investigation or related remedial steps.[572]

Some courts find that litigants relying on other assertions cause an "at issue" work product waiver.

- Examples include relying on a paralegal's affidavit in support of a class certification motion; claiming that a contracting party had special knowledge; claiming a good faith compliance with the FMLA; asserting lack of knowledge in filing a lawsuit against the police for suppressing evidence; filing a malpractice claim against a former lawyer (which allowed the former lawyer to obtain documents from other lawyers that the plaintiff employed); asserting that the statute of limitations did not bar a claim, because the party was unaware of the claim; asserting a "qualified immunity" affirmative defense; alleging a bad faith settlement of an insurance case.

[572] EEOC v. Spitzer Mgmt., Inc., Case Nos. 1:06-CV-2837, 1:08-CV-1326 & -1542, 2010 U.S. Dist. LEXIS 34975, at *3 (N.D. Ohio Apr. 9, 2010).

CHAPTER 49

DISCLOSURE OF WORK PRODUCT TO AND BY EXPERTS

49.1 Introduction

Disclosure of work product to and by experts involves more complicated analyses than in the attorney-client privilege context.

49.2 Disclosure to Non-Testifying Experts

Disclosure to non-testifying experts generally does not waive work product protection.

- General work product waiver principles prevent waivers in that context.

49.3 Disclosure by Non-Testifying Experts

Disclosure by non-testifying experts involves more subtle issues. [49.301]

- Although non-testifying experts' materials do not technically deserve work product protection (discussed in Chapter 34), their immunity parallels work product protection.

Disclosure by non-testifying experts to testifying experts generally requires disclosure of the same materials to adversaries. [49.302]

- Litigants' reliance on non-testifying experts' opinions to gain some litigation advantage usually waives work product protection. [49.303]

In contrast, non-testifying experts' disclosure to third parties might or might not waive work product protection. [49.304]

- Courts disagree about whether the federal rule protection for non-testifying experts' materials can even be waived.[573]

- Most courts hold that non-testifying experts' disclosure does not result in a subject matter waiver.

49.4 Non-Testifying Experts Playing Multiple Roles

Disclosure to non-testifying experts playing multiple roles in the same case raises complicated waiver issues, which are discussed below.

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[573] United States Inspections Servs., Inc. v. NL Engineered Solutions, LLC, 268 F.R.D. 614, 625 (N.D. Cal. 2010).

- Chapter 34 discusses the impact of designating employees or fact witnesses as non-testifying experts.

49.5 Testifying Experts' Documents and Communications

Under relatively recent changes to the federal rules, work product protection can extend to testifying experts' documents and communications with litigants' lawyers (unless the communications provided facts such testifying experts considered in forming their opinions).

- Chapter 34 discusses that issue.

49.6 Fact Work Product Disclosed to Testifying Experts

Courts traditionally found that litigants waived their fact work product protection by disclosing fact work product to testifying experts.

- However, relatively recent federal rule changes extend work product protection to some communications between litigants' lawyers and testifying experts, presumably including pre-existing work product not containing facts the testifying experts consider.

49.7 Opinion Work Product Disclosed to Testifying Experts

Disclosing opinion work product to testifying experts formerly generated a vigorous debate among federal courts, which has been quieted by recent federal rules changes. [49.701]

Until 2010, such disclosures resulted in different waiver impacts -- depending on the time period and the court.

- Before 1993, such disclosures generally did not waive opinion work product protection. [49.702]

After 1993 federal rules changes, courts disagreed about the waiver impact of disclosing opinion work product to testifying experts. [49.703]

- Most courts followed what some called the bright-line test, finding that disclosing opinion work product to testifying experts always waived that protection. [49.704]

- Some courts took a different approach. [49.705]

The 2010 federal rules changes define as outside work product protection communications or documents providing facts that testifying experts consider in forming their opinions. [49.706]

- The new rules thus simply exclude some communications from work product protection, rather than rely on a waiver doctrine. However, the rules changes' intent is clearly to allow adversaries access to certain specified types of communications containing the factual underpinnings of testifying experts' opinions.

Most states have not yet adopted the new federal rules approach, so different rules might apply in state court litigation. [49.707]

49.8 Testifying Experts Playing Multiple Roles in the Same Case

Some testifying experts play multiple roles in the same case.

Most courts usually require production of documents created by, or disclosed to, company employees also designated as testifying experts -- if there is any ambiguity about the experts' role in creating or receiving such documents.

Similarly, most courts generally require production of documents reviewed by someone acting both as non-testifying and testifying expert in the same case.

- Such experts usually can withhold from discovery only those documents clearly relating to their non-testifying role.

Someone moving from a non-testifying expert role to a testifying expert role faces the same basic principle.

49.9 Testifying Experts with Multiple Roles in Different Cases

The same individual sometimes plays different roles in different cases, such as acting as a testifying expert in one case and a non-testifying expert in a different related case.

- As in other situations, any ambiguity about such individuals' role weighs in favor of production.

Such individuals usually can withhold from discovery only documents clearly shown to be unrelated to their expert testimony.

49.10 Scope of Waiver

Disclosure of work product to testifying experts does not technically cause a waiver, so it does not risk a subject matter waiver.[574]

[574] Monarch Fire Prot. Dist. v. Freedom Consulting & Auditing Svcs., Inc., Case No. 4:08CV01424 ERW, 2009 U.S. Dist. LEXIS 52328, at *6 (E.D. Mo. June 10, 2009).

CHAPTER 50

SUBJECT MATTER WAIVER: APPLICABILITY AND SCOPE

50.1 Introduction

The risk of subject matter waivers can dramatically increase the stakes in any work product waiver analysis.

- If a waiver results in a subject matter waiver, the waiving litigant must disclose all other protected documents on the same subject matter as that involved in the original waiver.

Although courts disagree about subject matter waivers' contours in the work product context, courts generally agree that such broad waivers arise less often in the work product context than in the attorney-client privilege context.

50.2 Comparison to the Attorney-Client Privilege

Most courts recognize that in the attorney-client privilege context intentional disclosure of, or reliance on, privileged communications to gain some advantage in litigation results in a subject matter waiver.

- Chapter 30 discusses that issue.

Courts disagree about whether a similar principle applies in the work product context.[575]

- Some courts state in the abstract that the subject matter waiver doctrine does not apply in the work product context.[576]

- Some courts acknowledge that the doctrine applies, but less extensively than in the attorney-client privilege context.[577]

This ambivalence rests in part on work product's nature.

- Litigants and prospective litigants frequently create work product intending to ultimately disclose it. Chapter 35 discusses that issue.

- Some courts correctly recognizing work product's "intensely practical" nature either refuse to apply the subject matter waiver, or apply it only narrowly.[578]

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575 United States v. Skeddle, 989 F. Supp. 917, 921 (N.D. Ohio 1997).

576 In re Basler, Ch. 7 Case No. BK10 43471 TJM, 2011 Bankr. LEXIS 2904, at *12 (Bankr. D. Neb. July 26, 2011).

577 Rambus, Inc. v. Infineon Techs. AG, 220 F.R.D. 264, 290 n.33 (E.D. Va. 2004).

50.3 Waiver of the Privilege but Not Work Product Doctrine Protection

The attorney-client privilege provides a much more fragile protection than the work product doctrine.

- Disclosing privileged communications to nearly any third party usually waives that protection. Chapter 26 discusses that issue.

Because the work product doctrine provides a more robust protection than the privilege, disclosing work product to third parties does not automatically waive that separate protection.

- Chapter 47 discusses that issue.

This mismatch of waiver doctrines means that disclosing communications or documents protected both by the privilege and the work product doctrine might waive the former but not the latter.

- Chapter 48 provides examples, the most famous of which involves Martha Stewart -- who waived her privilege but not her work product protection by disclosing to her own daughter an email covered by both protections.[579]

50.4 Subject Matter Waiver in the Work Product Context

As in many other areas, the subject matter waiver doctrine applies differently in the work product context than the privilege context. [50.401]

Federal Rule of Evidence 502 applies to both protections, and limits subject matter waivers to litigants' deliberately misleading use of protected documents in litigation.[580] [50.402]

As in the privilege context, disclosure of work product to gain an advantage in litigation creates the greatest risk of subject matter waivers.[581] [50.403]

Because work product protection can extend to documents that lawyers have not shared with their clients, courts disagree about whether subject matter waivers reach such work product. [50.404]

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578 Goff v. Harrah's Operating Co., 240 F.R.D 659, 662 (D. Nev. 2007).

579 United States v. Stewart, 287 F. Supp. 2d 461, 469 (S.D.N.Y. 2003).

580 154 Cong. Rec. H7817, H7818 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

581 Resilient Floor Covering Pension Fund v. Michael's Floor Covering, Inc., Case No. C11-5200 JSC, 2012 U.S. Dist. LEXIS 104398, at *25 (N.D. Cal. July 26, 2012).

50.5 Examples of Subject Matter Waiver

Examining situations in which courts recognize work product subject matter waivers highlight the narrow circumstances where they occur. [50.501]

Litigants' intentional disclosure and use of work product creates the likeliest scenario for subject matter waivers. [50.502]

Some courts find that disclosing work product to third parties does not result in a subject matter waiver.

- Examples include disclosing an investigator's report into the possible sale of counterfeit goods; disclosing governmental work product in response to a FOIA request; disclosing work product to the government; disclosing a loss reserve figure established by an in house lawyer; disclosing a non-testifying expert's report; disclosing documents created during an internal investigation; disclosing work product to the IRS during settlement negotiations; producing work product during discovery (although attempting to use it at trial would result in a subject matter waiver); using other factual work product at trial; using work product-protected pictures at trial; disclosing protected documents to a testifying expert.

In contrast some courts find that disclosing work product to third parties results in a subject matter waiver.

- Examples include using work product in testimony; disclosing to plaintiffs documents created during an internal investigation; allowing a former employee to keep work product after leaving employment; disclosing work product during settlement negotiations; sharing work product with the district attorney and the public (by the parents of murdered JonBenet Ramsey); making testimonial use of work product but attempting to avoid cross-examination by relying on the work product doctrine protection.

As with privilege, implied work product waivers automatically result in subject matter waivers, because there has been no previous disclosure. [50.503]

50.6 Scope of Waiver

Only a few cases have defined the scope of work product subject matter waivers.

Some courts analyze such waivers' horizontal scope.

- Examples include reliance on an advice of counsel defense did not result in a subject matter waiver covering documents that did not "bear on the [client's] state of mind."; disclosure of investigators' reports resulted in a subject matter waiver covering documents prepared by those investigators only; disclosure of work product relating to one meeting with the

government resulted in a subject matter waiver covering just that meeting; disclosure of an opinion letter resulted in a subject matter waiver of work product only about the investment transaction related to the opinion; arranging for an in-house lawyer to verify interrogatory answers resulted in a subject matter waiver only on certain limited issues; disclosure of work product about a particular investigation interviewee extends only to the notes of interviews with that witness (significantly, another court found that such an action resulted in a waiver that extended to all other interview notes).

Few courts have analyzed work product subject matter waivers' temporal scope.

50.7 Waiver of Fact but Not Opinion Protection

Some courts find that waiving fact work product protection does not necessarily waive related opinion work product protection.[582]

- Since Rule 502's enactment, several courts have taken this approach.[583]

50.8 The Faragher/Ellerth Doctrine

The Faragher/Ellerth doctrine involves defendants' affirmative defense to hostile work environment claims.

- Such an affirmative defense result in an "at issue" waiver, because it does not rely on or mention lawyers or privileged communications.

Courts disagree about whether Faragher/Ellerth doctrine subject matter waivers cover just lawyers' underlying work product generated during the investigation, or whether they also include lawyers' related legal advice.

- Some courts extend such subject matter waivers to the investigating lawyers' opinion work product and legal advice,[584] while some courts find a narrower waiver.[585]

50.9 Application in the Patent Context

Most cases addressing work product subject matter waivers involve patent issues. [50.901]

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582 In re Qwest Commc'ns Int'l Inc., 450 F.3d 1179 (10th Cir.), cert. denied, 549 U.S. 1031 (2006).

583 Chick-Fil-A v. ExxonMobil Corp., Case No. 08-61422-CIV-COHN/SELTZER, 2009 U.S. Dist. LEXIS 109588, at *20, *21-22 (S.D. Fla. Nov. 10, 2009).

584 Musa-Muaremi v. Florists' Transworld Delivery, Inc., 270 F.R.D. 312, 319 (N.D. Ill. 2010).

585 Reitz v. City of Mt. Juliet, 680 F. Supp. 2d 888, 895 (M.D. Tenn. 2010).

Courts disagree about whether litigants' reliance on non-infringement opinions results in a subject matter waiver that includes work product that lawyers did not share with their clients. [50.902]

- If such reliance focuses on clients' state of mind, one would think that courts would not require production of work product did not affect that state of mind.

Some courts find a broad subject matter waiver in the patent context, which can even extend to the litigants' trial lawyers. [50.903]

- The Federal Circuit takes a narrower approach.[586]

Because patent infringement cases involve an alleged ongoing wrong, some courts extend subject matter waivers up to the day of trial. [50.904]

[586] In re Seagate Tech., LLC, 497 F.3d 1360, 1376 (Fed. Cir. 2007).

CHAPTER 51

ASSERTING AND LITIGATING THE PROTECTIONS

Although the attorney-client privilege and the work product doctrine differ dramatically from one another, claiming and litigating the separate protections often generate identical procedural issues.

Courts must first select the applicable law.

- Courts choosing the applicable attorney-client privilege law normally undertake a choice of law analysis (discussed in Chapter 52).

- Courts apply their own work product rule. This sounds simple, but can actually create varied results -- because courts disagree on several basic work product issues (discussed in Chapter 53).

Litigants must collect responsive documents, withhold privileged or work product-protected documents, file appropriate and timely objections, and sometimes redact protected parts of otherwise unprotected documents.

- Chapter 54 discusses that issue.

Litigants withholding privileged or work product-protected documents must then generally list the withheld documents on a privilege log, and at some point may have to present evidence justifying their withholding.

- Chapter 55 discusses privilege logs.

- Chapter 56 discusses evidentiary support.

If adversaries seek to overcome litigants' privilege or work product claim, various issues then arise.

- Chapter 57 discusses standing, burdens of proof, and the effect of privilege and work product headers.

Litigants and their adversaries may try to pursue or preclude certain specified types of discovery, including contention interrogatories, Rule 30(b)(6) depositions, or discovery of the other side's lawyers.

- Chapter 58 discusses those issues.

- Chapter 58 also discusses adversaries' increasingly common focus on litigants' alleged failure to produce responsive documents or information -- which could be called "discovery about discovery."

Trial courts and sometimes appellate courts assess privilege and work product claims.

- Chapter 59 discusses trial courts' role.
- Chapter 60 discusses appellate courts' role.

CHAPTER 52

SOURCE AND CHOICE OF ATTORNEY-CLIENT PRIVILEGE LAW

52.1 Introduction

Courts analyzing litigants' attorney-client privilege claims must select the applicable privilege law.

52.2 Addressing Only One Type of Protection

In many cases, litigants withholding communications or documents claim both attorney-client privilege and work product protection.

Some courts inexplicably fail to address one of the protections if it finds the other applicable.[587]

- This does not make much sense.

Later developments might require courts to deal with the protection the court failed to address.

- For instance, courts finding the work product doctrine applicable might decline to assess litigants' privilege claim, but later find that adversaries can overcome the litigants' work product claim -- either requiring the courts' analysis of the privilege claim, or unfairly depriving litigants of additional grounds for withholding communications or documents.

- Similarly, courts finding the privilege applicable might decline to assess litigants' work product claim, but later conclude that the litigants waived the fragile attorney-client privilege through a disclosure that would not have waived the more robust work product protection.

Courts ruling on only one protection claim might also deprive appellate courts of additional grounds to uphold litigants' withholding of communications or documents.

52.3 Choice of Privilege Law

Some courts seem to seek ways to avoid engaging in choice of law analyses. [52.301]

- For instance, some courts conclude that different states' possibly applicable laws provide essentially the same protection,[588] or note that the

[587] Bourne v. Arruda, Civ. No. 10-cv-393-LM, 2012 U.S. Dist. LEXIS 63233, at *6 n.1 (D.N.H. May 3, 2012).

parties explicitly or implicitly agree on the applicable privilege law.[589] [52.302]

Some courts honor transactional parties' choice of law in selecting applicable privilege law. [52.303]

- This is discussed below.

52.4 Source of Privilege Law

Every United States jurisdiction organically developed its own attorney-client privilege law. [52.401]

Despite its ancient heritage and grand societal purpose, attorney-client privilege protection does not rest on constitutional principles. [52.402]

Federal courts have developed a federal common law of privilege, which applies in federal question cases.[590] [52.403]

States articulate their attorney-client privilege principles in statutes, rules, common law, or a mixture of them. [52.404]

- Some states continue to tinker with their privilege law.[591]

Some federal and state courts look to each others' privilege law when interpreting and applying their own protections. [52.405]

52.5 Choice of Privilege Law in State Courts

State courts selecting the applicable attorney-client privilege law apply their own choice of law rules.

- This exercise usually results in state courts applying their own state's attorney-client privilege law, but not always.

- For instance, some Illinois state courts apply the narrow Illinois "control group" test (discussed in Chapter 6) to communications that took place outside Illinois -- often in states applying the broader Upjohn standard.[592]

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588 Penn Mut. Life Ins. Co. v. Rodney Reed 2006 Ins. Trust, Civ. A. No. 09-CV-0663 (JCJ), 2011 U.S. Dist. LEXIS 46781, at *4-5 (D. Del. Apr. 29, 2011).

589 Cummins, Inc. v. Ace Am. Ins. Co., Case No. 1:09-cv-0738-JMS-DML, 2011 U.S. Dist. LEXIS 46984, at *3 (S.D. Ind. May 2, 2011).

590 Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998).

591 In re Avantel, S.A., 343 F.3d 311, 315 (5th Cir. 2003).

592 Sterling Fin. Mgmt., L.P. v. UBS PaineWebber, Inc., 782 N.E.2d 895 (Ill. App. Ct. 1st 2002).

State courts' choice of law analysis can dramatically affect the available privilege protection.[593]

52.6 Choice of Privilege Law in Federal Courts

Federal courts selecting the applicable privilege law face a more difficult and subtle task than state courts. [52.601]

Federal courts handling federal question cases apply federal common law. [52.602]

- Most courts also apply federal common law to pendant state claims,[594] although some courts look to state privilege law. [52.603]

Patent cases can present complicated issues. [52.604]

- Most courts apply Federal Circuit privilege law to unique patent issues, but apply their circuit's law to other privilege issues.

Under Federal Rule of Evidence 501, federal courts sitting in diversity apply state attorney-client privilege law to a "claim or defense for which the state law supplies the rule of decision." [52.605]

- Federal courts must therefore first determine if claims or defenses involve state law.[595] [52.606]

In multidistrict litigation, most courts apply the transferor courts' law,[596] which can create complications.[597] [52.607]

- Some courts simplify this process, by applying just one state's privilege law.

Federal Rule of Evidence 502 changes the choice of law provisions governing federal courts' analysis of whether disclosures in state court waive privilege protection in federal court. [52.608]

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593 3Com Corp. v. Diamond II Holdings, Inc., C.A. No. 3933-VVCN, 2010 Del. Ch. LEXIS 126 (Del. Ch. May 31, 2010).

594 Hilton-Rorar v. State & Fed. Commc'ns, Inc., Case No. 5:09-CV-01004, 2010 U.S. Dist. LEXIS 36121, at *16 (N.D. Ohio Apr. 13, 2010).

595 State Farm Mut. Auto. Ins. Co. v. Hawkins, Case No. 08-1-367, 2011 U.S. Dist. LEXIS 13511 (E.D. Mich. Feb. 10, 2011).

596 In re Human Tissue Prods. Liab. Litig., 255 F.R.D. 151, 156 (D.N.J. 2008).

597 In re Yasmin & Yaz Mktg., Sales Practices, & Prods. Liab. Litig., No. 3:09-md-02100-DRH-PMF, MDL No. 2100, 2011 U.S. Dist. LEXIS 39820 (S.D. Ill. Apr. 12, 2011).

- In essence, Rule 502 directs federal courts to apply the most forgiving federal or state waiver principles.

52.7 Choice of Privilege Law in Federal Diversity Cases

Federal courts sitting in diversity must select the applicable state privilege law. [52.701]

Federal courts should apply their host states' choice of law principles when undertaking this analysis.

- However, many federal courts seem to short-circuit the process by automatically applying their host states' privilege law. [52.702]

Some federal courts correctly applying choice of law principles conclude that their host states' choice of law rules require the application of another state's privilege law.[598] [52.703]

Federal courts applying their host states' choice of law rules in selecting the applicable privilege law take widely varying views of which state's privilege law applies. [52.704]

- Examples include: state that has the most significant relationship to the claim; state from which the pertinent discovery issued; state whose law governs the cause of action at issue; host state; state whose law "governs the claims and defenses"; state which is "the location of defendant's principal place of business"; state where the privileged communication occurred; state where the evidence will be introduced; state where an alleged waiver occurred (rather than the state where the pertinent document was created); state which possesses the "superior interest in seeing its privilege law applied"; state where the client is headquartered and its in-house counsel works, rather than the state where its outside counsel works; state where the attorney-client relationship was formed; state where the client is incorporated and where both its principal place of business and the client's law firm were located; state designated by the traditional "center of gravity" test.

Some courts explicitly honor transactional parties' choice of law contract provisions in selecting the applicable privilege law. [52.705]

- These courts usually rely on general contractual choice of law provisions, not clauses specifically designating privilege law.[599]

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598 Wells Fargo, N.A. v. Konover, No. 3:05cv01924(CFD)(WIG), 2010 U.S. Dist. LEXIS 19973, at *4 (D. Conn. Mar. 5, 2010).

599 Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n, Case No. CIV-08-1125-C, 2010 U.S. Dist. LEXIS 61612, at *6-8 (W.D. Okla. June 22, 2010); 3Com Corp. v. Diamond II Holdings, Inc., C.A. No. 3933-VCN, 2010 Del. Ch. LEXIS 126 (Del. Ch. May 31, 2010).

It normally would make the most sense to apply the privilege law of the state where the clients and their lawyers communicated. [52.706]

- They presumably expected that state's law to apply.

52.8 Foreign Communications and Privilege Law

Some federal courts analyze privilege protection for communications to or from the United States, or taking place wholly outside the United States. [52.801]

- Although these cases usually involve United States courts' discovery, a federal statute allows U.S. courts to order discovery in foreign proceedings.[600] [52.802]

United States courts undertaking this analysis first determine if the communications "touched base" with the United States. [52.803]

- This analysis formerly focused mostly on whether communications came from or went to the United States, but now takes essentially a "significant relationship" approach[601] -- sometimes concluding that purely foreign communications "touched base" with the United States if they discussed some United States issue.

- If communications "touched base" with the United States, U.S. courts apply the appropriate U.S. privilege law (using the choice of law rules discussed above).

The issue becomes more complicated if communications did not "touch base" with the United States. [52.804]

- Some courts nevertheless apply United States privilege law, if they conclude that it essentially parallels possibly applicable foreign privilege law.

- Some courts dealing with communications in non-Western countries apply United States privilege law as a matter of comity -- sometimes noting that those other countries never developed evidentiary protections because they never adopted widespread discovery.[602]

- Courts dealing with communications in Western countries usually undertake a choice of law analysis in determining which country's privilege

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600 28 U.S.C. § 1782(a).

601 Gucci Am., Inc. v. Guess?, Inc., No. 09 Civ. 4373 (SAS) (JLC), 2010 U.S. Dist. LEXIS 65873, at *5 (S.D.N.Y. June 29, 2010).

602 Astra Aktiebolag v. Andrx Pharms., Inc., 208 F.R.D. 92, 102 (S.D.N.Y. 2002).

law to apply -- ultimately selecting the country where the communication occurred, the country with the most predominant interest, etc.

United States courts determining that another country's privilege law applies must then define that country's privilege protection. [52.805]

- This normally requires expert testimony.

Perhaps the most significant issue involves many countries' refusal to protect communications to and from in-house lawyers. [52.806]

The European Union[603] and many European countries take this narrow approach.

- Some U.S. courts have applied other countries' privilege law in refusing to protect such communications.[604]

As international trade and lawyer mobility increase, one would expect that the application of foreign privilege law will receive more judicial attention. [52.807]

52.9 Choice of Privilege Law in Arbitrations

Arbitrators generally can apply whatever privilege law they select.[605]

- Disgruntled losers usually must establish that arbitrators' improper choice of applicable privilege law amounted to "misconduct."

603 Akzo Nobel Chems. Ltd. v. European Comm'n, Case C-550/07 P (E.C.J. Sept. 14, 2010).

604 AstraZeneca LP v. Breath Ltd., Civ. No. 08-1512 (RMB/AMD), 2011 U.S. Dist. LEXIS 42405, at *26, *27 (D.N.J. Mar. 31, 2011); In re Rivastigmine Patent Litig., 237 F.R.D. 69 (S.D.N.Y. 2006) (applying Swiss law).

605 Howard Univ. v. Metro. Campus Police Officer's Union, 512 F.3d 716, 722 (D.D.C. 2008).

CHAPTER 53

SOURCE AND CHOICE OF WORK PRODUCT LAW

53.1 Introduction

Courts analyzing litigants' work product protection claims would seem to have an easy task, but disagree about many issues.

53.2 Addressing Only One Type of Protection

As discussed in Chapter 52, some courts inexplicably fail to address work product claims if they find the attorney-client privilege applicable -- or vice versa.

53.3 Source of Work Product Law -- State Courts

State courts rely on their own work product rules, some of which vary from the federal rules. [53.301]

Most states articulate their work product principles in statute or court rule, but some recognize common law principles. [53.302]

Some states' work product rules or other principles vary from familiar federal work product rules.

- Examples include: Connecticut limits the scope of the work product doctrine to a lawyer's work product; New York state courts provides absolute protection to what is called "attorney work product," which differs from the lower level of protection provided to what is called "trial preparation" material;[606] Washington state rules applicable in criminal proceedings protect only opinion work product; California provides work product protection to materials created by lawyers, even if the client does not anticipate litigation; Illinois's work product rule only protects what federal courts define as "opinion" work product;[607] Pennsylvania does not require an adversary to prove substantial need before obtaining a litigant's work product and also differentiates between work product prepared by a lawyer and by another client's representative.

Some state courts look to federal case law in applying their own state work product rules. [53.303]

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606 Gama Aviation Inc. v. Sandton Capital Partners, L.P., 951 N.Y.S.2d 519, 521 (N.Y. App. Div. 2012).

607 Shields v. Burlington N. & Santa Fe Ry., 818 N.E.2d 851 (Ill. App. Ct. 2004).

53.4 Source of Work Product Law -- Federal Courts

Federal courts apply federal work product rules, but sometimes deal with nuances. [53.401]

The United States Supreme Court's 1947 Hickman decision[608] recognized common law work product principles, which preceded the federal rule. [53.402]

- Some federal courts rely on this parallel federal common law in extending work product protection to intangible work product, among other things.

- Federal courts hearing federal question cases look at federal work product rules and presumably this federal common law, while federal courts sitting in diversity presumably apply the rules alone. [53.403]

Some federal courts inexplicably also look to their host state's work product principles. [53.404]

53.5 Variations in Work Product Law -- Federal Courts

Although federal courts' choice of applicable work product principles might seem simple, anticipating the governing principles can present enormous challenges -- because federal courts differ widely in how they interpret the federal work product rules. [53.501]

Federal courts looking at the identical federal rule sentence fragment inexplicably diverge on many significant work product issues. [53.502]

Examples include:

- 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 another lawsuit.[609]

- What type of non-judicial proceedings count as "litigation" for work product doctrine purposes.[610]

- Whether litigants must identify a "specific claim" before successfully asserting work product protection.[611]

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608 Hickman v. Taylor, 329 U.S. 495 (1947).

609 Chapter 34 discusses that issue.

610 Chapter 36 discusses that issue.

611 Chapter 36 discusses that issue.

- The type of "anticipation" required to assure work product protection -- ranging from "imminent" to "some possibility."[612]

- Whether the work product doctrine protects only those documents litigants will use to assist in their litigation, or whether it extends to other documents created "because of" such litigation (but which will not be used to assist in that litigation).[613]

- Whether the work product doctrine protects intangible work product, or only protects "documents and tangible things" (as described in the rule itself).[614]

- Whether the work product doctrine only protects documents with "legal content," or can also protect non-substantive documents such as those setting up meetings, etc.[615]

- Whether opinion work product protection extends to clients' opinions, or can only protect client representatives' opinions.[616]

- The degree of protection available for lawyers' selection of documents or facts reflecting the lawyers' opinions.[617]

- Work product doctrine protection's duration.[618]

- The degree of protection available for opinion work product (absolute or simply higher than that provided to fact work product).[619]

This wide variation can be especially significant for defendants. [53.503]

- Such defendants usually do not know where they will face litigation, and therefore cannot predict which court might apply an idiosyncratic approach.

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612 Chapter 37 discusses that issue.

613 Chapter 38 discusses that issue.

614 Chapter 39 discusses that issue.

615 Chapter 39 discusses that issue.

616 Chapter 41 discusses that issue.

617 Chapter 42 discusses that issue.

618 Chapter 44 discusses that issue.

619 Chapter 46 discusses that issue.

53.6 Choice of Work Product Law

State and federal courts generally have little trouble determining which work product law to apply, although the variation among courts' approaches might not bring much certainty even then. [53.601]

State courts apply their own work product rules. [53.602]

Federal courts handling federal question cases apply their own work product rules and parallel federal common law principles. [53.603]

- Federal courts sitting in diversity apply the federal rules.

CHAPTER 54

ASSERTING THE PROTECTIONS

54.1 Introduction

Litigants who might withhold protected communications or documents must collect responsive documents, withhold those deserving protection, file appropriate and timely objections, and sometimes redact protected parts of otherwise unprotected documents.

- Most courts apply these rules to documents, but the rules also apply to other communications.

54.2 Horizontal Scope of Litigant's Duty

Litigants must deal with relevant documents, which initially involve what could be called the "horizontal" scope of their duty. [54.201]

Federal rules require litigants to deal with documents within their "custody or control." [54.202]

- Although ethics rules and common law fiduciary duties generally give litigants control over documents in their lawyers' possession,[620] most litigants seem to ignore their arguable obligation to deal with those. [54.203]

- Litigants normally take the same approach to documents their former lawyers possess.[621] [54.204]

When governments seize documents that might contain protected material, they usually arrange for their lawyers to review the seized documents. [54.205]

- Most courts approve this process, in which the reviewing "taint team" lawyers play no substantive role in the governments' litigation efforts.

54.3 Temporal Scope of Litigant's Duty

Litigants must also address what could be called the "temporal" scope of their duty.

Courts disagree about litigants' possible duty to review documents created or received after the litigation began.

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620 Jans v. Gap Stores, Inc., Case No. 6:05-cv-1534-Orl-31JGG, 2006 U.S. Dist. LEXIS 67266, at *3-5 (M.D. Fla. Sept. 20, 2006).

621 Hobley v. Burge, 433 F.3d 946 (7th Cir. 2006).

- Some courts apply the federal rules literally, and expect litigants to deal with such documents.

Some courts lessen the normal burden (by allowing categorical rather than specific log descriptions, etc.);[622] apply various presumption to lower litigants' burden; honor litigants' private agreements eliminating such a burden; adopt specific local rules exempting post-litigation documents from any review or log requirement.

- Some litigants ignore their possible burden to deal with such documents -- relying on a "mutually assured destruction" concept that deters adversaries from mentioning the lapse.

54.4 Duty to Object: Timing

Most courts allow litigants to delay their specific privilege or work product claims until after the court resolves their general relevance, burden, or other macro objections.[623]

54.5 Duty to Object: Specificity

Courts expect litigants to assert specific privilege or work product objections, although they disagree about the level of specificity. [54.501]

Most courts reject litigants' "blanket" privilege or work product claims. [54.502]

- Some courts specifically condemn litigants' discovery responses made "subject to" some protection or "to the extent that" privilege or work product protection applies.[624] [54.503]

Although most courts require litigants to assert privilege or work product claims with "specificity," they disagree about that term's meaning. [54.504]

- Various courts use that term in requiring litigants to support the withholding of each communication or document; satisfy each element of the privilege or work product doctrine; support any protection claim with specific facts.

Some courts permit more general privilege or work product assertions. [54.505]

- This issue normally involves litigants' logs (discussed in Chapter 55).

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622 In re Motor Fuel Temperature Sales Practices Litig., Case No. 07-MD-1840-KHV, 2009 U.S. Dist. LEXIS 34026, at *41-42 (D. Kan. Apr. 3, 2009).

623 Tetra Fin. Grp., LLC v. Cell Tech Int'l, Inc., Case No. 2:08-cv-935-DAK-PMW, 2010 U.S. Dist. LEXIS 41734, at *5 (D. Utah Apr. 28, 2010).

624 Pro Fit Mgmt., Inc. v. Lady of Am. Franchise Corp., Civ. A. Case No. 08-CV-2662 JAAR/DJW, 2011 U.S. Dist. LEXIS 19152, at *8 (D. Kan. Feb. 25, 2011).

54.6 Redaction

Some documents contain portions protected by the attorney-client privilege or the work product doctrine, as well as unprotected portions. [54.601]

- Most courts permit litigants to mask or withhold the protected portions of responsive documents while producing the rest -- a process most courts call "redaction."

Some courts assess privilege or work product protection based on an entire document's "primary purpose," while some courts assess available protections for each portion of such documents. [54.602]

- Chapters 13 and 15 discuss that issue.

In some situations, redaction cannot effectively mask protected information in a document. [54.603]

- For instance, redacting and logging the "General Counsel" reference from the following sentence would not mask the privileged communication: "I checked with the General Counsel and the office manager, and both of them say that we should not agree to the indemnity provision."

Litigants usually do not produce all non-protected portions of generally protected documents -- such as salutations, normal sign-off statements like "Best regards," etc. [54.604]

- This common practice does not prejudice adversaries, and therefore does not draw courts' attention.

Because work product protection depends much more on context than on content, most work product-protected documents either deserve protection in their entirety or not at all. [54.605]

54.7 Effect of Party's Failure to Object

Courts dealing with litigants' failure to properly object can take several actions.

- Examples include forgive the lapse and allow litigants to file late;[625] find that litigants have forfeited their chance to withhold the documents and order their production.[626]

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625 Mills v. Iowa, 285 F.R.D. 411 (S.D. Iowa 2012).

626 Young v. Dollar Tree Stores, Inc., Civ. A. No. 11-cv-01840-REB-MJW, 2012 U.S. Dist. LEXIS 39668, at *6 (D. Colo. Mar. 23, 2012).

CHAPTER 55

PRIVILEGE LOGS

55.1 Introduction

Litigants withholding privileged or work product-protected communications or documents usually must list and briefly describe them on what courts usually call a "privilege log."

55.2 Federal and State Rules

Various federal and state rules govern the log process. [55.201]

Fed. R. Civ. P. 26 does not mandate a log, although it requires litigants to describe withheld documents. [55.202]

- However, many courts' local rules explicitly require a log, and most federal courts expect litigants to file a log.

Federal courts disagree about other federal rules' requirements.

- Most courts do not sanction litigants for failing to file a log with a Rule 33 response.[627] [55.203]

- Courts disagree about litigants' duty to log documents under Rule 34. [55.204]

- Most courts require a log under Rule 45, but disagree about the timing. [55.205]

Litigants dealing with logs must also comply with other rules, such as local "meet and confer" requirements. [55.206]

55.3 Timing of Privilege Logs

Many courts require a log only after they resolve litigants' more general objections.[628]

- This makes sense, because it relieves litigants of the burden of preparing a log until the court better frames the issues.

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627 Johnson v. Couturier, 261 F.R.D. 188, 191 n.5 (E.D. Cal. 2009).

628 Grand River Enters. Six Nations, Ltd. v. King, No. 02 Civ. 5068 (JFK), 2009 U.S. Dist. LEXIS 2045, at *49 (S.D.N.Y. Jan. 9, 2009).

55.4 Required Details about Withheld Documents

Most courts require certain basic information on a log, but courts disagree about other log issues. [55.401]

Because adversaries cannot view withheld documents, logs must contain sufficiently specific information to allow such adversaries to challenge the litigants' withholding or seek courts' in camera review. [55.402]

Most courts require that privilege logs include:

- The claimed protection and its basis. [55.403]
- Documents' authors, and (frequently) their role or capacity.[629] [55.404]
- Documents' recipients and (frequently) their role or capacity -- allowing courts to analyze their "need to know." [55.405]

Some courts require logs that include documents' recipients not listed in the documents themselves. [55.406]

- A few courts require logs that identify those who learned of withheld documents' substance, even if they did not receive the documents. [55.407] This could create an enormous burden in many situations.

Some courts require log entries claiming work product protection to identify the anticipated litigation. [55.408]

Some courts require additional data. [55.409]

- Examples include whether any of the authors or recipients are lawyers; number of pages in the withheld document; Bates number; cross reference to a discovery request; cross reference to the pertinent discovery request; document's location and custodian.

One court required a withholding litigant to log metadata, which could be a burdensome task. [55.410]

Some courts impose logistical requirements, such as requiring an electronic log, placing the documents in chronological order, etc. [55.411]

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629 Berlinger v. Wells Fargo, N.A., Case No. 2:11-cv-459-FtM-99SPC, 2012 U.S. Dist. LEXIS 25018, at *5 (M.D. Fla. Feb. 28, 2012).

55.5 Logging Attachments and Email

Courts disagree about whether withholding litigants must log each attachment, and each email in a string. [55.501]

Most courts require litigants to log documents' redacted portions and marginal notes. [55.502]

Most courts require litigants to log all attachments. [55.503]

- This requirement sometimes creates additional burdens for litigants, such as explaining that an apparently unprotected letter to an adversary that was attached to a cover email actually deserves protection as an internal draft that was never sent to the adversary.

Courts disagree about whether litigants must log each email in a string.[630] [55.504]

- Most courts specifically addressing the issue require litigants to log each email.

- Many courts do not explicitly address this issue, but their discussion of privilege and work product issues makes it clear that they did not expect each email to be logged -- because their analyses refer to withheld email strings rather than individual emails.

Some courts articulate a more lenient view, as long as log descriptions adequately describe the entire email string and justify the withholding.[631]

- Given the enormous volume of emails that frequently require logging, it makes sense to permit general log descriptions of email strings in most situations -- as long as the log properly tees up pertinent issues for adversaries and ultimately for courts. [55.505]

55.6 Required Details about Withheld Oral Communications

The few courts to have addressed logging withheld oral communications require the same basic information as litigants must include when withholding documents.[632]

55.7 Circumstances Justifying a Less Specific Log

Some courts permit less specific logs in particular situations. [55.701]

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630 Acosta v. Target Corp., 281 F.R.D. 314, 320 (N.D. Ill. 2012).

631 United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1074 n.6 (N.D. Cal. 2002).

632 Ambling Mgmt. Co. v. Univ. View Partners LLC, Civ. No. WDQ-07-2071, 2010 U.S. Dist. LEXIS 57953, at *8 (D. Md. June 11, 2010).

The 1993 Advisory Committee Notes to the Federal Rules of Civil Procedure acknowledge that circumstances may justify less specific descriptions.[633] [55.702]

Some courts allow litigants to forego logging certain withheld documents. [55.703]

- Examples include irrelevant or marginally relevant documents; post-litigation documents; communications to and from trial lawyers and their staff.

Some courts permit litigants to log withheld documents by category.[634] [55.704]

Courts disagree about litigants' obligation to log transmittal communications. [55.705]

Some courts have taken a logical approach to log requirements in a Sporck doctrine context.[635] [55.706]

- As discussed in Chapter 42, the Sporck doctrine can extend opinion work product protection to the identity of documents that do not themselves intrinsically deserve protection.

- Some courts permit category descriptions in that context -- recognizing that requiring specific log entries for each withheld document would destroy the protection.[636]

55.8 Courts' Treatment of Particular Log Phrases

Courts have condemned and endorsed certain privilege log phrases. [55.801]

Some courts criticize repetitive log entries, often labeling them "boilerplate." [55.802]

- However, other courts recognize that repetitive documents can be described in repetitive log entries.

Court-approved privilege log entries can help guide lawyers' log preparation. [55.803]

Some courts harshly criticize vague logs.[637] [55.804]

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633 Advisory Committee Note on 1993 Amendments to Fed. R. Civ. Proc. 26(b).

634 Allen v. City of Chi., Case No. 09-C-243, 2010 U.S. Dist. LEXIS 1545, at *12-13 (N.D. Ill. Jan. 8, 2010).

635 ASPCA v. Ringling Bros. & Barnum & Bailey Circus, 233 F.R.D. 209, 212 & n.2, 213 (D.D.C. 2006).

636 United States v. Gericare Med. Supply, Inc., Civ. A. No. 99-4366-CB-L, 2000 U.S. Dist. LEXIS 19662, at *12 (S.D. Ala. Dec. 11, 2000).

637 Klig v. Deloitte LLP, C.A. No. 4993-VCL, 2010 Del. Ch. LEXIS 193, at *13-14 (Del. Ch. Sept. 7, 2010).

- Litigants' lawyers can learn from courts' specific criticism of certain log entries claiming privilege protection [55.805] or work product protection. [55.806]

55.9 Challenging a Withholding Litigant's Privilege Log

Some courts require that adversaries challenging litigants' logs identify each log entry they question, rather than generically criticize the entire log.[638]

55.10 Litigant's Failure to Properly Log Withheld Documents

Courts respond in various ways to litigants' failure to properly log withheld documents. [55.1001]

Some courts recognize that extensive privilege logs may contain errors.[639] [55.1002]

Courts disagree about their power to sanction litigants for inadequate Federal Rules 33 and 45 logs. [55.1003]

Some courts apply a "sauce for the goose" approach to logs, rejecting adversaries' complaints about litigants' logs that contain the same level of specificity as the adversaries' own logs.[640] [55.1004]

- Some courts reject such comparisons, and judge each log on its own merits.

Courts can choose from several possible responses to litigants' failure to properly log withheld documents. [55.1005]

- Examples include conducting an in camera review without requiring any additional logging [55.1006]; giving a tardy litigant more time to log documents [55.1007]; finding that a litigant's inadequate log does not result in loss of the privilege [55.1008]; allowing litigants the chance to amend an inadequate log [55.1009]; imposing some sanctions short of waiver (such as requiring a supporting affidavit, refusing to consider any protection claim not included on the log, etc.) [55.1010]; ordering production of the withheld documents. [55.1011]

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638 Kelly v. United States, 281 F.R.D. 270, 277 (E.D.N.C. 2012).

639 Am. Mgmt. Svcs., LLC v. Dep't of the Army, 843 F. Supp. 2d 859, 870 (E.D. Va. 2012).

640 Cashman Equip. Corp. v. Rozel Operating Co., Civ. A. No. 08-363-C-M2, 2009 U.S. Dist. LEXIS 70264, at *6-7 (M.D. La. Aug. 11, 2009).

55.11 Correcting Privilege Logs

Most courts do not criticize, and some even welcome, litigants' corrected or amended logs.[641]

- This judicial tolerance should reduce litigants' possible worry that amending their logs will induce skepticism about other log entries.

55.12 Risk of Providing too Much Information

Some litigants and their lawyers worry that including too much information on their logs might waive their privilege or work product protection.

- However, no case seems to have found such a waiver.

- In contrast, many courts find that litigants lost their protection by providing too little information on their logs.

55.13 Practical Tips and Suggested Language

Litigants and their lawyers should consider practical ways to prepare successful privilege logs. [55.1301]

Logs should be clear, understandable, and consistent in quality and tone. [55.1302]

- Some lawyers prefer terse log entries, but more expansive log entries usually make success more likely.

Log entries describing privilege protection should specifically describe clients' and lawyers' role, and fully explain why withheld documents primarily relate to legal advice. [55.1303]

Log entries describing work product protection should explain why the withheld document's creation was motivated by anticipated litigation identified in the log entry. [55.1304]

641 In re Sulfuric Acid Antitrust Litig., 432 F. Supp. 2d 794, 796 (N.D. Ill. 2006).

CHAPTER 56

EVIDENTIARY SUPPORT

56.1 Introduction

Litigants may be called upon to present evidence justifying their withholding of protected communications or documents.

56.2 Timing of Requirement for Evidentiary Support

Courts disagree about such an evidentiary requirement's scope and timing. [56.201]

Most courts take what seems like the most logical approach, requiring litigants to provide evidentiary support only if and when adversaries challenge particular log entries.[642] [56.202]

- A few courts apparently require full evidentiary support for each withheld communication or document when litigants prepare their logs. [56.203]

56.3 Focus on the Four Corners of Withheld Documents

Some courts seem to erroneously focus exclusively on withheld documents' four corners, without also considering the withholding litigants' explanation of such documents' context or motivation.

- Chapters 16, 17, and 38 discuss that issue.

56.4 General Rule Requiring Evidentiary Support

Some courts explicitly allow litigants to justify their withholding based only on the documents, without requiring any evidentiary support.[643]

- Many courts implicitly take that approach, by basing their decisions solely on their in camera review of withheld documents.

56.5 Specific Assertions Requiring Evidentiary Support

Some courts require litigants to provide evidence supporting various assertions.

Courts disagree about litigants' duty to present evidence supporting their "need to know" assertions.

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642 Go v. Rockefeller Univ., 280 F.R.D. 165, 174 (S.D.N.Y. 2012).

643 Cashman Equip. Corp. v. Rozel Operating Co., Civ. A. No. 08-363-C-M2, 2009 U.S. Dist. LEXIS 93695, at *12-13 (M.D. La. Oct. 6, 2009).

- Some courts essentially accept corporate litigants' assertions about privileged communications or documents recipients' "need to know,"[644] while some courts demand evidence.[645]

Some courts require evidentiary support for assertions underlying attorney-client privilege claims.

- Examples include in-house lawyer's role as a legal advisor rather than a business advisor; an independent contractor was the "functional equivalent" of a company employee; authenticity of documents submitted in support of a privilege claim; lack of waiver; protected nature of third parties present during an otherwise privileged communication; creation of an attorney-client relationship at the time a document was created; content of an illegible document; primary legal rather than business purpose; primary purpose of a communication as legal; status of a document as a draft (referring to the need for supporting information); existence of a confidential attorney-client relationship; primary purpose of a communication was for generating or requesting legal advice; applicable foreign privilege law.

Some courts require evidentiary support for assertions underlying work product protection claims.

- Examples include adversary can overcome a litigant's work product claim; litigation the party anticipated and its nexus with the document withheld; anticipation of litigation requirement necessary to protect a non-testifying expert's work; motivation test for the work product doctrine; anticipation of litigation requirement of the work product protection.

56.6 Lawyer Representations

Some courts accept lawyers' representations, rather than require their sworn statements or other evidence.[646]

- In contrast, some courts reject lawyers' letters or other representations as insufficient.

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644 Agence Fr. Presse v. Morel, No. 10 Civ. 2730 (WHP) (MHD), 2011 U.S. Dist. LEXIS 126025, at *5-6 (S.D.N.Y. Oct. 28, 2011).

645 Acosta v. Target Corp., 281 F.R.D. 314, 324 (N.D. Ill. 2012).

646 U.S. Bank Nat'l Ass'n v. James, Civ. No. 09-84-P-JHR, 2010 U.S. Dist. LEXIS 34043, at *15-16 (D. Me. Apr. 5, 2010).

56.7 Legal Memoranda

Most courts require litigants to submit legal memoranda supporting their privilege or work product claims.

- Some courts do not accept statements in such memoranda as sufficient evidentiary support.

56.8 Affidavits and Similar Evidence

Some courts require litigants to support their privilege or work product claims with affidavits or other sworn testimony.

56.9 Effect of Failure to Provide Evidentiary Support

Some courts require litigants to produce withheld communications or documents if they fail to produce evidence justifying the withholding.[647]

[647] Safeco Ins. Co. of Am. v. M.E.S., Inc., No. 09 CV 3312 (ARR) (ALC), 2011 U.S. Dist. LEXIS 140700, at *13 (E.D.N.Y. Dec. 6, 2011).

CHAPTER 57

LITIGATING THE PROTECTIONS

57.1 Introduction

If adversaries seek to overcome litigants' privilege or work product claims, courts may have to deal with issues such as standing, burdens of proof, and the effect of headers or stamps.

57.2 Standing

Standing to assert privilege or work product protection usually follows those protections' ownership.

- Chapter 3 discusses privilege ownership and Chapter 34 discusses work product protection ownership.

Other standing issues sometimes arise when litigants assert and litigate either protection.

- Protections' owners usually can attend depositions or trials, and assert their protections.[648]

- Protections' owners usually can seek trial or appellate court relief from subpoenas or other discovery.[649]

57.3 Adverse Inference

Some courts preclude adversaries from arguing or implying that litigants act inappropriately or are "hiding something" when they assert privilege or work product protection claims.[650]

- Some courts rely on specific rules prohibiting adversaries from arguing such an adverse inference.[651]

In contrast, some courts take a less protective approach, allowing trial adversaries to pose questions that will draw litigants' privilege or work product objections.

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[648] Fewer v. GFI Grp. Inc., No. 601099/08, 2010 NY Slip Op 31309U, at 7 (N.Y. Sup. Ct. May 21), rev'd on other grounds, 909 N.Y.S.2d 629 (N.Y. App. Div. 2010).

[649] Flex Energy, LLC v. St. Paul Surplus Lines Ins. Co., Civ. A. No. 6:09-cv-1815, 2011 U.S. Dist. LEXIS 64674, at *14 (W.D. La. June 10, 2011).

[650] Roesler v. TIG Ins. Co., 251 F. App'x 489, 500 (10th Cir. 2007).

[651] Lucio v. State, No. 2-08-179-CR, 2010 Tex. App. LEXIS 3241, at *12-13 (Tex. App. Apr. 29, 2010).

57.4 Narrowness of the Protections

Most courts narrowly construe attorney-client privilege protection.

- Some courts take the same narrow approach in applying work product protection.

57.5 Presumptions

Some courts rely on presumptions when analyzing privilege or work product claims. [57.501]

Some courts presume that communications between clients and their lawyers deserve privilege protection, although most of those courts are in California.[652] [57.502]

Some courts recognize presumptions in the corporate context. [57.503]

- Some courts presume that outside lawyers' communications deserve privilege protection while in-house lawyers' do not; that communications to or from in-house lawyers outside the law department do not deserve protection. Chapter 14 discusses that issue.

Many courts do not recognize any presumptions in favor of or against privilege or work product protection.[653] [57.504]

57.6 Avoiding Waiver by Asserting the Protections

Courts apply both express and implied waiver principles in analyzing litigants' dealings with arguably protected communications and documents. [57.601]

Clients and lawyers can expressly waive attorney-client privilege and work product protection by failing to assert the protections. [57.602]

- Such lapses might result in intentional express waivers (as when deponents disclose privileged communications without objection), or inadvertent express waivers (as when litigants produce protected documents without having taken adequate precautions).

Clients and their lawyers can also forfeit privilege or work product protection without disclosing protected communications or documents. [57.603]

This lapse might be characterized as a "waiver," but that seems incorrect.

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652 Fid. Nat'l Fin., Inc. v. Nat'l Union Fire Ins. Co., Case No. 09cv140-AJB (KSC), 2012 U.S. Dist. LEXIS 137616, at *7-8 (S.D. Cal. Sept. 25, 2012).

653 Flagstar Bank, FSB v. Freestar Bank, N.A., Civ. No. 09-CV-225-SM, 2009 U.S. Dist. LEXIS 104414, at *7 (D.N.H. Nov. 9, 2009) (not for publication).

- Litigants' failure to adequately support the withholding of protected communications or documents should not be considered an express waiver, because the litigants have not disclosed anything. Such failure likewise does not seem like an implied waiver, because the litigants have not relied on the fact of a protected communication.

It makes more sense to consider what some courts call a "waiver" in this context as litigants' failure of proof.

- The proper characterization may not make much difference, because courts can order disclosure of withheld communications or documents regardless of the label.

57.7 Burden of Proof: Privilege

Courts usually require litigants to carry the burden of proving attorney-client privilege protection. [57.701]

- This approach seems appropriate, given the privilege's societal cost and narrowness. [57.702]

Some courts articulate standards of proof in describing such burden. [57.703]

- Examples include prima facie showing; reasonable certainty; non-onerous; clear showing; preponderance of the evidence; conclusive proof.

Courts disagree about who has the burden of proving privilege waiver. [57.704]

- Some courts require litigants asserting privilege protection to prove the absence of waiver,[654] while some courts require adversaries to prove waiver.[655]

- Some courts recognize shifting burdens -- requiring litigants asserting privilege protection to bear the initial burden, then requiring adversaries to come forward with some evidence of waiver, and ultimately shifting the burden back to the litigants asserting privilege protection to prove the absence of waiver.

Courts require litigants to carry the burden of proving other privilege elements. [57.705]

- Examples include existence and effectiveness of common interest agreements.

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654 Adair v. EQT Prod. Co., 285 F.R.D. 376, 381 (W.D. Va. 2012).

655 Hanson v. First Nat'l Bank, Civ. A. No. 5:10-0906, 2011 U.S. Dist. LEXIS 125935, at *17 (S.D.W. Va. Oct. 31, 2011).

57.8 Burden of Proof: Work Product Doctrine

Work product doctrine burden of proof can implicate subtle issues. [57.801]

Courts usually require litigants to carry the burden of proving work product protection. [57.802]

Some courts articulate standards of proof in describing such burden. [57.803]

- Examples include clear showing; heavy burden.

Courts disagree about who has the burden of proving work product waiver. [57.804]

- The standard work product formulation does not include the absence of waiver -- in contrast to the standard attorney-client privilege formulation.

Some courts require litigants to prove the absence of waiver, while some courts require adversaries to prove waiver.

- Some courts taking the latter approach explicitly recognize the difference between work product doctrine elements and attorney-client privilege elements.[656]

Because adversaries can sometimes overcome litigants' work product protection, courts must deal with applicable burdens of proof in that context. [57.805]

- Most courts require adversaries to carry the burden of proof in their efforts to overcome litigants' work product protection.

Many courts recognize an elaborate choreography of shifting burdens of proof in the work product context.

- Most courts require adversaries to prove relevance; withholding litigants to establish work product protection; adversaries to establish that they have "substantial need" for the withheld documents and the impossibility of obtaining their "substantial equivalent" without "undue hardship"; withholding litigants to identify any opinion work product deserving a higher level of protection.[657]

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656 Judicial Watch, Inc. v. United States Dep't of Homeland Sec., 841 F. Supp. 2d 142, 158 (D.D.C. 2012).

657 Kumar v. Hilton Hotels Corp., No. 08-2689 D/P, 2009 U.S. Dist. LEXIS 53387, at *3-4 (W.D. Tenn. June 16, 2009).

57.9 Effect of Privilege Headers and Stamps

Some courts assessing privilege or work product claims deal with headers or stamps proclaiming documents' protection. [57.901]

Courts apply various principles to such headers or stamps. [57.902]

- Examples include the presence of such a header or stamp is not dispositive; the absence of a such a header or stamp is not dispositive; the presence of such a header or stamp provides some evidence of privilege or work product protection (either explicitly explaining that or mentioning such a presence in supporting the withholding); the absence of such a header or stamp weighs against the protection.

The presence or such headers or stamps can affect other analyses too. [57.903]

- Examples include analyzing the ethics implications of lawyers receiving adversaries' labeled documents; applying intentional express waiver principles (discussed in Chapter 26) or inadvertent express waiver principles (discussed in Chapter 27).

- In the latter context, some courts find that the presence of headers or stamps weighs in favor of a waiver.[658]

Although placing headers or stamps on documents usually does not assure protection, it might help with privilege reviews. [57.904]

- Using such headers or stamps as search terms might help privilege reviewers find potentially protected documents.

[658] United States v. CITGO Petroleum Corp., CR. No. C-06-563, 2007 U.S. Dist. LEXIS 27986, at *12 (S.D. Tex. Apr. 16, 2007).

CHAPTER 58

OTHER DISCOVERY ISSUES

58.1 Introduction

Litigants and their adversaries may try to pursue or block certain specific types of discovery, including contention interrogatories, Rule 30(b)(6) depositions, and discovery of lawyers.

- Adversaries also seem to increasingly focus on litigants' alleged failure to adequately review and properly produce responsive documents or information -- in what can be called "discovery about discovery."

58.2 Contention Interrogatories

Contention interrogatories necessarily seek the fruits of litigants' discovery, and insights into their trial strategy. [58.201]

A federal rule specifically permits such contention interrogatories.[659] [58.202]

- The case law supports the rule's language.

The key issue involves timing -- a common work product theme. [58.203]

- Unlike Rule 30(b)(6) depositions (discussed below), the federal rules invite courts to delay litigants' obligation to answer contention interrogatories.

Some courts refuse to order litigants answers to contention interrogatories early in the discovery process,[660] or remind litigants answering contention interrogatories that they may have to later supplement their responses.

- Ironically, some courts decline to order litigants' answers to contention interrogatories late in the discovery process -- because the adversaries already know the litigants' positions, supporting facts, documents, witnesses, etc.[661]

58.3 Rule 30(b)(6) Depositions

Fed. R. Civ. P. 30(b)(6) depositions often seek the same type of information as contention interrogatories, and raise the same issues. [58.301]

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659 Fed. R. Civ. P. 33(a)(2).

660 Turner v. Moen Steel Erection, Inc., No. 8:06CV227, 2006 U.S. Dist. LEXIS 72874, at *43 (D. Neb. Oct. 5, 2006).

661 Johnson v. Couturier, 261 F.R.D. 188, 192 (E.D. Cal. 2009).

Unlike the contention interrogatory rule, Rule 30(b)(6) does not invite courts to delay such depositions until closer to trial. [58.302]

Some courts preclude Rule 30(b)(6) depositions as impermissibly invading litigants' work product or privilege protection. [58.303]

- Most of those decisions involve private litigants seeking to depose the government,[662] but some decisions apply the same approach in the private litigation context.

Rule 30(b)(6) depositions implicate a number of waiver concepts. [58.304]

- Designated Rule 30(b)(6) deposition witnesses presumably can waive privilege or work product protections, but most courts hold that merely designating a lawyer does not automatically waive those protections.

- These courts reason that such lawyers may testify about non-protected facts, or about their decision-making role.

Adversaries asking Rule 30(b)(6) deponents about documents the deponents reviewed before testifying might raise privilege or work product issues. [58.305]

- Although the Sporck doctrine (discussed in Chapter 42) sometimes allows litigants to withhold such documents' identities, some courts find the Sporck doctrine normally inapplicable to Rule 30(b)(6) deponents -- who often have no personal knowledge of historical events.

- Similarly, courts applying Federal Rule of Evidence 612 find that "justice requires" disclosure of protected documents Rule 30(b)(6) deponents review.

Rule 30(b)(6) depositions inevitably raise privilege and work product issues. [58.306]

- Some courts acknowledge that lawyers nearly always prepare such deponents to testify.[663]

Courts addressing these issues have wrestled with several issues.

- Some courts preclude deponents' reliance on work product protection, if courts do not protect intangible work product (discussed in Chapter 39).

- Most courts do not protect historical facts from discovery, even if deponents learned those facts from lawyers.[664]

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662 In re Linerboard Antitrust Litig., 237 F.R.D. 373, 385-386 (E.D. Pa. 2006).

663 SEC v. Merkin, 283 F.R.D. 689, 699 (S.D. Fla. 2012).

- Most courts analyze privilege and work product issues on a question-by-question basis.

Some courts have difficulty drawing the line between permissible questions about litigants' contentions and impermissible questions intruding into litigants' privilege and work product protection.[665]

- Some courts prohibit questions about litigants' contentions, while some courts allow "who, what, when, where" questions -- but not "why" questions.

Rule 30(b)(6) deponents normally cannot rely on privilege or work product protection if they point to lawyers as decision maker or repositories of pertinent knowledge.

58.4 Deposing Lawyers

Adversaries sometimes seek discovery of litigants' lawyers. [58.401]

Most courts frown upon adversaries' unbridled depositions of litigants' lawyers, often citing the predictable acrimony. [58.402]

Most courts follow what they call the Shelton standard, named for a 1986 Eighth Circuit decision.[666] [58.403]

- Under the Shelton standard, adversaries seeking to depose litigants' trial lawyers must demonstrate that they seek crucial non-privileged information unavailable elsewhere.

Some courts, including the Second Circuit, follow a more "flexible" standard -- but still strongly discourage such depositions.[667] [58.404]

- A few courts do not treat such lawyer depositions differently from other depositions. [58.405]

Some courts apply the Shelton or similar restrictive standards to any lawyers who currently represent or formerly represented litigants.[668] [58.406]

- Some courts protect only litigants' trial lawyers.

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664 Okla. v. Tyson Foods, Inc., 262 F.R.D. 617, 629 (N.D. Okla. 2009).

665 United States EEOC v. Caesars Entm't, Inc., 237 F.R.D. 428, 434 (D. Nev. 2006).

666 Shelton v. Am. Motors Corp., 805 F.2d 1323 (8th Cir. 1986).

667 Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Friedman, 350 F.3d 65, 72 (2d Cir. 2003).

668 Newkirk v. ConAgra Foods, Inc., No. 8:19-cv-22-LSDC-FG3, 2010 U.S. Dist. LEXIS 60835, at *15 (D. Neb. May 27, 2010).

Some courts applying the Shelton or similar restrictive standards prohibit lawyers' depositions.[669] [58.407]

- Some courts delay such depositions until later in discovery.

Some courts permitting such depositions mandate other restrictions. [58.408]

- Examples include excluding questions about the deponent's lawyer's opinion; limiting the deposition's scope to certain questions; scheduling the deposition when a court would be available to rule on any questions as they arise; limiting the deposition to a certain number of hours; requiring that the deposition proceed by written questions.

58.5 Discovery about Discovery

Adversaries sometimes try to challenge litigants' discovery responses in a "sideshow" that can eclipse the main case. [58.501]

- This tactic might be called "discovery about discovery."

Adversaries sometimes focus on litigants' document discovery. [58.502]

- Courts disagree about opinion work product protection for the existence or non-existence of documents.[670]

Courts disagree about adversaries' entitlement to discovery about litigants' search for and collection of responsive documents.[671]

- Some courts allow such discovery only if adversaries establish good cause for scrutinizing litigants' actions.

Courts permitting such discovery sometimes point to litigants' actions.

- Such actions can include litigants' representative's signature on discovery responses,[672] or litigants' testimony about their document search (especially if such testimony seeks to explain inadvertent productions or to avoid sanctions).

Courts disagree about the discoverability of litigants' "document hold" memoranda.

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669 Vazquez v. Cent. States Joint Bd., 2009 U.S. Dist. LEXIS 46373, at *16 (N.D. Ill. June 1, 2009).

670 Jackson v. City of Chi., Case No. 03 C 8289, 2005 U.S. Dist. LEXIS 32538, at *14 (N.D. Ill. Dec. 9, 2005).

671 Helwig v. Old Dominion Freight Line Inc., No. Civ. 09-4133, 2010 U.S. Dist. LEXIS 51731, at *3-4 (D.S.D. May 25, 2010).

672 Wal-Mart Stores, Inc. v. Dickinson, 29 S.W.3d 796, 803-04 (Ky. 2000).

Some courts find that the attorney-client privilege protects such memoranda, while some courts take the opposite approach.

- Some courts undertake a more nuanced analysis, finding the privilege inapplicable to background facts such as lawyers' role, date and recipients, employees' steps after receiving such memoranda, etc.

Courts also disagree about work product protection for such memoranda, although one would think that by definition such memoranda normally deserve that protection.[673]

Adversaries sometimes focus on litigants' interrogatory answers. [58.503]

- Some courts protect the identity of those who assisted in preparing litigants' answers,[674] while some courts take the opposite position.

- Some courts preclude discovery into litigants' case investigations, which can involve interrogatory answers and other discovery responses.

- Some courts order litigants to identify documents they relied on when answering interrogatories.

- Some courts allow discovery of paralegals or lawyers who sign interrogatory attestations.

Adversaries sometimes focus on litigants' witnesses. [58.504]

- Chapter 39 discusses some courts' protection of background facts about work product, including the role of such witnesses.

Courts disagree about work product protection for the identity of documents that witnesses review before testifying.

- Chapter 42 discusses that issue.

- Federal Rule of Evidence 612 might also apply to such documents protected by attorney-client privilege (discussed in Chapter 28) or the work product doctrine (discussed in Chapter 44).

673 ADT Sec. Servs., Inc. v. Swenson, Civ. No. 07-2983 (JRT/AJB), 2010 U.S. Dist. LEXIS 3456, at *12 (D. Minn. Jan. 15), aff'd in part & rev'd in part on other grounds, 2010 U.S. Dist. LEXIS 74987 (D. Minn July 26, 2010).

674 Yerger v. Liberty Mut. Grp., Inc., No, 5:11-CV-238-D, 2012 U.S. Dist. LEXIS 136291, at *12 (E.D.N.C. Sept. 24, 2012).

CHAPTER 59

COURTS' ROLE

59.1 Introduction

Courts sometimes face procedural issues when assessing privilege and work product claims.

- Examples include determining whether to bifurcate proceedings to avoid any privilege issues; determining who should decide privilege/work product issues; analyzing whether the court should review withheld communications or documents in camera.

59.2 Bifurcation of Patent and Other Cases

Some courts consider whether they should bifurcate proceedings, thus delaying privilege/work product issues until later and perhaps avoiding the issues altogether. [59.201]

Patent cases can be good candidates for such bifurcation. [59.202]

- Litigants can sometimes avoid reliance on advice of counsel defenses if the first phase of such litigation resolves the case.

Only a few courts have dealt with the bifurcation issue in non-patent cases.[675] [59.203]

59.3 Who Should Decide Privilege/Work Product Issues

Some courts have discussed who can or should assess privilege/work product claims. [59.301]

This issue can involve constitutional and common sense considerations. [59.302]

Some courts indicate that Article II judges do not possess the authority to order withheld communications or documents produced.[676]

Surprisingly few courts recognize what seems like a common-sense concept -- that the judge hearing a case (especially in a non-jury setting) should arrange for another judge to review arguably protected communications or documents.

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675 Libbey, Inc. v. Factory Mut. Ins. Co., Case No. 3:06 CV 2412, 2007 U.S. Dist. LEXIS 45160, at *30 (N.D. Ohio June 21, 2007).

676 NLRB v. Interbake Foods, LLC, 637 F.3d 492, 499 (4th Cir. 2011).

- Such a process prevents any adverse effects of the trial judge reviewing what should never have been disclosed, and discourages adversaries' attempts to "poison the well" by urging in camera reviews on flimsy grounds.

- Some courts have explicitly acknowledged that another judge should conduct such reviews,[677] or implicitly recognized the principle by praising such a process.[678]

Many courts delegate such tasks to special masters or referees. [59.303]

59.4 In Camera Review

Judges or other court representatives frequently review withheld communications or documents in camera. [59.401]

Some courts decline to conduct in camera reviews. [59.402]

- Some courts recognize the time-consuming nature of such in camera reviews, and refuse to undertake reviews absent good cause.[679]

- Some courts decline to conduct in camera reviews because other evidence demonstrates a protection's applicability or inapplicability, or because privilege logs provide sufficient information.

- Some courts recognize that in camera reviews may not provide necessary information -- such as the waiver implications of documents' disclosure to third parties whose identities do not appear in the document, etc.[680]

Most courts conduct in camera reviews in appropriate circumstances. [59.403]

- For instance, in camera reviews might help courts determine whether withheld communications or documents primarly involve legal or business advice, were motivated by anticipated litigation, etc.

Courts assessing the crime-fraud exception almost always undertake or consider in camera reviews. [59.404]

- Chapter 18 discusses that issue.

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677 United States v. Nicholson, 611 F.3d 191 (4th Cir. 2010).

678 United States v. Velazquez, 141 F. App'x 526, 527 (9th Cir. 2005).

679 Chevron Corp. v. Weinberg Grp., 286 F.R.D. 95, 99 (D.D.C. 2012).

680 Iowa Pac. Holdings, LLC v. Nat'l R.R. Passenger Corp., Civ. A. No. 09-cv-02977-REB-KLM, 2011 U.S. Dist. LEXIS 45879, at *13 (D. Colo. Apr. 21, 2011).

Most courts undertaking in camera reviews follow similar processes. [59.405]

- Courts usually insist that litigants log the documents and justify their withholding. [59.405]

59.5 Courts' Questionable Procedures

Some courts have ordered surprisingly questionable procedures while assessing privilege/work product claims.

- Examples include sampling of withheld documents; harsh punishments such as orders to produce all withheld documents if the withholding litigant has been found to have improperly withheld any documents, etc.

59.6 Other Procedural Issues

Some courts address other procedural issues raised by privilege/work product claims.

- For instance, courts require litigants' compliance with local "meet and confirm" rules, and sometimes allow juries to decide underlying factual issues related to privilege/work product claims.

59.7 Trial Courts' Duty to Prepare for Appellate Review

Some appellate courts remind trial courts to compile a full evidentiary record that can support appellate review.

- Chapter 60 discusses appeals.

CHAPTER 60

APPELLATE REVIEW

60.1 Introduction

Appellate courts might ultimately assess attorney-client privilege and work product claims.

- Federal courts have been curtailing use of interlocutory appeals.
- Federal and state appellate courts use the same basic standards for reviewing trial court privilege/work product rulings.

60.2 Preparing for an Appeal

Most trial courts try to compile full factual records for appellate courts' review. [60.201]

- Some appellate courts remind trial courts to take that step.

Some trial courts[681] or appellate courts enter orders preserving the status quo pending appeals. [60.202]

- Most courts refuse to enter such orders, which raises the stakes for possible interlocutory appeals.

60.3 Interlocutory Appeals in Federal Courts

Litigants can consider several options for seeking interlocutory relief from trial court orders requiring production of protected communications or documents. [60.301]

First, litigants can seek trial courts' certification allowing an interlocutory appeal. [60.302]

Second, litigants can immediately appeal some contempt orders. [60.303]

- Parties usually can appeal criminal contempt orders imposed when they ignore a court order to produce withheld communications or documents.
- Non-parties usually can appeal civil contempt orders.[682]

Third, litigants formerly could rely on the Cohen decision[683] in filing interlocutory appeals under what courts call the "collateral order" doctrine. [60.304]

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681 In re Grand Jury, 680 F.3d 328 (3rd Cir. 2012).

682 In re Grand Jury, 705 F.3d 133, 143 (3d Cir. 2012).

- However, in 2009 the United State Supreme Court eliminated that possible interlocutory appeal route for such orders.[684]

Fourth, some litigants can rely on the Perlman doctrine[685] to immediately appeal orders requiring production of their protected communications or documents in third parties' possession. [60.305]

- That doctrine rests on the assumption that third parties will not risk an immediately appealable contempt order by ignoring court orders to produce protected communications or documents.[686]

- Some federal courts have curtailed this process if litigants can retrieve their protected documents from the third party, and then immediately appeal a contempt citation resulting from their refusal to produce the documents.[687]

Fifth, litigants can seek mandamus relief. [60.306]

- Although some litigants can meet the high mandamus standard, most fall short.

Some courts have recognized other possible grounds for interlocutory appeals. [60.307]

The shrinking availability of interlocutory relief raises the stakes for litigants dealing with privilege/work product protection issues in trial courts. [60.308]

60.4 Interlocutory Appeals in State Courts

State courts generally follow the same approach to interlocutory appeals, although they sometimes use different terms.

60.5 Appellate Standard of Review in Federal Courts

Federal courts hearing interlocutory or other appeals must select an appellate standard of review. [60.501]

Federal courts generally apply one of three appellate standards when reviewing trial court privilege/work product orders.[688] [60.502]

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683 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

684 Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 109 (2009).

685 Perlman v. United States, 247 U.S. 7 (1918).

686 United States v. Krane, 625 F.3d 568, 572 (9th Cir. 2010).

687 In re Grand Jury, 705 F.3d 133 (3d Cir. 2012).

688 Miss. Pub. Emps.' Ret. Sys. v. Boston Scientific Corp., 649 F.3d 5, 30 (1st Cir. 2011).

- Appellate courts generally review legal issues under a de novo standard, [60.503] mixed legal/factual issues under a "clearly erroneous" standard, [60.504] and factual findings under an "abuse of discretion" standard. [60.505]

60.6 Appellate Standard of Review in State Courts

State appellate courts generally follow the same standards as federal courts. [60.601-60.605]