ETHICS: ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT CONSIDERATIONS

Perkins Coie Virtual CLE Conference: Legal Strategies for Business Success

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Agenda:

- Preliminary question: what law applies?
- Elements and application of attorney-client privilege
- Elements and application of the work product doctrine
- Waiver of, and exceptions to attorney-client privilege and work product protection
- Special cases: what’s not a waiver? (common interest/joint defense, retained experts/agents)
What Law Applies? STATE COURT

• Law governing privilege differs somewhat by jurisdiction.
• In state court, state privilege law applies.
  - But which state? Depends on forum court’s choice of law rules -- most states apply the privilege law of the state with the most significant relationship to the communication at issue (the test under Second Restatement § 139).
• The main aspects of privilege law are largely consistent among the states (some exceptions).
In federal question cases, the federal common law of privilege interpreted “in the light of reason and experience” applies, but in civil diversity cases based on state law claims, state law applies to privilege issues.


In federal question cases that also involve supplemental state law claims, federal law applies to all privilege issues.

[See, e.g., Agster v. Maricopa County, 422 F.3d 836, 839 (9th Cir. 2005)]
What Law Applies? FOREIGN LAW

More Protection

United States
United Kingdom
Brazil
Germany
India
European Union (Brussels)
Switzerland
France
Japan
China

Less Protection

Austria
Saudi Arabia
Russia
UAE

* Countries with more protection
* Countries with less protection

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• **U.S. law vs. foreign law** — does the communication in question “touch base” with the U.S. (i.e., relate to activities in the United States or inquiries into American law)?
  - If so, a U.S. court will apply U.S. privilege law.
  - That does *not* mean that a foreign court or government agency will necessarily apply U.S. law to any privileged documents it may obtain.

*** Be mindful of where your communications end up (and where they might be seized) ***
Elements and Application of Attorney-Client Privilege
The Challenge

- A company’s lawyers and employees need to maintain the confidentiality of communications that are subject to the attorney-client privilege.

- But:
  - the privilege elements are rigorous, and strictly applied
  - many business people don’t know about (or don’t bother to think about) protecting privilege
  - by the time the privilege is being asserted in litigation, courts are skeptical of new facts about old communications – act now to protect privilege later
Elements of attorney-client privilege under U.S. law

(1) a client;
(2) an attorney (or his or her agent);
(3) a communication;
(4) for the purpose of legal advice; and
(5) confidentiality was anticipated and preserved.

** The burden of proof is on the party claiming the privilege.
Generally, any employee of a company can be the “client” for privileged communications relating to his or her duties.

[See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981)]

- A few jurisdictions, like Illinois, follow a stricter “control group test,” where only high level employees able to control or impact the company’s course of action or act on the lawyer’s advice can be the “client.” *See Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250 (Ill. 1982).

- An in-house lawyer may be either an “attorney” or a “client” for privilege purposes.
Who is an “attorney,” for privilege purposes?

- Under U.S. privilege law, anyone who is licensed to practice law in any jurisdiction in the world when the communication is made can be an “attorney.”

- In the U.S., privilege applies to both outside counsel and in-house counsel (in some countries, only outside counsel).

- The “attorney” role can be filled by agents or subordinates (paralegals, assistants, etc.) who are acting under an attorney’s direction.
Element (2) — The “Attorney”

- Privilege may still apply when non-attorney employees convey or summarize a prior privileged communication with an attorney.
  - Legal training or legal guidance documents from an attorney generally remain privileged, even when they are passed between non-attorneys within the company.
- Privilege *may* still apply if the client reasonably, but mistakenly, believed that a person was licensed to practice law and was representing them when the communication occurred.
Element (3) — a “Communication”

• Underlying *facts* are not privileged – only a *communication* can be privileged.
  • Conveying a fact to an attorney does not protect that fact from discovery from other sources.

• The privilege covers communications that went from client to attorney and from attorney to client in any form (email, oral statements, handwritten notes, phone messages, etc.)
Element (3) — a “Communication”

- A privileged communication that is conveyed or referred to in an otherwise non-privileged document can remain privileged (e.g., “Bob in legal said it was OK for us to do this.”)
  - This is common – watch for it
- Part of a communication may be privileged, even though other parts of the communication are not.
- Email chains?
Element (3) — a “Communication”

- When a non-lawyer is conveying legal advice:
  - Clearly signal that a lawyer gave the advice being forwarded (and, preferably, identify the lawyer);
  - If the sender is acting at the direction of a lawyer, say so clearly;
  - Consider including the lawyer as a “cc:” recipient; and
  - Mark the document as “Attorney-Client Privileged” (if an email, put it in the subject line)
Element (4) — For the purpose of legal advice

- The **primary purpose** of the communication must be to assist in obtaining or providing *legal* advice or assistance.
- The privilege covers:
  - communications requesting or giving legal advice, **and**
  - communications through which the lawyer seeks, or the client conveys, the factual or business information that is necessary to prepare the legal advice.
- A request for legal advice may be implicit, but there is no “lawyer cc:” privilege.
In determining whether the primary purpose of the communication was to seek or provide legal advice, courts look almost exclusively at the content of the document itself -- so be explicit and clear. The court will ask:

- was the communication with the lawyer made for the purpose of seeking or providing legal advice, whether explicitly or implicitly [Privileged], or

- was the communication with the lawyer made for business purposes, or to merely to keep the lawyer informed of something [Not Privileged]?
From: Kim.Inhouse.Lawyer@ABC.com
Sent: July 12, 2017
To: Rhonda.Salesperson@ABC.com
Subject: XYZ Corp. Contract Negotiation (Attorney-Client Privileged)

Rhonda,

I have looked at the price quote that you want to send to XYZ Corp. I doubt they will go for your proposal—our price seems awfully high to me. Don't you think we should give them a discount similar to the one we gave to the Xeon company? The other terms of our proposal look fine, and you've cured the problem we spoke about last week. By the way, I would prefer not to have Larry at our next internal meeting but we have no choice. He should have been fired years ago.

Kim
From: Kim.Inhouse@ABC.com
Sent: July 12, 2017
To: Rhonda.Salesperson@ABC.com
Subject: XYZ Corp. Contract Negotiation (Attorney-Client Privileged)

Rhonda,

I have looked at the price quote that you want to send to XYZ Corp. I doubt they will go for your proposal—our price seems awfully high to me. [Consider revising preceding sentence because not privileged.] Don't you think we should give them a discount similar to the one we gave to the Xeon company? By the way, I would prefer not to have Larry at our next internal meeting but we have no choice. He should have been fired years ago.

As far as the legal issue you raised about your price quote last week, I have analyzed the issue, and concluded that the new language is sufficient, so you have approval to move forward. The other terms of our proposal look fine.

--- Kim
Best Practices on Separating Business & Legal Advice

- Make it obvious when you are rendering legal advice, in a legal capacity -- “leave a hook”.
- Where practicable, do not mix legal advice on sensitive matters with general business counseling.
- In situations where a communication contains a mix of legal and business advice, the provision of legal advice should be clearly marked (e.g., “Based on this, my legal advice is . . . .”).
- Don’t use privilege labels indiscriminately.
Element (5) — Confidentiality was Intended, and Preserved

• Did the client reasonably expect this communication to remain confidential as between the attorney and the client (and their agents)? The privilege legend helps.

• Communicating privileged information between employees of a client is generally OK if “need to know” (but beware the “control group” requirement in some jurisdictions).

• Was the communication in fact kept confidential from third parties, even after the fact?
  • A few exceptions to discuss later (common interest, retained experts, employee equivalents, former employees)
POLL – Hypo 2: Using the Privilege Legend

From: Betty.Manager@ABC.com
Sent: July 22, 2017
To: Peter.Manager@ABC.com; Janice.Financial@ABC.com
cc: Larry.Inhouse@ABC.com
Subject: Company Strategy and the “Big Picture” – Attorney-Client Privileged

PRIVILEGED – FOR ATTORNEY REVIEW

Pete and Janice: We really need to make a final decision about our “big picture” strategy for the next 3 years re: whether to jump into the new market for the more expensive X-Series compatible products, or to focus instead on the lower cost Q-series products. Our competitors at Super Corp. have no idea that we have this technology, and we need to act now to take advantage of this window of opportunity. Whatever we do, we need to make a decision fast, and we need to keep this conversation highly confidential. When you respond, copy Larry Inhouse to keep everything privileged.

Betty
Elements and Application of the Work Product Doctrine
• Under federal law, applies to “materials” that are prepared by a party or its representative or attorney “in anticipation of litigation.” See Fed. R. Civ. P. 26(b)(3).
• Unlike attorney-client privilege, work product is not limited to “communications” between an attorney and client.
• Work product protection is less powerful than attorney-client privilege and can be overcome by a showing of necessity (“substantial need”/“undue hardship”).
  • BUT there is special protection for attorney opinion work product that reflects an attorney’s mental processes.
Work Product – “In Anticipation of Litigation”

- The type of “litigation” anticipated can be any litigated dispute with any party in any court, arbitration, agency proceeding, or investigation.

- Work product protection automatically applies as soon as the threat or likelihood of litigation on a particular issue becomes real and fairly imminent (but more than just “possible”).

- **NOTE**: work product protection likely coincides with document retention obligations
Work Product – “Materials”

• Work product can include things like handwritten notes, factual summaries and analysis, annotations on documents, attorneys’ to-do lists, memos to file, spreadsheets and calculations, etc.

• These materials need not have been communicated between an attorney and client.

• The waiver standard for work product is less strict than for attorney-client privilege.
Waiver of the Attorney-Client Privilege:

• **Voluntary disclosure** to a third party will usually amount to a waiver.
  • Waiver results from revealing the legal analysis and advice itself, not merely the conclusion. *See, e.g.*, *Empire West Title Agency, L.L.C. v. Talamante ex rel. Cty. of Maricopa*, 323 P.3d 1148 (Ariz. 2014).

• Most courts apply a balancing test to determine whether an *inadvertent disclosure* amounts to a waiver. *See* F.R.E. 502.
  • Factors include reasonableness of the precautions taken to prevent inadvertent disclosure, number and extent of disclosures, how the errors occurred, the efforts taken to discover and rectify, etc.

• **Compelled disclosure** normally does not result in a waiver, if you make reasonable attempts to oppose and prevent the disclosure.
Generally, the more affirmative the waiver, the broader the scope of the waiver.

A court may find a broad “subject matter waiver” for all privileged documents relating to the topic in question.

Most court have rejected “selective waiver” (e.g., when producing to government agencies).

**Implied Waiver by Putting Something “in issue”**

• Don’t be tempted to produce a privileged document just because it is good for your case.
The waiver rules for work product are less strict. Most courts hold that disclosure of work product to a third party does not waive the protection unless such disclosure is made to an adversary in litigation or has substantially increased the opportunities for potential adversaries to obtain the information.

[See, e.g., United States v. Sanmina Corp., 968 F.3d 1107 (9th Cir. 2020)]
The Crime-Fraud Exception

- Attorney-client privilege does not extend to communications seeking or providing advice on how to commit a criminal or fraudulent act, or to a client’s statement of intent to commit a crime.

- The party seeking to apply this exception must make a threshold showing that the particular document or communication at issue was itself made in furtherance of the client’s alleged crime or fraud and was closely related to it.
Special Cases: What’s Not a Waiver?
The common interest doctrine is not a separate privilege – it is an exception to the general rules of waiver.

Joint defense is a type of common interest.

The common interest doctrine applies to allow disclosure to third parties without a waiver where the parties share a common **legal** interest on some issue and share privileged communications about that issue in furtherance of their common interest, and the parties maintain confidentiality as against outside parties.
A written common interest agreement is not required, but is helpful to establish and prove the parties’ intention.

“[A] shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within [the common interest] exception. . . . Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement—whether written or unwritten.” In re Pacific Pictures Corp., 679 F.3d 1121, 1129 (9th Cir. 2012).

The parties may not assert privilege against each other for any shared communications if they later become adverse, unless the agreement states otherwise.
Most courts recognize the common interest doctrine even when there is no anticipated litigation, including in the context of pre-merger due diligence, so long as the common interest is legal rather than commercial in nature. See, e.g. 3Com Corp. v. Diamond II Holdings, Inc., 2010 WL 2280734 (Del. Ch. May 31, 2010); In re Teleglobe Comms. Corp., 493 F.3d 345, 364 (3d Cir. 2007).

BUT New York law will only apply the common interest doctrine to protect privilege where the parties share a common interest in pending or anticipated litigation. See, e.g. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616 (2016).
Two possible waiver exceptions:

- The *Kovel* doctrine: where the attorney retains a third party specifically to assist the attorney in providing legal advice to the client, the privilege may not be waived. *See, e.g., United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (accountant hired by tax counsel).

- The functional equivalent doctrine: where a party has hired a third party or independent contractor to perform services as a functional equivalent of an employee, the privilege may not be waived. *See, e.g., In re Bieter Co.*, 16 F.3d 929, 938-39 (8th Cir. 1994); *United States v. Graf*, 610 F.3d 1148, 1157-59 (9th Cir. 2010).
The End