Attorney-Client Privilege

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The attorney-client privilege is a crown jewel of the legal profession. Many lawyers don't understand its contours, yet know that when they provide legal advice to a client, that information is protected from disclosure by common law—or, depending on the jurisdiction, by statutory or procedural rules—as long as the privilege has not been waived and no exception applies.

But the attorney-client privilege is inconsistent with the truth-seeking function. It conceals information even when that information may be essential to determining facts. Thus, it is not unusual to read judicial decisions narrowing its application. Nor is it surprising that lawyers have had to confront numerous forks in the road in deciding when to assert the privilege or how to protect information as privileged.

Two of those forks changed the face of privilege law in the federal courts. In 1981, the U.S. Supreme Court decided *Upjohn Co. v. United States*, 449 U.S. 383. And in 2008, Congress adopted Rule 502 of the Federal Rules of Evidence. If the privilege could speak, it would say that those decisions by the Supreme Court and by Congress were watershed moments. But in the same breath, it would add that organizational depositions, selective waiver, common interest legal groups, and ethics rules present issues of privilege protection or privilege waiver that are challenging to follow even with a road map.

Upjohn Conundrums: Former Employees and Public Relations Consultants

Before *Upjohn*, lawyers faced the thorny question of whether conversations with employees other than key management personnel (or the "control group" of a corporation) were privileged. *Upjohn* established the principle that a lawyer's communications with employees to obtain information needed by the lawyer to provide legal advice to the corporation are protected from disclosure by the privilege.

But *Upjohn* closed one fork in the privilege road, only to create many others. The attorney-client privilege has had to evolve as lawyers' information sources have evolved. Former employees and public relations consultants, in particular, represent a jurisprudential crossroads for lawyers.

For example, in 1981 "outsourcing" was not a common practice—indeed, it was not identified as a business strategy until several years later—and today outsourcing happens in any industry, including law firms. So when is a nonemployee the "functional equivalent" of an employee, embraced by the rule in *Upjohn*? When confronted with the choice of applying *Upjohn* to nonemployees, many courts have been persuaded by lawyers that *who is on the payroll* is not controlling; rather, *who*

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has information needed by the lawyer to render legal advice is.

Thus, *Upjohn* has been extended to communications between a lawyer and consultants, investigators, independent insurance adjusters, accountants, investment bankers, technical experts, physicians of all kinds, patent agents, and myriad other individuals who provide information in confidence to the lawyer so that the lawyer can provide legal advice to the client.

Lawyers confronted with the need to speak with former employees to render legal advice to their clients have to ask if the *Upjohn* road is safe. Prudent lawyers will determine the applicable jurisdiction's rules before answering that question.

Lawyers hoping to protect their conversations with public relations consultants should know they are treading on thin ice.

To illustrate, in *Newman v. Highland School District No. 203*, 186 Wash. 2d 769 (2016), the Washington Supreme Court determined that *Upjohn* did *not* apply to a conversation between a school district lawyer and a former coach who had information about a football player seriously injured in a high school game. The court was matter-of-fact in its holding:

> At issue is whether postemployment communications between former employees and corporate counsel should be treated the same as communications with current employees for purposes of applying the corporate attorney-client privilege. Although we follow a flexible approach to application of the attorney-client privilege in the corporate context, we hold that the privilege does not broadly shield counsel's postemployment communications with former employees.

As a result, counsel for the plaintiff was allowed to inquire about conversations between the school district's counsel and the former employee.

In contrast, the Fourth Circuit in *In re Allen*, 106 F.3d 582 (4th Cir. 1997), noted that the *Upjohn* court left open the question of whether its rule should apply to former employees, but the Fourth Circuit adopted Chief Justice Burger's analysis in his concurring opinion in *Upjohn*: "[I]n my view the Court should make clear now that, as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment."

Of course, a former employee does not speak "at the direction of management," but the Fourth Circuit was persuaded by a host of decisions that *Upjohn* should be extended to a former employee who had information needed by the lawyer "to develop her legal analysis for the client." As a result, counsel's notes and summary of her interview with the former employee were insulated from discovery.

But while the Ninth Circuit has agreed with the Fourth Circuit, *see Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486 (9th Cir. 1989), even in federal court there are forks in the road. For example, *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303 (E.D. Mich. 2000), limits *Upjohn* protection to communications with a former employee that concern "a confidential matter that was uniquely within the knowledge of the former employee when he worked for the client corporation, such that counsel's communications with this former employee must be cloaked with the privilege in order for meaningful fact-gathering to occur."

That's a mouthful, but if you are speaking with a former employee in the Eastern District of Michigan and cannot make that required showing, your conversation will not be privileged. So, when facing forks in the road involving former employees, choose wisely.

Another interesting example is public relations consultants. In litigation today, lawyers often use public relations strategies and strategists, including when the risk of an indictment might be affected by public sentiment. But lawyers hoping to protect their conversations with public relations consultants should know they are treading on thin ice.

Among the decisions holding that a public relations consultant is the functional equivalent of an employee for *Upjohn* purposes, there is a fundamental theme: The firm either serves as the equivalent of an in-house public relations staff (and thus is, in effect, part of the "client") or is integral to the lawyer's effort to provide a defense to a target of a criminal investigation. This statement from a magistrate judge's decision in *In re Abilify (Aripiprazole) Products Liability Litigation*, 2017 U.S. Dist. LEXIS 213493 (N.D. Fla. Dec. 29, 2017), captures the theme:

> To the extent these [two marketing] firms were retained [by the defendants] to assist Otsuka's in-house legal departments in monitoring and analyzing media coverage as part of in-house counsel's strategies and legal advice relating to threatened and ongoing litigation and actions by regulatory agencies, the consultants would stand in the shoes of an Otsuka corporate employee.

The court added this context, which is applicable to many types of high-profile litigation in today's 24-hour instantaneous news cycle:

> In the world today—where a drug manufacturer may face liability in the hundreds of millions of dollars in a product liability suit—it is not only common but necessary to involve public relations and marketing consultants to assist in-house counsel and outside counsel in responding to media inquiries regarding ongoing or threatened legal actions. So long as the role of the consultant is to assist legal counsel in responding to the media the protections of the attorney-client privilege should apply the same as where a corporate employee is tasked with responding to media inquiries.

Alas, there are numerous decisions that reach the opposite conclusion when the required "functional equivalent" showing was not made. For example, the argument failed in *McNamee v. Clemens*, 2013 U.S. Dist. LEXIS 179736 (E.D.N.Y. Sept. 18, 2013), because the public relations firm provided "standard public relations or agent services." What is a "standard" service and what is a litigation-specific service may be in the eyes of the beholder, but lawyers who plan ahead will shape that determination.

In some cases in which a public relations firm was found *not* to be a functional equivalent of an employee for privilege purposes, there still was a finding of a work-product protection. For example, in *Pemberton v. Republic Services, Inc.*, 308 F.R.D. 195, 201 (E.D. Mo. 2015), the court rejected an *Upjohn* argument but determined that all of the materials at issue "were created by a party and its attorney or an agent of the attorney, and would not have been prepared in substantially similar form but for the prospect of litigation." So not all hope is always lost.

Work product aside, lawyers hoping to make a public relations consultant into the functional equivalent of an employee must wisely structure the relationship (who retains whom, when, and why) and must account for the potential that the selected structure, and communications made under it, will be tested. Listing a public relations consultant's communications with counsel on a privilege log will almost certainly result in a request for in camera review, unless the parties have reached an agreement to avoid such review. So, when approaching a fork in this privilege road, packaging may dictate which road the court takes.

Electronically Stored Information and the Privilege: Avoiding Waiver

When the Federal Rules of Civil Procedure were adopted in 1938, document production was controlled by the court. Parties had to file a motion and show good cause to obtain documents from each other. That changed in 1970, when document production became extrajudicial. Then along came electronic discovery.

In most lawsuits, electronic discovery may involve no more than printing emails and producing them. Identifying privileged documents and creating a privilege log are then manageable tasks. But there are about 300,000 cases filed in federal court annually and many times that number in state courts. While only a small percentage will have large amounts of electronic discovery, that's still a lot of cases. And multidistrict litigation, which represents over 30 percent of the federal docket nationwide, will always have significant electronic discovery.

Combine an extrajudicial process with the tens or hundreds of thousands—or millions—of documents, and the attorney-client privilege becomes a wayward traveler, trying to survive the elements. Lawyers dealing with tens or hundreds of gigabytes or a terabyte or more of information are challenged to identify and remove all privileged documents when responding to a request for production. Inadvertent production of privileged communications could result in waiver of the privilege not only for the documents produced but also for other documents involving the same subject matter.

Hence, the nuanced subjects of inadvertent production, waiver, and subject matter waiver. If ever lawyers needed a wizard, Congress gave it to them in adopting Rule 502. Remarkably, it was a rule of evidence—not a rule of civil procedure—that came to the rescue.

How? First, Rule 502(a) eliminated subject matter waiver claims unless a disclosure of privileged information is intentional. Under Rule 502(a), an inadvertent production of a privileged document in a federal court or to a federal agency can no longer trigger subject matter waiver claims in any federal *or state* proceeding. The reference to "state proceeding" here is designed, according to the explanatory note to Rule 502(a), to ensure "protection and predictability" in that the federal rule on subject matter waiver will govern "subsequent state court determinations on the scope of the waiver" by the disclosure.

Rule 502(a) gives courts even more direction when a production of privileged communications is intentional. There still is no subject matter waiver unless documents relating to the same subject matter "ought in fairness" to be produced. And lest one think that's always going to be the case, consider the opinion in *In re General Motors Ignition Switch Litigation*, 80 F. Supp. 3d 521 (S.D.N.Y. Jan. 15, 2015), in which General Motors provided Congress and others with the results of its attorney-managed investigation. Nonetheless, the court held that "fairness" did not require production of counsel's interview notes and memoranda because GM was not attempting to use the investigative report as a "sword" that would require the production of the notes and memoranda that GM was trying to shield.

Rule 502(b) solved a different problem. Under the pre–Rule 502 case law, an inadvertent production of a privileged document was subject to three competing lines of authority: (1) the strict rule (waiver is automatic); (2) the lenient rule (the client will not be penalized for a mistaken production); and (3) the rule of reason (courts judge the reasonableness of the conduct that

resulted in the inadvertent production—if the conduct was reasonable, then there was no waiver).

Rule 502(b) eliminated the first two lines of authority and adopted the rule of reason as the standard for disclosures made in a federal proceeding or to a federal office or agency. The inadvertent disclosure does not operate as a waiver in a federal or a state proceeding if the holder of the privilege or work-product protection "took reasonable steps to prevent disclosure" and the holder "took reasonable and prompt steps to rectify the error," including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B), the "clawback" rule that was adopted on December 1, 2006. It allows a party who learns of an inadvertent production of privileged or work-product-protected information to notify the recipient of the discovery, who then must "promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information" until the claim of privilege or work product is resolved.

Rule 502(d) solved a third problem. By its terms, Rule 26(b)(5)(B) still allows a challenge to a privilege claim. But Rule 502(d) allows a court to enter an order that provides for no waiver in that proceeding or in any other federal or state proceeding. It reads: "A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."

Unfortunately, not all Rule 502(d) orders will provide a road map to Oz. Lawyers must specifically disclaim any application of Rule 502(b) or otherwise draft the 502(d) order so that its effect is to eliminate application of Rule 502(b). Otherwise, they may find themselves defending the reasonableness of the actions taken to prevent an inadvertent production of privileged or protected information.

Remarkably, Rule 502(d) orders are not routinely entered in litigation, though they should be. There is no reason for litigators to run the risk of waiver. Always travel on the right road—have the Rule 502(d) order entered without triggering the application of Rule 502(b).

The Rule 30(b)(6) Witness Trap

Trial testimony is governed by evidence rules, which, in federal court, include Rule 612, entitled "Writing Used to Refresh a Witness's Memory." Rule 612(a) and (b) provide for production to the adverse party of any writing used by a witness to refresh a recollection while testifying, or "before testifying, if the court decides that justice requires" the adverse party to have the option to inspect the document, to cross-examine the witness about it, or to introduce in evidence any portion that relates to the witness's testimony.

Of course, a corporation can speak only through its representatives. Federal Rule of Civil Procedure 30(b)(6) provides for the deposition of an organization, allows a party to identify topics for examination, and requires the organization to designate a person or persons to testify on those topics. Sometimes it happens that corporate witnesses are shown privileged information or work product, and sometimes that is necessary to teach the designated witness the "corporate memory" in response to a topic of which the witness might not otherwise have personal knowledge.

Does Evidence Rule 612 compromise the integrity of the attorney-client privilege or work-product protection if a Rule 30(b)(6) deponent is shown a privileged document or work product to prepare the witness for the deposition? One might say, No, Rule 612 applies only to trial testimony. After all, there is a reference to "the court" in Rule 612(a)(2), so it must be referring to testimony before a judicial officer.

That argument, however, has not succeeded before most federal judges. Why not? There are at least two reasons. First, Rule 30(c)(1) provides that "examination and cross-examination of a deponent proceed as they would *at trial* under the Federal Rules of Evidence. . . ." (emphasis added). Second, too many courts have held that Rule 30(c)(1) trumps the reference to "the court" in Rule 612.

Thus, this is a road filled with potholes, not forks. Avoid them.

Selective Waiver: A Lonely Road

When privileged information or work product is voluntarily disclosed to a regulatory agency under a "non-waiver" and confidentiality agreement, the disclosing person will argue that the privilege is not waived as to any other person or entity under the so-called "selective waiver" doctrine.

The Eighth Circuit adopted the doctrine in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc). The court held that memoranda of counsel's interviews with employees provided to the Securities and Exchange Commission in response to a subpoena in a nonpublic investigation did not waive the privilege as to other parties. "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."

Diversified has been widely criticized. The D.C., First, Third, Fourth, Sixth, Ninth, and Tenth Circuits have rejected the doctrine of selective waiver of privileged information voluntarily disclosed to a regulatory agency. The Second Circuit decided not to adopt a per se rule of waiver, instead allowing for a case-by-case determination:

> Establishing a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a

common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.

In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993).

So what should you do when the government agency is demanding cooperation and wants the results of your investigation, and you want to preserve the privilege and work product as to others? First recognize that hope is not a strategy. Then consider following this road map, all the while realizing it may lead to nowhere:

1. Enter into a confidentiality agreement with the agency.
2. Attempt to provide facts—orally, if possible—in lieu of privileged materials or work product.
3. If you must provide privileged information or work product, limit it to fact work product and provide, in a non-waiver and confidentiality agreement, that the waiver is limited to the agency, there are no third-party beneficiaries, and privilege and work product are preserved as to all other persons.
4. Attempt to obtain an agreement that the agency will not disseminate or disclose the materials to any other person or entity.
5. Define the subject matter of the materials provided to the agency. If the waiver is contoured by a subject matter definition, arguments over subject matter waiver may be avoided. Remember that under Federal Evidence Rule 502(a), voluntary disclosure amounts to a subject matter waiver only if "fairness" requires disclosure of other information within the same subject matter.
6. Define the subject matter up front to avoid Rule 502(a) arguments about what "fairness" requires. In *SEC v. Bank of America*, 2009 U.S. Dist. LEXIS 133901 (S.D.N.Y. Oct. 14, 2009), a subpoena existed giving the bank access to a court proceeding to obtain a Rule 502 protective order, and Bank of America made the most of it. The court approved a protective order that allowed Bank of America to waive attorney-client privilege and work-product protection regarding certain categories of information material to the matter at issue without waiving such privilege and protection regarding other information of interest in related private lawsuits. The court said that the order comports with Rule 502 "which permits such cabined waivers." At a minimum, however, commit the agency to not making a subject matter waiver argument.
7. Attempt to identify a common interest with the agency that may allow for an argument that there has not been any waiver.
8. Provide for a clawback of privileged information or work product inadvertently produced.
9. Evaluate the risk and benefits of disclosure up front. "Game out" potential consequences at the outset of the investigation and as appropriate at various stages of the investigation. Cooperation with an agency may outweigh the risk of losing a selective waiver argument.

Forks in the Common Interest Road

There is a difference between a joint defense group and a common interest (or community of interest) legal group. Historically, a joint defense group means one lawyer represents multiple parties, while a common interest legal group means that, among multiple parties, each party has its own lawyer and the parties collectively have a common legal interest.

In a joint defense setting, waiving the joint-client privilege requires the consent of all joint clients; but in a dispute between co-clients, all communications in the course of joint representation are discoverable.

Ethics opinions in this arena do not necessarily comport with the case law.

In a community of interest or common interest setting, privileged information or work product can be shared with members without waiver. But each member must be represented by a lawyer. Then attorneys can exchange privileged information without waiver. Clients in a common interest group cannot do the sharing directly. And to prevent abuse, the type of information exchanged must relate to the common legal interest.

So far, so good. Unfortunately, there are numerous forks in the common interest road. Consider just these two:

First, must there be litigation to establish a common interest privilege? No, says *Schaeffler v. United States*, 806 F.3d 34, 37, 40–41 (2d Cir. 2015) (citations omitted). And *United States v. BDO Seidman*, LLP, 492 F.3d 806, 816 (7th Cir. 2007), agrees: "The weight of authority favors our conclusion that litigation need not be actual or imminent for communications to be within the common interest doctrine. At least five of our sister circuits have recognized that the threat of litigation is not a prerequisite to the common interest doctrine."

But do not accelerate too quickly. *In re Santa Fe International Corp.*, 272 F.3d 705, 710–11 (5th Cir. 2001), takes a different view.

The privilege is "an obstacle to truth seeking," [and] must "be construed narrowly to effectuate necessary consultation between legal advisers and clients . . . [I]t appears that there must be a palpable threat of litigation at the time of the communication, rather than a mere awareness that one's questionable conduct might some day result in litigation, before communications between one possible future co-defendant and another . . . could qualify for protection."

And the highest court in New York agrees. "New York courts uniformly [have] rejected efforts to expand the common interest doctrine to communications that do not concern pending or reasonably anticipated litigation. . . ." *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 627, 628–29, 57 N.E.3d 30, 37, 38 (N.Y. 2016).

Can the common interest be used to compel disclosure? Yes, according to *Waste Management, Inc. v. International Surplus Lines Insurance* Co., 579 N.E.2d 322, 327–329 (Ill. 1991). This was an action for indemnification from insurers for moneys paid to settle litigation. The insurers sought the insured's defense counsel files. Some documents were withheld based on privilege claims. A log was provided. The insurers moved to compel.

The Illinois Supreme Court held that the privilege was not applicable because of (1) the cooperation clause in the insurance policy and (2) insurers and insureds have a common interest in defeating or settling the claim against the insured. Hence, communications between the insured and its attorneys were not privileged in a dispute between them.

But *Waste Management* has not gained a lot of traction. *Petco Animal Supplies Stores, Inc. v. Insurance Co. of North America*, 2011 U.S. Dist. LEXIS 70748, at *60–62, n.12 (D. Minn. June 10, 2011), explains that the weight of authority rejects *Waste Management*. "The *Waste Mgmt*. holding, that a cooperation clause in an insurance contract destroys all expectation of attorney-client privilege, has been soundly rejected by courts across the country."

Bituminous Casualty Corp. v. Tonka Corp., 140 F.R.D. 381, 386–87 (D. Minn. 1992), is one those rejecters:

> The *Waste Management* opinion extends this doctrine to hold the attorney-client privilege unavailable to an insured even where the insured's attorney never represented the insurance company, and was not even retained by the insurance company to represent the insured. This reasoning is unsound. The rationale which supports the "common interest" exception to the attorney-client privilege simply doesn't apply if the attorney never represented the party seeking the allegedly privileged materials.

Once again, privilege protection is tied to jurisdictional precedents. It's advisable to arm oneself with legal authority. On these roads, cases are better than maps.

Receiving Privileged Documents: The Road to Victory or Defeat?

Model Rule of Professional Conduct 4.4(b) provides: "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."

If an employer is in litigation with a former employee and the employer discovers emails between the former employee and the former employee's counsel on its email servers, does counsel for the employer read the emails, or eschew reading and notify the "sender"?

Another fork. Which path to choose?

The case law on privilege waiver in this arena is very fact-dependent. Ethics opinions in this arena do not necessarily comport with the case law. And state versions of Rule 4.4(b) may be more stringent than the Model Rule version.

In New Hampshire, for example, Rule 4.4(b) provides that a lawyer who receives privileged material and knows it was inadvertently sent "shall not examine" the materials. In New Jersey, a lawyer is also prohibited from reading the document or required to stop reading the document: "A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document if he or she has not begun to do so or stop reading the document, promptly notify the sender and return the document to the sender."

In *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 990 A.2d 650 (N.J. 2010), the New Jersey Supreme Court determined that counsel for an employer violated Rule 4.4 when the lawyer retrieved privileged emails located in the cache folder of temporary Internet files on the hard drive of a former employee's laptop. The court held that counsel should have set aside the "arguably privileged messages once" counsel "realized they were attorney-client communications." Counsel then erred by "failing either to notify its adversary or seek court permission before reading further." The matter was remanded for determination of what sanction to impose, including, potentially, disqualification.

When dealing with this privilege fork, then, the path to take is relatively clear: (1) Do not read the privileged documents; (2) know your jurisdiction's version of Rule 4.4; (3) know your jurisdiction's case law; (4) get legal advice on the issue of waiver if appropriate; and (5) make your arguments to the court before you read.

The safest road is usually the soundest road.

Travel smart. The attorney-client privilege is a delicate evidentiary gift to lawyers. It should be properly packaged, zealously safeguarded, and objectively respected. Lawyers who do so will stay on the path to privilege protection. Lawyers who don't may find that there is no way to turn back. ■