

Law & Ethics of the Attorney – Client Relationship: Privilege and Work Product Developments

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What's at Issue

- I. Which Jurisdiction's Privilege Law Applies to Your Communications?
- II. Work Product and Expert Discovery Rules
- III. Production and Receipt of Inadvertently Produced Documents
- IV. Privilege Status of Employees' Personal Legal Communications
- V. When Is Litigation "Reasonably Anticipated" and Consequences
- VI. Foreign Privilege: *AkzoNobel* Decision

I. Which Jurisdiction's Privilege Law Applies to Your Communications?

- There are differences among the states and the federal common law concerning the scope of the attorney-client privilege
 - Your communications with what internal group?
 - Two-way or one-way only?
 - Derivative privilege (all communications among “privileged persons” protected)
 - Nuances in waiver principles
- Which jurisdiction's privilege law applies may require a choice of law analysis

A Sample Conflicts Analysis: New York vs. Chicago

- *Sterling Fin. Mgmt., L.P. v. UBS PaineWebber, Inc.*, 782 N.E.2d 895 (Ill. App. Ct. 2002)
 - Illinois applies the “control group test”
 - Privilege applies to “top management” and “any employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority”
 - New York had not yet adopted a test, but was predicted to reject the control group test in favor of a broader privilege

Conflicts (continued)

- Restatement (Second), Law of Conflicts of Laws, 'most significant relationship" standard:
 - "will usually be the state where the communication took place, which is the state where an oral interchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing"
 - If a call from a company's NJ headquarters is made to counsel in NY, which state has the most significant contacts?
 - What if the company is a DE corporation?
 - Where is an email?
- Held: Communication admissible and not privileged because it was disseminated to an employee outside the control group

Conflicts (continued)

- NY had the “most significant relationship” with the communication
- But the Restatement provides that “[e]vidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect”
 - State of Sender?
 - State of Recipient?

Variations in Privilege Law

- Federal Common Law: *Upjohn Co. v. United States*, 449 U.S. 383 (1981):
 - Recognizes a two-way, derivative privilege
 - Rejects the “control group test” used to limit corporate privilege
- New York Law:
 - Attorney-Client Privilege Codified, NY CPLR § 4503:

Unless the client waives the privilege...evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose[,] such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof.
 - Recognizes a two-way, derivative privilege

(continued...)

- Pennsylvania Law:

- Attorney-Client Privilege Codified, 42 Pa. C.S. § 5928:

- Confidential communications to attorney. In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client

- Hostile to the “derivative privilege” and arguably narrower than in almost every other jurisdiction

- Recent decisions strictly construe the statutory language and hold that the “attorney-client privilege protects from disclosure *only* those communications *made by a client to his or her attorney*,” see *Nationwide Mut. Ins. Co. v. Fleming*, 2007 Pa. Super. 145 (2007), *aff’d*, 992 A.3d 65 (2010)

- Pennsylvania Supreme Court to address the issue head-on in *Gillard v. AIG*, argued on Sept. 14, 2010.

Avoiding Pitfalls

- Summary:
 - Include some of client communication in your written advice.
 - Resist redaction of the client communication incorporated in the attorney's communication.

II. Developments in the Work Product Doctrine and Expert Discovery Rules

- Imminent Amendments to Federal Rules of Civil Procedure:
 - Drafts of Reports
 - After years of testimony, public comments, and debate, effective December 1, 2010, work product protections will extend to testifying experts' draft expert reports and communications between counsel and testifying experts
 - "Facts and Data Considered"
 - The requirement that reports "disclose the data and other information considered by the expert" has been revised so that reports need only "disclose the facts and data considered by the expert"

Why?

“Experience with [the existing Rule], requiring discovery of draft expert reports and broad disclosure of any communications between an expert and the retaining lawyer, has shown that lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side’s drafts and communications.

“The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts—one for consultation, to do the work and develop the opinions, and one to provide the testimony...

“The practices also include tortuous steps to avoid having the expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report. Instead, the only record is a single, final report.

“These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert’s opinion, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts’ work.”

—*Committee’s Recommendation to the Chief Justice of the Supreme Court of the United States*

Exceptions/Clarifications

- Three Exceptions in the Revisions to the Federal Rules:
 - Communications related to testifying expert's compensation
 - Communications that identify facts or data provided by counsel that the testifying expert considered in forming the opinions to be expressed
 - Communications that identify assumptions counsel provided that the testifying expert relied on in forming the opinions to be expressed
- Witnesses who “are not retained or specially employed” to testify and “are not employees who regularly give expert testimony” do not have to create expert reports, but a “lawyer relying on such a witness must disclose the subject matter and summarize the facts and opinions that the witness is expected to offer”

What the ABA Wanted But Did Not Get

- ABA sought an absolute bar on discovery of communications with experts, similar to the New Jersey rule:
 - N. J. Rule 4:10-2(d)(1): “Discovery of communications between an attorney and any expert retained or specially employed by that attorney occurring before service of an expert’s report is limited to facts and data considered by the expert in rendering the report...all other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process shall be deemed trial preparation materials...”
- In 2006, the NY State Bar Association formally opposed the amendments as “superfluous” insofar as they relate to NY state practice because NY rules already address, i.e. preclude, such discovery.

Similar Rule in New York

- NY CPLR § 3101(d):

(1) Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion....

(2) Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable...and prepared in anticipation of litigation or for trial by or for another party, or by or for that party's representative...may be obtained only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

New York Rule Applied

- Reports not required under CPLR § 3101(d)(1)(i), and should not be discoverable absent a showing of “substantial need” and “undue hardship”

A party is not obligated pursuant to CPLR 3101(d)(1)(i) to disclose his expert’s report; that subdivision provides for the disclosure in reasonable detail of the subject matter on which the expert is expected to testify and a summary of the grounds for the expert’s opinion. The report itself constitutes material prepared for litigation and is not subject to disclosure unless the party seeking disclosure has a substantial need for the report and is unable without undue hardship to obtain its substantial equivalent by other means.

– *Barrowman v. Niagara Mohawk Power Corp.*, 675 N.Y.S.2d 734 (App. Div. 1998)

- The NY State Bar Association highlighted these differences in the CPLR and NY practice in its opposition to the ABA’s suggested revisions

Testifying vs. Consulting Experts in New York

Consulting experts are immune from the discovery addressed in CPLR § 3101(d)(1)(i):

Where...an expert has been retained by an attorney to act as a consultant to assist in analyzing or preparing the case, that expert is generally seen as an adjunct to the lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure under CPLR § 3101, attorney's work product, and the mental impressions exclusion of CPLR § 3101(d)(2) as well

Lisa W. v. Seine W., 862 N.Y.S.2d 809 (2005), Family Court decision

Other Surprising Variations Recently at Issue

- Pennsylvania “bright-line” rule: no work product protection for draft expert reports
- No work product protection for communications between counsel and testifying experts that are relied on by the testifying expert, see *Barrick v. Holy Spirit Hosp.*, 2010 Pa. Super. 170 (September 16, 2010)
 - Rejected position of proposed amendments to the Federal Rules of Civil Procedure
 - “Bright-line” rule applies to all pending and future cases: rejected the use of *in camera* review and redactions of materials

Reducing Risks in Expert Discovery

- Ways to avoid discovery of draft reports and communications between counsel and experts:
 - Stipulate up front that the parties will not seek discovery of draft expert reports or communications between counsel or consulting experts and testifying experts
 - Minimize the paper trail by using WebEx, Microsoft NetMeeting, and other web-based tools to review working drafts of expert reports and provide real-time, oral input
 - Shift collaboration and dialogue to consulting (i.e., non-testifying) experts, who are not subject to discovery

III. Production and Receipt of Inadvertently Produced Documents

- Federal Rule of Civil Procedure 26(b)(5)(B):
 - “If information produced in discovery is subject to a claim of privilege...the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.”
 - Initial burden on the producing party; notification by producing party triggers the receiving party's obligations
 - Procedural rule for federal litigation, not an ethical rule

Ethical Rules: The Model Rule

- Model Rule 4.4(b) (adopted in 2002): “if a lawyer receives a document the lawyer knows or reasonably should know was sent inadvertently, he or she must promptly notify the sender”
 - ABA Standing Committee on Ethics and Professional Responsibility has since withdrawn earlier opinion requiring a recipient to refrain from reviewing documents and to follow the producing party’s instructions
 - Model Rule 4.4(b) does not apply to receipt of documents from an unauthorized source
 - Applies to inadvertently-produced metadata

The New York Ethical Rule

- NY Rule 4.4(b) (CPLR §1200.35): “A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender”
 - Commentators note that the adoption of the Model Rule replaces “divergent” ethics opinions and “brings the long-standing inadvertent-disclosure debate in New York to a close as a matter of ethics”
 - Should, as in most jurisdictions, apply to inadvertently-produced metadata, too

Ethical Rules in Other Jurisdictions

- New York Rule is Similar to Pennsylvania's Rule 4.4(b): "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender"
 - Philadelphia Bar Association Ethics Opinion 94-3:
 - It is not unethical for a lawyer to retain and seek to use, over opposing counsel's objections, a privileged memorandum faxed by opposing counsel, where: (1) the receiving lawyer already had read the document before being notified of the inadvertence of the disclosure; and (2) the privileged nature of the document was not apparent without first reading it
 - There may be some circumstances in which it is preferable (or perhaps more professional) to return a requested document, although a failure to return the document would not constitute an ethical violation
 - Applies to inadvertently-produced metadata

The Client's Role/Lawyer's Role

- Be aware that the receiving lawyer's client may disagree:
 - Rule 4.4(b) Comments in Some Jurisdictions
 - "Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment primarily reserved to the lawyer. See Rules 1.2 and 1.4."

Ethical Rules in Other Jurisdictions

- But D.C. has a different Rule 4.4(b): “A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing”
 - DC Bar Ethics Opinion 256:
 - It is not unethical for a lawyer to retain and use documents containing an opposing party’s “secrets or confidences” where, he had, in good faith, obtained and already reviewed documents not marked confidential before being notified of the inadvertence of the disclosure
 - Companies’ use of designations such as “Confidential” or “Privileged” does not automatically put receiving lawyers on notice
 - Also applies to inadvertently-produced metadata

Ethical Rules in Other Jurisdictions

- Similar to the DC Rule, is New Jersey's Rule 4.4(b):
"A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender"

Effect of Inadvertent Production

- If found to be inadvertent, and the production does not implicate intentional waiver or selective use of privileged information as both a sword and shield, there should be no subject matter waiver
 - Fact-intensive analysis as to the circumstances of production, and there is a risk of waiver with gross negligence
- “No Waiver” Recently adopted in Federal Rule of Evidence 502(b):
 - “When made in a Federal proceeding or to a Federal office or agency, the disclosure need not operate as a waiver...if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following [Rule] 26(b)(5)(B)”
- Use clawback provisions in confidentiality agreements and stipulated protective orders
- Producing party may also have violated applicable rules of professional conduct by failing to safeguard client confidences or by failing to exercise due care

IV. Employees' Personal Legal Communications on Employer's Electronic Media

What happens when an employee communicates with her personal legal counsel about a legal matter from the office or a company-owned device? What if she does not use the company's e-mail system?

Recent Case Law

- Recent developments seem inconsistent:
 - *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (New Jersey Mar. 30, 2010)
 - Employee communicated with counsel on her employer-owned laptop using a personal, password-protected, web-based email service (Yahoo!)
 - After employee sued, the company forensically restored her laptop and reviewed files without returning privileged communications to her counsel
 - The company's policy permitted personal use of computers but did not expressly limit the employees' use of personal, web-based email services or notify employees that the company retained and monitored the content of emails generated or received using personal, web-based email services
 - Held:
 - Privilege attached to emails
 - Company's counsel violated ethical Rule 4.4(b) by reviewing and using privileged emails, even though it was "legitimately attempting to preserve evidence"; it "erred in not setting aside arguably privileged messages...and failing to notify its adversary or seek court permission before reading further"

(continued...)

Stengart (continued...)

- Court forewarns employers that no company policy can strip the privilege from emails accessed on a personal, password-protected email account:
 - “Employers can adopt and enforce lawful policies relating to computer use to protect the assets and productivity of a business, but they have no basis to read the contents of personal, privileged, attorney-client communications. A policy that provided unambiguous notice that an employer could retrieve and read an employee’s attorney-client communications, if accessed on a personal, password-protected e-mail account using the company’s computer system, would not be enforceable.”
- The court relied on *Nat’l Economic Research Assocs., Inc. v. Evans*, 21 Mass. L. Rep. 337 (Mass. Super. Ct. Aug. 3, 2006), which involved a nearly identical set of facts.

Ambiguous Company Policies

- *United States v. Nagle*, 2010 U.S. Dist. Lexis 104711 (M.D. Pa. Sept. 30, 2010)
 - Employee stored privileged, personal chronology on hard drive of his password-protected, company-owned laptop
 - The company reviewed files on the employee's laptop after his termination and came across the privileged chronology, which the CEO sought to use to cross-examine the employee in a criminal action against the CEO
 - The employee sought a court ruling to preclude use of the chronology on the basis of the attorney-client privilege
 - The company had a general computer-usage policy, but the policy did not prohibit employees from using computers for personal purposes and there was no evidence the company notified the employees of any policy and its implementation or that the company actually monitored usage
 - Held: Privilege attached to emails

No Policy Prohibiting Personal Use

- *Convertino v. United States Dept. of Justice*, 674 F. Supp. 2d 97 (D.D.C. Dec. 10, 2009)
 - Assistant United States Attorney used government email to communicate with his personal counsel regarding claims brought by a former United States Attorney against the DOJ arising out of an investigation conducted by the Office of Professional Responsibility and its disclosures to the press
 - The former United States Attorney sought the privileged emails in discovery
 - Although a general policy existed, the DOJ did not prohibit employees from using government email for personal purposes, and there was no evidence the DOJ notified its employees that it would regularly access and save emails
 - Held: Privilege attached to emails

Waiver of Employee's Privilege

- *Alamar Ranch, LLC v. County of Boise*, 2009 U.S. Dist. Lexis 101866 (D. Idaho Nov. 2, 2009)
 - Third-party employee used company email to communicate with counsel
 - Plaintiff sought the employee's emails during third-party discovery directed to the employee's counsel and to the employee's employer
 - Employee's company policy put all employees "on notice that their emails would (1) become [the company's] property, (2) be monitored, stored, accessed and disclosed by [the company], and (3) should not be assumed to be confidential"
 - Held: Privilege was waived as to the employee's emails (the court distinguished the case from one involving personal, web-based email)
 - "It is unreasonable for any employee in this technological age...to believe that her emails, sent directly from her company's e-mail address over its computers, would not be stored by the company and made available for retrieval"
 - To the Same Effect: in *Scott v. Beth Israel Med. Ctr. Inc.*, 847 N.Y.S.2d 436 (N.Y. Sup. Ct. Oct. 17, 2007)

The Basic Analysis

- Courts have essentially adopted the four-factor analysis first discussed in *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005):
 - Does the company maintain a policy banning personal or other objectionable use?
 - Does the company monitor the use of the employee's computer or email?
 - Do third parties have a right to access the computer or email?
 - Did the company notify the employee, or was the employee aware, of the company's monitoring practices?
- Were the emails on a web-based, password protected system?
- Fact-intensive reviews: in New Jersey, *Stengart* is clear as to the use of personal, web-based password-protected email accounts)

V. When Is Litigation “Reasonably Anticipated”: Surprising Consequences

- The work product doctrine generally attaches to work product generated by attorneys or others if prepared in “reasonable anticipation of litigation”
- When is litigation “reasonably anticipated”?
- Increasingly tied to the triggering of other legal rights and duties

Klig v. Deloitte LLP

Vice Chancellor Laster, Delaware Court of Chancery, August 6, 2010:

- “People need to think about reasonably anticipating litigation because a lot of things may trigger off it. Your document preservation obligation triggers off it. Your work product obligation triggers off it....You don’t get to adopt positions of convenience, or...to invoke one date for one of these things and dramatically different dates for [others]”
- Litigants usually want to assert, for work product protection purposes, that litigation was anticipated as early as possible, *but* most do not also issue internal hold memoranda and preserve documents at that early date

Lessons

1. You should be issuing litigation hold memoranda more frequently than you do
2. Failure to issue early litigation holds will reduce work product protection
3. What's worse, asserting that litigation was "reasonably anticipated" *earlier* than your litigation hold lead *to serious spoliation claims*
4. What about notification to insurers of a claim? Does asserting that litigation was "reasonably anticipated" mean you should have put your carrier on notice of a claim or of facts and circumstance that may result in a claim?

VI. The Amazing Disappearing Foreign Attorney-Client Privilege: *AkzoNobel and In-house Counsel*

- Most developed countries recognize some form of the attorney-client privilege
- The privilege in foreign countries, however, is often narrower than in the United States:
 - Communications between in-house counsel and client are often not protected
 - Communication between outside counsel not licensed to practice law in the country and client may not be protected

Communications with In-House Counsel Are Not Privileged in Some Countries

- Albania, Austria, Bulgaria, Croatia, Czech Republic, Estonia, France, Finland, Hungary, Italy, Latvia, Lithuania, Luxembourg, Russia, Serbia, Slovenia, Sweden, Switzerland, Turkey, Ukraine, India, and Mexico.
- Why not?
 - A lawyer is not “independent,” for the purposes of the test for professional privilege, if bound to his or her client by a relationship of employment
 - In some countries, in-house counsel are not eligible to be members of the Bar

AkzoNobel Decision, European Court of Justice, September 14, 2010

- Commission officials seized documents in a raid on Akzo's offices relating to an EU antitrust investigation
- Akzo argued that the legal professional privilege applied to communications between its General Manager and its coordinator for competition law (member of the Dutch bar), protected their disclosure and required return of improperly seized privileged documents of in-house counsel
- Most European bar authorities, and several national governments, filed *amicus* briefs in support of the privilege

Akzo-Nobel (continued...)

- ECJ rejected argument, holding that, at least in EU competition proceedings, communications with in-house counsel are not privileged
- Although technically limited to EU competition investigations, the reasoning could apply in any EU matter

Significant Questions

1. Will a U.S. court recognize a privilege for European in-house lawyers if not recognized abroad?
2. What about U.S.-admitted lawyers working as in-house attorneys in Europe?
3. Status of in-house lawyers barred in multiple jurisdictions?
4. What about in-house counsel's cross-border communications?
5. What about a communication written by an American in-house lawyer in the United States for U.S.-based management that resides in the Company's European office or subsidiary?
6. Consequence of laptop being examined/confiscated by E.U. customs.