PRACTICAL TIPS

Attorney-Client Privilege and Work-Product Doctrine: Maximizing the Privileges

By Craig M. Sandberg

Becoming familiar with the Federal Rules of Civil Procedure regarding discovery will make litigating your federal case less burdensome and will allow you to concentrate more on coming up with a winning strategy. Rules 26–37 set forth the pretrial discovery mechanisms available to litigants in federal civil lawsuits. Those rules broadly define what is discoverable and narrowly define what is privileged subject matter. In particular, Rule 26(b)(1) is broad, permitting discovery of "any matter, not privileged, that is relevant to the claim or defense of any party. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Traditionally, the use of discovery has been applied very liberally. At the same time, however, privileges permit litigants to avoid disclosing certain information. In order to preclude the discovery of otherwise discoverable matter, a party must timely assert a claim of privilege.

One of the paramount duties an attorney owes to his or her client is the duty to maintain the confidentiality of the client's information.[1] This ethical duty is articulated in Rule 1.6(a) of the American Bar Association's *Model Rules of Professional Conduct*, which states that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[2] While the vast majority of jurisdictions adopted the ABA's *Model Rules of Professional Conduct* there are currently four exceptions. Ohio and New York still adhere to the ABA's *Model Code of Professional Responsibility* in which DR 4-101(B)(1) provides that a lawyer shall not knowingly reveal a confidence or secret of his client.[3] California and Maine each have their own unique set of rules governing attorney conduct. The purpose of all these rules is "the centrality of open client and attorney communication to the proper functioning of our adversary system of justice."[4]

In diversity cases, Federal Rule of Evidence 501 makes clear that state law governs privileges asserted under state law.[5] The federal law of privilege governs privileges when the court's jurisdiction is premised on a federal question, even if the witness's testimony is relevant to a pending state-law count that may be controlled by a contrary state law of privilege.[6] Federal privileges are governed by the principles of common law, except as otherwise required by the U.S. Constitution, federal statute, or rules prescribed by the Supreme Court.

The most common privilege is the attorney-client privilege. The most common privilege doctrine is the work-product doctrine. Both of these privileges are addressed below.

Attorney-Client Privilege

The attorney-client privilege is the oldest recognized form of common law privilege.[7] The preeminent evidence scholar and author of a treatise on evidence Professor and Dean John Henry Wigmore of Northwestern University School of Law defined the privilege in the early 1900s as "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived."[8]

The right to assert the privilege belongs to the client and exists for the client's benefit. That privilege may be invoked any

Looking beyond the attorney-client privilege, we find that there are several other types of privileges that exist in the federal courts, including:

- privilege against self-incrimination
- psychotherapist-client privilege
- clergy privilege
- journalist's privilege
- husband-wife privilege
- government privileges such as
  - deliberative process privilege
  - state secret privilege
  - bank examination privilege
  - legislative privilege
  - executive privileges
  - judicial privilege
  - litigation privilege
  - law-enforcement privileges
  - statutory privileges

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time during the attorney-client relationship and may even be invoked after the termination of the relationship. While the privilege exists for the client's benefit, the attorney generally raises the privilege on his or her client's behalf.

Rule 501 generally requires that federal courts apply federal attorney-client privilege law in criminal cases and federal question cases but that state law applies in diversity cases. "The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy."[9]

As stated, the attorney-client privilege is one of the most common privileges asserted. However, a claim of attorney-client privilege is not a blanket claim, but must be made and sustained on a document-by-document or question-by-question basis.[10] When called upon to examine a party's claim of privilege, a court must examine each claimed communication independently and reach its conclusion for each of those communications.[11] It is the burden of the party asserting the privilege to establish its application to a particular communication.

While identifying certain written or electronic communications as being "privileged" or "confidential" may ease later identification, such identification is not required for the attorney-client privilege to attach itself. Conversely, merely branding a communication "confidential" or "privileged" will not shield it in the absence of the existence of a proper claim of privilege.[12] As a result, the test must be whether a communication satisfies all the elements necessary to establish the privilege.

Regarding corporations and the claims they can assert, corporations are equally entitled to assert claims of privilege as individuals.[13] The most common problem a corporation encounters in asserting a claim of privilege is determining who speaks on the corporation's behalf. Across the country, the courts usually apply either the control-group or the subject-matter tests to review claims of privilege. A few courts have adopted a third test, which is really a slight variation on the subject-matter test.

Many other privileges are not generally recognized in federal question cases, but they may be applicable in diversity cases under state law, including:

- parent-child privilege
- physician-patient privilege
- accountant-client privilege
- self-evaluation privilege
- banker-client privilege
- stockbroker-client privilege
- insurer-insured privilege
- ombudsman privilege
- probation officer–parolee privilege
- peer review privilege

Knowing the elements of these three tests will help in deciding whether or not your client can assert a privilege, so let's go over the details.

In *Upjohn*, the Supreme Court rejected the control-group test as frustrating the very purpose of the privilege.

Under the control-group test, which was originally formulated in *Philadelphia v. Westinghouse Electric Corp.*,[14] an employee's statement is not considered a corporate communication unless the employee is in a position to control or even to take a substantial part in a decision about any action that the corporation may take upon the advice of the attorney or if he is an authorized member of a body or group that has that authority. Only such employees qualify as the "client" for attorney-client privilege purposes. In *Upjohn Co. v. United States*, the Supreme Court rejected the control-group test as frustrating the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorneys' advice will also frequently be more significant to noncontrol-group members than to those who officially sanction the advice, and the control-group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy.[15] At least one state still adheres to this test.[16]

"The counterpoint to the control group test is the subject matter test."[17] Under the subject-matter test, "an employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment."[18] The benefit of the subject-matter test is that it provides employees with direct accountability of relevant responsibilities to communicate critical information to corporate counsel.

The third test is referred to as the "*Diversified Industries* test" or the self-described "modified *Harper & Row* test."[19] This test is really only a slight variation on the subject-matter test. In this test, the "attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice, (2) the employee making the communication did so at the direction of his corporate superior, (3)

the superior made the request so that the corporation could secure legal advice, (4) the subject matter of the communication is within the scope of the employee's corporate duties, and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents."[20] The "need to know" element exists so that the communication must not be circulated beyond those persons who actually are required to know that communication's contents. The *Diversified Industries* test was crafted as an alternative to the subject-matter test to concentrate on the reason the attorney was consulted and to prevent the routine routing of information through counsel to prevent later disclosure and to prevent an employee from functioning as merely a fortuitous witness.

A few commentators suggest that there exists a "functional approach" to the attorney-client privilege that "focus[es] on the 'perceived purpose of the privilege.'"[21] One such commentator wrote that the Supreme Court in *Upjohn Co. v. United States* adopted a functional test that "protects a corporation's lawyer's communications with any company employee regarding information the lawyer needs to give the corporation legal advice. To earn this protection, lawyers must identify themselves, describe their communications' purpose and advise the employee to keep the communication confidential."[22]

While the attorney-client privilege can protect a great deal, there remains much that this privilege does not protect. The protection of the privilege extends only to the content of an attorney-client communication and not to the underlying facts. For example, the privilege ordinarily does not protect a client's identity.[23] Furthermore, the privilege does not shield from discovery communications produced or received by an attorney who may be acting in something other than a legal capacity.[24]

Also, keep in mind this warning: the attorney-client privilege is not absolute and can be waived. Waiver of privileges may take any of the following forms: (1) failure to timely object, (2) failure to object with specificity, (3) disclosure, and (4) placing privileged information at issue. If a claim of privilege is not asserted in the manner proscribed by federal rules, statutes, and/or case law, the privilege may be lost. When a party objects to a discovery request with an express claim of a specific privilege, the best protection is to prepare a privilege log. The specific rules for the required content of a privilege a log may vary among the jurisdictions. Generally, the log will detail (1) the type of document, (2) the general subject matter, (3) the date, and (4) information sufficient to identify it for a subpoena, including the author, the addressee and, if not apparent, their relationship to each other.

While the first two methods of waiver are self-explanatory, the others need greater clarification. As stated above, a privilege may be waived by inadvertently producing it. This is a particular issue with insurance policies containing a cooperation clause. Among other things, that clause may require insureds to turn over various kinds of information to their insurers. Some courts have construed the cooperation clause to require the insured to turn over information that is otherwise subject to the attorney-client privilege.[25] There are, however, times that those who share common interests want to coordinate their efforts without destroying the privileged status of their communications with their respective lawyers. Thus, there is within the law of attorney-client privilege the common interest doctrine, which is an exception to the law of waiver. An example of this is when codefendants enter into a joint defense agreement. In the case of a joint defense agreement, to assert the joint defense privilege, a party must establish (1) that the protected communications were made in the course of a joint litigation effort and (2) that the communications were designed to further that effort.[26]

In contrast to the attorney-client privilege, either the attorney or the client may invoke the work-product doctrine.

The privilege is also waived when it is put at issue in a case. Additionally, a number of exceptions exist where the court will essentially hold that the privilege does not exist for the purpose of the proceedings. Primary exceptions to the attorney-client privilege include the following:

- crime-fraud exception—when an attorney is consulted about either an ongoing or prospective crime (as opposed to past wrongdoing)[27]
- testamentary exception—in a dispute over a will between heirs in the process of settling the estate[28]
- malpractice exception—in malpractice claims against an attorney involving competence or compensation (to allow the attorney to defend himself or herself);[29] the purpose of this exception is to prevent a client from invoking the privilege when alleging malpractice, which might prevent the introduction of evidence by the attorney in defense
- bankruptcy exception—the trustee acquires the right to claim or waive privilege; because the trustee steps into the shoes of the debtor with respect to the bankruptcy estate, the rights to invoke the privilege claim passes to the trustee[30]

Work-Product Doctrine

The work-product doctrine, like the attorney-client privilege, derives from common law origin. In contrast to the attorney-client privilege, which may be asserted only by the client, either the attorney or the client may invoke the work-product doctrine. At common law, the privilege was much broader than its modern day counterpart. The federal law of work-product governs in civil actions brought in federal court.[31]

The modern work-product doctrine, which is codified in Federal Rule of Civil Procedure 26(b)(3) and its state counterparts, protects the attorney's effective trial preparation by enabling attorneys to prepare their cases without fear that their

work product will be used against their clients and traces back to the Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), in which the Court sought to foreclose unwarranted inquiries into attorneys' files and mental impressions in the guise of liberal discovery. In *Hickman*, the Court held that an attorney must "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel" and be free to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."[32]

There are two categories of attorney work product: "opinion" work product and "ordinary" work product.[33] Opinion work product refers to an attorney's "mental impressions, conclusions, opinions or legal theories."[34] Some courts hold that the immunity for opinion work product is absolute, but others hold that it may be overcome under rare and extraordinary circumstances.[35] Ordinary work product consists of raw factual information that may include photos, witness statements, memoranda, notes, and so on. To qualify as ordinary work product, the party seeking to assert the privilege must demonstrate that the material was "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative."[36] Since courts typically afford ordinary work product only a qualified immunity, a party wishing to obtain that information must make a showing of substantial need and undue hardship. The discovering party must specifically explain its need for the materials sought.[37] As a practical matter, when courts consider what an undue hardship is for a particular party, that analysis generally goes into the issue of what such discovery will cost the discovering party to obtain the same or comparable information by any other means.

One of the key discovery issues following a claim of work product is whether the item was prepared "in anticipation of litigation."[38] Unlike the attorney-client privilege, information must be prepared in anticipation of litigation for it to qualify as work product. Courts take different approaches to what constitutes "anticipation of litigation." Therefore, practitioners must know whether the local district court requires that litigation be threatened or imminent or merely a substantial probability that litigation will ensue or anything in between.

Also, litigants must be mindful that the work-product protection—like the attorney-client communication privilege—may be lost through an "inadvertent waiver." This typically arises when a party is not careful in maintaining the confidentiality of its privileged documents, or, in litigation, if the privileged documents are produced to the other party through error resulting from a careless production procedure. District courts' analyses of inadvertent waiver ranges from holdings that an inadvertent production is never a waiver to holdings that disclosure is always a waiver to holdings that it is only a waiver if, in the totality of the circumstances, adequate measures were not taken to avoid the disclosure.

Finally, as work-product privilege is ordinarily asserted on the basis of each individual document, it is advisable to maintain a record of each document over which a particular client may assert the privilege exception to discovery or disclosure. Many attorneys have adopted a multitude of mechanisms to prepare themselves for the virtual certainty of having to create a privilege log.

While the attorney-client privilege and work-product privilege offer benefits that can be reaped during litigation, the savvy practitioner must understand the nuances of those privileges. Familiarity with the rules is a great place to start, but because the courts interpret these privileges and their waivers differently, investing time into learning the law will ensure that you can best serve your clients.♦

Endnotes

1. *See generally* Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988 (1986).
2. Model Rules of Prof'l Conduct R. 1.6 (2004).
3. Model Code of Prof'l Responsibility DR 4-101 (1980).
4. United States v. Zolin, 491 U.S. 554, 562, 109 S. Ct. 2619, 2626 (1989).
5. Fed. R. Evid. 501.
6. Lewis v. United States, 517 F.2d 236 (9th Cir. 1975).
7. 8 Wigmore on Evidence § 2290 (McNaughton rev. 1961).
8. Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 319 (7th Cir.), *cert. denied*, 375 U.S. 929, 84 S. Ct. 330 (1963) (internal citations omitted) (citing and quoting 8 Wigmore on Evidence § 2292).
9. *See* Notes of Committee on the Judiciary, House Report No. 93-650 (regarding Fed. R. Evid. 501).
10. United States v. White, 970 F.2d 328, 334 (7th Cir. 1992).
11. Fed. R. Evid. 104.
12. United States v. Segal, 2004 U.S. Dist. LEXIS 6616 (N.D. Ill. 2004).
13. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 105 S. Ct. 1986 (1985).
14. Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962).
15. Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677 (1981) (criticizing the "control group test").
16. Consol. Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 432 N.E.2d (Ill. 1982) (adopting the "control group test").
17. John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. Rev. 443, 452 (1982).
18. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided Court*, 400 U.S. 348, 91 S. Ct. 479 (1971).
19. Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc).
20. *Id. at* 609.
21. Susan J. Stabile, *Sarbanes-Oxley's Rules of Professional Responsibility Viewed Through a Sextonian Lens*, 60 N.Y.U. Ann. Surv. Am. L. 31, 34 (2004) (citing and quoting Sexton, *supra* note 17, at 459).
22. Thomas E. Spahn, *Business Lawyers: Listen Up! Attorney-Client Privilege Isn't Just for Trial Lawyers*, 14 Bus. L. Today 5 (May/June 2005).
23. United States v. BDO Seidman, 337 F.3d 802 (7th Cir. 2003).
24. *Diversified Indus., Inc.*, 572 F.2d at 602.
25. *See, e.g.*, Beloit Liquidating Trust v. Century Indemnity Co., No. 02 C 50037, 2003 U.S. Dist. LEXIS 2082 (N.D. Ill. Feb. 13, 2003); Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991).
26. United States v. Almeida, 341 F.3d 1318 (11th Cir. 2003).
27. Restatement (Third) of the Law Governing Lawyers § 82 (2000).
28. Swidler & Berlin v. United States, 524 U.S. 399, 118 S. Ct. 2081 (1998).
29. EEOC v. Danka Indus., 990 F. Supp. 1138 (E.D. Mo. 1997).
30. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 358 (1986).
31. Fed. R. Civ. P. 26(b)(3).
32. Hickman v. Taylor, 329 U.S. 495, 510–11 (1947).
33. *In re* San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1014 (1st Dist. 1988).
34. Baker v. GMC (*In re* GMC), 209 F.3d 1051, 1054 (8th Cir. 2000).
35. Alexander v. FBI, 192 F.R.D. 12 (D.D.C. 2000).
36. Fed. R. Civ. P. 26(b)(3).
37. *Id.*
38. Fed. Trade Comm'n v. Grolie, Inc., 462 U.S. 19, 103 S. Ct. 2209 (1983).