



PRIVILEGE ISSUES: THEY'RE NOT JUST FOR LITIGATORS ANYMORE

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Scope of Today's Program

- ❖ Attorney Work Product Doctrine
- ❖ Attorney-Client Privilege
- ❖ Common Interest Doctrine
 - ❖ a/k/a “Joint Defense” or “Joint Prosecution”

Attorney Work Product Doctrine

- ❖ Applies to an attorney's written product and mental impressions created in anticipation of litigation. See Fed. R. Civ. P. 26(b)(3).
- ❖ Work product prepared because of the prospect of litigation will be protected, unless opposing party can show substantial need and that the opponent is unable to obtain the substantial equivalent of the work product without undue hardship. Fed. R. Civ. P. 26(b)(3)(A)(ii).

Attorney-Client Privilege

- ❖ Protects **confidential** communications between attorney and client requesting or providing **legal** advice.
- ❖ Does not preclude disclosure of the underlying facts conveyed in the communication.

Common Interest Doctrine

- ❖ Protects communications between or among two or more separately-represented clients that agree to exchange information concerning a common legal interest.
Restatement (Third) of the Law Governing Lawyers, §76.
- ❖ Exception to the general rule that the attorney-client privilege does not apply to confidential communications to, or in the presence of, third parties.
- ❖ To be protected under common interest, information exchanged must be privileged attorney-client communication.

Internal Investigations

- ❖ D.C. Circuit Court recently considered privilege issues not once, but twice, in *In re Kellogg Brown & Root, Inc.*
- ❖ In 2014, court vacated the lower court's order compelling KBR to produce materials from an internal investigation into alleged False Claims Act violations.
- ❖ Appellate court determined that lower court misinterpreted the Supreme Court's decision in *Upjohn v. United States*. *Upjohn* established the scope of the attorney-client privilege and attorney work product protections for corporations conducting internal investigations.
- ❖ Protections apply in the context of an internal investigation, even if:
 - ❖ in-house counsel, without outside lawyers, conducted investigation;
 - ❖ non-attorneys, as agents of attorneys, conducted interviews; and
 - ❖ investigation was conducted for business/regulatory purposes – pursuant to internal compliance program required by statute or regulation – and for the purpose of obtaining or providing legal advice.

Internal Investigations (cont'd)

- ❖ In August, the D.C. Circuit reversed the lower court's decision that KBR waived privilege in more ways than one.
- ❖ The court found that KBR did not waive privilege when 30(b)(6) witness reviewed privileged documents to prepare for deposition.
- ❖ Closer call where lower court ruled that KBR waived privilege by placing certain documents "at issue" based on a footnote in KBR's brief in support of its summary judgment motion. Lower court found that KBR put documents at issue because it was seeking an inference that no wrongdoing had occurred.
 - ❖ Appellate court noted possible alternative inference – wrongdoing was found, but not reported. Plus inference offered by lower court would have been in KBR's favor, when it should have been in plaintiff's favor.
- ❖ Appellate court also took issue with lower court's finding that plaintiff had shown "substantial need" for investigation documents.

Internal Investigations (cont'd)

- ❖ Deputy AG Sally Q. Yates recently provided assurance that DOJ's new policy aimed at individuals accused of corporate wrongdoing would not threaten the protections of the attorney-client relationship.
- ❖ Companies, in the course of their cooperation, will be expected to provide prosecutors with any pertinent facts included in discussions between attorneys and their clients.
 - ❖ "As we all know, legal advice is privileged. Facts are not."
- ❖ Under the new policy, notes or memos produced during and after discussions between attorneys and corporate clients that could be considered legal advice or contributing to legal advice will be protected.

Mergers & Acquisitions

- ❖ A New York appellate court recently held that the common interest doctrine protected pre-merger communications between parties that ultimately consummated the transaction. *Ambac Assurance Corp v Countrywide Home Loans, Inc*, 124 A.D.3d 129 (1st Dep't 2014).
- ❖ Not the universal view, but the right one. Clarified that common interest doctrine can apply even where litigation is not "pending or reasonably anticipated," which many New York courts had previously held was necessary to allow for application of the doctrine.

Mergers & Acquisitions (cont'd)

- ❖ Unless merging parties agree otherwise, generally the privilege belongs to the company so the buyer gets to see the seller's pre-deal privileged communications with outside counsel. See *Great Hill Equity Partners IV LP v. SIG Growth Equity Fund I LLLP*, 80 A.3d 155 (Del. Ch. Nov. 15, 2013) (barring former stockholders of acquired company from asserting privilege over merger-related communications with company's legal counsel that buyer discovered post-closing).
- ❖ Could be an issue if there is a fraud claim and there were communications with counsel about whether something should be disclosed.

Enforceability of Patents

- ❖ Common interest doctrine also applied to pre-acquisition communications discussing the validity and enforceability of patents because the parties shared a common interest in avoiding litigation over patents to be acquired in the merger.

Tax Opinions

- ❖ Court of Appeals for the Second Circuit recently ruled that a German auto parts supplier did not waive attorney-client privilege by sharing outside consultant's tax advice with consortium of banks that had underwritten a loan to finance a proposed acquisition by the Schaeffler Group. *Schaeffler et al. v. United States of America*, 2015 U.S. App. LEXIS 19617 (2d Cir. Nov. 10, 2015).
- ❖ The appellate court unanimously rejected the lower court's finding that parties waived privilege with respect to certain documents sought by the IRS in connection to the acquisition, including a legal analysis of the tax consequences of a corporate restructuring undertaken by Schaeffler.
- ❖ “[T]he fact that the Consortium stood to lose a lot of money (along with appellants) if appellants’ tax arguments failed is not support for the position that no common legal interest existed. To the contrary, it was the interest in avoiding the losses that established a common legal interest.” *Schaeffler*, 2015 U.S. App. LEXIS 19617 at *18.

Counseling on Business Matters

- ❖ Attorneys reviewed and edited a consultant's analysis of risks and concerns of entering a new business arrangement. Analysis was provided to the board to help in its decision whether to agree to the arrangement. Privilege did not apply because the analysis was created to aid in making a business decision, and would have been undertaken even if no attorneys were involved. *Visa U.S.A., Inc. v. First Data Corp.*, 2004 WL 1878209 (N.D. Cal. Aug. 23, 2004).
- ❖ Court held that privilege did not protect materials relating to a corporate restructuring processes where documents sought input from in-house counsel and senior management because no clear **legal** advice was sought. *Craig v. Rite Aid Corp.*, 2012 WL 426275 (M.D. Pa. Feb. 9, 2012).

Drafts

- ❖ Courts are inconsistent in whether privilege applies to drafts.
- ❖ As threshold matter, privilege is available only for drafts where legal advice – not business advice – is provided and/or requested.
- ❖ Even if draft involves legal advice, the party asserting the privilege has the burden of establishing that it was intended to remain confidential – may be difficult where final is intended to be shared with third party.

Drafts (cont'd)

- ❖ For drafts of documents that will be submitted in their final form to a third party (e.g., SEC, IRS):
 - ❖ Privilege has been found not to apply on the grounds that there was “subject matter” waiver – i.e., disclosure of the final version, waived privilege as to the substance of the overall document.
 - ❖ Contrary argument is that the client must have intended draft to remain confidential, as evidenced by draft not being shared with third party.

Practical Guidance

- ❖ Be mindful of what privilege(s) may be available
 - ❖ Application varies from state to state; be aware of the differences
- ❖ If you believe privilege should apply, assert it
 - ❖ If you believe confidential communication that requests or provides legal advice should be privileged, clearly identify it as such
- ❖ Inform clients of privilege(s)
 - ❖ Merely sharing a communication with an attorney does not make it privileged, and protection may be lost when shared with third parties
- ❖ Separate legal advice from business advice
- ❖ Share privileged information only with those who need it