What is the attorney-client privilege and why is it important?

Most of us know that communication with our lawyer is confidential. Few of us know why this is so. We put the question to American lawyers John Cox and Erin Weesner-McKinley. They explain how the attorney-client privilege operates in the United States, in criminal as well as civil cases. More importantly, they explain how easily the privilege can be lost. In our next Insight we will put the same questions to English lawyers to compare and contrast the approach to privileged communications in these two key jurisdictions.

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The attorney-client privilege protects communications (oral or written) between an attorney and his/her client made for the purpose of providing legal services and is a fundamental and enduring cornerstone of American law. The privilege originated in early English law and was later adopted by the American legal system. The United States Supreme Court states that the privilege exists to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy ... depends on the lawyer's being fully informed by the client." *See Upjohn Co. v. United States* , 449 U.S. 383 (1981). While the privilege is not contained in the United States Constitution, its federal common law origins are acknowledged in the Federal Rules of Evidence (FRE) (see FRE Sections 501-502) and it is a bedrock legal doctrine recognized by all federal and state courts in the United States. As long as communications are protected by the privilege they are completely protected from disclosure to any other party.

The attorney-client privilege is perhaps all the more important in the criminal context where full and frank discussions with counsel are essential to ensure that an individual can be defended against prosecution or incarceration. The attorney-client privilege is different than a defendant's right against self-incrimination under the US Constitution's Fifth Amendment which provides that "no person ... shall be compelled in any criminal case to be a witness against himself." In other words, an individual can never be compelled to provide statements to the government or otherwise that could later be used to prosecute him. It is important to note that business entities have no Fifth Amendment rights even though their individual employees do. See *Braswell v. United* States, 487 U.S. 99, 104-110 (1988).

How does the attorney-client privilege work?

No matter how the attorney-client privilege is articulated, there are four basic elements necessary to establish its existence:

(1) a communication;

(2) made between privileged persons;

(3) in confidence;

(4) for the purpose of seeking, obtaining or providing legal assistance to the client.

See *Teleglobe Communs. Corp. v. BCE, Inc. (In re Teleglobe Communs. Corp.)* , 493 F. 3d 345, 359 (2007).

Federal courts often define the privilege to apply only if

(1) the asserted holder of the privilege is or sought to become a client;

(2) the person to whom the communication was made

(a) is a member of the bar of a court, or his subordinate, and

(b) in connection with this communication is acting as a lawyer;

(3) the communication relates to a fact of which the attorney was informed

(a) by his client

(b) without the presence of strangers

(c) for the purpose of securing primarily either

(i) an opinion on law, or

(ii) legal services, or

(iii) assistance in some legal proceeding, and not

(d) for the purpose of committing a crime or tort; and

(4) the privilege has been (a) claimed and (b) not waived by the client.

See *NLRB v. Interbake Foods, LLC* , 637 F.3d 492, 501-502 (4th Cir. 2011) (*citing United States v. United Shoe Mach. Corp.* , 89 F. Supp. 357, 358-59 (D. Mass. 1950)).

The privilege is held by the client and can only be waived by the client.

In addition to protecting communications, the legal privilege extends to legal opinions (work product) formed by counsel during representations of the client even if the opinions have not been communicated to the client. However, the privilege does not attach to facts relayed to counsel such that a client could protect bad evidence simply by providing it to counsel. The communication itself would be privileged but the client could still be compelled to testify regarding the facts within the communication (absent a Fifth Amendment right to refuse). See *Bofi Fed. Bank v. Erhart* , 2016 U.S. Dist. LEXIS 103576, 11-12 (S.D. Cal. Aug., 2016)(*citing Upjohn Co. v. United States* , 449 U.S. 383, 395-396 (1981)).

The US Supreme Court has long held that the attorney-client privilege applies to both individual and corporate clients. See *Gardner v. Major Auto. Cos., 2014 U.S. Dist. LEXIS 44877 (E.D.N.Y. Mar. 31, 2014) (citing United States v. Louisville Nashville R. Co., 236 U.S. 318 (1915))*. However, complications in the application of the privilege arise when the client is a business entity.

Business entities must consider how far the privilege extends or risk losing it altogether. In *Upjohn* , the Supreme Court held that communications made to in-house counsel by employees during an internal investigation of illegal conduct, made at the direction of management for the purposes of rendering legal advice, are protected by the attorney-client privilege. The Court expressly rejected a previously used “control group” test that would only have only extended the privilege to communications between in-house counsel and senior management level employees. In arriving at its conclusion the Court reasoned that lower level employees will often be involved in conduct creating serious liability for the company and will possess information crucial for counsel to understand in order to provide proper legal advice. Id. at 391. The privilege also generally applies to communications between counsel and former employees. See *In re Coordinated Pre-Trial Proceedings* , 658 F.2d 1355, 1361 n. 7 (9th Cir. 1981); *Admiral Ins. Co. v. United States Dist. Ct.* , 881 F.2d 1486, 1493 (9th Cir. 1989); *In re Allen* , 106 F.3d 582, 605-607 (4th Cir. 1997); *Sandra T.E. v. S. Berwyn Sch. Dist* . 100, 600, 621 n. 4 F.3d 612 (7th Cir. 2009).

The *Upjohn* holding is not as broad as it may seem. The Court only extended the privilege in that case based upon specific facts including:

(1) in-house counsel's investigation was directed by management in order to assist him in rendering legal advice on compliance issues;

(2) counsel made clear the purposes of his investigation and the fact that he represented the company when he spoke with or otherwise communicated with the employees; and

(3) counsel made clear that their communications were “highly confidential.”

See *Upjohn* , 449 U.S. at 387.

In the absence of these protections the privilege is lost. In this age of electronic communication it is very easy for a privileged email be to widely distributed to individuals not involved in an investigation or legal dispute at which point privilege is waived.

The attorney-client privilege can attach to reports prepared by third party consultants when they are made at the request of an attorney and the purpose of the report is to provide information to the attorney for purposes of providing legal advice to the client. See *Lluberes v. Uncommon Prods., LLC, 663 F. 3d 6, 24 (1st Cir. 2011)* ; *United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).*

A claim of attorney-client privilege for communications with consultants is much stronger when the consultant is retained directly by counsel and counsel directs the activities of the consultant. *See Kovel, 296 F.2d at 922.*

How can the attorney-client privilege be waived?

Generally, providing otherwise privileged information to any other third party will waive the privilege. “The courts will grant no greater protection to those who assert

thereprQwilestgeCbommtheicrcotiiornpsreIcnttesironatiotniosnwalrIninct.” See, 450 F. 3d 1179, 1185 (10th Cir. 2006). Where the client or counsel do not take adequate steps to protect and preserve the confidentiality of privileged communications, the privilege may be waived.

An implied waiver of the attorney-client privilege occurs where a company attempts to both assert and withhold privileged communications. See *, e.g., Chevron Corp. v. Pennzoil Co.* , 974 F.2d 1156 (9th Cir. 1992). For example, if a company discloses a privileged investigation report prepared by counsel to assist in its defense or seek to mitigate harm the attorney-client privilege may be waived not only as to the report, but also all underlying documents, communications and information that formed the basis of the report. See *, e.g., Westinghouse Elec. Corp. v. Republic of Philippines* , 951 F.2d 1414 (3d Cir. 1991). In other words, a company cannot pick and choose helpful information to use as the sword and at the same time claim privilege as a shield against bad facts contained in the same privileged communication.

A common battleground in the attorney-client privilege arena of litigation in the modern era is electronic communications. Almost every claim in litigation these days involves emails, text messages or some other form of electronic communication. In the US we refer to this as “electronic discovery” or “E-discovery.” Typical business disputes may involve the review and production of thousands of emails sometimes dating back many years. It is not unusual to have cases involving millions of electronic files. The sheer volume of this data means that it is literally impossible to review each and every email to determine if it is privileged. Counsel must rely upon electronic discovery review tools that search key words and types of files. However, there is always the possibility that privileged documents will be inadvertently produced.

The courts have acknowledged this fact and amended the rules of procedure to allow a party to “clawback” inadvertently produced privileged documents and prevent waiver of the privilege. See the Federal Rule of Civil Procedure 26(b)(5)(B); Federal Rule of Evidence 502(d). To protect against waiver in this context a party to a litigation must do several things. First, they must be diligent in their efforts to detect inadvertently disclosed privileged documents. Second, they must immediately communicate with opposing counsel to request that the documents not be reviewed and that they be destroyed. Third, parties should enter into written agreements governing electronic discovery at the outset of litigation and file the agreement with the Court.

The consequences of a waiver of privilege, even if inadvertent, can be devastating. If a party contends that a document was privileged but the opposing side contests that determination, the Court must rule on the issue. If the Court determines that the privilege was waived the producing party has no recourse until a final judgment is entered and the case can be appealed. See *Mohawk Industries Inc. v. Carpenter* , 130 S. Ct. 599 (2009).

Tips on maintaining and protecting the attorney-client privilege.

Below are helpful tips for maintaining and preserving the attorney-client privilege:

• Have counsel retain consultants, experts and surveyors directly with written instructions that their work product (analysis and reports) be provided directly to counsel.

• Copy counsel on all communications in which legal advice is sought or in which confidential communications (like conclusions or assessments) are transmitted.

• Be thoughtful about who is included on communications with counsel and only include those necessary to the representation. This is particularly important when counsel is retained by the shipowner directly in a criminal matter which is not covered by the P&I club. Including the club on communications in this instance could waive the privilege.

• Never forward communications received from counsel without first communicating with counsel about the effects of doing so. This also applies to communications on which counsel is copied.

• Store communications and documents protected by the attorney-client privilege in secure areas or as password-protected files. Do not permit the information to be generally available on the server.

• Employee witnesses interviewed by counsel should receive an "Upjohn warning" explaining the application of the attorney-client privilege under the circumstances. The purpose of the warning is to make clear that the attorney represents the company and its interests (not the employee) and explain that the attorney-client relationship exists only between the attorney and the company and can therefore only be waived by the company.

• Communicate with counsel regarding the effect of providing documents and communications protected by the attorney client privilege in the course and scope of a government investigation or in response to subpoenas and/or the use of such documents as an affirmative defense.

• In cases involving electronic discovery, counsel should ensure that an appropriate electronic discovery agreement (with a clawback provision) is entered into and filed with the court before engaging in discovery.

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