

Legal Privilege & Professional Secrecy 2019

Contributing editors

Matthew T Reinhard and Dawn E Murphy-Johnson



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent

adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

Published by

Law Business Research Ltd

87 Lancaster Road

London, W11 1QQ, UK

Tel: +44 20 3780 4147

Fax: +44 20 7229 6910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between January and March 2019. Be advised that this is a developing area.

© Law Business Research Ltd 2019

No photocopying without a CLA licence.

First published 2016

Fourth edition

ISBN 978-1-83862-098-1

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Legal Privilege & Professional Secrecy 2019

Contributing editors**Matthew T Reinhard and Dawn E Murphy-Johnson**

Miller & Chevalier Chartered

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Legal Privilege & Professional Secrecy*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on France and Russia.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew T Reinhard and Dawn E Murphy-Johnson of Miller & Chevalier Chartered, for their continued assistance with this volume.



London

March 2019

Reproduced with permission from Law Business Research Ltd

This article was first published in May 2019

For further information please contact editorial@gettingthedealthrough.com

Contents

Global overview	3	Netherlands	45
Matthew T Reinhard and Dawn E Murphy-Johnson Miller & Chevalier Chartered		Enide Perez and Floris Dudok van Heel Sjöcrona Van Stigt Advocaten	
Argentina	4	Portugal	52
Maximiliano D'Auro Beccar Varela		Manuel de Abreu Castelo Branco and Raquel Galvão Silva Linklaters LLP	
Brazil	11	Russia	58
Fernanda Ferrer Haddad and Ricardo Quass Duarte Trench, Rossi e Watanabe Advogados		Magomed Gasanov and Alexander Mikhailov ALRUD Law Firm	
England & Wales	16	Spain	62
Michelle de Kluyver, Amy Russell and Jennifer Burton Addleshaw Goddard LLP		Santiago Nadal Santiago Nadal Abogados Joan Oset Joan Oset Advocats	
France	25	Switzerland	66
Aurélia Grignon Soulez Larivière & Associés		Dominique Müller and Miguel Oural Lenz & Staehelin	
India	32	Ukraine	72
Aditya Bhat and Priyanka Shetty AZB & Partners		Sergiy Grebenyuk, Orest Stasiuk and Olha Yurchenko Asters	
Japan	39	United States	78
Tsuyoshi Suzuki, Rin Moriguchi and Mariko Sumiyoshi Momo-o, Matsuo & Namba		Matthew T Reinhard, Dawn E Murphy-Johnson and Sarah A Dowd Miller & Chevalier Chartered	

United States

Matthew T Reinhard, Dawn E Murphy-Johnson and Sarah A Dowd

Miller & Chevalier Chartered

DOMESTIC LEGISLATION

Attorney–client communications doctrine

- 1 Identify and describe your jurisdiction's laws, regulations, professional rules and doctrines that protect communications between an attorney and a client from disclosure.

In the United States, the protection governing attorney–client communications is called the 'attorney–client privilege'. Attorney–client privilege, which seeks to protect the confidentiality of the attorney–client relationship, first developed as a common law privilege to prevent compelled disclosure of certain attorney–client communications during litigation. Although attorney–client privilege is a rule of evidence, it applies beyond issues of admissibility in court and reaches other matters, including pretrial discovery, subpoenas and internal investigations. Even though attorney–client privilege is not constitutionally protected, it is an absolute privilege that other public policy concerns cannot overcome.

In the federal courts, protections for attorney–client communications are embodied in part in Federal Rule of Civil Procedure 26, Federal Rule of Criminal Procedure 16 and Federal Rules of Evidence 501 and 502.

Federal Rule of Civil Procedure 26 governs attorney–client privilege in the context of civil discovery. Rule 26(b)(1) allows civil pretrial discovery for non-privileged materials. Rule 26(b)(5) provides procedures for claiming that materials are privileged and are, therefore, not discoverable.

Federal Rule of Criminal Procedure 16 governs discovery in federal criminal cases. Rule 16(b)(2) protects from disclosure any statements made by the defendant to his or her attorney.

Federal Rule of Evidence 501 provides that attorney–client privilege applies in federal court proceedings. Federal Rule of Evidence 502 limits the scope of waiver of attorney–client privilege when a disclosure is made in a federal proceeding, to a federal office or agency, in state proceedings or when the disclosure is inadvertent.

This chapter focuses largely on federal law, which applies in the federal courts. However, practitioners must be aware that each of the 50 US states has developed its own rules governing attorney–client privilege, and those rules apply in state courts. State privilege rules are often very similar to the federal rules, but there can be important distinctions, depending on the circumstances.

In-house and outside counsel

- 2 Describe any relevant differences in your jurisdiction between the status of private practitioners and in-house counsel, in terms of protections for attorney–client communications.

Attorney–client privilege can apply equally to communications to and from in-house lawyers, just as it can apply to communications to and from private practitioners. Generally speaking, for privilege to attach to

communications to or from in-house counsel, the in-house lawyer must be engaged in providing legal advice, not business advice. The limits on privilege for in-house attorneys' communications are discussed further in question 12.

Work-product doctrine

- 3 Identify and describe your jurisdiction's laws, regulations, professional rules and doctrines that provide protection from disclosure of tangible material created in anticipation of litigation.

Protections for work product first arose under federal common law in a decision by the United States Supreme Court, *Hickman v Taylor*, 329 US 495 (1947). Today, the federal protections for work product are governed by Federal Rule of Civil Procedure 26, Federal Rule of Criminal Procedure 16 and Federal Rule of Evidence 502.

Federal Rule of Civil Procedure 26(b)(3) provides that a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative.

However, such materials may be discovered if 'they are otherwise discoverable' and 'the [requesting] party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means'.

In addition, Rule 26(b)(3) requires courts to 'protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation'.

Pursuant to Federal Rule of Criminal Procedure 16(b)(2), a defendant in a criminal case is not required to produce to the government any 'reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defence'.

And, with certain exceptions, the government is not required to produce to the defendant any 'reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case', or any 'statements made by prospective government witnesses except as provided in 18 USC § 3500 [relating to the production of non-testimonial statements by government witnesses in criminal proceedings]'.

Federal Rule of Evidence 502 limits the scope of waiver of work product protections when a disclosure is made in a federal proceeding, to a federal office or agency, in state proceedings or when the disclosure is inadvertent.

Again, practitioners must be aware that each of the 50 US states has developed its own rules governing protections for work product, and those rules apply in state courts. State work product protections are often very similar to the federal rules, but there can be important distinctions, depending on the circumstances.

Recent case law

4 Identify and summarise recent landmark decisions involving attorney-client communications and work product.

Upjohn v United States, 449 US 383 (1981) is the seminal United States Supreme Court case on attorney-client privilege with regard to communications between counsel and corporations to individual employees. The Court held that attorney-client privilege protected certain communications made between in-house counsel and non-management employees during an internal investigation.

In *Hickman v Taylor*, the Supreme Court established the work product doctrine for federal courts. Because attorneys play an essential role in the adversarial system, the Court held that an attorney's mental processes must be protected from discovery during litigation.

More recently, a federal appellate court in *In re Kellogg Brown & Root Inc*, 756 F3d 754 (DC Circuit 2014) extensively reviewed the attorney-client privilege and the work product doctrine in the context of corporate internal investigations, and overturned a lower court's ruling that the investigation materials in question were not privileged. First, the Court of Appeals held that for attorney-client privilege to attach, outside counsel does not have to conduct the internal investigation; such investigations may be led by in-house counsel. Second, privilege still attaches when non-attorney agents conduct an internal investigation at the direction of counsel. Third, for privilege to attach to an investigator's interview of a company employee, if other indicia of privilege are present, then the investigator does not have to inform the employee that the conversation is privileged. The Court of Appeals also held that even when a company has a regulatory duty to investigate, attorney-client privilege can still attach. With regard to work product, the Court held that documents are protected from disclosure when they incorporate an investigator's mental impressions.

ATTORNEY-CLIENT COMMUNICATIONS

Elements

5 Describe the elements necessary to confer protection over attorney-client communications.

Attorney-client privilege attaches to a communication between privileged persons, made in confidence, for the purpose of seeking or obtaining legal advice.

Generally, the communication must occur between a client and lawyer who have established an attorney-client relationship – or between a potential client and a lawyer, when the potential client seeks to establish an attorney-client relationship for the purpose of obtaining legal advice.

The primary purpose of a communication must be to seek or provide legal advice, though an implicit request for legal advice is generally sufficient to meet the standard. Attorney-client privilege does not apply to business advice. Distinguishing between legal advice and business advice is a fact-intensive, case-by-case inquiry. Advice on the legal or tax consequences of a business decision is legal advice; however, a communication in which an attorney evaluates a business decision is not privileged. So, for example, simply copying in-house counsel on an email regarding a business matter does not render the communication privileged unless it is clear that the communication was sent to counsel so that he or she could then provide legal advice.

The privilege protects against disclosure of the particular facts a client shares with his or her attorney, the legal questions the client asks his or her lawyer, the legal advice given by the lawyer to his or her client and the fact-based questions the lawyer asks his or her client.

In most jurisdictions, a lawyer-to-client communication is protected, but it must relate to a prior confidential communication the client made

to the lawyer. Legal advice is protected by attorney-client privilege only when the advice reflects a confidential client-to-lawyer communication. The privilege also protects internal lawyer memoranda memorialising privileged communications. Lawyer-to-lawyer conversations among lawyers in the same firm and representing the same client are also considered privileged conversations.

Because attorney-client privilege is intended to protect the expectation of confidentiality, it will not attach to a communication if a non-agent third party is present.

Exclusions

6 Describe any settings in which the protections for attorney-client communications are not recognised.

Attorney-client communications made during the course of an internal investigation can be privileged, but only when the communication meets the usual standard for privilege – a confidential communication for the purpose of seeking or giving legal advice. Privilege does not attach simply because an attorney is conducting the investigation; privilege attaches only when the attorney conducts the investigation as a legal adviser for the purpose of providing legal advice.

Companies often use outside counsel to conduct internal investigations to ensure that privilege attaches to attorney-client communications made during the investigation. But privilege can also attach when in-house counsel directs an internal investigation for the purpose of providing legal advice. In-house counsel can direct other, non-legal, departments to conduct the investigation, and privilege will attach so long as the fruits of the investigation are for legal advice. If in-house counsel directs another department to conduct the investigation, then that department becomes the lawyer's agent and can meet the standard for a privileged communication.

Who holds the protection

7 In your jurisdiction, do the protections for attorney-client communications belong to the client, or is secrecy a duty incumbent on the attorney?

Privilege belongs to the client, not the lawyer. A lawyer's duty of confidentiality is a separate ethical duty rather than an evidentiary rule. A client can demand that an attorney waive privilege on his or her behalf.

Underlying facts in the communication

8 To what extent are the facts communicated between an attorney and a client protected, as opposed to the attorney-client communication itself?

Facts are not privileged. However, a client cannot be compelled to disclose which particular facts were relayed to his or her lawyer, or which facts the lawyer asked him or her to relay for the purpose of providing or seeking legal advice.

Agents

9 In what circumstances do communications with agents of the attorney or agents of the client fall within the scope of the protections for attorney-client communications?

As a general rule, communications with a client's agents fall outside the scope of privilege. In contrast, communications with a lawyer's agents fall inside the scope of privilege.

A client's agent is only within the scope of privilege, such that it will attach to the confidential communication, when the agent is necessary to the communication between the client and lawyer. Some jurisdictions use a 'reasonableness' standard for evaluating whether the client-agent

was necessary. Examples of client-agents found to be within the scope of privilege include translators, co-counsel, independent auditors and consultants. However, the issue is analysed on a case-by-case basis, so an accountant might be within the scope of privilege for one client but not for another. Courts have concluded that friends, former personal lawyers and union representatives are generally outside the scope of privilege. Family members and spouses can fall within privilege depending on the circumstances.

Lawyers' agents can be within the scope of privilege, such that it attaches to a confidential communication with the agent. Courts have regularly held that members of a lawyer's regular staff, such as secretaries and paralegals, are within the scope of privilege. But not all lawyers' agents are within the scope. When a lawyer uses irregular staff members, privilege may be destroyed unless the lawyer takes care to ensure privilege attaches (for example, by engaging the person directly, in writing, with a contract stating that the services are for the purpose of providing legal advice).

Corporations claiming protection

10 | Can a corporation avail itself of the protections for attorney-client communications? Who controls the protections on behalf of the corporation?

Yes, a corporation can avail itself of the protections for attorney-client communications. Both in-house counsel and outside counsel represent the incorporeal institution, not its employees or directors. Within the corporate structure, separate entities can retain their own counsel. The lawyer represents the corporate entity that hired him or her – such as a board, an audit committee or a pension plan.

Generally, only high-level executives can waive the company's privilege. That said, some courts allow any employee who has access to the privileged communication to waive privilege. In addition, the company's lawyer can waive privilege when authorised.

Communications between employees and outside counsel

11 | Do the protections for attorney-client communications extend to communications between employees and outside counsel?

Yes, communications between an employee and outside counsel can be privileged – as long as the communication is for the purpose of providing legal advice and the employee is discussing matters related to his or her employment.

To assess whether the employee-lawyer communication is privileged, federal courts and many states use the 'functionality test' articulated in *Upjohn v United States*. *Upjohn* requires the court to evaluate the role the employee played in the conduct at issue and the facts the employee possessed.

The minority rule, used by a handful of states, allows only the company's 'control group' to engage in privileged communications with company counsel. The control group consists of high-ranking employees who are responsible for corporate decision-making.

Communications between employees and in-house counsel

12 | Do the protections for attorney-client communications extend to communications between employees and in-house counsel?

Yes, communications between employees and in-house counsel can be privileged as long as they meet either the *Upjohn* test or the 'control group' test, depending on the jurisdiction.

Communications between company counsel and ex-employees

13 | To what degree do the protections for attorney-client communications extend to communications between counsel for the company and former employees?

Attorney-client privilege extends to a communication between company counsel and a former employee as long as the communication meets the *Upjohn* standard or the control group test. The communication between the former employee and company counsel must also be for the purpose of providing legal advice, rather than business advice.

However, a communication between company counsel and a former employee is not privileged when company counsel provides information to the former employee regarding developments that occurred after the employee left the company.

Who may waive protection

14 | Who may waive the protections for attorney-client communications?

The client and the client's successors in interest may waive their own privilege. When an attorney jointly represents more than one client, a client can waive privilege only as to his or her own communications with the lawyer. For any communication involving other jointly represented clients, all the clients must unanimously consent to any waiver of privilege. In the context of a joint defence or common interest agreement, the power to waive privilege is treated largely the same way as joint representations.

A lawyer, as an authorised agent, can also waive privilege on his or her client's behalf – but only with the client's authorisation.

Actions constituting waiver

15 | What actions constitute waiver of the protections for attorney-client communications?

Two kinds of waiver can occur: express and implied. An express waiver occurs through any intentional disclosure of a privileged communication, and can occur despite a confidentiality agreement or disclaimer. Express waivers must also be voluntary; a thief cannot destroy privilege by disseminating stolen privileged documents.

An implied waiver occurs without an actual disclosure of a communication. When a party relies on the fact of a privileged communication or affirmatively raises an issue that implicates privileged communications, an implied waiver occurs.

Either type of waiver – whether express or implied – can trigger a subject-matter waiver. A subject-matter waiver requires disclosure of additional privileged communications regarding the same subject matter. This prevents litigants from selectively waiving privilege for materials; all materials concerning that subject must be disclosed if privilege is waived for any single related communication.

Accidental disclosure

16 | Does accidental disclosure of attorney-client privileged materials waive the privilege?

Inadvertent disclosure in civil pretrial discovery is governed by Federal Rule of Civil Procedure 26(b)(5)(B), which provides that if privileged information is inadvertently disclosed during discovery, then the party claiming privilege has an opportunity to prevent waiver. First, the party claiming privilege must notify the party that received the information. Then, the recipient of the privileged information must promptly return, sequester or destroy the information. The recipient cannot make use of the information until the claim of privilege is resolved.

Under Federal Rule of Evidence 502, inadvertent disclosure in a federal proceeding or to a federal agency does not constitute waiver if:

- the disclosure was inadvertent;
- the privilege holder took reasonable steps to prevent disclosure; and
- the privilege holder promptly took reasonable steps to rectify the error.

In this context, 'inadvertent' means 'accidental'. The federal courts have generally adopted the same standard in non-litigation proceedings.

Recently, parties have begun entering into confidentiality agreements with 'clawback' provisions, which provide that an inadvertent disclosure does not constitute waiver when certain remedial steps are taken. Courts generally require parties to abide by the terms of such agreements.

Sharing communications among employees

- 17 | Can attorney-client communications be shared among employees of an entity, without waiving the protections? How?

Attorney-client communications can be shared among employees of an entity without waiving privilege only when the employees who receive the information are those who 'need to know' a lawyer's legal advice. When the lawyer's communication is shared beyond those who need to know, attorney-client privilege is destroyed. Generally, courts define those who need to know to mean agents of the organisation who reasonably need to know the contents of the communication to act on behalf of the organisation. However, courts have noted that company-wide dissemination of advice may implicate business advice as opposed to legal advice, which means that attorney-client privilege did not attach to the communication in the first instance.

Exceptions

- 18 | Describe your jurisdiction's main exceptions to the protections for attorney-client communications.

The US legal system recognises two primary exceptions to the attorney-client privilege: the crime-fraud exception and the fiduciary exception.

Attorney-client privilege does not extend to communications between an attorney and client where the client uses the legal advice to later engage in unlawful conduct. This is known as the 'crime-fraud' exception. Some courts disagree on the types of fraud to which the exception applies; some courts limit the exception to common-law fraud and other courts extend the exception to all frauds. Courts also disagree about whether the exception applies to other forms of misconduct such as intentional breach of fiduciary duty and intentional torts.

Under the fiduciary exception, a fiduciary cannot claim the protections of attorney-client privilege when a third-party beneficiary seeks fiduciary-attorney communications concerning legal advice sought by the fiduciary in exercising the fiduciary's duties and responsibilities. This is because the attorney owes the beneficiary a duty of full disclosure when he or she gives advice to a client acting as a fiduciary for that beneficiary.

While technically not an exception, when a litigant uses 'advice of counsel' as an affirmative defence, he or she cannot then withhold from discovery his or her lawyer's communications concerning that advice.

Litigation proceedings overriding the protection

- 19 | Can the protections for attorney-client communications be overcome by any criminal or civil proceedings where waiver has not otherwise occurred?

No, it is an absolute privilege.

Recognition of foreign protection

- 20 | In what circumstances are foreign protections for attorney-client communications recognised in your jurisdiction?

Traditional choice-of-law principles generally apply. First, the court determines whether the potentially applicable US privilege rule conflicts with the potentially applicable foreign rule. If the rules do not conflict, then the court applies the consistent standard. If they do conflict, then the courts generally apply a 'touch base' test, which assesses whether the attorney-client communication sufficiently touched base with the United States to justify applying the US privilege rule. If the communication fails the touch base test, the foreign rule applies – unless other choice-of-law principles foreclose its application.

Best practice to maintain protection

- 21 | Describe the best practices in your jurisdiction that aim to ensure that protections for attorney-client communications are maintained.

Lawyers should carefully protect confidential communications. When a communication loses its confidentiality, through negligence or purposeful conduct, it can lose its privilege. Lawyers should use secure computer networks for client communications and lawyers should also refrain from engaging in confidential communications in public.

Additionally, simply copying a lawyer on a written communication does not make the communication privileged. Moreover, doing so can cause lengthy battles concerning whether the communication is privileged and can unintentionally trigger a subject-matter waiver.

Lawyers should also carefully label documents and provide privilege logs when producing documents to an adversary or to a government agency. Under Federal Rule of Civil Procedure 26(b)(5)(A)(ii), failure to provide a detailed and accurate privilege log to 'enable other parties to assess the claim' of attorney-client privilege can result in waiver.

With respect to document production, clawback agreements allow parties to disclose privileged materials without waiving privilege under certain circumstances. Courts usually give effect to such agreements.

In the context of internal investigations, company lawyers often give an 'Upjohn warning' to company employees before interviewing each employee. The warning explains that the lawyer represents the company rather than the individual employee, that the communication is privileged and that the privilege belongs to the company. Providing such a warning helps preserve privilege by notifying the employee that the conversation is confidential.

WORK PRODUCT

Elements

- 22 | Describe the elements necessary to confer protection over work product.

Under Federal Rule of Civil Procedure 26(b)(3), work product protection applies to two categories of documents: tangible work product and mental impression work product. Tangible work product includes documents and other tangible items prepared in anticipation of litigation or for trial by or for another party or that party's representative. A lawyer need not be involved to create tangible work product. For example, a client's own notes on strategy in preparation for trial could constitute work product.

Mental impression work product includes materials that incorporate an attorney's mental impressions, conclusions, opinions or legal theories. For example, an attorney's 'working file' where he or she organises otherwise non-privileged materials in a specific order may constitute mental impression work product.

Under Federal Rule of Criminal Procedure 16(b)(2), a defendant in a criminal case is not required to produce to the government any 'reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defence'. And, with certain exceptions, the government is not required to produce to the defendant any 'reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case' or any 'statements made by prospective government witnesses except as provided in 18 USC § 3500'.

Exclusions

23 | Describe any settings in which the protections for work product are not recognised.

The work product doctrine applies only to materials created in 'anticipation of litigation'. This definition varies widely by jurisdiction. While Federal Rule of Criminal Procedure 16 and Federal Rule of Civil Procedure 26 apply in federal criminal and civil proceedings, respectively, the work product doctrine stretches beyond those contexts. As a doctrine first established at common law, it can apply to grand jury proceedings, internal investigations, arbitration, pretrial proceedings, trials and post-trial proceedings.

Who holds the protection

24 | Who holds the protections for work product?

The client or the lawyer may invoke the protections. The lawyer has independent standing over his or her work product.

Types of work product

25 | Is greater protection given to certain types of work product?

Yes, an attorney's mental impressions are distinct from ordinary work product. Work product incorporating mental impressions – such as drafts of motions and briefs, assessments of litigation, evaluations of options and attorneys' notes – is granted greater protection, bordering on the absolute. To overcome the work product protection for mental impression work product, a litigant must meet a higher standard of need than for ordinary work product.

In-house counsel work product

26 | Is work product created by, or at the direction of, in-house counsel protected?

Yes, where materials created by or at the direction of in-house counsel otherwise meet the criteria of 'work product', those materials are protected.

Work product of agents

27 | In what circumstances do materials created by others, at the direction of an attorney or at the direction of a client, fall within the scope of the protections for work product?

Materials created by others are protected if the materials were created at the direction of the client or lawyer and if the materials otherwise meet the criteria for work product. If the materials were created by a paid outside agent, it is irrelevant who compensates the outside agent.

Third parties overcoming the protection

28 | Can a third party overcome the protections for work product? How?

Yes, a third party can overcome the protections of the work product doctrine, because it is not an absolute privilege. Different tests apply to tangible work product and to mental impression work product.

Under Federal Rule of Civil Procedure 26(b)(3)(A), a litigant can overcome the tangible work product protection by demonstrating that he or she has a substantial need for the work product material and has hardship in obtaining the work product material by other means. For example, courts commonly find a litigant has met the standard of substantial need when a witness has become unavailable after the adverse party had an opportunity to interview the witness. If work product is likely going to be disclosed at trial, a litigant can also meet the substantial need standard in pretrial discovery. A litigant must articulate his or her need with sufficient specificity.

For mental impression work product, the protection is nearly absolute. Federal Rule of Civil Procedure 26(b)(3) uses absolute terms, stating that if the court requires discovery of tangible work product, 'it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representatives concerning the litigation.'

Courts generally examine the extent of the attorney's mental processes in the work product, the effect the disclosure would have and the necessity of disclosure to a fair result.

In addition, if work product is a key issue in litigation, such as when an advice of counsel defence is asserted, then the work product loses its protected status.

Who may waive work-product protection

29 | Who may waive the protections for work product?

Either the client or the attorney can waive work product protections. Where a client and his or her attorney have divergent interests on waiver, some courts have found that a client cannot waive work product protection for materials incorporating his or her attorney's mental impressions.

Actions constituting waiver

30 | What actions constitute waiver of the protections for work product?

Voluntary disclosure of work product to an adversary waives work product protection.

Federal Rule of Civil Procedure 26(b)(5)(B) allows a party to claim work product protections for materials that were inadvertently disclosed. Also, see question 16 for further information regarding inadvertent disclosure in a federal proceeding or to a federal agency.

Client access to attorney files

31 | May clients demand their attorney's files relating to their representation? Does that waive the protections for work product?

Clients have a right to access their files, without waiving work product protections. Neither the federal courts nor the state courts recognise attorney liens over client files.

An attorney cannot assert work product protection over materials when his or her interests and a former client's interests have become adversarial. However, some courts have allowed an attorney to maintain protections for mental impression work product under such circumstances.

Accidental disclosure of work product

32 | Does accidental disclosure of work-product protected materials waive the protection?

Inadvertent disclosure in civil pretrial discovery is governed by Federal Rule of Civil Procedure 26(b)(5)(B). If information produced in discovery is protected by the work product doctrine, then the party claiming protection must notify the party that received the information. The recipient must then promptly return, sequester or destroy the protected information and cannot use the information until the claim is resolved.

See question 16 for further information regarding inadvertent disclosure in a federal proceeding or to a federal agency.

Exceptions

33 | Describe your jurisdiction's main exceptions to the protections for work product.

Materials related to expert witnesses who plan to testify at trial are discoverable. Under Federal Rule of Civil Procedure 26(b), a party can discover, without a showing of need, the identity of experts who will be called at trial, the facts and opinions on which the experts will testify and the grounds for the experts' opinions. If a party does not plan to have its expert testify at trial, then the expert's work product must be disclosed only to the extent it would otherwise be discoverable.

If an attorney's representation of his or her client is at issue in the case, then the attorney's work product is not protected.

If materials are prepared in furtherance of a crime, then the work product is not protected. This is the work product version of the crime-fraud exception to attorney-client privilege.

Any surveillance tape a party makes of an adversary is not protected. Surveillance tapes are commonly used in personal injury cases to demonstrate the extent of a plaintiff's injuries (or the lack thereof).

Litigation proceedings overriding the protections

34 | Can the protections for work product be overcome by any criminal or civil proceedings where waiver has not otherwise occurred?

Yes, when a client files a claim of inadequate assistance of counsel or malpractice, which makes an attorney's representation of his or her client a central issue, the work product protection will not apply. In addition, if work product is created in furtherance of a crime, then it is not protected.

Recognition of foreign protection

35 | In what circumstances are foreign protections for work product recognised in your jurisdiction?

This issue has not been explored by many courts. It is likely that, as a preliminary step, the court will determine whether the work product protection in question constitutes a procedural rule or a substantive one. When work product protections are considered to constitute a procedural rule, such as under the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure, then the court will apply its own rule. However, if a court were to find the work product protections to be a substantive rule, then the court would apply its jurisdiction's conflict-of-law analysis.

OTHER ISSUES

Who determines what is protected

36 | Who determines whether attorney-client communications or work product are protected from disclosure?

The body responsible for the final adjudication of the underlying substantive dispute evaluates whether the protections of attorney-client privilege or the work product doctrine apply – usually a judge or arbitrator.

Common interest

37 | Can attorney-client communications or work product be shared among clients with a common interest who are represented by separate attorneys, without waiving the protections? How may the protections be preserved or waived?

Yes, parties with a common legal interest or joint defence can agree to share privileged communications and work product. Attorney-client confidentiality attaches within the group, with the assumption that all communications are still made in confidence. Work product shared within the group likewise remains protected. Some courts have upheld the protections of attorney-client privilege and the work product doctrine even when a group of common-interest defendants did not explicitly enter into an express agreement.

Parties often execute a 'common interest' or 'joint defence' agreement stipulating which particular protected materials will be shared and agreeing that the materials must be kept confidential. If parties to a common interest agreement become adverse to each other, the materials remain protected from disclosure to third parties. However, if parties to a common interest agreement engage in litigation against each other and the litigation implicates joint defence materials, then the privilege and work product protections can be overcome.

Some courts hold that if one member of a common interest group unilaterally discloses a privileged communication or work product, then the protections of attorney-client privilege and of the work product doctrine are waived for all purposes for the particular communication or materials disclosed. Other courts have held that one member's disclosure of a privileged communication or work product only effects a waiver for that party.

Limited waiver

38 | Can attorney-client communications or work product be disclosed to government authorities without waiving the protections? How?

Generally, courts have found that disclosing privileged communications to the federal government, such as to the US Securities and Exchange Commission or to the US Equal Employment Opportunity Commission, waives attorney-client privilege and work product protection. Federal Rule of Evidence 502, however, can limit the scope of a waiver.

In the context of voluntary disclosure to the government, the scope of the waiver is governed by Federal Rule of Evidence 502. When a party discloses information in a federal proceeding or to a federal agency, the disclosure waives protection for undisclosed material only if:

- the waiver is intentional;
- the disclosed and undisclosed communications concern the same subject matter; and
- in fairness they should be considered together.

If the government compels disclosure of work product then work product protections are not necessarily waived. However, when a party

voluntarily discloses work product to the government (for example, to prevent prosecution), work product protections are waived.

Some courts have found that if a party has entered into a confidentiality agreement with the government, then disclosing otherwise protected communications and materials does not constitute a waiver.

In addition, some statutes and regulations allow for disclosure to the government without waiving privilege, such as the regulations governing suspicious activity reports for financial institutions.

Other privileges or protections

39 | Are there other recognised privileges or protections in your jurisdiction that permit attorneys and clients to maintain the confidentiality of communications or work product?

No other policies apply specifically to attorney–client communications or to work product. Other specific privileges often apply in litigation, however.

The spousal privilege, for example, protects from compelled disclosure communications between married spouses.

Additionally, the deliberative process privilege protects government documents from compelled disclosure when the documents reflect the government’s decision-making process for formulating policies. The deliberative process privilege includes advisory opinions, recommendations and deliberations that are part of the decision-making process. However, post-decisional memoranda are not protected, including post-decision memoranda justifying a past decision.

Finally, pursuant to the presidential communications privilege, the President of the United States may refuse to produce materials to Congress or in judicial proceedings when the materials reflect confidential presidential deliberations. To fall within the scope of the privilege, the documents must reflect presidential decision-making and they must be authored or solicited and received by the President or his or her immediate advisers in the White House.

UPDATE AND TRENDS

Current developments

40 | Are there any other current developments or emerging trends that should be noted?

Courts in the United States have long required that attorneys substantiate their assertions of attorney–client privilege and work product, and they routinely reject conclusory statements that attorney–client communications are protected from discovery. These requirements are more frequently subject to heightened scrutiny in the context of in-house representation, because the party claiming privilege must demonstrate that the communication’s purpose was in furtherance of providing legal advice to the company, rather than as business advice.

In one recent case arising in federal court (*LDP New York, LLC v Adidas America, Inc*, Case No. 15-cv-6360 (EDNY 7 December 2018)), Adidas argued that it was not required to produce, in discovery, a handful of documents. Adidas, however, failed to provide any ‘explanation, evidentiary showing, or legal analysis’ for its claim that the documents in question were protected by the attorney–client privilege. By failing to meaningfully engage on the issue, Adidas waived its opportunity to respond. Regardless, as the proponent of the privilege, it was the company’s burden to establish that the attorney–client privilege and the work product doctrine applied. To that end, the court noted the ‘glaring absence of any supporting affidavits’ concerning the attorney–client relationship and the context for the disputed documents, and concluded that Adidas could not discharge its burden ‘with conclusory or ipse dixit assertions’.

Miller & Chevalier

Matthew T Reinhard

mreinhard@milchev.com

Dawn E Murphy-Johnson

dmurphyjohnson@milchev.com

Sarah A Dowd

sdowd@milchev.com

900 16th Street NW
Washington, DC 20006
United States
Tel: +1 202 626 5800
Fax: +1 202 626 5801
www.millerchevalier.com

In other words, the proponent of the privilege must provide the court with enough information to enable the court to determine privilege. This often requires providing an affidavit that sets out precise facts to support the claim of privilege over the communications at issue; when the attorneys involved in the communications are in-house, such a sworn statement becomes even more important given an in-house attorney’s dual roles.

Other titles available in this series

Acquisition Finance	Distribution & Agency	Islamic Finance & Markets	Real Estate M&A
Advertising & Marketing	Domains & Domain Names	Joint Ventures	Renewable Energy
Agribusiness	Dominance	Labour & Employment	Restructuring & Insolvency
Air Transport	e-Commerce	Legal Privilege & Professional Secrecy	Right of Publicity
Anti-Corruption Regulation	Electricity Regulation	Licensing	Risk & Compliance Management
Anti-Money Laundering	Energy Disputes	Life Sciences	Securities Finance
Appeals	Enforcement of Foreign Judgments	Litigation Funding	Securities Litigation
Arbitration	Environment & Climate Regulation	Loans & Secured Financing	Shareholder Activism & Engagement
Art Law	Equity Derivatives	M&A Litigation	Ship Finance
Asset Recovery	Executive Compensation & Employee Benefits	Mediation	Shipbuilding
Automotive	Financial Services Compliance	Merger Control	Shipping
Aviation Finance & Leasing	Financial Services Litigation	Mining	Sovereign Immunity
Aviation Liability	Fintech	Oil Regulation	Sports Law
Banking Regulation	Foreign Investment Review	Patents	State Aid
Cartel Regulation	Franchise	Pensions & Retirement Plans	Structured Finance & Securitisation
Class Actions	Fund Management	Pharmaceutical Antitrust	Tax Controversy
Cloud Computing	Gaming	Ports & Terminals	Tax on Inbound Investment
Commercial Contracts	Gas Regulation	Private Antitrust Litigation	Technology M&A
Competition Compliance	Government Investigations	Private Banking & Wealth Management	Telecoms & Media
Complex Commercial Litigation	Government Relations	Private Client	Trade & Customs
Construction	Healthcare Enforcement & Litigation	Private Equity	Trademarks
Copyright	High-Yield Debt	Private M&A	Transfer Pricing
Corporate Governance	Initial Public Offerings	Product Liability	Vertical Agreements
Corporate Immigration	Insurance & Reinsurance	Product Recall	
Corporate Reorganisations	Insurance Litigation	Project Finance	
Cybersecurity	Intellectual Property & Antitrust	Public M&A	
Data Protection & Privacy	Investment Treaty Arbitration	Public Procurement	
Debt Capital Markets		Public-Private Partnerships	
Defence & Security		Rail Transport	
Procurement		Real Estate	
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)