

Legal Privilege & Professional Secrecy

Contributing editors

Matthew T Reinhard and Dawn E Murphy-Johnson



2016

GETTING THE
DEAL THROUGH 

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Legal Privilege & Professional Secrecy 2016

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Global overview

Matthew T Reinhard and Dawn E Murphy-Johnson

Miller & Chevalier Chartered

As each day draws to a close, the world seems just a little bit smaller. In this increasingly global landscape, legal disputes are becoming more intensely international in scope. A quick glance at the front page of any major city's leading newspaper reveals as much. The criminal authorities of the United States and Switzerland are investigating corruption among officials of the International Federation of Association Football (FIFA), who hail from Honduras, Venezuela and Costa Rica, among other places. Brazil's investigation into an alleged price-fixing, bribery and political kickback scheme involving the country's national oil company, Petrobras, reaches far beyond Brazil's borders to multinational corporations and individuals around the globe, and related civil cases are being filed by plaintiffs in multiple jurisdictions. In addition, a decades-long environmental pollution case brought by a group of Ecuadorian plaintiffs against Chevron involved legal proceedings in Ecuador, the United States, The Hague and Canada, with the threat of more to come.

As governmental authorities continue to investigate cases like these, and as private plaintiffs continue to bring civil claims against alleged wrongdoers, corporate internal investigations will also increase. How to preserve the protections for attorney-client communications in cross-border internal investigations is already a hot topic, and it will almost certainly become hotter. In 2014, for example, a US federal court of appeals issued a decision in a civil *qui tam* case brought by a plaintiff who alleged that Kellogg Brown & Root (KBR), a US-based defence contractor, defrauded the US government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq. KBR had previously conducted an internal investigation, and during pretrial discovery the plaintiff wanted to obtain documents relating to that investigation. The court held that because KBR conducted its investigation under the auspices of its in-house legal department, acting in its legal capacity, the investigation materials were protected from disclosure – even though the investigation was purportedly mandated by regulation rather than simply an exercise of company discretion.

Working behind the scenes in all of these matters are the lawyers who represent the people and companies caught up in each scandal. And in some cases, such as the *Chevron* matter in Ecuador, the lawyers – and their failure to adequately protect applicable privileges – can turn out to be 'the story' themselves. As these cases become more commonplace, the intricacies of legal privilege and professional secrecy across multiple jurisdictions will be ever more important to attorneys engaged in cross-border matters. However, the value of staying 'in the know' is not limited to lawyers at large firms who work on headline-grabbing cases. Indeed, it is just as important for attorneys working on day-to-day international matters or corporate counsel guiding their companies into new international markets to appreciate the intricacies of local privilege and professional secrecy protections.

The constitutions, laws and regulations of many nations prohibit attorneys from revealing their clients' secrets, but the country-specific nuances are legion. This book intends to bring to light some of the major differences between jurisdictions so that practitioners can best shape their approaches to communicating with their clients, effectively gather and use evidence when their work takes them outside their home country, and identify local counsel well-versed in the contours of local protections for attorney-client communications and attorney work product.

The recent release of the 'Panama Papers' provides a good example of not only a worldwide scandal, but also the complications that could arise concerning attorney-client privilege and professional secrecy. After a Panamanian law firm's database was allegedly hacked, a group of journalists was provided with more than 11 million files – nearly 40 years' worth of documents relating to the firm's representation of thousands of clients, many of whom likely expected that their work with the firm would be protected from disclosure to the outside world and that their identities would forever remain confidential. As a result of the leak, individuals from Japan to Pakistan to Ukraine to Iceland might find themselves ensnared in multiple national investigations looking for evidence of tax evasion, money laundering, corruption and more.

Meanwhile, another recent leak of documents revealed billions of dollars of government contracts around the world, allegedly awarded as a result of payments of bribes and kickbacks. Among those implicated are companies in Australia, France, Italy, Japan, Singapore, South Korea, Spain, the United Kingdom and the United States. The contracts purportedly came about as a result of the work of a Monaco-based company called Unaoil, which allegedly hired 'fixers' to bribe individuals in Iran, Iraq, Kuwait, Libya and Syria. It has been reported that the US Department of Justice, the US Federal Bureau of Investigation, the UK National Crime Agency and the Australian Federal Police are investigating Unaoil and some of its clients, in what could be the largest joint international probe of all time.

In both cases, journalists have reviewed the leaked documents, but prosecutors conducting their own investigations face many hurdles presented by ethical and legal obligations concerning protections for attorney-client communications and professional secrecy. Questions abound. Has the dissemination of the documents destroyed the protections bestowed by whatever legal doctrines might have otherwise shielded them from disclosure? Does it matter that the documents were purportedly purloined and not voluntarily disclosed to the public? Does the answer change, given the possibility that at least some subset of the documents might relate to completely lawful transactions? What procedures should be put in place to preserve the legitimate invocation of attorney-client privilege or professional secrecy laws before investigators start sifting through the materials? In the case of the Panama Papers, because the files undoubtedly contain communications between clients from Panama and elsewhere around the world, which country's professional secrecy laws even apply? Or do the laws of more than one jurisdiction apply? Will these questions be answered in different ways in different jurisdictions? We can offer an answer to that last question – a resounding 'yes' – as the guidance contained in this book makes clear.

The authors of this book are at the top of their game in terms of knowing the ins and outs of the protections embodied in legal privilege and professional secrecy in their home countries. Each country-specific chapter, written by well-qualified attorneys, brings important local insights into the issues of the day. That said, this guide is just that: a guide. Complex questions should always be addressed by competent and diligent local counsel.

United States

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Domestic legislation

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.' The 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 the 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 the attorney-client privilege is not constitutionally protected, it is an absolute privilege that other public policy concerns cannot overcome.

In the federal courts, the 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 the 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.

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.

The 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 the 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.

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 the 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 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.

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 communication between counsel to corporations and individual employees. The Court held that the attorney-client privilege protected certain communications made between in-house counsel and non-management employees during an internal investigation.

In *Hickman v Taylor*, 329 US 495 (1947), 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's decision in *In re Kellogg Brown & Root Inc*, 756 F3d 754 (DC Cir 2014), extensively reviewed the attorney-client privilege and the work product doctrine in the context of corporate internal investigations. The Court of Appeals overturned a lower court's ruling that the investigation materials in question were not privileged on three grounds. First, the court held that for the 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 the 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, the attorney-client privilege can still attach. With regards to work product, the Court held that documents are protected from disclosure when they incorporate an investigator's mental impressions.

Attorney-client communications

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

The 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. The 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 the 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 the 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.

6 Describe any limitations on the contexts in which the protections for attorney-client communications are 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. The privilege does not attach simply because an attorney is conducting the investigation; the 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 the 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 as 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.

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

The 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 the privilege on his or her behalf.

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.

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 the 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 or without the 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, the 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.

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 the privilege. In addition, the company's lawyer can waive privilege when authorised.

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*, 449 US 383 (1981). *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.

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.

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

The 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.

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

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 of 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 a client’s authorisation.

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 an express waiver 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.

16 Under what circumstances is an inadvertent disclosure of an attorney–client communication excused?

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.

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,’ the 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 the attorney–client privilege did not attach to the communication in the first instance.

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.

The 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 the 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.

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.

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.

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

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’.

23 Describe any limitations on the contexts in which the protections for work product are 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.

24 Who may invoke 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.

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.

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

Yes, where the work product of in-house counsel otherwise meets the criteria of ‘work product’, it is protected.

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 constitute work product when the materials otherwise meet the criteria for work product. In addition, the materials must have been created at the behest of the client or lawyer. If the materials

were created by a paid outside agent, it is irrelevant who compensates the outside agent.

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 it loses its protected status.

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.

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.

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 when his or her interests are adversarial to a former client’s interests.

32 Can work product be disclosed to government authorities, without waiving the relevant protections? How?

Yes, if the government compels disclosure of work product to a governmental agency 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.

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.

Update and trends

Federal Rule of Civil Procedure 26(b)(5)(B) provides that if privileged information is inadvertently disclosed during discovery, then the party claiming privilege has an opportunity to prevent waiver. Federal Rule of Evidence 502 further provides that the inadvertent disclosure of information protected by the attorney–client privilege or work product doctrine does not operate as a waiver under certain conditions. Parties are increasingly entering into ‘clawback’ agreements that augment these rules. The increased use of these agreements, which are largely uncontroversial, has nonetheless also led to an increase in litigation about the terms of such agreements.

Another area to watch is litigation over the extent to which the attorney–client privilege and work product doctrine apply to corporate internal investigations. In *In re Kellogg Brown & Root Inc*, 756 F3d 754 (DC Cir 2014), one federal appellate court extensively reviewed the attorney–client privilege and the work product doctrine in the context of an internal investigation, and concluded that both protections applied to the materials at issue in that case. In the coming years, however, federal and state courts will likely face additional complex questions concerning the extent to which the protections apply to witness interviews conducted outside the United States, the ability of corporate shareholders and members of boards of directors to demand protected investigative information, the manner in which Federal Rule of Evidence 502 applies to post-investigation disclosures to governmental entities, and other intricacies inherent in corporate internal investigations.

33 Under what circumstances is an inadvertent disclosure of work product excused?

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.

34 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 is only discoverable 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 the 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).

35 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, where an attorney’s representation of his or her client is 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.

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

This issue has not been explored by many courts, but the usual conflict-of-law analysis likely applies. 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 the forum’s 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.

Common issues**37 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 the attorney–client privilege or the work product doctrine apply – usually a judge or arbitrator.

38 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 the 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

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the litigation implicates joint defence materials, 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 the 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.

39 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 (see question 32).

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

40 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 immediate advisers in the White House.

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