

# Legal Privilege & Professional Secrecy 2021

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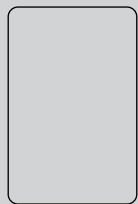
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# Legal Privilege & Professional Secrecy 2021

**Contributing editors**

**Matthew T Reinhard and Dawn E Murphy-Johnson**  
Miller & Chevalier Chartered

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

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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.

Lexology 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.



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# United States

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## 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 the disclosure of 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 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, 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.

### 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, 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'.

Also, 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'.

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 section 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 concerning 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*, 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.

In *re Kellogg Brown & Root Inc*, 756 F3d 754 (DC Cir 2014) a federal court 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. Concerning work-product, the Court held that documents are protected from disclosure when they incorporate an investigator's mental impressions.

Early this year, in *Wengui v Clark Hill, PLC, et al*, No. 19-3195 (JEB), 2021 WL 106417, (DDC, 12 January 2021), the court ordered that the defendant law firm (Clark Hill) produce a report prepared by an outside consultant into a cyber-attack on Clark Hill. While the report was originally commissioned by a separate law firm engaged to guide Clark Hill through litigation following the cyber-attack, the court rejected the defendant's claim that the investigation report was protected from production in civil litigation where a former client of the firm sought damages from for harm suffered as a result of the attack. The court ruled that Clark Hill failed to show the report would not have been prepared 'in the ordinary course of business irrespective of litigation' and that 'discovering how [a cyber] breach occurred [is] a necessary business function.' *Id* at \*2 (citations omitted). In a nod to the notion that facts, not words, govern the assertion of privilege and work-product, the court rejected the idea that Clark Hill could 'paper' the arrangement by using its own outside counsel (which had been retained 'in anticipation of litigation') to engage the third party investigator and held that the arrangement 'appears to [have been] designed to help shield material from disclosures and is not sufficient in itself to provide work-product protection.' *Id* at \*4 (citations omitted).

## 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, although 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 (eg, 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. Also, 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 limit the exception to common-law fraud and others 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 advises 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 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.

Concerning 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 section 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 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.

Also, 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.

## 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.

## 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. Also, 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 agree 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 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 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 (eg, 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.

Also, 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, under 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

### Proposals and developments

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

The Criminal Division of the US Department of Justice (DOJ) hired a new team of attorneys to review materials obtained through searches and seizures conducted by federal law enforcement officials and to subsequently sift out documents believed to be protected by the attorney-client privilege or by other doctrines before providing the remaining non-privileged materials to prosecutors assigned to the case. The work of this full-time 'filter team' would fall under the auspices of the DOJ's Fraud Section, which has jurisdiction over federal domestic white-collar crime and certain international bribery and financial fraud offences. The creation of a dedicated privilege team is a shift from the DOJ's prior practice, which was to assign prosecutors uninvolved in the underlying investigation, on an ad hoc basis, to review seized materials, and indicates that defence counsel are raising issues more frequently in the federal courts concerning privilege generally and the government's handling of potentially privileged information in particular.

Indeed, the United States Court of Appeals for the Fourth Circuit concluded that the government's use of a filter team in a particular criminal investigation 'contravene[d] foundational principles that protect attorney-client relationships'. In that case, *In Re: Search Warrant Issued June 13, 2019*, 942 F 3d 159 (4th Cir 2019), the government was investigating the conduct of a lawyer and one of the lawyer's clients. Under a warrant, the government searched the lawyer's offices and seized all of the lawyer's email correspondence, which included emails relating to the client under investigation, as well as emails relating to numerous other clients, some of whom DOJ was investigating in other unrelated matters. Very few (less than 1 per cent) of the seized records were responsive to the search warrant, meaning that the filter team received and reviewed communications concerning other ongoing federal investigations of other clients. Although the filter team did not include any personnel involved in the underlying investigation of the lawyer and the targeted client, that was not necessarily the case for investigations in which other clients might have been targets. As the Fourth Circuit put it, in these circumstances the authorisation by a federal magistrate judge to allow the filter team to conduct the privilege review disregarded the attorney-client privilege, the work-product doctrine, and the Sixth Amendment to the United States Constitution, and it created an appearance that the 'government's fox [was] left in charge of guarding the [l]aw [f]irm's henhouse'.

Perhaps recognising the risk of the Fourth Circuit's decision, in July 2020, the DOJ sent a recommendation to all US Attorneys' describing 'best practices' in reviewing potentially privileged material obtained through searches and seizures. Before this best-practices recommendation, each US Attorneys' office set its own policy or considered such issues on an ad hoc basis. The July recommendations instruct prosecutors to submit their privilege review plans and protocols to the magistrate judge from whom they seek a search warrant. The hope is that such judicial review and approval of the plan before execution of the warrant may help insulate the privilege review from later challenge. Moreover, at the end of 2020, the Deputy Attorney General directed that his office be informed of and provided an opportunity to provide input regarding any plan to execute a search warrant of a lawyer.

While corporations regularly rely on their internal policies and procedures prohibiting the use of company computers for personal business, a recent federal district court case in the Eastern District of New York cast doubt on whether such policies alone are sufficient to find that personal material on an employee's computer could not, by definition, be privileged. In *United States v Inniss*, No. 18-cr-134 (KAM),

2019 US Dist, LEXIS 221119 (EDNY, 20 December 2019), the DOJ sought a ruling that a chronology of events written by a company employee at the direction of her personal lawyer was not privileged because she wrote and saved the document on her work-issued computer. The DOJ also argued that, regardless, she waived any claim of privilege when she turned over her computer hardware to her employer, which later conducted a forensic review of the device, located the privileged document, and produced the document to the DOJ. Ultimately, the district court rejected the DOJ's arguments, finding that the document was indeed privileged and that there had been no intentional waiver of the attorney-client privilege by returning the computer to the employer. Addressing the effect of boilerplate corporate policies prohibiting the use of company-owned computers for personal business on claims of privilege, the court cautioned 'against an undue focus on the specific wording of any company's computer policy, insofar as this factor assumes that a typical employee actually reads the entirety of his or her employer's computer policy and analyses the specific language used therein'. Comparing such policies to contracts of adhesion, the court concluded that, depending on the facts, 'it may be inappropriate for courts to discount an employee's claim that he or she had a reasonable expectation of confidentiality in documents or files stored on an employer's device, simply because the Code of Conduct evinces the employer's intent to monitor its employees' computers.' *Id* at \*51 n 7.

As of February 2021, there are two notable ongoing criminal cases with active litigation regarding whether individual defendants can assert attorney-client privilege protection over advice given to their employer.

In *US v Cole, et al*, No. 1:20-cr-00424, (ND Ohio filed 12 August 2020), several individuals and the founder of an adoption agency (European Adoption Consultants (EAC)) with, among other crimes, violating the Foreign Corrupt Practices Act for allegedly paying bribes to foreign government officials to help secure adoptions for EAC's client. Following the charges, EAC ceased operations and continued to exist in a limited corporate form to wrap up certain legal proceedings. During search warrants executed on EAC's offices, a DOJ privilege review team reviewed and kept from prosecutors documents it deemed to be protected by the attorney-client privilege. The DOJ now maintains that because EAC has wrapped up any remaining legal obligations and is fully defunct any attorney-client privilege that once belonged to EAC ceased to exist and the previously withheld materials should be produced. Attorneys representing EAC are opposing the motion arguing that EAC continues to exist in a limited legal form and thus the privilege continues, that the documents currently held by the DOJ review team should have long ago been returned to EAC, and that the criminal case of former EAC officials is an improper judicial forum in which to resolve the privilege questions raised by the DOJ.

In *US v Holmes, et al*, No. 5:18-cr-00258 (EJD), (ND Cal filed 14 June 2018), Elizabeth Holmes, the infamous founder of Theranos, faces multiple charges surrounding the company's collapse. In a pretrial evidentiary motion, the DOJ is seeking an order that Holmes may not assert the attorney-client privilege over advice provided to Theranos by its outside counsel. According to the DOJ, Holmes seeks to assert the privilege over certain documents the government intends to use as exhibits and to prevent the DOJ from interviewing or questioning certain witnesses (including former outside counsel for the company) on the basis that the communications were legal advice to Theranos as well as legal advice to Holmes in her personal capacity; a notion the government vigorously denies.

Rulings in both *Cole* and *Holmes* are expected by the summer of 2021.

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## Coronavirus

**41 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?**

Although the United States implemented several covid-19 relief measures over the past 18 months, none of these measures specifically addressed attorney-client privilege or other legal privileges. However, the shift to 'remote' work and reliance on third-party online meeting platforms (eg, Zoom and Microsoft Teams, etc) means that privileged conversations are regularly being hosted by third-party systems during the lockdown. While these systems all appear to have security measures in place adequate to reasonably maintain the privilege, there have been several high-profile instances of such meetings being hacked by unauthorised parties. While unauthorised access of such platforms is unlikely to result in a waiver of applicable privileges, attorneys conducting privileged conversations over such platforms should be alert to such risks and take steps to guard against hacks or other intrusions. Similarly, many of the meeting platforms include a 'chat' or 'message' function to allow real-time written communication between meeting participants. Depending on the platform, these chats may be saved or archived for some period of time, although most platforms allow users to select an option deleting the chat at the end of the call. To the extent such chat conversations may be privileged, it would be best practice to make sure they are immediately deleted at the conclusion of any online meetings to ensure privileged conversations are not being stored on third party systems and potentially accessible to hacks or other malign use.

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