

Can You Keep A Secret? How the Attorney-Client and Self-Evaluative Privileges Can Apply to Your Compliance Practice

Pamela J. Grimm
grimmp@msx.upmc.edu
Associate Counsel
UPMC Health System
200 Lothrop Street
Pittsburgh, PA 15219

Attorney-Client Privilege

Federal Rule, Evidence 501

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in Rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Elements needed to invoke attorney-client privilege:

- Holder is or has sought to be a client of the attorney;
- The advice sought is legal advice as opposed to business or some other kind of advice;
- The communication was made in confidence for the purpose of securing a legal opinion and/or assistance in a legal proceeding;
- The privilege was not waived.

U.S. v. Mass. Inst. of Tech., 129 F. 3d 681 (1st Cir. 1997) U.S. v. Noriega, 917 F. 2d 1543, 1550 (11th Cir. 1990); U. S.v. Bay State Ambulance and Hosp. Rental Serv., 874 F .2d 20, 27-28 (1st Cir. 1989)

Attorney-Client Privilege - Cont'd

- Designed to encourage and facilitate full and frank communication between attorneys and their clients regarding legal representation.
- Privilege belongs to the client; client decides whether to invoke or waive privilege.
- Applies whether client is individual or corporation.
- Does not create an “invisibility” cloak of protection around all occurrences and conversation with any direct or indirect connection to the relationship between the attorney and client.
- Case-by-Case analysis. Univ. of Pa. v. E.E.O.C., 493 U.S. 182, 189 (1990).

Attorney-Client Privilege - Cont'd

- Basic areas not protected by the attorney-client privilege: identity of the client, the existence of an attorney-client relationship, and the substance of the fee arrangement.
- Delivery of documents to the attorney for safekeeping does not shield them from disclosure.
- Merely copying counsel on routine, nonprivileged business communications is inadequate to, in and of itself, to establish the privilege.
- Criminal fraud exception. Communications which solicit or offer advice for commission of a crime or fraud are not privileged, but discussions of past criminal conduct remain privileged.

Attorney-Client Privilege - Cont'd

- Voluntary disclosure of privileged communications to a third party destroys the confidentiality and may constitute a waiver of the attorney-client privilege.
- State statutes, common law and ethics rules may also provide exceptions or authorized disclosures. E.g., Rule 1.6 of Model Rules of Professional Conduct.
- For federal law purposes, extends to conversations between employees of the corporation and attorneys of the corporation in an effort to obtain legal advice for the corporation. Upjohn v. United States, 449 U.S. 383, 394-95 (1985)

Attorney - Client Privilege in the Corporate Context

- The attorney - client privilege applies regardless of the corporate rank of the employee making the communication if the communication was for purposes of seeking and rendering legal advice to the corporation, was at the insistence of the employee's superior, and was within the scope of the employee's duties.

Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978)

- Recent trend to scrutinize claims of privilege for communications with lawyers-employees more closely than communications with outside counsel. Intel Corp. v. VIA Technologies, Inc., 198 F.R.D. 525 (N.D. Ca. 2000) (reviewing role of inside counsel in the corporation); Georgia - Pacific Corp. v. GAF Roofing Manufacturing Corp., 1996 WL 29392 (S.D.N.Y. 1996) (Finding that in-house lawyer acted as negotiator and not as traditional legal counsel).

- Corporate employees who seek to assert a personal claim of attorney-client privilege must additionally establish that 1) they made it clear that they were seeking legal advice in a personal capacity; 2) Corporate counsel communicated with them in a personal capacity; and 3) the substance of private conversations with the counsel of the corporation did not concern matters within the corporation or its general affairs.

In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir. 1986); In re Grand Jury Subpoena, No. 01-1975 (1st Cir. November 8, 2001)

- In the corporate context, revealing confidential communications to decision-making corporate employees does not defeat the corporation's attorney-client privilege.

Waiver of Attorney-Client Privilege

- The presence of third party generally negates the element of confidentiality and defeats the attorney-client privilege.
- Voluntary disclosure of privileged communications to a third party destroys the confidentiality and may constitute a waiver of the attorney-client privilege. Corporation's attorney-client privilege maybe waived by current management. CFIC v. Weintraub, 471 U.S. 343, 349 (1985)
- Involuntary waiver may occur when one party to a joint defense agreement elects to waive the privilege without consent of the other party. See In re Grand Jury Subpoena, No. 01-1975 (1st Cir. November 8, 2001)
- Disclosures to government agencies: limited or complete wavier of the privilege? Diversified Indus. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977).

Attorney Work-Product Doctrine

- Protects materials prepared by an attorney in anticipation of litigation from disclosure to opposing parties. First recognized by the Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947)

- **Federal Rule of Civil Procedure 26(b)(3)**

. . . (b)(3) *Trial Preparation: Materials*. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Attorney Work Product Doctrine - Cont'd

- Provides qualified protection from discovery in a civil action when materials are:

- Documents and tangible things otherwise discoverable;
- Prepared in anticipation for trial; and
- By or for another party or by or for that other party's representative.
- The rule also protects the mental impression, conclusions, opinions, and legal theories of an attorney.

- To overcome the qualified protection, a party must show:

- A substantial need for materials; and
- An inability to obtain the substantial equivalent of the information without undue hardship.

Attorney Work Product Doctrine - Cont'd

- **Criminal Federal Rule of Criminal Procedure 16(b)(2)**

. . (b)(2) *Information Not Subject to Disclosure.*

Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

Attorney Work Product Doctrine - Cont'd

- FRC provides strict protection from discovery or inspection in a criminal action of:
 - Reports, memoranda, or other internal defense documents;
 - Statements made by the defendant, or by government or defense witnesses or by prospective government or defense witnesses;
 - Made by or to the defendant or the defendant's attorneys or agents; or
 - In connection with the investigation or defense of the case.
- In criminal cases, there is no exception regardless of any showing of need.

Attorney Work Product Doctrine - Cont'd

Waiver of Attorney Work-Product Protection

- The protections afforded by the work-product doctrine can be waived by disclosure of materials to a third party.
- Limited waiver of the work-product doctrine?
- Going outside the “magic circle” of secretaries, interpreters, counsel for cooperating defendants. Cavallaro v. U.S., 153 F. Supp. 2d 52, 59 (D. Mass 2001).

Self-Critical Analysis Privilege

- A common law privilege that is generally considered to have been first recognized in *Bredice v. Doctors Hosp. Inc.*, 50 F.R.D. 269 (D.D.C. 1970), aff'd w/o op., 479 F. 2d 920 (D.C.Cir. 1973). In *Bredice*, a medical malpractice case, plaintiff moved for discovery of a medical review board meeting minutes and reports. Court held that confidentiality is essential to effective functioning of internal reviews. Constructive professional criticism is something of value that would be chilled out of fear of disclosure if not protected.

Self-Critical Analysis Privilege - Cont'd

Four Part Test

1. The information must result from self-critical analysis undertaken by the party seeking protection;
2. The public must have a strong interest in preserving the free flow of the type of information sought;
3. The information must be of the type whose flow would be curtailed if discovery were allowed, and
4. No document should be accorded the privilege unless it was prepared with the expectation that it would be kept confidential.

Hickman v. Whirlpool Corp., 186 F.R.D. 362, 363 (N.D. Ohio 1999).

Self-Critical Analysis Privilege-Cont'd

- The privilege is not absolute
- Applies only to analysis or evaluation, and not to the facts on which evaluation is based. In re Six Grand Jury Witnesses, 979 F. 2d 939, 945 (2d Cir. 1992).
- Data or statistical information is not protected.
- The privilege may be waived, and the privilege must be asserted expressly at the time that discovery of the information is sought.
- The privilege is qualified and can be overcome by a showing of extraordinary circumstances or special need.
- Some courts have required that materials to be protected are mandatory government reports. Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 434 (E.D. Pa. 1978).

Cases Addressing Self-Critical Analysis Privilege

1. *U.S. ex. rel. Sanders v. Allison Engine Co., Inc.*, 196 F.R.D. 310 (S.D. Ohio 2000) Defendant is a government contractor under a Navy defense contract. Relators claim that documents sought are evidence of noncompliance with Allison's with its contractual obligations and are therefore directly relevant to allegations of the lawsuit. Government subcontract at issue included procurement document quality requirement, corrective action, record retention and inspection rights. Court found that there was no expectation of confidentiality.

2. *Federal Trade Comm'n v. TRW, Inc.*, 628 F.2d 207 (D.C. Cir. 1980) Strong public interest in allowing governmental investigations to proceed efficiently and expeditiously outweighs public interest in companies continually trying to improve production and efficiency.

3. *In re Grand Jury Proceedings*, 861 F. Supp. 386 (D. Md. 1994) (outside consultant's reviews are discoverable by government agency).

4. *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992). Self-critical analysis privilege does not protect routine internal corporate reviews.

5. *Reichhold Chemicals Inc. v. Textron, Inc.*, 157 F.R.D 522, 527 (N.D. Fla. 1994) Self-critical analysis privilege only applies to reports which were prepared *after the fact* of the purpose of self-evaluation and analysis.

6. *U. S. ex rel. Falsetti v. Southern Bell Tel. & Tel.Co.*, 915 F. Supp. 308 (N.D. Fla. 1996). Holding that because Congress provided its own version of the self-critical analysis privilege in 31 U.S.C. Sections 3729(a)(1-7)(A-C) and 3729(d), a common law self-critical analysis privilege does not exist in a qui tam action brought under the False Claims Act.

- Practical Applications

- Questions