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**Practical Issues Arising From Preserving Work Product and Attorney Client Privilege**

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## I. The Attorney Client Privilege

### A. What, precisely, is the privilege

The lawyer-client privilege is one of the sacred cornerstones of our system of jurisprudence and allows for, in most cases, the lawyer and client, whether an individual or a corporation, to freely communicate regarding the case and representation without fear of the content being disclosed.

The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980): "The lawyer–client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see Hunt v. Blackburn, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the *390 **683 law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation. United States v. Louisville & Nashville R. Co., 236 U.S. 318, 336, 35 S.Ct. 363, 369, 59 L.Ed. 598 (1915), and the Government does not contest the general proposition.

Upjohn Co. v. United States, 449 U.S. 383, 389-90, 101 S. Ct. 677, 682-83, 66 L. Ed. 2d 584 (1981)

### B. Who and what does it protect

The privilege protects every sort of communication between the client and the attorney, including facts, legal theories, defenses, etc.

**C. How is it asserted**

The privilege is generally asserted as an objection in response to a request for disclosure during investigation or discovery, such as a question during deposition - "Who have you spoken to regarding this case", or a discovery request "Produce each writing referring to the incident herein sued upon".

The party claiming the privilege bears the burden of establishing all of the elements of the attorney-client privilege. Id. "The claim of privilege cannot be a blanket claim; it must be made and sustained on a question-by-question or document-by-document basis." United States v. Lawless, 709 F.2d 485, 487 (7th Cir.1983)

**D. Who can and must assert it and when**

Depending on the jurisdiction, it is the attorney's obligation to assert the privilege on behalf of the client unless permission to waive is provided.

**E. How is it waived and what are the consequences**

The privilege is waived either expressly or impliedly, for instance, agreeing to produce documents which it is agreed fall within the privilege for tactical reasons, or failing to timely assert an objection to the disclosure of privileged testimony or other tangible evidence. The consequences can be that damaging information regarding facts or tactics which the opposition is not entitled come into their possession and can be utilized against the client. The privilege is founded on the following factual predicate, and is waived if not preserved, or by an communicative act or production of material that falls within the privilege :

1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1160 (D.S.C. 1974)

Accordingly, voluntary disclosure to a third party of purportedly privileged communications has long been considered inconsistent with an assertion of the privilege. United States v. AT & T, 642 F.2d 1285, 1299 (D.C. Cir.1980).
Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1424 (3d Cir. 1991)

**F. What exceptions exist, i.e., crime-fraud**

The privilege is not absolute. The most commonly asserted exception in insurance litigation is the 'crime fraud' exception, which holds that if someone consults an attorney for purposes of planning a crime or fraud, the communications between lawyer and client are not protected from disclosure. Some counsel claim that insurance "bad faith" is per se a fraud and thus attorney client communications must be produced as no privilege exists. That assertion has been rejected repeatedly by the courts. See, Freedom Trust v. Chubb Grp. of Ins. Companies, 38 F. Supp. 2d 1170, 1171 (C.D. Cal. 1999)

## II. The Work Product Doctrine

### A. What is it

The work product 'doctrine' is frequently referred to as a 'privilege'. This is a misnomer. The doctrine originally arises from case law [Hickman v. Taylor, a 1943 United States Supreme Court decision], was later codified by Fed Rule Civ Proc 26, and protects documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, those materials may be discovered if: (i) they are otherwise discoverable; and (ii) the 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. But even if the court orders discovery of those materials, it must still protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

The logic behind the work product doctrine is that opposing counsel should not enjoy free access to an attorney's thought processes. Hickman v. Taylor, 329 U.S. 495, 511, 67 S.Ct. 385, 1958, 91 L.Ed. 451 (1947); In the Matter of Grand Jury Subpoenas, 959 F.2d 1158, 1166–67 (2nd Cir.1992). An attorney's protected thought processes include preparing legal theories, planning litigation strategies and trial tactics, and sifting through information. See Hickman, 329 U.S. at 511, 67 S.Ct. at 1958. "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." United States v. Nobles, 422 U.S. 225, 238, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975). "[T]he doctrine grants counsel an opportunity to think or prepare a client's case without fear of intrusion by an adversary." In re Six Grand Jury Witnesses, 979 F.2d 939, 944 (2d Cir.1992), cert. denied, 509 U.S. 905, 113 S.Ct. 2997, 125 L.Ed.2d 691 (1993).
Once a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears. Courts therefore accept the waiver doctrine as a limitation on work product protection. The waiver doctrine provides that voluntary disclosure of work product to an adversary waives the privilege as to other parties. See Nobles, 422 U.S. at 239, 95 S.Ct. at 2170; In re John Doe Corp., 675 F.2d 482, 489 (2d Cir.1982).

In re Steinhardt Partners, L.P., 9 F.3d 230, 234-35 (2d Cir. 1993)

### B. How does it differ from the attorney client privilege

The work product doctrine prevents the work, thoughts, impressions and reports of the attorney and others in preparing for litigation from being hijacked by the opposing party, as opposed to protecting attorney client communications.

**C. How long does it last**

The work product doctrine lasts until the protected material is disclosed at trial, during discovery, or waived.

**D. Why is it a doctrine and not a privilege**

The attorney client privilege and the work product doctrine serve different purposes.

The purpose of the work-product doctrine differs from that of the attorney-client privilege. See, for example, Stephen A. Saltzburg, *Corporate and Related Attorney–Client Privilege Claims: A Suggested Approach, 12 Hofstra L.Rev. 279, 303 n. 121 (1984)*; Willcox, 49 Md.L.Rev. at 922–23. As we have explained, the attorney-client privilege promotes the attorney-client relationship, and, indirectly, the functioning of our legal system, by protecting the confidentiality of communications between clients and their attorneys. In contrast, the work-product doctrine promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation. Protecting attorneys' work product promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients. *Hickman v. Taylor, 329 U.S. 495, 510–11, 67 S.Ct. 385, 393–94, 91 L.Ed. 451 (1947)*; *United States v. AT & T, 642 F.2d 1285, 1299 (D.C. Cir.1980)*

Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1427-28 (3d Cir. 1991)

**E. How is it asserted and waived**

It is asserted by objection, it is waived by disclosure.

The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived. Here respondent sought to adduce the testimony of the investigator and contrast his recollection of the contested statements with that of the prosecution's witnesses. Respondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony. Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination. See, e.g., McGautha v. California, 402 U.S. 183, 215, 91 S.Ct. 1454, 1471, 28 L.Ed.2d 711 (1971).

United States v. Nobles, 422 U.S. 225, 236-40, 95 S. Ct. 2160, 2169-71, 45 L. Ed. 2d 141 (1975)

**III. What Are the Tactical Considerations Arising from Waiver and Assertion of the Privilege and Doctrine**

There are a variety of considerations in determining and analyzing whether to assert or waive the protections afforded by the attorney client privilege and the work product doctrine.

**A. What is the utility of the 'advice of counsel' defense**

The advice of counsel defense is used to demonstrate that the defendant acted

based on the advice of a lawyer, thus demonstrating good faith. The issue arising from the assertion of the defense is that the advice must then be disclosed. Since it is not a blanket waiver, but a partial waiver, it can make it look like the defendant is hiding something. The modern view is that it is better to simply assert that the defendant acted in good faith than to partially disclose lawyer client communications, as the lawyer becomes a witness and can be cross examined about what factual disclosures were made by the client and what steps were taken to ascertain the true facts, whether the research was complete and objective, and so on.

As to the attorney-client privilege, the general rule is that the assertion of an advice-of-counsel defense waives that privilege "as to communications and documents relating to the advice." SNK Corp. of America v. Atlus Dream Ent. Co. Ltd., supra at 570, citing Handgards, Inc. v. Johnson & Johnson, 413 F.Supp. 926, 929 (N.D.Cal.1976). "Fairness dictates that a party may not use the attorney-client privilege as both a sword and a shield," and therefore, parties asserting the advice-of-counsel defense "may not selectively disclose privileged communications that it considers helpful while claiming privilege on damaging communications relating to the same subject." Id. As a result, the inquiry into the scope of an attorney-client privilege waiver, arising from the assertion of an advice-of-counsel defense, should be guided by concerns for fairness, and by "the subject matter of the documents disclosed, balanced by the need to protect the frankness of the client disclosure and to preclude unfair partial disclosure." Id., citing Starsight Telecast, Inc. v. Gemstar Development Corp., 158 F.R.D. 650, 655 (N.D.Cal.1994). Given the nature of the defense being asserted, "the scope [of the waiver] must of necessity be somewhat broad and is, in fact, a 'subject matter' waiver-i.e., a waiver of all communications on the same subject matter." Micron Separations, Inc. v. Pall Corp., 159 F.R.D. 361, 363 (D.Mass.1995). Since the work product doctrine is based, however, on different considerations than is the attorney-client privilege, the waiver of its protections may be more limited in scope. The work product doctrine is meant "to protect the effectiveness of a lawyer's trial preparations by immunizing such materials from discovery." Handgards, Inc. v. Johnson & Johnson, supra at 929. Thus, an inquiry into a waiver of work product protection requires a balancing of "the need for discovery with the right of an attorney to retain the benefits of his own research." Id. at 932. Nevertheless, at its heart, the fundamental inquiry as to the scope of the work product waiver is, again, a matter of fairness, and we must consider the waiver in the context of an asserted advice-of-counsel defense…
Minnesota Specialty Crops, Inc. v. Minnesota Wild Hockey Club, L.P., 210 F.R.D. 673, 675-76 (D. Minn. 2002)

In "bad faith" litigation, the advice of counsel defense generally puts an attorney on the witness stand who has given a lot of advice to the company, thus raising the possibility of a blistering cross examination concerning her or his impartiality, gross billings, etc. Most companies have concluded it is better to simply assert that the company did what it did because it was reasonable and the right thing to do, not because their lawyer told them to.

In any event, we need not pursue this distinction between the federal and state rules because it appears that Aetna is not in fact relying on an "advice of counsel" defense. As set forth in its brief in support of the instant petition, "Aetna is not saying that their conduct was reasonable *because their counsel opined so,* but rather that their conduct was reasonable because the *facts* indicated that no valid claim existed." (Emphasis in original.) Stated differently, Aetna claims it

acted as it did not because it was advised to do so, but because the advice was, in its view, correct; and it is prepared to defend itself on the basis of that asserted correctness rather than the mere fact of the advice. Such a defense does not waive the attorney-client privilege.

Aetna Cas. & Sur. Co. v. Superior Court, 153 Cal. App. 3d 467, 475, 200 Cal. Rptr. 471, 475 (Ct. App. 1984)

**B. What evidence can and should be shielded in tort claims**

Absent unusual circumstances, the attorney client privilege should never be waived. Ever. It must be asserted with care before a jury, however, and is better handled in pre trial motions so a jury does not form the impression that it is being denied salient information by a defendant.

Likewise, accident reports (unless they contain favorable admissions from the plaintiff) and pre trial workup by the attorneys and claims handlers, insured risk management personnel, etc. should also be withheld on objection so as not to share strategy with the opposing party and have it turned against you.

The threshold determination is whether the documents sought to be protected were prepared in anticipation of litigation or for trial. Caremark, Inc. v. Affiliated Computer Services, Inc., 195 F.R.D. 610, 614 (N.D.Ill.2000). The test for each document is "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." Id. (citing and quoting Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1118–19 (7th Cir.1983)). Precedent is clear that eventual litigation does not ensure protection of all materials prepared by attorneys—the "remote prospect of future litigation" does not suffice to bring the work product doctrine into play. Id. at 1120. Materials or investigative reports developed in the ordinary course of business do not qualify as work product. If the material or report came into existence because of the litigation or because of an existing claim likely to lead to litigation, then the doctrine applies. Caremark, 195 F.R.D. at 614.Upjohn Co. v. United States, 449 U.S. 383, 390, 101 S.Ct. 677, 683, 66 L.Ed.2d 584 (1981). The Seventh Circuit applies the privilege under the following principles:
(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

United States v. White, 950 F.2d 426, 430 (7th Cir.1991)

**C. What evidence can and should be shielded in bad faith claims**

As discussed above, attorney client communications unless disclosure of advice of counsel is essential, and work product. Materials from claims files and other sources are commonly "redacted" to preserve the privilege, and listed in a "privilege log" so as to allow the opposing counsel or the judge to determine the bona fides of the claim. Likewise, trade secrets and other proprietary information are commonly withheld, or produced under a protective order to avoid public dissemination to competitors, counsel and experts in other cases, and the like. In camera

review is sometimes used, but some believe that any disclosure, even to a judicial officer or discovery referee for review, constitutes a waiver of privilege.

**D. The practical effect of the "Sword and Shield" doctrine**

A party cannot use a privilege to both assert its position in the litigation and at the same time withhold evidence.

However, the attorney-client privilege cannot at once be used as a shield and a sword. See In re von Bulow, 828 F.2d 94, 103 (2d Cir.1987); see also Clark v. United States, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933) ("The privilege takes flight if the relation is abused."). A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes. See von Bulow, 828 F.2d at 101-02. Thus, the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications. See United States v. Exxon Corp., 94 F.R.D. 246, 249 (D.D.C.1981) (claim of good faith reliance on governmental representations waived attorney-client privilege); Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D.Wash.1975) (assertion of qualified immunity defense waived attorney-client privilege). This waiver principle is applicable here for Bilzerian's testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent.

United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991)

As the district court correctly suggested, a litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion. See Moore's, supra, § 26.70[6][c]; Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578, 587 (N.D.N.Y.1989). Frontier, however, did not use any work product as a sword merely by filing a suit for equitable indemnification; nor did it thereby automatically waive work product protection or place work product in issue. The record on appeal reveals Frontier did not rely on the work product in any manner to justify its right to recovery or to respond to Gorman–Rupp's defense that the initial settlements were not reasonable. Contrary to the conclusion of the district court, Frontier did not use the work product as a sword and is not, therefore, prohibited from shielding the material from discovery.Furthermore, for many of the same reasons that preserved the attorney-client privilege, namely that information regarding the reasons for and reasonableness of the settlement was available elsewhere, Gorman–Rupp failed to establish a substantial need for the work product and undue burden if the protected materials were not disclosed. Accordingly, the district court erred in allowing discovery of the Holland & Hart materials and ordering that Teig submit to deposition.

NL Indus., Inc. v. Commercial Union Ins. Co., 144 F.R.D. 225, 230–31 (D.N.J.1992).

**E. Is a knowing waiver ever justified?**

In the normal course of business, the privileges are preserved to protect communications with counsel and work done in anticipation of litigation, as well as corporate institutional issues which

are confidential. There are exceptions, but these are generally few, far between and defensive in nature. What must be counterbalanced is a holding that the waiver is "blanket" and applies to all communications, or all work product within a given subject matter. Such a ruling is to be avoided at all costs, and generally militates against even selective waivers unless they are well crafted.

**F. Curing inadvertent waivers and disclosures**

Given the advent of electronic discovery, the problem of containing inadvertent disclosure of privileged documents has been compounded. Courts expect parties to exercise diligence in pre-production review, and to enter into case management orders dealing with return of privileged documents produced in error. However, some courts and jurisdictions are less forgiving than others.

In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered. *Transamerica Computer, 573 F.2d at 652; United States v. Zolin, 809 F.2d 1411, 1415 (9th Cir.1987)*, *aff'd in part and vacated in part,* 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). We have previously held that the attorney-client privilege may be waived by implication, even when the disclosure of the privileged material was "inadvertent" or *750 involuntary. *Weil v. Investment/Indicators, Research & Management, 647 F.2d 18, 24 (9th Cir.1981)*. When the disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts "reasonably designed" to protect and preserve the privilege. *See Transamerica Computer, 573 F.2d at 650.* Conversely, we will deem the privilege to be waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter. *Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C.Cir.1981)* (quoting *In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672, 675 (D.C.Cir.)*, *cert. denied,* 444 U.S. 915, 100 S.Ct. 229, 62 L.Ed.2d 169 (1979)). The district court thus committed no reversible error in permitting the letter to be introduced into evidence

United States v. de la Jara, 973 F.2d 746, 749-50 (9th Cir. 1992)