Preserving Attorney-Client and Work Product Privileges in Class Action Litigation

Protecting Confidential Information, Avoiding Inadvertent Disclosures, and Navigating the Complexities of Parallel Regulatory Investigations

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Preserving the Attorney-Client Privilege and Work Product Protection in Class Action Litigation

PROTECTING CONFIDENTIAL INFORMATION, AVOIDING INADVERTENT DISCLOSURES, AND NAVIGATING THE COMPLEXITIES OF PARALLEL REGULATORY INVESTIGATIONS

APRIL 17, 2014

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I. The Attorney-Client and Work Product Privilege in Class Action Litigation

- Attorney-Client Privilege and Work Product
- The Attorney-Client Relationship and Communications Between Attorneys And Putative Class Members
- Other Privilege Considerations
Attorney-Client Privilege and Work Product Protection
Attorney-Client Privilege

- Basic elements of the attorney-client privilege:
  - (1) a communication between client and counsel that
  - (2) was intended to be and was kept confidential, and
  - (3) was made for the purpose of obtaining or providing legal advice
    - In re Cnty. of Erie, 473 F.3d 413, 419 (2d Cir. 2007)
Work Product

- Work product is “distinct from and broader than the attorney-client privilege” United States v. Nobles, 422 U.S. 225, 238 n.11 (1975)
- The work product doctrine protects from disclosure
  - documents and tangible things
  - prepared in anticipation of litigation
  - by a party or its representative – including a party’s attorney, consultant, surety, indemnitor, insurer, or agent
    - Fed. R. Civ. P. 26(b)(3)
  - Two Types:
    - Opinion Work Product and Fact Work Product
The Attorney-Client Relationship and Communications Between Attorneys And Putative Class Members
Pre-Certification – Putative Class Members and Class Representatives

- Pre-Certification
- Class Representatives are clients
- Putative Class Members are not plaintiffs’ counsel’s clients
Post-Certification – Putative Class Members

- Post-Certification
- Putative Class Members are generally considered plaintiffs’ counsel’s clients
Plaintiffs’ Attorneys’ Questionnaires and Website Communications

- Plaintiffs’ firms often use the Internet, direct mailings or questionnaires to solicit potential class members

- Scenario: Defendant seeks to compel production of questionnaires completed by potential class members and Plaintiffs assert privilege
  - When is an attorney-client relationship formed?
  - Did putative class members believe they were seeking legal representation when they completed the questionnaires?
  - What type of information is on the form?
  - Were the questionnaires confidential?
Privileged Communications

- Privileged or Protected
- *Barton v. U.S. Dist. Court for Cent. Dist. of Cal.*, 410 F.3d 1104, 1107 (9th Cir. 2005) (questionnaires with ambiguous disclaimer were privileged under California law because “[m]ore important than what the law firm intended is what the [prospective] clients thought”)
- *Vodak v. City of Chi.*, 2004 WL 783051 (N.D. Ill. Jan. 16, 2004) (questionnaires distributed at a meeting to provide legal representation, if desired, were privileged)
- *But see Gates v. Rohm & Haas Co.*, 2006 WL 3420591, at *3 (E.D. Pa. Nov. 22, 2006) (“the dispositive factor typically is whether the putative class members were seeking legal advice or representation at the time they filled out the questionnaires” and ordering production of factual information based upon practicality)
Non-Privileged Communications

- **Non-Privileged or Protected**
  - *Morisky v. Pub. Serv. Elec. & Gas Co.*, 191 F.R.D. 419, 423 (D.N.J. 2000) (not privileged because no indication that the “employees were seeking to become clients at the time they completed the questionnaires”)
Other Privilege Considerations
Other Privilege Considerations – Joint Defense and Common Legal Interest

- **Joint Defense/Common Legal Interest Doctrines**

- **Under the joint defense doctrine**, privileged or work product information may be shared, without waiver, among parties to a joint defense
  - *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 94 (3d Cir. 1992)
  - It applies to defendants and plaintiffs
    - “It is fundamental that ‘the joint defense privilege cannot be waived without the consent of all parties to the defense.’”
      - *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544, 556 (8th Cir. 1990) (citations omitted)
  - Information may be shared, without waiver, under common legal interest doctrine in a non-litigation setting
II. Selective Disclosure/Waiver in Governmental Investigations

- Waiver Principles
- Selective Disclosure/Waiver
- Statutory Non-Waiver Provisions
Waiver Principles
Traditional Waiver Analyses

- **Traditional Attorney-Client Waiver Analyses**
  - Strict Confidentiality Requirement
  - Intent Required
  - Multi-Factor Analyses
- **Fed. R. Evid. 502**
- **Work Product Waiver**
  - Disclosure must be inconsistent with the adversary process
Fed. R. Evid 502 – Inadvertent Disclosures

- **Inadvertent Disclosure**
- **Rule 502(b)** – Inadvertent disclosures in a federal proceeding or to a federal office or agency do **NOT** effectuate a waiver in that federal proceeding or in other federal and state court proceedings
  - If reasonable steps were taken to prevent and rectify the disclosure
- **Rule 502(c)** – Disclosures in a state proceeding do not effectuate a waiver in a federal proceeding
  - If the disclosure would not have been a waiver in federal proceeding, or if it would not constitute a waiver under state law
  - The law most protective against waiver controls
Fed. R. Evid 502 – Intentional Disclosures

- Rule 502(a) – Limits Instances of Subject Matter Waiver
  - An intentional disclosure in a federal proceeding or to a federal office or agency generally only effectuates a waiver of the disclosed document
  - but waiver may be extended to undisclosed communications concerning the same subject matter that ought in fairness to be considered with the disclosed document
Rule 502 Orders and Agreements

- Non-Waiver Orders and Agreements

  - Under Rule 502(d)
    - Federal courts can enter orders that any disclosure, inadvertent or intentional, in that proceeding will not constitute a waiver in other federal and state courts proceedings

  - Under Rule 502(e)
    - Non-waiver agreements only bind the parties, unless incorporated in a court order
Selective Disclosure/Waiver
Selective Disclosure/Waiver Doctrine

- Plaintiff argues waiver based upon a litigant’s disclosure to the government in connection with an investigation
- Under the Selective Disclosure/Waiver Doctrine
  - No waiver as to other litigants based upon selective disclosure to the government
Selective Disclosure/Waiver Cases

- The Selective Disclosure/Waiver Doctrine has been adopted, including on a case-by-case basis
  - *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (disclosing interview memoranda to the SEC did not effectuate a waiver as to other litigants because it encourages companies to conduct such investigations)
  - *In re Steinhardt Partners*, 9 F.3d 230, 236 (2d Cir. 1993) (declining to adopt a “per se rule” against selective waiver)
  - *In re Martin Marietta Corp.*, 856 F.2d 619, 625-26 (4th Cir. 1988) (disclosure to government waived attorney-client privilege and non-opinion work product, but not opinion work product)
Selective Disclosure/Waiver Cases

- Selective Disclosure/Waiver Doctrine has not been adopted
  - *In re Pacific Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012)
  - *In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179, 1194 (10th Cir. 2006) (based on record before the court)
Selective Disclosure/Waiver Cases – Confidentiality Agreements

- No waiver found when the disclosure was subject to a confidentiality agreement
  - *Gruss v. Zwirn*, 276 F.R.D. 115, 142 (S.D.N.Y. 2011) (no waiver of privilege for selective disclosure to the SEC pursuant to a confidentiality agreement)
  - *Police & Fire Ret. Sys. of Detroit v. SafeNet, Inc.*, 2010 WL 935317, at *2 (S.D.N.Y. Mar. 12, 2010) (no waiver of privilege or work product when disclosure to government was subject to confidentiality agreement)
  - *Maruzen Co. v. HSBC USA, Inc.*, 2002 WL 1628782 (S.D.N.Y. July 23, 2002) (no waiver under *In re Steinhardt* for disclosure pursuant to confidentiality agreement)
  - *McDonnell Douglas Corp. v. EEOC*, 922 F. Supp. 235 (E.D. Mo. 1996) (no waiver when disclosure to the SEC was subject to non-waiver agreement)
Selective Disclosure/Waiver

- **Scenario:** Defendant has provided privileged information to the government subject to an executed confidentiality/non-waiver agreement.

- Plaintiff argues waiver and seeks to compel production in a class action.

- Defendant argues selective waiver.

- Some courts have been willing to apply selective waiver in Defendant’s favor where the Defendant and government agency entered into an explicit confidentiality agreement.
PLAINTIFFS’ ARGUMENTS

Intentional disclosure waives privilege or protection
- In re Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (A “litigant who wishes to assert confidentiality must maintain genuine confidentiality”) (citing Permian)

Additional protection is unnecessary to encourage cooperation with government investigations because a defendant typically has reasons to cooperate

The confidentiality agreement is not enforceable against plaintiff
- In re Tyco Int’l Inc. MDL, 2004 WL 556715, at *2 (D.N.H. Mar. 19, 2004) (“agreements with government agencies to maintain the privileged status of voluntarily produced documents are not enforceable against third parties”)
Selective Disclosure/Waiver

- DEFENDANTS’ ARGUMENTS
  - Confidentiality was maintained as to third parties, under confidentiality agreement
  - Such disclosures further governmental investigations
  - Possible common interest with the government
  - Information is available from other sources
  - If waiver were found, it should be limited to the disclosed document under Fed. R. Evid. 502
Selective Disclosure/Waiver – Considerations

- Analyze litigation jurisdictions, if possible
- Consider the privileged or protected nature of the information, such as fact work product
- Obtain a non-waiver/confidentiality order
- Obtain a non-waiver/confidentiality agreement
- Compelled production
- Possible common interest with the government
Statutory Non-Waiver Provisions
Statutory Non-Waiver Provisions

- The Federal Deposit Insurance Act provides that there is no waiver for disclosures to certain agencies under 12 U.S.C. § 1828(x)

  (x) Privileges not affected by disclosure to banking agency or supervisor

  (1) In general

  - The submission by any person of any information to the Bureau of Consumer Financial Protection, any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such Bureau, agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such Bureau, agency, supervisor, or authority.

  (2) Rule of construction

  - No provision of paragraph (1) may be construed as implying or establishing that—

    - (A) any person waives any privilege applicable to information that is submitted or transferred under any circumstance to which paragraph (1) does not apply . . .
Similarly, 12 U.S.C. § 1785(j) states:

(j) Privileges not affected by disclosure to banking agency or supervisor

(1) In general

○ The submission by any person of any information to the Administration, any State credit union supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such Board, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such Board, supervisor, or authority.

(2) Rule of construction

No provision of paragraph (1) may be construed as implying or establishing that—

○ (A) any person waives any privilege applicable to information that is submitted or transferred under any circumstance to which paragraph (1) does not apply . . .
III. Considerations for Preserving Privilege and Work Product Protection

- Witness Interviews
- Electronic Document Considerations
- Protecting Confidential Information
Witness Interviews
Witness Interviews

- Employee responses to questionnaires prepared by counsel for the company, as well as counsel’s notes and memoranda of interviews with employees, are privileged
Witness Interviews

- Interview notes, prepared in anticipation of litigation, are work product.
- They are opinion work product, if they contain opinions or mental impressions.
  - *Hickman v. Taylor*, 329 U.S. 495, 512 (1947) (As “to oral statements made by witnesses to [opposing counsel], whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production.”)
A party or witness may obtain copies of their own witness statements, signed or verbatim, under Fed. R. Civ. P. 26(b)(3)

Courts may delay production until after the witness testifies
“Upjohn” Notice – If the corporation’s and employee’s interests may differ, consider advising an employee that:

- counsel represents the corporation, not the employee
- the communication is privileged and the privilege belongs to the corporation, not to the employee
- at the corporation’s request, the employee should keep the communication confidential
- counsel may share the communication with the corporation
- the corporation, not to the employee, has the right to waive the privilege
- the employee may consult with his or her own counsel
Electronic Document Considerations
Electronic Document Considerations

- **Email**
  - Which email account was used?
  - What is the company’s policy regarding privacy regarding company email?

- **Privilege found when employees had a reasonable expectation of privacy**

- **Privilege inapplicable when company policy disclaims employees’ expectation of privacy or plaintiff waives privilege as to emails**
Protecting Confidential Information
Many companies have processes designed to avoid or mitigate risks giving rise to class actions, including:

- Self Evaluative Committees
- Early Warning Defect Systems
- Quality Assurance Committees

Some companies analyze warranty data and complaints received from the field about a product’s performance.

In-house lawyers frequently participate in such groups or committees.

Plaintiffs may challenge the privileged or protected status of such communications.
Protecting Confidential Information: Legal vs. Business Communications

- An aspect of the inquiry may be whether the communications were made to obtain or provide legal advice or business advice.

- Some cases:
  - *In re Ford Motor Co.*, 110 F.3d 954, 966 (3rd Cir. 1997) (privilege applicable because although the ultimate decision could be “characterized as a business decision,” it was reached “only after examining the legal implications”)
  - *Weeks v. Samsung Heavy Indus., Ltd.*, 1996 WL 288511, at *2 (N.D. Ill. May 30, 1996) (the “privilege is not vitiated simply because the attorney has weighed business considerations in rendering legal advice”)
Protecting Confidential Information: Legal vs. Business Communications

- In addition, work product would apply if such groups or processes involve anticipated or pending litigation.

- It is also important that personnel characterize the communications to reflect their legal nature.

- Other considerations include whether it makes sense to have a separate group or subcommittee to address legal issues.

- The Checklist
Implement Policies for Confidential Corporate Information

- Company information is the company’s property, must be maintained as confidential, and only disclosed as authorized
- All company documents must remain with the company when an employment relationship ends
- Confidentiality requirements survive the employment relationship
- Reaffirm confidentiality requirements during exit interview
- Incorporate confidentiality provisions in severance agreements
Rule 502 Orders and Agreements

- Non-Waiver Orders and Agreements

- Under Rule 502(d), Federal courts can enter orders that any disclosure, inadvertent or intentional, in that case will not constitute a waiver in other federal and state courts cases.

- A court can issue a Rule 502 order, over objection, to protect privileges

- If documents are produced again in another action, obtain an order in that action.
A 502 Order may permit, but should not require, the production of privileged or protected information without waiver


Under Rule 502(e) – Non-waiver agreements only bind those parties, unless incorporated in a court order
Questions?

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