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Comparing Waivers: Lawyer-Client Privilege v. Work Product Protection

BY ROY SIMON

When discovery disputes revolve around either the attorney-client privilege or the work product doctrine, one of the most frightening words in a litigator's vocabulary is "waiver." Waiving privilege or work product protection can be devastating to a client's case and damaging to a lawyer's reputation. When I practiced law in Chicago, Jenner & Block and a name partner in a boutique labor law firm were co-counsel to a much-feared national labor union in high stakes litigation with the federal government. By mistake, the name partner disclosed some damning privileged documents to the adversary during discovery. The fuming client waged a desperate battle to retrieve the documents and preserve the privilege, but the court ruled that disclosure had waived the privilege. The client took revenge. The next time I encountered the former name-partner; he had been expelled from his own firm and had become a no-name associate in a cubicle at a small third-tier law firm.

Not all waivers occur by accident, however. Sometimes lawyers deliberately disclose documents to a person outside the law firm, only to learn later that the disclosure has waived the attorney-client privilege or work product protection (or both). And yet not all disclosures to people outside a law firm destroy the privilege or work product protection. Which disclosures do, and which disclosures don't? That is the subject of this column.

A Primer on Privilege and Work Product

The attorney-client privilege is the oldest privilege in the common law. Its purpose is "to encourage full and frank communication between attorneys and their clients ...." *Upjohn Co. v. United States,* 449 U.S. 383 (1981). The attorney-client privilege arises whenever five "Cs" are present: a Confidential Communication between Client and Counsel for the purpose of giving or obtaining legal Counsel (i.e., legal advice).

Work product protection is far more recent and more complex. The federal courts did not fully articulate the work product doctrine until the seminal case of *Hickman v. Taylor*, 329 U.S. 495 (1947). Explaining why an opposing party was not entitled to witness statements taken by an attorney after a fatal tugboat accident, Justice Murphy observed that if an adversary could obtain trial preparation materials on demand, "much of what is now put down in writing would remain unwritten." Proper preparation of a case therefore required that an attorney be permitted to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his legal strategy without undue and needless interference." If a defense attorney could easily discover the work product of the plaintiff's attorney (or vice versa), why would the defense attorney bother to do the same work himself? If each side could readily discover the adversary's work product, discovery would be totally contrary to the theory of the adversary system, in which each party is supposed to be responsible for developing its own case. As Justice Jackson said in his memorable concurrence:

> Counsel for the petitioner candidly said on argument that he wanted this information to help prepare himself to examine witnesses, to make sure he overlooked nothing. He bases his claim to

> it in his brief on the view that the Rules were to do away with the old situation where a law suit developed into "a battle of wits between counsel." But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

(I cannot resist noting that Justice Jackson grew up in Jamestown, New York, never went to college, attended only one year of Albany Law School's two-year program, apprenticed in a law office in Jamestown, and became a lawyer in 1913, at age 21. He was a brilliant lawyer. President Roosevelt named him General Counsel of the Treasury Department's Bureau of Internal Revenue in 1934; Solicitor General of the United States in 1938; Attorney General of the United States in 1940; and Associate Justice of the Supreme Court in 1941. Cream rises to the top, with or without formal legal education. See, also, Abraham Lincoln.)

The common law articulation of the work product doctrine in *Hickman v. Taylor* guided the federal courts for more than two decades. Eventually, in 1970, the work product doctrine was codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. Today, the heart of Rule 26(b)(3) provides as follows:

> *Trial Preparation: Materials.* ... [A] party may obtain discovery of documents and tangible things otherwise discoverable ... *and prepared in anticipation of litigation or for trial* by or for another party ... 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 ... 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. [Emphasis added.]

The rule thus describes two categories of work product. Materials “prepared in anticipation of litigation or for trial" constitute what is typically called "ordinary" work product. These materials may be discovered upon a showing of "substantial need" and inability without "undue hardship" to obtain the "substantial equivalent" by other means. However, if ordinary work product contains the "mental impressions, conclusions, opinions, or legal theories of an attorney," then the material is elevated to what is known as "opinion" work product and cannot be obtained at all, on any showing.

Comparing Waiver Doctrines

Here, in two short paragraphs, is just about everything you need to know about waiver of the attorney-client privilege and waiver of work product protection:

If you disclose information protected by the attorney-client privilege to any "third party" (other than a translator or interpreter), you have waived the attorney-client privilege. Whether disclosure is to an adversary or an ally, disclosing privileged documents or information outside the magic circle of lawyer and client (and their agents) waives the attorney- client privilege.

Work product is radically different. Disclosing work product to an adversary waives the protection, but disclosure to an ally (i.e., a person with a "common interest") does not waive protection unless the disclosure significantly increases the likelihood of disclosure to an adversary.

Why the difference? The rest of this column will discuss the differences between waiving the attorney client privilege and waiving work product protection, and will discuss the policy rationale for those differences. I intend to focus mainly on waiver of work product protection, which is a more difficult and less well known subject.

In Vincent C. Alexander & Robert A. Barker, *Evidence in New York State and Federal Courts,* (Volume 5 in Thomson West's New York Practice Series), the authors concisely explain the difference between the attorney-client privilege and the work product doctrine: "Whereas the purpose of the attorney-client privilege is to encourage clients to be candid in their communications with counsel, the work product immunity encourages lawyers to be diligent in their case preparation." Disclosing privileged information to any third party outside the tight circle of attorney and client will thus undermine the goal of encouraging a client's candor to the attorney, but disclosing work product to friendly third parties will not undermine the purpose of encouraging diligent trial preparation unless the disclosure sharply increases the adversary's chance of learning the information. As Alexander and Barker put it in § 5.16 of their treatise: "Waiver of the work product immunities may occur if the protected materials are disclosed to an adversary or the circumstances increase the opportunity for an adversary to obtain the materials."

The case cited for this general proposition is *Matter of Will of Pretino,* 150 Misc.2d 371, 567 N.Y.S.2d 1009 (Nassau County Surr. 1991) (Raymond Radigan, J.), which depends heavily on the distinction under New York law between an attorney's "work product" under CPLR § 3101(c) and "materials ... prepared in anticipation of litigation" under CPLR § 3101(d).

CPLR § 3101(c), headed "Attorney's work product," is one sentence: "The work product of an attorney shall not be obtainable." But the term "work product" is potentially misleading because it is apparently used in § 3101(c) to cover only a narrow category of information. As Professor Siegel explains, the "work product of an attorney" in § 3101(c) is "an ill-defined category whose potential for mischief has been avoided only because the judiciary has accorded it narrow scope. It is a category wholly distinct from the 'materials ... prepared in anticipation of litigation'" in §3101(d). *David D. Siegel, New York Practice*, 557 (4th ed. 2005). Thus, Professor Siegel continues: "The judiciary, in large measure tacitly, has ... cast precious little under the 'work product' category of subdivision (c), preferring instead to fit doubtful items under the 'materials ... prepared in anticipation of litigation' banner of subdivision (d)(2) ...."

CPLR § 3101(d)(2) - which is almost identical to Rule 26(b)(3) of the Federal Rules of Civil Procedure - provides as follows:

> *Materials.* [M]aterials otherwise discoverable ... and prepared in anticipation of litigation or for trial by or for another party ... may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the 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.

Thus, § 3101(d)(2) - like Rule 26(b)(3) - divides work product into "ordinary" work product and "opinion" work product.

Against that background , I will examine *Will of Pretino*.

"Dear Diary ..."

In *Matter of Will of Pretino,* two surviving adult children of John Pretino objected to his will, which favored Mr. Pretino's second wife. One objectant, Gina DeRise, remarked during her EBT that she wished she had her "book" to help her answer a question. She described the book as "a review of her relationship with her father." The proponent of the will (the second wife) sought discovery of the diary. Ms. DeRise opposed discovery on grounds that the diary was protected by the attorney-client privilege, by work product immunity under CPLR § 3101(c), and as "material prepared for litigation" under CPLR § 3101(d).

Both Ms. DeRise and her lawyer testified that she had prepared the diary at her attorney's instruction in connection with this litigation, and the court ruled that the diary was a privileged communication. But Ms. DeRise also testified that "she gave the diary to her husband and mother to review," so the proponent argued that Ms. DeRise had waived confidentiality. The Surrogate stated a basic principle: "Where the disclosure of information protected by the attorney-client privilege is disclosed in a communication which is itself privileged, there is no waiver." Here, Ms. DeRise argued that the communication to the spouse was protected by the marital privilege (CPLR § 4502), and the communication to the mother was protected by the "parent-child privilege."

The Surrogate said it was unnecessary to resolve the issue of privilege waiver because Ms. DeRise also contended that the diary constituted both attorney work product and material prepared for litigation. "Work product is a separate and distinct source of immunity from the attorney-client privilege," the Surrogate said, "and waiver of the attorney- client privilege does not necessarily result in waiver of the protection afforded under the work product category, nor... waiver of immunity for material prepared for litigation."

In the New York courts, "work product" under § 3101(c) is limited to materials that are "uniquely the product of an attorney's learning and professional skills." An interview conducted by an attorney would be attorney work product, but "material prepared solely by the client at the direction of the attorney is generally categorized as material prepared for litigation." The diary thus did not meet the requirements of an attorney's work product. But the diary was "material prepared for litigation." That forced the Surrogate to confront the waiver issue, which he addressed as follows:

> The purpose of the protection granted work product and material prepared for litigation is to protect the effectiveness of a lawyer’s trial preparations by immunizing the same from discovery. Thus, ... a waiver of work product immunity does not result where information is disclosed to a party or other person with a common interest. To constitute a waiver, disclosure must be inconsistent with maintaining secrecy as against an adversary and it must significantly increase the possibility that the opposing party will obtain the information.

Here, disclosing the diary to the objectant's mother "did not increase the likelihood that it would become available to the proponent." Accordingly, the Surrogate held that there was no waiver. Since the proponent had failed to establish that she was unable to obtain the substantial equivalent of the diary, as

required by § 3101 to overcome the protection for material prepared for litigation, the diary was protected from disclosure.

Cardinal Rules

A more recent and more significant case is *In re Cardinal Health Inc. Securities Litigation*, 2007 WL 495150 (S.D.N.Y. 2007) (Patterson, J.). In late 2003, the SEC began investigating Cardinal's accounting practices and requested certain documents from Cardinal. Cardinal discovered documents suggesting that certain employees might have engaged in improper practices. In 2004, the Audit Committee of Cardinal's Board of Directors began conducting its own independent investigation of these accounting practices and issues, and the Audit Committee retained Kramer Levin Naftalis & Frankel LLP as its "special counsel." In its capacity as special counsel, Kramer Levin investigated legal and accounting issues, obtained and analyzed hundreds of thousands of Cardinal documents, interviewed dozens of present and former Cardinal employees, and retained forensic accountants who worked under Kramer Levin's direct supervision and reported directly to Kramer Levin. Eventually, Kramer Levin advised the Audit Committee of the results of its legal analysis.

During Cardinal's internal investigation, both the SEC and the Unites States Attorney's Office ("USAO") contacted Kramer Levin. Both offices invited Kramer Levin to share the results of its investigation. After consulting with its client, Kramer Levin determined that "its mandate was the same as that of the SEC and USAO" and "shared issues, evidence, and theories with the SEC and USAO in fulfilling the mandate of the Audit Committee." Kramer Levin then produced documents to the SEC pursuant to a written confidentiality agreement between the Audit Committee, the SEC, and Kramer Levin. The same documents were produced to the USAO without a confidentiality agreement with Kramer Levin, but the USAO later advised Kramer Levin that it maintained confidentiality of all materials produced to it.

Meanwhile, a class of plaintiffs had sued Cardinal Health for securities fraud based on the improper accounting practices. The allegations were serious. (On April 23, 2007, the company established a $600 million reserve to cover its estimated liability in the event of a settlement.) Plaintiffs subpoenaed documents from Kramer Levin, which moved to quash on grounds of work product protection. Specifically, Kramer Levin asserted work product protection for (1) interview memoranda for more than 300 witnesses; (2) binders prepared for the Audit Committee reviewing the evidence relating to accounting issues and the actions of Cardinal employees involved in those issues; (3) work papers of the outside accountants analyzing issues for the Audit Committee; (4) compilations of documents organized by issue and prepared by Kramer Levin; and (5) materials compiled and produced by individual witnesses or lawyers for Cardinal.

Plaintiffs opposed the motion to quash, arguing that Kramer Levin's voluntary disclosure of those materials to the SEC and the USAO had waived work product protection. (Plaintiffs also argued that the materials were not protected as work product, and the court carefully analyzed that issue, but in this article I am concentrating solely on the waiver question.)

The court began its analysis of the waiver issues by citing the venerable case of *In re Steinhardt Partners, L.P.,* 9 F.3d 230 (2d Cir. 1993). There, the Second Circuit had held that Steinhardt's voluntary disclosure of privileged materials to the SEC while under investigation by the SEC waived the privilege protecting those materials. However, the Steinhardt court declined to adopt a per se rule that all voluntary

disclosures to the government waive work product protection. "Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis," the Second Circuit said. "Establishing a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials."

Under the circumstances in *Cardinal*, Judge Patterson said, "the Audit Committee's purpose in authorizing the investigation in the face of almost certain litigation between Cardinal and the SEC or USAO - as well as in sharing the results with the SEC and USAO - was that Cardinal's financial and accounting practices be 'clean as a hounds tooth,' an interest in common with the SEC and USAO." Because Cardinal had a "common interest" with the USAO, "Kramer Levin's failure to obtain a confidentiality agreement with the USAO does not waive the work product protection." Likewise, the Audit Committee determined that it and the SEC shared a "common interest in developing legal theories and analyzing information" concerning potential financial irregularities at Cardinal, and the Audit Committee authorized Kramer Levin to share documents with the SEC and the USAO. Moreover, in footnote 8, Judge Patterson said:

> Given that the work product doctrine is itself rooted in strong public policy concerns, it is entirely appropriate ... for courts to protect work product in these circumstances to encourage cooperation between the private and public sectors acting with a common interest.

Accordingly, based on *Hickman and Steinhardt,* Judge Patterson held that sharing documents with the SEC and the USAO did not waive work product protection.

Commentary on Cardinal

Judge Patterson's decision in *Cardinal Health* was praised in a column by Lisa Cahill, *'Cardinal Health' and Key Work Product Waiver Decision,* N.Y.L.J. March 20, 2007. (Ms. Cahill is a partner at Hughes Hubbard & Reed and a member of the firm's white-collar criminal defense group.) *The Cardinal Health* decision could "greatly assist corporations that ...sometimes have to face the Hobson's choice of sharing the results of an internal investigation with the government or withholding those results in order to prevent plaintiffs' class action counsel and other adverse parties from obtaining them." Ms. Cahill said that *Cardinal Health* appears to provide "a safe harbor - through the vehicle of the audit committee - for cooperating with the government and providing work product in furtherance of that cooperation while avoiding exposing potential damning work product to civil discovery." She added that the *Cardinal Health* decision would also help the SEC and U.S. Attorney's Offices because it "eliminate[s] a major deterrent" to disclosing work product.

However, another commentator cautioned that Audit Committees "would be wise to draw their mandate in the case of any independent investigation in a manner that demonstrates its common interests with government parties to examine evidence, develop legal theories, eliminate any wrongdoing, take remedial action and prevent its recurrence." Harry Weiss, Martine Beamon, Theodore Wells, Jr., and Peter White, *Privilege and Cooperation,* 1609 PLI/Corp 179, 192 (2007) (in PLI's program book for "Internal Investigations 2007: Legal, Ethical & Strategic Issues"). Furthermore, Ms. Cahill noted that she had located no other Second Circuit decision finding that a cooperative relationship between a corporation's

audit committee and the government resulted in a finding of no waiver "where the corporation's own relationship with the government remains at least potentially adverse." (The investigations by the SEC and the U.S. Attorney remained ongoing and could eventually result in adversary proceedings against Cardinal.)

Waiving Privilege - But Not Work Product

An important point to keep in mind is that waiver of the attorney-client privilege does not necessarily waive work product. If you have two locks on your house and a burglar picks one lock but not the other lock, the burglar is still locked out. (I have written about the relationship between privilege and work product before in the highly specialized context of patent litigation - see *Willful Infringement Litigation - Waiver & Work Product Protection (Parts I and II),* NYPRR July & August, 2004.)

A case illustrating the difference is *Charter One Bank, F.S.B. v. Midtown Rochester, L.L.C.,* 191 Misc.2d 154, 738 N.Y.S.2d 179 (Monroe County Supreme Ct. 2002) (Thomas Stander, J.). During a dispute between a big downtown landlord and a major commercial tenant, the landlord and tenant met (apparently without counsel) to try to negotiate a resolution. The defendant landlord was represented by the venerable Rochester firm of Harter, Secrest & Emery, LLP, which had written two confidential memos to its client interpreting disputed lease provisions. During the direct landlord-tenant negotiations, the landlord "voluntarily disclosed" one of Harter, Secrest & Emery's memos to the tenant for "a short period of time" and allowed the tenant to "read a portion of the document," obviously to convince the tenant that he had a weak case. After briefly reading part of the memo, the tenant returned it to the landlord and did not keep a copy.

During discovery, the tenant sought the disclosed memo, arguing that the landlord had waived any attorney-client privilege and work product protection by disclosing it. Moreover, the tenant argued that under the doctrine of "subject matter" waiver, the landlord's disclosure had also waived privilege regarding the second confidential memo from Harter Secrest on the same disputed lease provisions, even though the tenant had not seen the second memo.

The court agreed that the landlord had waived the attorney- client privilege. The disclosure was not inadvertent but rather "voluntary and intentional," demonstrating that the landlord "did not intend to retain the confidentiality of the privileged material and did not take reasonable precautions to prevent disclosure." But the court also held that the landlord had not waived work product protection. "Waiver of the attorney-client privilege does not prevent a document from being protected as work product of an attorney."

Moreover, even if the landlord's disclosure had waived work product protection as to the first Harter Secrest memo, it did not automatically waive work product protection as to the second, undisclosed memo. "The disclosure of a document protected by the work-product rule does not result in a waiver of the privilege as to other documents," the court said.

Conclusion: Three Key Differences

The cases above illustrate three important points about waivers of the attorney-client privilege and work product protection:

1. Disclosing a document protected by the attorney-client privilege to a third party nearly always waives the privilege, but does not ordinarily waive work product protection unless (a) the disclosure is to an adversary, or (b) the disclosure will materially increase the adversary's opportunity to obtain the materials.

2. Waiving the attorney-client privilege does not by itself waive work product protection. If a document is protected by the work product doctrine, it will continue to be immune from discovery even if the attorney-client privilege has been waived, unless work product protection has been independently waived.

3. Waiving the attorney-client privilege as to any document ordinarily waives the attorney-client privilege as to every privileged document on the same subject matter, but waiving protection for one work product document does not waive protection for any other work product documents. Work product waivers are determined document by document, and there is no such thing as a subject matter waiver of work product protection.

These fundamental points demonstrate that waiver doctrines for attorney-client privilege and work product protection differ in crucial ways that every litigator should understand.

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