APEX JURIST

How To Keep Secrets: The Attorney-Client Privilege

Thomas E. Patterson

Material originally written and prepared by Thomas Patterson.

Presented by Peter Bora

www.ApexCLE.com

apex CLE ApexCLE Inc.

The Apex Jurist, **www.ApexJurst.com** is

Published by ApexCLE, Inc.
www.ApexCLE.com

500 North Michigan Avenue,
Suite 300
Chicago, Illinois 60611
Toll Free 866□657□2004

920 South Spring Street
Springfield, Illinois 62704
Toll Free 866□657□2004

Ordering Information:

Copies of this book may be ordered direct from the publisher for $24.95 plus $4.25 shipping and handling. Please enclose your check or money order and shipping information. For educational, government or multiple copy pricing, please contact the publisher.

Library of Congress Cataloging-in-Publication Data

ApexCLE, Inc.

How To Keep Secrets: The Attorney-Client Privilege.

1. Patterson, Thomas, E. 3. ApexCLE, Inc. 2. Law-United States – Guide-books Page ii

About The Author

Thomas E. Patterson

Thomas E. Patterson graduated from Illinois Wesleyan University in 1976, was a salesman for one year, and then attended law school, graduating from DePaul University in 1979. In law school, he was an editor of the Law Review and published a Note, Ex Parte Contracts in Informal Rulemaking Proceedings: Home Box Office v. FCC. 27 DePaul Law Review 489 (1978), which the administrative Law Committee of the Illinois State Bar Association reviewed as "unusually perceptive."

After law school, he became a law clerk for Justice William G. Clark of the Illinois Supreme Court, where he observed the inner workings of the state's highest court, noted winning advocacy skills, and researched and wrote memoranda for the opinions that were issued.

Mr. Patterson was an associate and then equity partner in the law firm of Wildman, Harrold, Allen & Dixon. He started the Patterson Law Firm, PC on April 14, 2000.

Mr. Patterson is a member of the Federal Trial Bar and is admitted to practice before the United States Supreme Court as well as the state and federal courts in the Chicago metropolitan area. As a member of the American Bar Association, the DuPage County Bar Association and the Illinois State Bar Association, he has been active on committees relevant to businesses, professionals entrepreneurs, and the selection of judges.

Author's Email Address: tep@pattersonlawfirm.com

Author's Website: www.pattersonlawfirm.com

Author's Mailing Address: **The Patterson Law Firm, PC**
33 North LaSalle Street
Suite 3350
Chicago, IL 60602

HOW TO KEEP SECRETS:
THE ATTORNEY-CLIENT PRIVILEGE

Table of Contents

I. Introduction: Are your clients' communications with you secret?

Most people believe that their lawyer will keep their communications secret, but it is not always so. This paper will help you recognize the issues that pervade the attorney-client privilege—and thus help you keep your clients' secrets.

The attorney-client privilege is the oldest known secrecy privilege. It was accepted as early as the reign of Elizabeth I in England, although then the privilege was owned by the attorney, not the client.' But, during the Clinton administration, attorneys for the President and Mrs. Clinton had to disclose their notes regarding conversations with them. Litigation over the attorney-client and related privileges have involved a significant number of public figures, including Presidents Nixon and Clinton and their lawyers, socialite Klaus VonBulow, lawyer Alan Dershowitz, Mrs. Clinton and many others.

Difficulty over the application of the doctrine has not been experienced by public figures alone. In every day litigation, risk managers, claims personnel, corporate executives, and their lawyers frequently misunderstand the privilege, sometimes with devastating results. Certain

recurring situations endanger the privilege. More sophisticated procedures should be enacted by clients and their corporations to ensure that secrets can be kept. Before reviewing such procedures, however, the doctrine itself must be understood.[1]

II The Purpose Of The Attorney-Client Privilege

The crux of the privilege is located between two opposite principles. "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."[2] Supreme Court cases going back to 1888 have endorsed this rationale.[23] There is a "social good derived from the proper performance of the functions of lawyers acting for their clients."[4] Thus, people will be encouraged to seek legal advice if they know they can do so

---

[1] The theory was that to require an attorney to provide testimony against his client to whom loyalty was owed would violate the attorney's honor as a gentleman. A.G. Wiarnore, Evidence, §2290 at 542-43 {McNaughton Rev, Ed. 1961). 2 Upjohn Company v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L.Ed. 2d 584 (1981).

[2] See e.g., Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 913, 63 L.Ed. 2d [3] (1980); Hunt v. Blackburn, 128 U.S. 464, 470, 9 S. Ct. 125, 127, 32 L. Ed. 488 (1888) (privilege based upon "the necessity, and 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").

[4] United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

in confidence; fully advised lawyers will provide accurate advice and promote adherence to the law; people who have fully confided in their lawyer will trust them, rely on their advice, and more laws will be adhered to as a result. This will not necessarily withstand a logician's analysis, but it is the basis of the privilege. An additional public policy includes the interest in privacy.

The opposite policy is one of full disclosure. How can the truth be discovered if we conceal evidence? "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the Rules of Evidence."[5] The aims of the criminal justice system are that "guilt shall not escape or innocence suffer."[6] Exceptions "to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."[7]

---

[5] United States v. Nixon, 418 U.S. 683, 709, 94 S. Ct. 3090, 3108, 41 L. Ed.2d 1039 (1974)

[6] Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935).

[7] United States v. Nixon, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L.Ed. 2d 1039 (1974).

As a result of these competing policies, the attorney-client privilege is "strictly confined within the narrowest possible limits consistent with the logic of its principle."[8] The law also requires that the person asserting the privilege sustain the burden of establishing its elements.[9]

III Differences between the States and Federal Government in Defining the Privilege

When filing a case, it is important to do so in a jurisdiction with more liberal disclosure rules with respect to the attorney-client privilege if your opponent has most of the documents relevant to the dispute, or in-house counsel who are fact witnesses, and if you think such documents or the testimony of these witnesses will help you.

Conversely, if your client has significant documents that you think should remain secret under the privilege, or if there are in-house attorney witnesses that you would prefer to keep silent, consideration as to which jurisdiction provides the most protection under the attorney client privilege is important.

---

[8] United States v. Nixon, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L.Ed. 2d 1039 (1974).

[9] Clarke v. American Commerce National Bank, 977 F.2d 1533 (9th Cir. 1992); Town of Norfolk v. United States Army Corps of Engineers, 968 F.2d 1438, 1457 (1st Cir. 1992).

The privilege should be considered at the outset because there are differences among the states and between the states and the federal courts with respect to its scope. Where the rule of the decision to be applied in a case is supplied by state law (for example, breach of contract claims, medical malpractice, automobile accidents, product liability claims), that state's law establishes the elements of and the scope of the privilege, even if the case is pending in Federal Court.[10]

If, however, federal law supplies the rule of decision (for example, antitrust, civil rights action, securities frauds), the federal attorneyclient privilege rule will be applied. See, Federal Rules of Evidence, R. 501. If a case is brought in a state court, that state's privilege law will apply even if the claim is based upon a federal statute (e.g., FELA claim), as long as the state courts are given concurrent jurisdiction to hear the claim.[11]

[10] See, Federal Rules of Evidence, R. 501.

[11] See, Abbott Lab v. Airco Inc., 1985 WL 3596, 1 (N.D. 111. 1985) (No. 82 C 3292). 12 See, Rager v. Boise Cascade Corp., 1988 WL 84724, at 1 (N.D. Ill. 1988) (No. 88 C 1436). See also, Perrignon v. Burgen Brunswig Corp., 77 F.R.D. 455, 458 (N.D. Calif. 1978).

If a case pending in federal court involves both state and federal claims, some cases apply the federal rule with respect to the scope of the privilege.[12] The privilege is arguably lost if the communications have to be disclosed pursuant to either state or federal law. Separate trials could be requested in order to prevent this result. In Abbott Lab v Airco Inc.,[12]the Court relied on Illinois law to determine the scope of the privilege notwithstanding that the contracting parties specified that the agreement at issue was governed by New York law.

The problems get even more complex considering multinational corporations. Advice might be rendered in a foreign country with no privilege law, or advice might be rendered here relating to events or transactions pending in a foreign country. It is beyond the scope of this paper to consider all of these examples, but a wise attorney will advise their client about such matters before communications are put at risk of being outside the privilege.

[12] Abbott Lab v Airco Inc., 1985 WL 3596, 1 (N.D. Ill. 1985) (No. 82 C 3292).

A discussion of the elements of the privilege will help explain the differences between the jurisdictions. All jurisdictions agree on the basic elements of the privilege, but they differ in how those elements are interpreted and applied.

IV Elements of the Privilege

The elements of the attorney-client privilege doctrine are:

(1) The privilege proponent is, was or sought to be a client;

(2) The privilege attaches to communications made to and from the lawyer, or one of the lawyer's subordinates, or another agent acting on behalf of the lawyer;

(3) The communications protected must relate to an opinion of law, legal services, and/or assistance in a legal proceeding;

(4) The communications must have been rendered under circumstances which show that they were intended to remain confidential;

(5) The privilege must be claimed by the client and not waived. Cases explaining the elements of the privilege with related formulations include[13]

Exception. The primary exception to the attorney-client privilege is that the communications cannot relate to the commission of a current or future crime or a tort. This is sometimes known as the crime/fraud exception.

Canons of Ethics.

The Canons of Ethics prevent a lawyer from disclosing or using a confidence or secret of the client absent client consent, with a few exceptions.[14] The ethics rules generally provide for a broader privilege than the case law.[16]

The elements of the privilege are set forth in more detail below.

[13] United States v. Construction Products Researchjnc., 73 F.3d 464, 473, 33 Fed. R. Serv. 3d 828 (2d Cir. 1996), and United States v. White, 970 F.2d 328, 333, 36 Fed. R. Serv. 657 (7th Cir. 1992).

[14] See Appendix A, attached, for a copy of the relevant provisions of the ABA Model

1 The Privilege Proponent Is, Was Or Sought To Be A Client

To obtain privilege, the person confiding in the lawyer must be a client or have sought to become a client. This sounds self-evident, but on closer examination, some subtle questions are presented.

Does the attorney-client relationship exist in the absence of an agreement hiring the attorney? If the other elements are present, the relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result."[17] If the client had a reasonable expectation that the attorney was his/her attorney, then the attorney client relationship will be found.[18]

However, a client contemplating a lawsuit might interview all of the firms that specialize in the type of litigation being considered (if the number of such firms are few), share confidential information with each of them,

---

Code of Professional Responsibility and the Illinois Code of Professional Responsibility.

16 See. Wright & Graham, Federal Practice and Procedure: Evidence, sec. 5472, p. 90 (1986).

17 Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978).

18 United States v. Walters, 913 F.2d 388, 392 (7th Cir. 1990).

and thereafter effectively preclude any of those firms from representing its opponent in the litigation after it is filed. Firms try to protect themselves from this by asking the prospective client to agree in writing that the information being shared with its attorneys during the preliminary discussions is not privileged, thus reserving the right to represent the opponent.

Corporations. More interesting questions are posed when an organization is the client. There are significant differences between federal and state law. The federal attorney-client privilege protects communications between any employee of the corporation and the corporation's lawyer under the following circumstances: (a) the communications were made by corporate employees to counsel for the corporation in order to secure legal advice; (b) the information was not available from upper management, and was needed to supply a basis for legal advice concerning compliance with the law; (c) the communications concerned matters within the scope of the employee's corporate duties; (d) the employees were aware that they were being questioned so that the corporation could obtain legal advice; (e) the employees were advised of the implications of

the information they were asked to supply; and (f) the employees were advised that the communications would be treated as highly confidential.[15] In contrast, many states fail to protect communications made between lower level employees and a corporation's attorneys. In those jurisdictions, the attorney-client privilege extends to communications between the "control group" and the corporation's counsel.[16] An employee falls within the control group of a corporation when (a) the employee is in an advisory role to top management (e.g. top management would not normally make a decision in a subject area without the employee's advice or opinion), and (b) the employee's opinion does in fact form the basis of the final decision by those with actual authority. An employee is not within the control group if he/she is one on whom top management merely relies upon for information. Some states have incorporated the control group test as the appropriate scope of the privilege by statute.[17] Other states, like Illinois,

[15] Upjohn Co. v. United States, 449 U.S. 383, 394-95, 101 S. Ct. 677, 685, 66 L. Ed. 2d 584 (1981).

[16] See, Archer Daniels Midland Co. v. Koppers Co. Inc., 138 Ill.App.3d 276, 485 N.E.2d 1301, 1303-4 (1st Dist. 1985).

[17] See, Alaska Rules of Evidence 503(a)(2) (1996); Arkansas Rules of Evidence 502(a)(2) (1996); Maine Rules of Evidence 502 (1996). (1982).

have adopted this test by judicial decision. In a corporate setting, therefore, the rules of several states privilege fewer employees' communications than federal law. If an employee is involved in an automobile accident and an attorney wishes to interview several non-control group employees, such communications will not be protected under the attorney-client privilege (although they might be protected by the work product privilege).

In Archer Daniels Midland Co. v. Koppers Co., Inc.,[23] corporate counsel commissioned a report to identify potential problem areas relating to the design of a grain storage structure, one of which had collapsed. The report identified problem areas and assisted with potential warnings. During discovery, Archer Daniels Midland sought the report. The Court noted that the communications were made with the intent of maintaining secrecy, that the company had significantly limited distribution of documents to in-house counsel and senior decision makers, that the documents were labeled confidential, that they were created to determine legal strategies, and that the privilege had not been waived.

---

23 Archer Daniels Midland Co. v. Koppers Co., Inc., 138 Ill. App.3d 276, 485 N.E.2d 1301 (1st

employees who were not decision makers for the corporation. Information related to the decision making process was protected, but not the information and opinions necessary to make the decision. Under federal law, the report would have been protected if the Upjohn factors were followed.

Corporate investigations. When hired to investigate a matter, you should make your client aware that any interviews with lower level employees may be disclosed if you are in a jurisdiction using the control group test, and the matter relates to state law. The client should be given two choices: (a) conduct the interviews anyway, with an understanding that there is a risk that the communications will be disclosed; or (b) rely only on existing reports that must be produced in discovery anyway, and confine interviews only to those involved in the decision making process. With respect to federal cases, when interviewing employees, ensure that the Upjohn criteria are closely followed.

Nevertheless, the report was ordered disclosed because it contained information provided by lower level technical and scientific

Accident investigations. When investigating an accident, an attorney should determine whether the applicable jurisdiction adheres to the

control group test. If in a jurisdiction that adheres to a control group test, clients should avoid having lower level employees make sensitive, premature judgments as to the cause of an accident in writing. A client should ensure that their attorney is on the scene of an accident as quickly as possible, and that all communications flow through that attorney.

While corporate communications cannot be cloaked in the privilege by routing them routinely through an attorney,[18] the attorney can provide instantaneous advice to lower and upper management if he or she controls the communications. If lower level employees also communicate independently with the risk management department, these communications—filled with hearsay, double hearsay and snap judgments—risk being disclosed to the opponent. With each separate communication, the risk of error and inconsistency increases, as does the likelihood of creating evidence for your opponent.

[18] Western Trails, Inc. v. Camp Coast to Coast Inc., 139 F.R.D. 4,13 (D.C.C.C. 1991).

Organizations As Clients. Organizations As Clients Present Additional Problems.

When an attorney interviews an individual employee of the corporation, that employee may think that the attorney is representing his/her interest. Where there is any risk that the employee being interviewed may have personal liability, the attorney should warn the employee and afford him/her the opportunity to obtain separate counsel.[19] In one criminal case, a corporation agreed to waive its attorney-client privilege but a communicating member of the control group did not wish to waive his privilege. Because the lawyer was acting for the company only, the privilege belonged to the company and not to the communicating officer.[20] He therefore had no privilege.

Who owns the privilege?

Perhaps the most spectacular traps relating to client identity and the attorney-client privilege relate to the question of who owns the privilege in the corporate or large organization context. The head of United Way could not assert the privilege relating to communications with United Way's

[19] See, Leary, Is There A Conflict In Representing a Corporation and Its Individual Employees? 36 Bus. Law 591 (1981).
[20] United States v. Keplinger, 776 F.2d 678, 700-701 (7th Cir. 1985).

counsel to conceal his misdeeds because the privilege belonged to United Way, not to him.[21] In another case, a corporation was prevented from asserting the privilege against a former member of the control group who sought access to privileged material in

litigation.[28]

Consider the following situation: A company considering bankruptcy has discussions with its counsel. It is later decided that a bankruptcy petition will be filed. The bankruptcy petition is filed and a trustee is appointed to manage the affairs of the corporation for the creditors. That trustee can decide to waive the attorney-client privilege as to communications that took place prior to filing of the bankruptcy. The reason is that the privilege belonged to the corporation, and the trustee—as decision maker for the corporation—can decide to waive the privilege.[22] This must have been a shock to the prior management.

Consider, too, the following example: A corporation discovers potential wrongdoing and hires an attorney to investigate. The attorney interviews

---

[21] United States v. Aramony, 88 F.3d 1369, 1390 (4th Cir. 1996). 28
Gottlieb v. Wiles, 143 F.R.D. 241, 247 (D.C. 1992).

[22] See, Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 105, S.Ct. 1986, 85 L.Ed 372 (1985).

several employees and reports to top management. For related reasons, a disgruntled shareholder files a lawsuit on behalf of the corporation. The shareholder requests all communications with attorneys hired by the corporation. The shareholder's argument is that his/her lawsuit is filed on behalf of the corporation; he/she is a shareholder; therefore, the communications between the corporation and attorney belong to him/her as much as to the current management.

In the leading case of Garner v. Wolfinbarger,[23] the court applied a balancing test to determine whether the information should be disclosed. The court recognized competing concepts. First, the management of the corporation manages on behalf of the shareholders. Second, the corporation must be free to seek legal counsel without fear of indiscriminate disclosure to disgruntled individual shareholders who might not share a commonality of interest with the managers of majority shareholders.

[23] Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971)

In Garner, however, the Court ordered disclosure after weighing the following factors: (a) the number of shareholders involved and the percentage of stock they represented; (b) the nature of their claim; (c) the necessity of obtaining the information and its availability from other sources; (d) whether the alleged misconduct of the corporation was criminal or of doubtful legality; (e) whether the communication related to past or prospective actions; (f) whether the communication related to advice concerning the litigation itself; (g) whether the shareholders were blindly fishing; and (h) the risk of revealing trade secrets or other confidential information.[24]

Garner has been expanded beyond derivative shareholder suits to shareholder actions in which they sue in their own right,[25] to partners of a limited partnership,[26] and to suits by union members against union officers.[27]

[24] See also, In Re: Transocean Tender Offer Securities Litigation, 78 F.R.D. 692, 69497 (N.D. Ill. 1978).
[25] Fausek v. White, 965 F.2d 126, 130 (6th Cir. 1992)
[26] Ferguson v. Lurie, 139 F.R.D. 362, 366 (N.D. Ill. 1991)
[27] Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 681 (D. Kan. 1986).

Fiduciary duties. Where a bank acted as a fiduciary on behalf of a party in a land acquisition deal, the communications between the bank employees and the bank's counsel were not immune from discovery by the fiduciary on whose behalf the bank acquired the land.[28] In one state court case, an executor of a will was held not to be able to assert the attorney-client privilege with respect to advice given to him by an attorney because the attorney acted not only for the executor but also on behalf of the beneficiaries to the will.[29] Similarly, a pension fund trustee might be required to disclose communications had with the fund's counsel to a pension fund beneficiary.[30]

Other examples. The most visible example of this principle involved a former occupant of the White House. President Clinton apparently discussed matters relating to the Monica Lewinsky investigation with attorney Bruce Lindsey. Lindsey was the Deputy White House Counsel and Assistant to the President. The court held that Lindsey must testify to the Grand Jury.

---

[28] Quintel Corp., N.V. v. Citibank, N.A., 567 F. Supp. 1357. 1360-64 (S.D.N.Y. 1983).
[29] Estate of Torrian v. Smith, 263 Ark. 304, 564 S.W.2d 521 (1978).
[30] See, Donovan v. Fitzsimmons, 90 F.R.D. 583, 586 (N.D.Il1. 1981).

While there were several reasons for the decision, one of them was that an attorney of the government does not owe a duty to defend clients against criminal charges and does not owe a duty to protect wrongdoers from public exposure. "Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his/her client agency."[31] In other words, the government, not President Clinton, was the client. The information that a government lawyer provides a government official about a matter found to be personal is not privileged.[32]

Insured/insurer. The presence of insurance complicates the analysis of client identity. The attorney-client privilege "extends to communications between an insurer and an insured, where the insurer has a duty to defend."[33][34]

One case has held that the insurance company cannot prevent an insured from examining the communications sent by insurance defense counsel to

---

[31] In Re: Lindsey, 148 F.3d 1100, 1108 (D.C. Cir. 1998).

[32] In Re: Grand Jury Subpoena Duce Tecum, 112 F.3d 910, 925 (8th Cir. 1997), cert. denied, 117 S. Ct. 2482 (1997).

[33] Chicago Trust Co. v. Cook County Hospital, 298 Ill. App.3d 396, 698 N.E.2d 641,

[34] ,232 Ill. Dec. 550. 558 (Ill.App. 1 Dist., 1998). See also, People v. Ryan, 30 I11.2d 456, 461, 197 N.E.2d 15 (1964); Buckman v. Columbus-Cabrini Medical Center, 272 Ill.App.3d 1060, 1066, 651 N.E.2d 767, 209 Ill. Dec. 589 (Ill. App. 1 Dist., 1995).

the insurance company.[35] As set forth later in this paper (in the section on confidentiality), significant questions are posed when an insurer insures two adverse parties, when there are coverage questions between the insured and the insurer, and when there is a reservation of rights issued by the insurance company.

The privilege survives the death of the client. In the White House investigation, notes and testimony were sought from the lawyer consulted by the late White House counsel, Mr. Foster, shortly before his death. The Circuit Court held that the privilege did not survive the death of the client, but the American Bar Association, National

Association of Criminal Defense Lawyers and the American Corporate Counsel Association appeared as amicus curiae in the Supreme Court. The Supreme Court concluded that the attorney-client privilege should survive the death of the client.[36]

[35] See, Blaylock & Brown Construction Co. v. A.I.U. Insurance Co., 796 S.W.2d 146, 155 (Tenn. App. 1990).

[36] Swidler & Berlin, et al. v. United States, 524 U.S. 399 (1998).

2 Only Communications Between Client And Attorney Are Subject To The Privilege

The attorney-client privilege "extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing."[37] If a client tells a lawyer, "I made a verbal contract with John Doe," the lawyer cannot be compelled to reveal that (with some specific exceptions), but nothing prevents John Doe from asking the client whether he in fact made a verbal contract with him. The client would then have to answer that question truthfully.

Pre-existing documents are not privileged. Simply because a client submits a tax return, a memorandum, or other document to his/her attorney does not make it privileged.[38] If the document was not privileged had it remained in the hands of the client, it will not become privileged by giving it to a lawyer.[39]

Although the privilege extends to communications between the attorney and his client, the attorney-client privilege "does not extend to information which an attorney secures from a witness while acting for his client in

[37] Upjohn, 449 U.S. at 396.
[38] Fischer v. United States, 425 U.S. 391, 403-4, 96 S.Ct. 1569 (1976).
[39] Matter of Grand Jury Subpoenas, 959 F.2d 1158, 1166 (2d Cir. 1992).

anticipation of litigation." Similarly, the attorney-client privilege does not protect attorney notes, mental impressions, file strategy memorandums and the like. Such information might be protected by the work product privilege, but it is not part of the attorney-client privilege.[40]

Because the privilege protects only communications, an attorney can be compelled to testify about his or her client's appearance or handwriting.[41] In one case, a letter from a defendant to her attorney was admitted, albeit for the limited purpose of comparing the style of type on a letter to the attorney with another letter typed on the defendant's typewriter.[42] Where a corporate attorney discussed matters with outside auditors and a tax attorney from the corporation's legal department, the summary of the meeting was ordered disclosed because it involved communications made by the auditor rather than the client.[49]

In addition to matters of appearance or handwriting, an opposing lawyer is able to obtain information relating to the fact that an attorney was

---

[40] Hickman v. Taylor, 329 U.S. 495, 508, 67 S. Ct. 385, 392, 91 L. Ed. 451 (1947); See, Federal Rules of Civil Procedure, R. 26(b)(3).

[41] See In Re: Grand Jury Proceedings 791 F. 2d 663, 665 (8th Cir. 1986).

[42] See, United States v. Weger, 709 F.2d 1151, 1154-56 (7th Cir. 1983). 49 United States v. Bonnell, 483 F. Sup. 1070, 1077 (D. Minn. 1979).

consulted. Under normal circumstances, therefore, the fact that a client consulted with an attorney, the date of the consultation, the amount of attorney fees and the scope and nature of employment are not deemed privileged.[43] Under the same theory, an engagement letter (the contract between client and attorney) can be requested and produced in discovery notwithstanding the privilege.[44] Likewise, an inquiry into the purpose for which an attorney was retained can be permitted.[45]

There are some occasions when the above rules will not apply—for example, when the fact of consultation itself would reveal the existence of criminal misconduct. Thus, attorneys who made payments to the I.R.S., "presumably for unpaid taxes, on behalf of unnamed clients" could claim the privilege to conceal the identity of the client, although some cases are to the contrary.[46]

---

[43] Humphreys, Hutcheson & Moseley v. Donovan 755 F.2d 1211,1219 (6th Cir. 1985); In Re: Grand Jury Subpoena Served upon Doe, 781 F.2d 238, 247-48 (2nd Cir.) (en bane), cert. denied, Roe v. United States, 475 U.S. 1108, 106 S.Ct. 1515 (1986).

[44] See, Diversified Industry v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977).

[45] Westhemeco, Ltd. v. New Hampshire Insurance Co., 82 F.R.D. 702, 707 (S.D.N.Y. 1979).

[46] Wright & Graham, sec. 5478. p. 224.

At a deposition, then, assuming the minimal relevance threshold is met, an in-house counsel can be routinely questioned about when meetings were held, how long they lasted, who attended the meetings, and the general purpose of the meetings. Likewise, assuming relevance, a plaintiff can be asked when he consulted an attorney, who was present, and what the general purpose in consulting the attorney was, all without running afoul of the attorney-client privilege.

At times this limitation on the attorney-client privilege can put a party in a very uncomfortable position. For example, where a corporate officer has left a corporation and set up a rival competing firm, information regarding his/her plans to leave the company and to compete are primary subjects of inquiry. If the company from whom the officer separated files an action for breach of fiduciary duty, it generally should be able to obtain the dates that the ex-officer consulted an attorney, the length of time of the meetings, the amount of fees paid relating to those meetings, and the general purpose for those meetings.

This puts the ex-officer in an awkward position if his former company is able to imply that he had a plan to leave at a date preceding his resignation

announcement. The ex-officer is forced to do one of two things: he can waive his privilege and reveal his communications with his counsel to show he acted properly; or he can allow his former company to imply that his meetings with his attorney were for some improper purpose. The exiting employee and his/her counsel facing such a situation at trial should vigorously oppose the introduction of such evidence on the grounds that it forces upon the client an obvious Hobson's choice of either waiving the privilege or allowing an improper implication to be asserted. Failing that, the attorney should request a limiting jury instruction as to the nature of the evidence with respect to the client's consultation with the attorney.

3 The Communications Must Relate To An Opinion Of Law, Legal Proceedings, And/Or Assistance In A Legal Proceeding

No privilege is attached to business advice or investigative facts because the purpose of the attorney-client privilege is to facilitate legal advice.[47] If legal advice is given to the board of directors by an attorney, the privilege attaches to that advice, but the attorney's presence at a board of directors

[47] In the Matter of Feldberg, 862 F.2d 622, 626-27 (7th Cir. 1988).

meeting does not make the meeting minutes privileged.[48] Moreover, communications made to an attorney acting as a business negotiator are not privileged.[49]

When an attorney is preparing tax returns, communications to the attorney and the documents prepared by the attorney are not privileged,[50] although some courts have disagreed.[51] This rule extends to any functions for which the attorney is not acting as a lawyer.[52] The Seventh Circuit in 1999 applied this rule and denied the privilege to the taxpayer's attorney's notes on the preparation of the tax return even though a taxpayer was being audited. Where an in-house counsel holds a dual role, the privilege is often lost.[60] Thus, corporations should be wary of having an in-house lawyer also serve as Director of Human Resources or in some other dual capacity if the corporation intends to keep communications with the officer secret.

---

[48] Great Plains Mutual Insurance Co. v. Mutual Reinsurance Bureau, 150 F.R.D. 193, 197 (D. Kan. 1993).
[49] United States v. Wilson, 798 F.2d 509, 513 (1st Cir. 1986).
[50] . Canaday v. United States, 354 F. 2d 849, 857 (8th Cir. 1966)
[51] Burlington Industries v. Exxon Corp., 65 F.RD. 26, 39 (D. Md. 1974).
[52] In the Matter of Grand Jury Proceeding. 68 F.3d 193, 197 (7th Cir. 1995). 60 In Re: Sealed Case, 737 F. 2d 94, 99 (D.C. Cir. 1984); Hardy v. New York News, Inc., 114 F.R.D. 633, 643- 44 (S.D.N.Y. 1987).

The attorney-client privilege does not protect documents relating to budgets, profitability and insurance.[53] In Dawson v. New York Life Insurance.,[54] the Court ordered information disclosed because the attorneys were requested to provide factual information and failed to offer instruction on the proper use of it. Because they acted more as "couriers" of factual information rather than as legal advisors, the attorney-client privilege failed to apply.

Some of the most contested attorney-client privilege cases involved whether an attorney was acting as an investigator rather than as a lawyer. In Diversified Industries, Inc. v. Meredith,[55] a corporation hired a law firm to investigate a potential slush fund maintained by the client. The initial panel of the court concluded that the firm was only investigating, it was not providing legal services, and the work of that firm would not be privileged. However, the full Court, rehearing the case en bane, reversed the panel's opinion, concluding that the law firm was retained to give legal advice, although it rested its opinion on the rather weak basis that the firm

[53] See Simon v. G.D. Searle and Co., 816 F.2d 397, 402-04 (8th Cir. 1987).
[54] Dawson v. New York Life Insurance., 901 F. Supp. 1362 (ND. III. 1995)
[55] In Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977)

was a professional legal advisor.[56] Similar investigative activities would come within the protection, provided that these tasks are related to the rendition of legal services.[57] Detective work— without legal advice—is not privileged, even if performed by attorneys.[66]

In analyzing whether the communications relate to a legal opinion or legal services, the primary danger in losing the privilege occurs with respect to documents. It is doubtful that any lawyer would testify in a deposition that he or she was not providing legal services. In many of these cases, however, an in camera inspection of withheld documents will be conducted.

If an attorney has not sufficiently related the investigative tasks to the provision of legal advice or opinions in the document, a court might rule that the attorney was not acting as a lawyer. If outside counsel is retained to make an investigation, the engagement letter should specify the legal services and the legal opinions that are requested to help establish that the work undertaken was legal, rather than investigative.

---

[56] Id. at 610.

[57] Dunn v. St. Farm Fire and Casualty Co., 927 F.2d 869 (5th Cir. 1991). 66 State v. Canady, 460 S.E.2d 677, 690 (W.Va. 1995).

4 For The Attorney-Client Privilege To Apply, Communications Must Have Taken Place Under Circumstances That Show The Parties Expected The Communications To Be Made In Confidence

To assert the privilege, the client must intend confidentiality. If consulting an attorney in the presence of strangers or a third-party, one should not expect one's communications to remain confidential.[58] As might be expected, the paralegals or secretaries of the law firm are not considered third parties or strangers for purposes of the confidentiality analysis. More complex problems arise when a client communicates with an attorney with the intention that the attorney relay information to others.

Information provided to an attorney with the intention that it be included in a tax return is not covered by the privilege.[68] Similarly, where information was communicated to a government agency, the privilege is absent.[69]

---

[58] See, United States v. Gann, 732 F.2d 714, 723 (9th Cir.), cert. denied, 105 5. Ct. 505 (1984); New Orleans Saints v. Griesedieck, 612 F. Sup. 59, 63 (E.D. La. 1985).

68 United States v. Bohonnon, 628 F.Supp. 1026, 1029 (D. Conn. 1985), aff'd., 795 F.2d 79 (2d Cir. 1986). See also, United States v. Tether, 255 F.2d 441, 447 (2d Cir. 1958) (defendant communicated objections to a bond issue to his attorney with the expectation that the attorney prepare a letter to the third parties; held that the privilege failed).

69 See, Colton v. United States, 306 F.2d 633, 637-38 (2nd Cir. 1962), cert. denied, 371 U.S. 951 (1963).

The confidentiality analysis is similar to the doctrine of waiver. The difference between *maintaining confidentiality* so that the privilege exists and *waiver* of the privilege itself is probably a distinction important only to lawyers: waiver can occur after the privilege has attached, whereas if the initial communication was not provided under circumstances of confidentiality, the privilege never existed at all. The point here is to maintain the secrecy of communications given to or received from the attorney during and after the communications.

There are times when the client may confide mistakenly believing that he has confidentiality. Consider a simple automobile accident case with an interesting twist: both drivers are insured by the same insurance company. As is customary, the insurance company, which is obligated to provide a defense, secures statements from each driver.

Under normal circumstances, a statement taken from you by your insurance company is privileged. If, however, you know that your litigation opponent is insured by the same company, one court held that "one of the essential conditions precedent to the attachment of the attorney client

privilege, i.e., that the communications must originate in a confidence that they will not be disclosed, cannot be said to exist."[59]

In normal circumstances, when an insurance company owes a party a defense, it will select the attorney to represent that party, unless the insurance policy reserves that right to the insured. When such a party communicates with its attorney. The party reasonably believes that the information provided to the attorney is confidential.

Complicated situations arise, however, when the insured and the insurer become adverse. In some cases, because the insured has a duty to cooperate pursuant to the insurance policy, the courts have ruled that information provided to counsel provided by the insurance company is not privileged from the insurer.[71]

To the same effect is Waste Management, Inc. v. International Surplus Lines Insurance Co.,[60] In that case, the insured had settled two cases arising out of environmental impairment litigation. The indemnity policy provided the insurers the right but not the duty to defend the claim. The insureds

---

[59] See, Monier v. Chamberlain, 35 Ill.2d 351, 221 N.E.2d 410, 415-16 (1966). 71 EDO Corp. v. Newark Insurance Co., 145 F.R.D. 18 (D. Conn 1992).

[60] Waste Management, Inc. v. International Surplus Lines Insurance Co., 144 Ill.2d 178, 579 N.E.2d 322 (1991). 73 579 N.E.2d 322, 328.

71 EDO Corp. v. Newark Insurance Co., 145 F.R.D. 18 (D. Conn 1992).

retained counsel, defended the case, settled one of the lawsuits, and then sought indemnification for the settlement and the defense costs. The insurers denied coverage. The court reasoned that the cooperation clause in the insurance policy disallowed any expectation by the insured that the information it provided to the insurance company's retained counsel would remain confidential from the insurance company.[73]

Such holdings do not apply to personal counsel retained by the client to litigate coverage questions against an insurance company. It is not unusual, however, for an attorney for the insured to provide a letter detailing facts and law in support of the insured's claim that coverage should be provided under the policy. The insurer can later request any and all communications that led to the preparation of the letter. In Gottlieb v. Wiles,[61] the court held that one may not release documents which pervasively cover a particular subject matter and then claim that the underlying supportive data is privileged."

[61] Gottlieb v. Wiles, 143 F.R.D. 241, 249 (D. Col. 1992)
73Castano v. American Tobacco Company. 896 F. Supp. 590 (E.D. La. 1995).

Similar holdings have prevented claims of privilege when information was transmitted to an attorney with the intention that it be included in the tax return, [62] when information was submitted to an attorney with the expectation that the attorney would prepare a letter to third person setting forth objections to a securities offering;[63] or to information relating to business proposals.[64]

In many cases, the insurance company will provide a defense but only subject to a reservation of rights. The insured and the insurer have a common interest in the defense of the underlying claim, even though their interests are adverse when considering the coverage of the policy itself. In such circumstances, the common interest doctrine will permit the insured and the insurer to share information common to their litigation position through other parties.

---

[62] United States v. Bohonnon, 628 F. Sup. 1026, 1029 (D. Conn. 1985), affirmed 795 F.2d 79 (2nd Cir. 1986).

[63] United States v. Tellier, 255 F.2d 441, 447 (2nd Cir. 1958).

[64] In Re: Ampicillin Antitrust Litigation, 81 F.R.D. 377, 390 (D. D.C. 1978).

The common interest doctrine. The "common interest" doctrine represents an exception to the idea that the presence of third parties during an attorney-client communication destroys the privilege. The theory is that if two persons have an identity of interest, they both have an interest in securing legal advice, and the attorney has the corresponding interest in hearing full disclosure of the facts from each and every party.[65] It is not, however, an independent source of confidentiality, and can only be applied when another privilege—like attorney-client or work product privileges—protects communications.[66] When this is established, the common interest doctrine would permit an insured and an insurer to share information while litigating against a common opponent.

To secure the privilege, however, the litigation of coverage questions between the insured and the insurer must be postponed. If the parties with the common interest conclude their cooperation and then litigate against

[65] See, United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987); Davis v. Costa Gavras, 580 F.Sup. 1082, 1098-99 (S.D.N.Y. 1984).

[66] Bitler Inv. Venture II, LLC v. Marathon Ashland Petroleum, LLC, et al., 2007 U.S. Dist. LEX1S 9231 (N.D.IN. 2007).

each other, the privilege is thereafter lost as to information shared between them.[67]

There are other situations in which the common interest doctrine applies (e.g. co-plaintiffs, co-defendants). It is preferable to have a written agreement and may be worthwhile to have the court expressly recognize the privilege and preclude discovery about such matters at the outset of the litigation by way of a case management or other order. It may be possible to have such communications exempt from inclusion in privilege logs. A written agreement should also state that the matters shared among the common interest participants will be related to the matters in which they have a common interest. Matters unrelated to their common interest or matters related to issues as to which the parties are adverse should expressly be excluded by way of a written agreement, which should be adhered to thereafter. Under these circumstances, a document signed by the parties pursuing a common strategy can help protect any secrets.

A further suggestion is not to permit clients with adverse

[67] See, Independent Petro-Chem Corp. v. Aetna Casualty Insurity Co., 654 F.Sup. 1334, 1365-66 (D.D.C. 1986). See also, Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 29 (N.D. Ill. 1980).

interests to attend a joint meeting. The attorneys alone can attend and this will help insure that the only information exchanged is that which relates to the common interest of the parties.

Emails.

Unencrypted emails lack the absolute assurance of confidentiality. Opinions vary by jurisdiction on whether emails to and from attorneys are privileged. The Iowa Bar concluded that lawyers should not use emails because of the possibility of interception. Illinois reached the opposite conclusion. It noted that it was a crime to intercept an email and that the likelihood of interception was no higher than the likelihood of interception of a telephone call.

As one might expect, simply including an attorney on an email that is copied to a number of additional people, or forwarding an email several times until it reaches an attorney will not protect that communication under the privilege.[68] Moreover, even if the subject of the email line

[68] In Re: Gabapentin Patent Litig., 214 F.R.D. 178, U.S. LEXIS 9675 (2003). 82 Muro v. Target Corp., et al., 2006 U.S. Dist. LEXIS 86030 (N.D. Ill. 2006).
[82]Appex Municipal Fund v. N-Group Securities, 841 F. Sup. 1423 (S.D. Tex. 1993).

specifically indicates that the communication is privileged and should not be forwarded without the consent of the author, if the author does not clearly identify those individuals to whom the information is privileged. the attorney-client privilege will not protect the communication.[82]

Review how many persons have access to email accounts (e.g., system administrator) and whether confidentiality policies exist and are followed. Sending sensitive information by email should be avoided.

5 Waiver Of The Attorney-Client Privilege

The doctrine of waiver overlaps the issue of confidentiality. If a third party or stranger were present at the time of the attorney client communications, no privilege would arise because the expectation of confidentiality would be absent. But if a communication privileged at the time it was made was later disclosed to a stranger or third party, then the privilege was waived. There are several types of waiver: (a) waiver by disclosure of the communications; (b) waiver by asserting a litigation position inconsistent with the privilege; and (c) a partial waiver which is held to require a full waiver.

82Appex Municipal Fund v. N-Group Securities, 841 F. Sup. 1423 (S.D. Tex. 1993).
Underwater Storage Inc. v. United States

Waiver By Disclosure.

There is a split in the cases as to whether inadvertent disclosure waives the privilege. A strict attitude can be found in Underwater Storage Inc. v. United States Rubber Co.,[69] (waiver by inadvertent disclosure). Some courts have taken a softer attitude and have put forth a test that will help in determining whether disclosure during discovery will result in loss of attorney-client protection. In Elkton Care Ctr. Assocs., Ltd. P'shp v. Quality Care Mgmt.,[70] the court considered (a) the reasonableness of the precautions taken to prevent the disclosure, (b) the number of inadvertent disclosures, (c) the extent of the disclosures, (d) the delay and/or measures taken to rectify the disclosures, and (e) the overriding interests of justice. The problem with losing the privilege because of the inadvertent disclosure of documents is that the lawyer's negligence has disadvantaged his/her client. Some courts refuse to find waiver of the privilege where documents were disclosed inadvertently by the attorneys.[71] If there has

---

[69] Underwater Storage Inc. v. United States Rubber Co., 314 F.Sup. 546, 549 (D. D.D. 1970) (waiver by inadvertent disclosure).

[70] Elkton Care Ctr. Assocs., Ltd. P'shp v. Quality Care Mgmt., 145 Md. App. 532, 545 (App. Ct. Md. 2002).

[71] See, Mendenhall v. Barber-Greene Co., 531 F.Sup. 951, 955 (ND. III. 1982); but see, FDIC v. Singh, 140 F.R.D. 252 (D.Me. 1992).

been an inadvertent disclosure of a document, a motion to recover that mistakenly disclosed document should be filed immediately.

A large production of documents can be undertaken pursuant to a written anti-waiver agreement. However, while I recommend an agreement before producing a substantial number of documents, the execution of this agreement cannot guarantee that the privilege will be maintained if a privileged document is disclosed by mistake. The only sure protection is to review the documents produced so thoroughly as to prevent the accidental production of a privileged document.

Thorough procedures must be undertaken to protect the attorney-client privilege. In Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina Inc.,[72] the privilege was lost when documents were recovered by a party from a trash dumpster. Other courts have disagreed with this holding, but that is no help to the party who lost the privilege in Suburban Sew.

For communications between lawyer and client over the Internet, extra precautions are required. In one case, documents that defendants argued

[72] Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina Inc., 91 F.R.D. 254, 260 (N.D. Ill. 1981).

were privileged were held to be within the public domain.[73] When a client is communicating with their attorney over the Internet, all the precautions made available by the technology to secure your communications should be taken.

Waiver By Taking Position Inconsistent With Privilege.

When information otherwise protected by the privilege is placed at issue through some affirmative act of the owner of the privilege for the owner's benefit, the privilege is waived.[74] This statement, while accurate, is so broad as to be unhelpful in defining the circumstances under which a waiver will be found. However, in some jurisdictions, the party seeking a waiver of the privilege must show that the information sought is (1) within the limitations period of discovery, (2) not a request for wholesale disclosure, and (3) is necessary.[75]

The easiest example of a situation like this is when the client sues the attorney for legal malpractice. In such a circumstance, the client owns the privilege, but it would be unfair to preclude an attorney from defending

[73] Castano v. American Tobacco Company. 896 F. Supp. 590 (E.D. La. 1995).
[74] See, Conkling v. Turner, 883 F.2d 431, 434(5th Cir. 1989).
[75] Darius v. City of Boston, 433 Mass. 274 (2001).

himself or herself by explaining what he or she was told by the client. The privilege is therefore waived by the affirmative act of suing the attorney for malpractice.

In Charlotte Motor Speedway, Inc. v. International Insurance Co.,[76] minority shareholders sued directors of the company alleging securities fraud. The case was settled and then an insurance company was sued on its policy to recover the amount paid in settlement. The insurance company defended in part on grounds that the settlement of the underlying lawsuit was not reasonable. Because the advice of the plaintiffs' counsel to settle the underlying action was interwoven with the issue of the insurance company's liability under the policy, the privilege was waived[2] because the whole issue in the case was whether the settlement was reached in good faith.

In Harding v. Dana Transport, Inc.,[77] the company retained a lawyer to investigate a sexual discrimination complaint by one of its former employees in a lawsuit which was subsequently filed against the company

[76] Charlotte Motor Speedway, Inc. v. International Insurance Co.. 125 F.R.D. 127 (M.D. N.C. 1989).
[77] Harding v. Dana Transport, Inc., 914 F. Supp. 1084 (D. N.J. 1996).

relating to this former employee. The company defended the lawsuit in part on grounds that it had fully investigated the complaint and found no evidence of sexual harassment. Because this defense asserted the actions of the attorney who investigated the complaint, the plaintiff sought to take the depositions of the lawyers who performed the investigation. Since this defense was asserted, the court ruled that the plaintiff could inquire of the lawyer as to what the investigation found.[78]

Additional examples of waiver by pleading defenses or claims that involve the attorney-client privilege are as follows:

(a) In a contempt proceeding, the affirmative use of an attorney's representation waived the privilege for all communications relating to those representations in a later tort action.[79]
(b) Where the advice of counsel was raised as a defense in an antitrust action.[94]
(c) Advice of counsel asserted in a patent infringement case to deny an allegation that the infringement was deliberate.[80]
(d) Advice of counsel asserted in defense of RICO prosecution.[81]

---

[78] Id. at 1096. The work product privilege was the privilege at issue, but the analysis is similar for the attorney-client privilege.
[79] Hyde Construction Co. v. Koehring Co., 455 F.2d 337, 342-43 (5th Cir. 1972). 94 Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2nd Cir. 1964), cert. denied, 380 U.S. 248 (1965).
[80] Central Soya Co. v. George A. Hormel & Co., 581 F. Supp. 51, 53-54 (W.D. Okla. 1982).
[81] United States v. Walters, 913 F.2d 388 (7th Cir. 1990).

For the above reasons, before filing pleadings or answering deposition questions that assert reliance upon advice of counsel, attorneys should thoroughly review these documents to insure that the attorney-client privilege is not waived unintentionally.

Partial Disclosure Requiring Full Disclosure.

In Appex Municipal Fund v. N-Group Securities,[82] the plaintiff sued the law firm for fraud alleging that the lawyers made misrepresentations when acting as legal counsel to Drexel, Burnham and Lambert. Plaintiff attempted to obtain documents that were used to prepare public offering statements but the law firm asserted the privilege. In depositions, however, the lawyers answered certain questions and revealed internal law firm deliberations. By partially disclosing their own understandings and interpretations of the law in order to deny their fraudulent intent, the attorneys waived their privilege with respect to these entire topics.

[82] Appex Municipal Fund v. N-Group Securities, 841 F. Sup. 1423 (S.D. Tex. 1993).

When a corporation is involved, disclosures among members of the control group will not be considered to have waived the privilege in a jurisdiction in which a control group is the appropriate test.[83] Conversely, in the federal courts, the Upjohn test would have to be applied to determine whether discussion among different employees within a corporation waived the privilege.

The waiver doctrine also relates to the preparation for depositions. Rule 612 of the Federal Rules of Evidence permits an adverse party to examine, cross-examine and to introduce into evidence any writings used by a witness to refresh his memory while testifying or before testifying if that is necessary in the interests of justice. The cases are more strict than the rule on this matter. [84] The waiver has been extended to settlement negotiations.[85]

---

[83] See, SCM Corp. v. Xerox Corp., 70 F.R.D. 508. 518 (D. Conn.), appeal dismissed, 534 F.2d 1031 (2d Cir. 1976).

[84] See, Bailey v. Meister Brau Inc., 57 F.R.D. 11, 13 (N.D. Ill. 1972) (waiver of privilege found because the court cannot ignore "the unfair disadvantage which could be placed upon the cross-examiner by the simple expedient by using only privileged writings to refresh recollection").

[85] R.J. Hereley & Son, Co. v. Stotler & Co.,87 F.R.D. 358, 359 (N.D. Ill. 1980) (privilege waived by the attorney's use of a memorandum to refresh recollection at a settlement conference).

The issue of waiver is closely related to the issue of who owns the privilege. As previously stated, in Commodity Futures Trading Commission v. Weintraub, [86] the court ruled that the trustee of a corporation in bankruptcy could waive the attorney-client privilege for the corporation, thus forcing the revelation of discussions between management for the corporation and counsel for the corporation before the appointment of the trustee. This waiver should not be confused with communications personal to the corporate officials. In other words, if they consulted an attorney with respect to personal matters or matters vis a vis the corporation, they would still have the privilege.[102]

6 Exception To The Attorney-Client Privilege: Crime/Fraud

An exception to the privilege relates to crimes and fraud. A client of an attorney can confess to the attorney that he/she has committed a crime or a tort. The confession can be accompanied by a full assurance that this information will remain confidential. (However, the client cannot thereafter take the witness stand and deny committing the crime or the

[86] Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343 (1985). 102 See, In Re: Bevill, Bresler and Schulman Asset Management Corp., 805 F. 2d 120, 124-25 (3rd Cir. 1986).

tort; the attorney cannot participate in committing a fraud on the court by having a client lie.) The attorney-client privilege may be breached, however, to disclose a client's intent to commit a crime or to harm another in the future.[103]

This exception is of particular relevance to in-house counsel because it applies to ongoing crimes or frauds when in-house counsel is consulted on an ongoing basis. If there is a pattern or practice of conduct which is arguably tortious or illegal, the communications of corporate officers or employees with in-house counsel are sure to lose the privilege.

In the Dalcon Shield litigation, the attorney-client privilege was lost because the court believed that a continuing pattern of misrepresentations of the dangers of the product were facilitated with counsel.[104] To illustrate, I once filed a successful motion to compel documents under this exception. Once a court ruled that documents had

---

103 Nix v. Whiteside, 475 U.S. 157, 168 (1986)(crime); Model Rules of Professional Conduct, 1.6 (1996) (comment 13)(harm).

104 See, In Re: A.H Robins Co.,107 F.R.D. 2, 14 (D. Kan. 1985).
legal information and representation outweighs the disclosure relating to past crimes and/or torts because they can no longer be prevented.

to be disclosed pursuant to the crime fraud exception, the case settled. How can an opponent convince the court of his or her client's innocence after the court has ruled that the crime/fraud exception applies?

The reason for the distinction between past crimes and/or torts and future crimes and/or torts is obvious upon reflection; society has every interest in preventing torts and crimes. On the other hand, the interest in facilitating

The crime fraud exception cannot be invoked unless the lawyer's advice was designed to serve the client in the commission of the crime or fraud.[87] The purported crime or fraud need not be proved, however.[88]

In United States v. Horvath,[89] the lawyer had deposited the client's funds into a separate account at the request of the client. The court ruled that the crime fraud exception was satisfied because the government made a prima facia showing that the purpose of the attorney client relationship was to conceal from the government the extent of the client's financial holdings and sources of income.

---

[87] Clark v. United States, 289 U.S. 1, 14 (1933).

[88] See, In Re: Feldberg, 862 F.2d 622, 625 (7th Cir. 1988). See also, Corp. v. Doe, 805 F. Sup. 598 (E.D. Va. 1992).

[89] United States v. Horvath, 731 F. 2d 557 (8th Cir. 1984)

In United States v. Zolin,[108] the Supreme Court stated that the crime fraud exception did not have to be established by independent evidence and that an in camera review may be the basis to determine whether a communication falls within the crime fraud exception. This lessens the threshold needed to ask a court to review documents in camera; after review, the court will decide whether the exception was proved.

---

108 United States v. Zolin, 491 U.S. 554 (1989).

Summary

To keep secrets, remember:

- Whether a lawyer is representing an individual or a corporation;
- Whether the lawyer represents additional parties;
- Whether information is being shared with someone with whom later be an adverse party; and
- Whether the subject matter of the communications could be construed as a crime or a fraud.

Always be sure to ask: is this conversation privileged? Record the answer in a file or even by confirming letter. Review the procedures for investigating accidents or cases. Prevent employees who lack the basis for a privilege from recording sensitive and perhaps premature judgments. Keep sensitive information confidential.

If you proceed carefully, communications that should be kept secret will be kept secret.

Thomas E. Patterson
The Patterson Law Firm, P.C.
33 North LaSalle Street Suite 3350
Chicago, Illinois 60602
312-233-1699 Fax: 312-233-8549

tep@pattersonlawfirm.com

Appendix

A. Illinois Code of Professional Responsibility

Rule 1.6. Confidentiality of Information

(e) Except when required under Rule 1.6(b) or permitted under Rule 1.6(c), a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.

(f) A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm.

(c) A lawyer may use or reveal:

(1) confidences or secrets when permitted under these Rules or required by law or court order;

(2) the intention of a client to commit a crime in circumstances other than those enumerated in Rule 1.6(b); or

(3) confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

(d) The relationship of trained intervenor and a lawyer, judge, or a law student who seeks or receives assistance through the Lawyers' Assistance Program, Inc., shall be the same as that of lawyer and client for purposes of the application of Rule 8.1, Rule 8.3 and Rule 1.6.

(e) Any information received by a lawyer in a formal proceeding before a trained intervenor, or panel of intervenors, of the Lawyers' Assistance Program, Inc., or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred shall be deemed to have been received from a client for purposes of the application of Rules 1.6, 8.1 and 8.3.

Adopted February 8, 1990, effective August 1, 1990; amended February 2, 1994, effective immediately; amended May 24, 2006, effective immediately.

B. ABA Model Rules

Model Rules of Professional Conduct

Client-Lawyer Relationship

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the

hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[2] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[3] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[4] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other

information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d),

that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations

in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must

discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorneyclient privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.