

Thoughtful Use of the Attorney-Client Privilege and Work Product Doctrine

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The Basics: Attorney-Client Privilege

► What information does the privilege protect?

– Federal definition:

- ◆ (1) Where **legal advice** of any kind is sought (2) from a **professional legal advisor** in his [or her] **capacity as such**, (3) the **communications** relating to that purpose, (4) made in **confidence** (5) by the client, (6) are at his [or her] instance permanently protected (7) from disclosure by himself [herself] or by the legal advisor, (8) except the protection be waived.

Great Plains Mut. Ins. Co. v. Mut. Reinsurance Bureau, 150 F.R.D. 193, 196 n.4 (D. Kan. 1993).

- State definitions will vary. In MO and KS the federal elements are generally consistent with state law.

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The Basics: Attorney-Client Privilege

► Element (5): “By the Client”??

- Despite this language, federal courts interpret the privilege to encompass communications from attorney to client (as long as all other elements are met).
 - ◆ *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL-DJW, 2006 WL 266599, at * 2 (D. Kan. Feb. 1, 2006).
- In Missouri and Kansas, statutes explicitly extend the privilege to communications from the attorney to the client and vice versa.
 - ◆ K.S.A. 60-426(c)(2); Mo. Rev. Stat. § 491.060(3)

The Basics: Attorney-Client Privilege

► Purposes/goals served by the privilege.

- Encouraging uninhibited communication between client and attorney.
 - ◆ *State v. Longo*, 789 S.W.2d 812, 814-15 (Mo. Ct. App. 1990).
- Preserving client confidences and client expectations of confidentiality (i.e., allowing attorneys and clients to speak in secrecy!)
 - ◆ *State ex rel. Great American Ins. Co. v. Smith*, 574 S.W.2d 379, 383 (Mo. 1978);
State v. Stovall, 312 P.3d 1271, 1282 (Kan. 2013).
- Promoting observance of law and administration of justice.
 - ◆ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

The Basics: Attorney-Client Privilege

► Exceptions to the privilege.

- In Kansas, exceptions are codified at K.S.A. § 60-426(b); in Missouri and under federal law, look to common law.
- Examples:
 - ◆ Communications used to further a crime or fraud or (if in Kansas) a tort.
 - ◆ When a later dispute arises between joint clients of the same attorney, or between an attorney and his/her client.
 - ◆ When a dispute arises against a corporation by shareholders alleging the corporation acted contrary to the shareholders' interests.
 - ◆ When due process demands that the privilege yield to a criminal defendant's need for exculpatory evidence.

The Basics: Work Product Doctrine

► Work product defined.

- Tangible material or its intangible equivalent—in unwritten or oral form—that was either prepared by or for a lawyer or prepared for litigation, either planned or in progress.
 - ◆ Black's Law Dictionary (9th ed. 2009).

The Basics: Work Product Doctrine

- ▶ What information does the work product doctrine protect?
 - Tangible work product:
 - ♦ Trial preparation documents such as written statements, briefs and attorney memoranda.
 - Intangible work product:
 - ♦ An attorney's mental impressions, conclusions, opinions and legal theories.
 - Seminal case: *Hickman v. Taylor*, 329 U.S. 495 (1947) (recognized that discovery of tangible work product might disclose intangible work product of attorney and established requirement that opposing party demonstrate "substantial need" for tangible work product).
 - *Hickman* is codified in the "General Provisions Governing Discovery."

The Basics: Work Product Doctrine

- ▶ Purposes/goals of the work product doctrine.
 - Encourages thoughtful case preparation by attorneys and discourages opposing counsel from reaping the benefits of that preparation.
 - ♦ *Ayers Oil Co. v. American Business Brokers, Inc.*, No. 2:09 CV 02-DDN, 2009 WL 4725297, at *3 (E.D. Mo. Dec. 2, 2009).
 - Promotes effective functioning of adversary system by allowing attorney to fully develop case without fear of disclosure.
 - ♦ *Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons*, 50 P.3d 66, 84 (Kan. 2002).

The Basics: Privilege and Work Product

- ▶ Not all protected communications are created equal! Some enjoy greater protection than others.
 - Attorney-client privilege is absolute unless waived.
 - Work product
 - ◆ Intangible/opinion work product is essentially absolute unless waived.
 - ◆ Tangible/ordinary work product is discoverable upon showing of substantial need and undue hardship in obtaining equivalent.
 - ◆ BUT NOTE: work product is only shielded from discovery in the litigation in which/for which it was created. Work product can be discovered in later unrelated litigation!

The Basics: Privilege and Work Product

- ▶ Waiver
 - Waiver of attorney-client privilege can result when:
 - ◆ The client voluntarily makes or discloses the communications to an unrelated third party.
 - ◆ There is a failure to claim the privilege or object to disclosure.
 - ◆ The subject matter of privileged communication is placed in issue.
 - ◆ Fed. R. Evid. 502 – puts limits on extent of waiver.
 - Waiver of work product can occur when:
 - ◆ The product is voluntarily disclosed to an adversary, or to a third party if doing so increased chances that the adversary would gain access to it. *Riley v. U.S. Bank*, No. 4:08CV00206, 2009 WL 2170016, at *1-2 (E.D. Mo. July 20, 2009).

The Basics: Privilege and Work Product

► Miscellaneous points.

- Burden of proof: Party asserting privilege and/or work product has initial burden to demonstrate same. *Western Resources Inc. v. Union Pacific RR*, No. 00-2043-CM, 2002 WL 181494, at *3-4 (D. Kan. Jan. 31, 2002).
- Attorney-client privilege/work product in federal court:
 - ◆ Federal common law governs application of attorney-client privilege . . .
 - ◆ Except, where a federal court sits in diversity, state law will govern application of attorney-client privilege to the state law claims.
 - ◆ In federal court, application of the work product doctrine is always governed by federal law, irrespective of whether court sits in diversity.
- Privilege and work product doctrines are not intended to protect/shield underlying facts from discovery; however, privileged/work product material is not rendered discoverable just because it contains facts.
 - ◆ *Bishop Rink Holdings, LLC v. CIMCO Refrigeration, Inc.*, N. 12-2715-JAR-KGG, 2013 WL 4047143, at *3 (D. Kan. Aug. 9, 2013).

The Basics: Privilege and Work Product

► Where are some of the rules/guidelines relative to privilege/work product found?

- Evidentiary Statutes/Rules:
 - ◆ K.S.A. § 60-426 (“Attorney Client Privilege”)
 - ◆ Mo. Rev. Stat. § 491.060 (“Persons incompetent to testify . . .”)
 - ◆ Fed. R. Evid. 501 (“Privilege in General”)
 - ◆ Fed. R. Evid. 502 (“Attorney Client Privilege and Work Product; Limitations on Waiver”)
 - ◆ Proposed Fed. R. Evid. 503 (“Lawyer-Client Privilege”) (never enacted, yet regularly utilized/referenced by federal courts analyzing privilege)
- Case law (abundant).
- Rules of Civil Procedure .
 - ◆ “General Provisions Governing Discovery”: Mo. Rule 56.01(b)(1), (3); K.S.A. § 60-226(b)(1), (4); Fed. R. Civ. P. 26(b)(1), (3).
 - ◆ Rules regarding written and deposition discovery (e.g., privilege log requirements).

Privilege/Work Product Take Aways

- ▶ Privileged materials enjoy absolute protection from disclosure so . . . use and protect (i.e., don't waive) the privilege!
- ▶ As the proponent of the privilege/work product assertion, your client will have initial burden of proof to show applicability so . . . make it easy on yourself!
- ▶ When you are dealing with litigation or anticipated litigation, work product provides a second method of protecting corporate information so . . . keep that in mind!
- ▶ Opposing parties and counsel want to discover underlying facts so they can make a case against YOUR client: MAKE 'EM WORK FOR IT!

In the Corporate Context: Attorney-Client Privilege

- ▶ In the corporate context, what communications are privileged?
- ▶ Seminal case: *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
 - In connection with an internal investigation of “questionable payments” made by a subsidiary, general counsel:
 - ♦ Sent and received/reviewed questionnaires to foreign subsidiaries requesting information about payments.
 - ♦ Interviewed recipients and some 33 other company officers or employees and prepared accompanying notes/memoranda.
 - The IRS demanded production of these files; Upjohn refused on the basis of privilege and work product.
 - Holding: The questionnaires were privileged communications; the accompanying attorney notes/memos were privileged to the extent they revealed communications from employees, and opinion work product to the extent they did not.

In the Corporate Context: Attorney-Client Privilege

- ▶ *Upjohn* produced a test for determining when communications between corporate counsel and lower-echelon employees are privileged:
 - (1) The information is necessary to supply the basis for legal advice to the corporation or was ordered to be communicated by superior officers; (2) the information was not available from “control group” management; (3) the communications concerned matters within the scope of the employees’ duties; (4) the employees were aware that they were being questioned in order for the corporation to secure legal advice; and (5) the communications were considered highly confidential. 449 U.S. 383, 394-95.
 - Under *Upjohn*, “*Upjohn warnings*” are required when speaking with corporate employees:
 - ◆ Warnings that the attorney’s client is the corporation, not the employee.
 - ◆ Warnings that the communication is privileged, but belongs to the corporation alone and may be waived by the corporation.

In the Corporate Context: Attorney-Client Privilege

- ▶ NOTE:
 - Federal courts applying federal law are bound by *Upjohn*.
 - State courts and federal courts sitting in diversity are not.

- ▶ So . . . while *Upjohn* is instructive (and particularly important if you know or suspect you are dealing with a federal law issue), you really must pay attention to the law of the jurisdiction you are in to know how it interprets and applies the attorney-client privilege in the corporate context.

In the Corporate Context: Attorney-Client Privilege

- ▶ As a *general rule* corporate counsel will have a better chance of attaching privilege to communications with/between corporate employees/representatives if . . .
 - Corporate counsel is involved in conducting and/or orchestrating the communication.
 - Corporate counsel reviews the communication.
 - It is crystal clear that the communication is made in connection with the seeking/rendering of legal advice.
 - The communication is shared only with those who to need/have a right to know.
 - There is documentation supporting all of the foregoing.

In the Corporate Context: Attorney-Client Privilege

- ▶ **Some enlightening examples:**
 - “The attorney client privilege encompasses documents prepared by an employee at the direction of the employer for the purpose of obtaining the advice of an attorney or for use in prospective or pending litigation.” *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 547-48 (Mo. Ct. App. 2008).
 - ♦ The “direction” to an employee does not necessarily have to come directly from counsel; it can come from a supervisor. *See id.*
 - ♦ Preliminary incident reports are protected if you can show that the purpose was to secure legal advice! *Id.*; *Enke v. Anderson*, 733 S.W.2d 462 (Mo. Ct. App. 1987).

In the Corporate Context: Attorney-Client Privilege

► Some enlightening examples:

- “[A] party may be able to demonstrate applicability of privilege by establishing that [a] communication [*between corporate management employees not in the presence of counsel*] was made in confidence for the primary purpose of obtaining legal advice.”
 - ♦ *Black & Veatch Corporation v. Aspen Ins. Co.*, 297 F.R.D. 611, 620 (D. Kan. 2014) (quoting *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL-DJW, 2006 WL 266599, at *3 (D. Kan. Feb. 1, 2006).

In the Corporate Context: Attorney-Client Privilege

► Some enlightening examples:

- While in-house counsel status does not “dilute” the privilege, when in-house counsel serves in another capacity, such as vice president, his/her advice is privileged only upon a “clear showing” that it was given in a professional legal capacity.
 - ♦ *Marten v. Yellow Freight System, Inc.*, No. 96-2013-GTV, 1998 WL 13244, at *6 (D. Kan. Jan. 6, 1998).
- Corporate counsel’s presence at corporate meeting does not *ipso facto* make communications privileged. If your primary purpose in being there is to carry out a business function (e.g., here, serving as voting member of employment committee), the communications related to that purpose are not privileged!
 - ♦ *Id.* at *7-8.

In the Corporate Context: Attorney-Client Privilege

► The joint defense/common interest doctrine:

- “[A]ffords two parties with a common legal interest a safe harbor in which they can openly share privileged information without risking the wider dissemination of that information.” *Sawyer v. Southwest Airlines*, No. 01-2385-KHV, 2002 WL 31928442, at *3 (D. Kan. Dec. 23, 2002).
- Can only exist where the underlying communication being shared with the third party is privileged. *Id.*
- The “common interest” of the parties must be a legal interest (not a commercial interest), and be identical, and the communications must further their shared interest. *Id.*
- Considered an exception to the general rule that the attorney-client privilege is waived if the communication is disclosed to a third party. *Id.*

In the Corporate Context: Work Product Doctrine

► Some points to consider:

- To be work product, the material must be prepared *in anticipation of litigation*, and *by or for an attorney* (in-house or outside counsel).
- Unlike privileged communications, and although deserving of rigorous protection, work product can be discovered without a waiver (substantial need; later unrelated suit).
- Disclosure of work product material by in-house counsel to the client does not result in a waiver of work product immunity.
 - ♦ *Ayers Oil Co. v. American Business Brokers, Inc.*, No. 2:09 CV 02-DDN, 2009 WL 4725297, at *3 (E.D. Mo. Dec. 2, 2009).
- Disclosure of work product to a non-adversarial third party does not waive work product immunity unless disclosure increased the chances that an adversarial party would gain access to the materials. *Id.*
- If you can classify something as privileged and work product, do so.

**Attorney-Client Privilege and Work Product:
Practical considerations for the in-house practitioner**

- ▶ **Create a plan that fits within the context of your business:**
 - Identify any states/jurisdictions where litigation is likely.
 - Research privilege/work product rules to confirm any particular/specific issues unique to that jurisdiction.
 - Review your corporate structure and identify persons in top management and within each department who are/will likely serve as primary points of contact for legal issues.
 - Establish internal procedures designed to maximize privilege/work product protections. Such as . . .

**Attorney-Client Privilege and Work Product:
Practical considerations for the in-house practitioner**

- ▶ Establish written directives/policies *now* (coming from legal department) governing how disputes will be handled.
- ▶ Establish procedures designed to immediately get and keep in-house counsel involved in every dispute (e.g., workplace accidents, whistleblowers, sexual harassment claims, etc.).
- ▶ Identify and prepare ahead of time for situations where privilege/work product applicability may be an issue, with goal of rectifying any such issue.
- ▶ Establish recordkeeping procedures that help to clearly identify privileged communications and work product – “document, document, document.”
- ▶ Train primary points of contact on privilege/work product and on procedures being implemented by company to maximize protections.

Attorney-Client Privilege and Work Product: Practical considerations for the in-house practitioner

► Privilege/Work Product Do's and Don'ts

- DO educate yourself on evolving applications of privilege/work product.
- DO be organized.
 - ◆ Maintain good/separate files for privileged communications/work product; maintain lists of prominent players in disputes and their respective roles; create a paper trail to establish privilege.
- DO think proactively/thoughtfully about how the privilege and/or work product can protect your client and how to prevent waiver.
- DON'T assume something will be protected just because an attorney did it or was involved, or will not be protected because an attorney did not do it or was not involved!
- DON'T label every document "privileged," "confidential," "work product," etc. unless you truly believe that it is.

Once Again . . .

Privilege/Work Product Take Aways

- Privileged materials enjoy absolute protection from disclosure so . . . use and protect (i.e., don't waive) the privilege!
- As the proponent of the privilege/work product assertion, your client will have initial burden of proof to show applicability so . . . make it easy on yourself!
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