THE INTERSECTION OF THE ATTORNEY-CLIENT PRIVILEGE, THE WORK PRODUCT DOCTRINE, AND THE PROFESSIONAL OBLIGATION OF CONFIDENTIALITY

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THREE DIFFERENT, BUT INTER-RELATED CONCEPTS

- Not well understood by lawyers and courts
- Disliked by government, prosecutors, and regulators
- Dangerous areas to litigate
- See especially In re Kellogg Brown &Root, 756 F.3d 754 (D.C Cir. 2014) & 796 F.3d 137 (D.C. Cir. 2015). See also C.E. Stewart, "The D.C. Circuit: Wrong and Wronger!" NY Business Law Journal (Winter 2015).

I. CLIENT CONFIDENTIALITY OBLIGATIONS

(ETHICAL RULE GOVERNING LAWYERS)

- ABA Model Rule 1.6 (2003)
  - **May** Disclose:
    - Certain Death/Substantial Bodily Injury
    - Crime or Fraud/Substantial Financial Injury/Lawyer's Services Used
    - Mitigate/Rectify #2
    - Establish Claim or Defense
    - "Actual knowledge" standard

I. CLIENT CONFIDENTIALITY OBLIGATIONS

(ETHICAL RULE GOVERNING LAWYERS)

- Disparate States' Reactions
  - 5 Groupings:
    1) In toto (e.g., Delaware)*
    2) Tinkering
    3) Pre-2003 Standards
    4) Retain long-standing, idiosyncratic rules (e.g., Illinois)
    5) Abject rejection (e.g., Washington, California)
  - So, what has New York done? What has New Jersey done?

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* But see Section 14 of the Del. Prof. Cond. Preamble (no disciplinary action when lawyers chooses *not* to exercise discretion).

I. CLIENT CONFIDENTIALITY OBLIGATIONS

(ETHICAL RULE GOVERNING LAWYERS)

- New York State (2009)
  - **May** disclose:
    - Certain Death/Substantial Bodily Injury
    - Prevent Client Crime
    - Establish Defense
  - **May** withdraw legal opinions (in 3 circumstances)
  - Carved out financial fraud
  - No change for past client conduct
  - No "reporting out" (Rule 1.13)
  - "Actual knowledge" standard

I. CLIENT CONFIDENTIALITY OBLIGATIONS

(ETHICAL RULE GOVERNING LAWYERS)

- New Jersey (current)
  - **Must** disclose:
    - "criminal, illegal or fraudulent act"/ 'reasonably believes"/ death or substantial bodily harm or substantial financial harm.
    - "criminal, illegal or fraudulent act" / "reasonably believes" /fraud on a tribunal
  - **May** disclose:
    - the foregoing to the person affected by the foregoing conduct
    - to rectify a client's "criminal, illegal or fraudulent act "in which the lawyer's services were used
  - "reasonable belief" is grounded on "some foundation in fact"
  - "reporting out" is expressly permitted (Rule 1.13 (c))

I. CLIENT CONFIDENTIALITY OBLIGATIONS

(ETHICAL RULE GOVERNING LAWYERS)

- Sarbanes-Oxley/SEC Regulation of Capital Markets Lawyers (Section 307) (2003)
  - **May** disclose "material violations" (past, current, future) to SEC
  - The "Reasonable Lawyer"
  - '34 Act Sanctions
  - No "Noisy Withdrawal"

I. CLIENT CONFIDENTIALITY OBLIGATIONS

(ETHICAL RULE GOVERNING LAWYERS)

- Open Issues
  - "Heads you win/tails I lose" – liability whipsaw
    - Fail to disclose & wrong (SEC & Plaintiff's Lawyers)
    - Disclose & wrong (Clients & Shareholders)
  - Multi-jurisdictional whipsaw
  - *SEC vs. New York* (pre-emption)
    - United State ex rel. Fair Lab. Practices Assocs. v. Quest Diagnostics, 2013 U.S. App. LEXIS 21709 (2d Cir. Oct. 25, 2013), aff'm, 2011 U.S. Dist. LEXIS 37014 (S.D.N.Y. April 5, 2011)
    - see also Hayes v. Page Perru, 26 F. Supp. 3d 1311 (N.D. Ga. 2014); 2015 BL 71863 (N.D. Ga. March 17, 2015), aff'd, No. 15-11506 (11th Cir. October 5, 2015) (not for publication)
    - SEC Cake (preempts) & eats it too (Steve Altman/ interfering with SEC investigations/permanent SEC bar/18 month NYS suspension – January 26, 2016)
  - But see: Wadler v. Bio-Rad Laboratories, 2016 WL 7369246 (C.D. Cal. Dec. 20, 2016) (SEC pre-emption position entitled to Chevron-like deference)

II. ATTORNEY-CLIENT PRIVILEGE

- Grounded in the law of Evidence (F.R.E. §501; N.Y.C.P.L.R. § 4503(a))

- Stronger concept than confidentiality (ethical rule drafted by lawyers to govern themselves)

- Owned by client, *not* by lawyer

- There *must* be the 5 "Cs"!
  1) Client
  2) Communication
  3) Confidentiality
  4) Counsel (an attorney)
  5) Counsel (giving legal advice)

  [All 5 required / 4 out of 5 is not good enough]

  – Voluntary waivers = privilege/once breached it cannot be resurrected (e.g., BouSamra v. Excela Health (Pa. 2019) (hospital waived privilege when sharing an email with a PR firm).

UPJOHN CO. v. UNITED STATES, 449 U.S. 783 (1981)

- 2 Way Street: clients ⇄ lawyers (Facts →; ← Advice)
- Promotes broad public interests (e.g., legal compliance) (see also Rossi v. Blue Cross and Blue Shield of Greater N.Y., 73 N.Y.2d 588, 592 (1989))
- Barred IRS subpoenas
- Rejected corporate control group in favor of all corporate employees
- Federal law / followed by most U.S. jurisdictions / *but see* Illinois, Arizona, etc.
- Reaffirmed in Swidler & Berlin v. United States, 524 U.S. 399 (1998) (survives death and criminal proceedings)

Is There An Additional Test Beyond the Five "C's"?

- Not according to the leading Supreme Court decision (Upjohn) or the classic treatise on the privilege (Wigmore) (see also CPLR §4503(a)(1); V. Alexander, "The Corporate Attorney-Client Privilege: A Study of the Participants," 63 St. John's L. Rev. 191 (1989).
- But, growing out of case law where lawyers were also acting as tax return preparers/accountants, there has developed a "primary purpose" test, since there is no accountant/tax preparer privilege (U.S. v. Arthur Young, 465 U.S. 805 (1984). See e.g., In re Grand Jury, 23 F. 4th 1088, 1095 (9th Cir. 2022); U.S. v. Frederick, 182 F.3d 496, 500 (7th Cir. 1999). This "primary purpose" test has expanded beyond just the tax preparation area. See, e.g., In re County of Erie, 473 F.3d 413, 420 (2d Cir. 2007) ("predominant purpose" test); Alomari v. Ohio Dep't of Pub. Safety, 626 F. App'x 588, 592-93 (6th Cir. 2015) ("primary purpose" test).
- The D.C. Circuit adopted an amended version of the "primary purpose" test: "[w]as obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?" In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014).

Is There An Additional Test Beyond the Five "C's"?
(cont'd)

- The U.S. Supreme Court recently took a case to decide what the right test should be: In re Grand Jury, No. 21-1397, 598 U.S. __, 143 S.Ct. 543 (mem.)(Jan. 23, 2023). After oral argument, the writ of certiorari was dismissed "as improvidently granted."
- Why? Who knows, but likely reasons:
  - not a good test case because the 54 documents at issue involved communications between the client and an accountant employed by the law firm – not an attorney.
  - at oral argument, concession that the practical effects of either standard were little to none (judges are not "having the hard time you're talking about")
  - Justice Barrett: "we can't get into this whole put a percentage on it . . ., maybe it's best to say nothing?"

Is there An Additional Test Beyond the Five "C's"?
(cont'd)

- Analog to Attorney Work Product:
  - Host of decisions which imposed a gloss on Rule 26(b)(3), requiring a showing that the AWP materials had been generated "primarily," "principally," or "exclusively" in anticipation of litigation. See e.g., In re Woolworth Corporation Securities Class Action Litigation, 1996 WL 306576 (S.D.N.Y. June 7, 1996); In re Leslie Fay Companies Inc. Securities Litigation, 161 F.R.D. 274 (S.D.N.Y. 1995); In re Kidder Peabody Securities Litigation, 1996 WL 263030 (S.D.N.Y. May 17, 1996); Garrett v. Metropolitan Life Ins. Co., 1996 WL 325725 (S.D.N.Y. June 12, 1996); In re Wilkie Farr & Gallagher, 1997 U.S. Dist. LEXIS 2927, 1997 WL 118369 (S.D.N.Y. March 14, 1997).
- In U.S. v. Adlman (II), 134 F.2d 1194 (3d Cir. 1998), a panel handed by Judge Pierre Level correctly noted none of the modifiers were part of Rule 26(b)(3). Hence, the relevant standard for 26(b)(3) is whether the document was created "because of" the prospect of litigation.

- Privilege under attack
  - Beyond the aforementioned attempt(s) to limit its scope, there has been an historic antipathy – two examples:
    - In response to a corporation asserting the privilege, a federal judge said the following:
      - [I]t's frankly striking that [a corporation] that purports to operate in this public market and serve the public, is asserting an attorney/client privilege here. I mean, that, comes a remarkable to me…I think [the corporation] should be embarrassed at taking this position. It's hard for me to see how they can take this position with a straight face and go before public agencies and say we are absolutely four square in the foreground of handling your public business."
    - A Georgetown law professor, who specializes in ethics, was quoted as saying the following:
      - "[Corporations often used the privilege] to stonewall and facilitate cover-ups. [Corporate counsel] treat litigation as if its's a game rather than the administration of justice. If there is serious wrongdoing, the real injustice is that we would never find out… because it would be buried under the [privilege]."

- Governmental Pressure: (i) Yates memo (previously, McNulty Memo; previously, Thompson Memo); (ii) United States v. Stein, 541 F.3d 130, 136 (2d Cir. 2008), affm'g, 435 F. Supp. 2d 330 (S.D.N.Y. 2006)

- Selective Waiver? Compare Diversified Industries v. Meredith, 572 F.2d 596 (8th Cir. 1977) with In re IPO Securities Litigation, 2008 U.S. Dist. LEXIS 11058 (S.D.N.Y. February 14, 2008)

- Imaginative/ends-oriented courts: *E.g.*, Georgia Pacific Corp. v. GAF Roofing Mfg. Corp., 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. 1996) (negotiator ≒ attorney); In re von Bulow [Von Bullow II], 828 F.2d 94 (2d Cir. 1987)(extra judicial disclosure ≒ waiver)

- Putting privilege at issue: In re Kiddler Peabody Securities Litigation, 168 F.R.D. 459 (S.D.N.Y. 1996)

- The Crime-Fraud Exception (much misunderstood & much uncertainty)
  - → **not** an "exception" to the A-C Privilege
  - → there is no privilege where (i) a client consults an attorney for purpose of assistance in engaging in crime/fraud, or (ii) a client -- without regard to purpose -- uses an attorney's advice to engage in crime/fraud. See Restatement (Third) of the Law Governing Lawyers §82 (2000) [in both scenarios, attorney's knowledge/involvement is irrelevant]
  - → uncertainty exists because, *inter alia*:
    a. different courts' definition of crime & fraud
    b. courts' requirement (or not) that client must know advice furthers crime/fraud
    c. courts sometimes go beyond the crime/fraud advice and find waiver as to all communications
    d. courts sometimes do not require that the client go through with the crime/fraud
  - → procedural issue: what can a court look at to determine the crime/fraud exception? -- only "independent" evidence or privileged material, as well? United States v. Zolin, 491 U.S. 554 (1989) [**both**] (plaintiff must have enough "independent" evidence to support a "good faith" application; this then triggers an *in camera* review) [notwithstanding (or because of) the Court's ruling, lower courts' application of this process in practice is very uneven]

→ famous/infamous cases:

- In re Sealed Case (Lewinsky), 162 F.3d 670 (D.C. Cir. 1998) (Independent Counsel invoked crime/fraud exception in connection with White House intern's communications with lawyers who prepared her affidavit, in which she denied a sexual affair with the president)
- Michael Cohen (President Trump's private lawyer) (Independent Counsel seized all of Cohen's files vis-à-vis his client) [client wrong-doing at issue? or wrong-doing by the lawyer?]

→ misuse of crime/fraud exception (e.g., tobacco litigation; famous law professor's confusion of exception with confidentiality obligations)

III. ATTORNEY WORK PRODUCT

- Grounded in the law of Procedure (Hickman v. Taylor, 329 U.S. 495 (1947); Fed. R. Civ. P. 26 (b)(3))
- Weaker than the attorney-client privilege -- it is a qualified privilege ("substantial need")
- Opinion work product vs. "ordinary" work product (analysis vs. verbatim)
- No application outside of the litigation context (adversarial/"anticipation") [U.S. v. Adlman, 134 F. 3d 194 (2d Cir. 1998) vs. U.S. v. Textron, 577 F. 3d 21 (1st Cir. 2009)(en banc)]
- Written vs. oral (the California "exception")
- Use of non-lawyers (designated agents of the lawyers)
- Use of experts (Fed. R. Civ. P. 26(b)(4) vs. testifying experts)
- Waivable (but not as waivable vis-à-vis 3rd party disclosure as the attorney-client privilege) [*but* risk of F.R.E. 612] (common interest clearly applies) (waiver of a/c materials not necessarily a waiver of work product)
- Sharing with the government: SEC v. Herrera, No. 17-cv-20301 (S.D. Fla. Dec. 19, 2017)

IV. CONFLUENCE OF THESE THREE CONCEPTS

- Could offer many examples, but will just highlight two:
  - In re Doe, 2017 BL 24658 (3d Cir. Jan. 27, 2017) [client email suggesting that client "thought about" covering up money-laundering with use of attorney's work product (i) was **not** privileged because client forwarded email to an accountant, but (ii) was protected from disclosure under the work product doctrine (crime-fraud exception did not vitiate protection because "an actual act to further [a] fraud is required before attorney work product losses its confidentiality")] [**correct**?]
  - Willy v. Administrative Review Board, 423 F. 3d 483 (5th Cir. 2005) ["offensive" language added to Model Rule 1.6 allows whistleblower attorney to use privileged communications to further his wrongful discharge claim(s)] [**wrong**: (1) ethics rules vs. attorney-client privilege; and (2) ABA Model Rules = federal common law]

V. THE DANGERS OF DOCUMENTS

- Inadvertent Waiver of Privileged Materials

  - The "reforms": Fed. R. Civ. P. 26(b)(5) and Fed. R. Evid. 502(b) ("reasonable steps" (i) to prevent and (ii) to rectify)

  - Inverse/perverse incentives

    - False sense of security
    - Disparate results Compare Rhodes Industries, Inc. v. Building Materials Corp. of America, 254 F.R.D. 216 (E.D. Pa. 2008) with Sitterson v. Evergreen School District of 114, 196 P.3d 735 (Wash. Ct. App. 2008) with Mt. Hanley Ins. Co. v. Felman Prod. Inc., 2010 WL 1990555 (S.D. W. Va. May 18, 2010) with Edelen v. Campbell Soup Co., 265 F.R.D. 676 (N.D. Ga. 2010). And the claw-back safe haven provided by F.R.E. 502(d) has not appeared to have had much effect in obviating the risks of the "reasonableness" standard. See Spicker v. Quest Cherokee, 2009 WL 2168892 (D. Kan. 2009); see also J. Rosans, "6 Years In, Why Haven't FRE 502(d) Orders Caught On?" Law360 (July 24, 2014).

V. THE DANGERS OF DOCUMENTS

- Return of Materials Disclosed By Mistake
  - ABA Model Rule 4.4(b) (notify only)
  - ABA Formal Opinion 06-440 (can review/need not abide instructions)
  - New York State Rule 4.4(b) (same) [Delaware Rule 4.4(b) (same)]
  - "Simple Clarity"?
    - State by state variation (ABA website)
    - Comment 2 to Rule 4.4(b) (judicial sanctions)
    - Comment 3 to Rule 4.4(b) (refrain/return/both)
    - Different court standards (federal & state)
    - Fed. R. Civ. P. 26(b)(5)(B) (return or destroy/not disclose)
    - But see NY CPLR §§ 4503 & 3103(c)
    - NY City Bar Opinion 2012-01 (withdraw prior opinion re additional duties)
    - Federal judges' individual rules
  - Washington (Fuss v. Brandewiede (Ct. Appls. September 14, 2015) (no automatic D/Q for access to privileged information))
  - New Jersey (Jablow v. Wager (App. Div. April 18, 2015)) (D/Q for use of privileged information)
  - Virginia (Harleysville v. Holding Funeral Home (W.D. Va. Feb. 2, 2017) (a/c waived & violation of Rule 4.4(b), plaintiff not "reasonable" in preventing disclosure; D/Q of defense counsel not ordered, only motion costs); but see (Oct. 2, 2017) (district court partially overturned; *no* a/c waiver; *but* ethical violation; no D/Q, but evidentiary sanctions)
  - Iowa (Op. 15-02 (January 28, 2015)) (must 1) stop reading, 2) notify opponent, 3) either return or seek judicial guidance)
  - Texas (State Bar Professional Ethics Comm., Op. 664 (Oct. 2, 2016) (attorney who receives opponent's privileged materials as a result of theft does *not* have to notify her opponent)

V. THE DANGERS OF DOCUMENTS

- McDermott Will & Emery LLP v. Superior Court of Orange County, G053623 (Cal. Ct. App. 4th Dist. April 18, 2017) (Gibson Dunn D/Qed for exploiting inadvertently disclosed email).
- California (Bona Fide Conglomerate, Inc. v. United States Dist. Court for S. Cal., 2018 BL 105006 (9th Cir. March 27, 2018)) (law firm D/Q which refused to return secreta recordings of defendant's general counsel)
- Washington (Patty Hur v. Lloyd & Williams, Case No. 38363-6) (Ct. Appls. Jan 31, 2023) (law firm *not* D/Qed which received and used privileged information because no evidence recipient lawyer sought out the privileged information.

VI. TEN TIPS TO MAXIMIZE THE PROCTECTIONS OF CONFIDENTIALITY

1. Any documents created should, where appropriate, be marked: "Confidential: attorney-client communication and attorney work product prepared for litigation." [Converse: Do not over legend!]
2. Where appropriate, documents created should be tailored to reflect and constitute opinion work product. The text should be replete with theories of legal claims, evaluations of liability, views as to witnesses, etc.; in the alternative, any witness interview verbatim transcripts should be shunned.
3. Where appropriate, observe the "5 Cs" rule.
4. Documents created should be shared or distributed on a need-to-know basis. Efforts to maximize notions of confidentiality should be evident and documentable.
5. Attorney generated materials should not be shared with third party agents of the company (e.g., accountants, investment bankers, etc.)
6. Written communications between outside lawyers and the company should be kept to a minimum; such communications, in the main, should be between in-house lawyers and outside counsel. To the extent that materials reflect opinion work product, it is better that they reside in *outside* attorneys' computers/files.

VI. TEN TIPS TO MAXIMIZE THE PROCTECTIONS OF CONFIDENTIALITY

7. Make sure that lawyers are doing the work. To the extent that experts are needed (e.g., accountants, investment bankers), they should be retained by outside counsel, work as agents of counsel, and such retention should be memorialized that it is in connection with litigation (anticipated or not). Whether said experts are retained for purposes of testifying at trial or for assisting counsel for trial alone is a very important distinction that must be established at the outset of the retention. Any documents created by said experts should be directed to outside counsel. Expert drafts may be discoverable; the number of drafts should therefore be kept to a minimum.

8. Materials created and distributed at the board of director's level should be at a minimum, should be carefully scrutinized, and a record kept of the distribution thereof. If practical, such materials should be retrieved after any presentation(s) are made.

9. Use of any such materials in a public forum may be justified for some business reason, but it will (a) waive the confidentiality thereof; and (b) provide any opponent a very helpful batch of information on a "silver platter".

10. Best practices vis-à-vis email/internet: do ***not*** engage in attorney-client communications and discussions of legal strategy over the internet. But if you must, encrypt it.

VII. HOW NOT TO DO A CORPORATE INTERNAL INVESTIGATION

- In re Kellogg Brown & Root
  - 756 F.3d 754 (D.C. Cir. June 27, 2014), rev'g 2014 WL 1016784 (D.D.C. March 6, 2014)
  - 796 F.3d 137 (D.C. Cir. August 11, 2015), rev'g 2014 WL 7212881 (D.D.C. December 17, 2014)
    - Non-Lawyers
    - But for/"primarily" test
    - No 5 C's
    - Non-Upjohn
    - Privilege ≠ work product
    - "Cf" citations
    - "Magical words"
    - Interlocutory appeals
    - Internal lawyer ≠ 30b6 deposition waivers
    - Witness prep / Rule 612 waiver
    - Sword & Shield Advocacy
    - Kovel
    - The Della Street Rule
  - Take aways:
    - **never** send non-lawyers to do what lawyers should do
    - **never** handle a 30b6 witnesses this way
    - courts can be very difficult places to litigate A/C & AWP issues
    - the Chamber of Commerce has influence in the DC Circuit

    See C.E. Stewart, "The D.C. Circuit: Wrong and Wronger," NY Business Law Journal (Winter 2015)