New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 252—NO. 76
MONDAY, OCTOBER 20, 2014

Outside Counsel

Attorney-Client Privilege: Misunderestimated or Misunderstood?

By
C. Evan Stewart

On the eve of the 2000 election, George W. Bush boasted: "They misunderestimated me."[1] And, arguably, he was correct. Equally "misunderestimated," or at least misunderstood, is the attorney-client privilege.

For almost 25 years, I have been writing about the eroding status of the attorney-client privilege.[2] Practitioners, legal academics, and judges (with a few, notable exceptions—e.g., Judge Pierre Leval)[3] seem either not to understand the privilege, or believe that the purposes it serves are overstated or not important.[4] One recent case—which purports to strengthen the privilege—further documents this disheartening state of affairs.

But, before we get to that case, let's make sure we all understand the basics.

What Is the Privilege?

The attorney-client privilege is the "oldest of privileges for confidential communications."[5] For the privilege to exist, there must be the 5 C's: (1) a client; (2) a communication; (3) confidentiality (4) counsel (an attorney); and (5) counsel (the giving of legal advice by an attorney).[6] Four out of five C's is not sufficient; there must be all five for the privilege to exist. It is the client's privilege to assert or waive, not the attorney's. When the client is a corporation, generally the board of directors or in-house counsel has the authority to waive the privilege on behalf of the corporation.[7] Voluntary waiver of the privilege vitiates the privilege thereafter; once breached, it cannot be resurrected.[8]

In 1981, the U.S. Supreme Court strongly affirmed the privilege in the corporate setting in *Upjohn Co. v. United States*.[9] The Upjohn court stressed the importance of there being "full and frank communications between attorneys and their clients," and that such communications were necessary to enable a lawyer to give "sound and informed advice." The court concluded that the privilege "promote[s] broader public interests in the observation of law and administration of justice." As a consequence of those policies and interests, the court barred disclosure to the Internal Revenue Service of corporate counsel's fact-oriented communications with employees regarding an investigation into questionable payments made to foreign government officials; and, given an attorney's need to render "sound and informed advice," the court specifically rejected prior precedent limiting the privilege to only certain employees.

The Supreme Court subsequently reinforced the teachings of *Upjohn* in *Swidler & Berlin v. United States*.[10] In *Swidler & Berlin*, the court rejected the argument that the attorney-client privilege could be vitiated after the client's death in certain criminal proceedings. Citing the broad purposes of the privilege, the court observed that "[k]nowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel" and that "[w]ithout assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all."

District Court: Right, Wrong

On June 27, 2014, the U.S. Court of Appeals for the D.C. Circuit handed down, in one commentator's opinion, "one of the most important decisions in recent memory concerning internal investigations."[11] Unfortunately, the D.C. Circuit in *In re Kellogg Brown & Root* got it wrong.[12]

> For the privilege to exist, there must be the 5 C's: (1) a client; (2) a communication; (3) confidentiality (4) counsel (an attorney); and (5) counsel (the giving of legal advice by an attorney).

The litigation arose out of allegations that a major defense contractor's employees had given "preferential treatment" to a subcontractor in exchange for bribes. On its own initiative, the defense contractor, employing its "Code of Business Conduct" protocols, initiated an internal investigation; it was

C. EVAN STEWART *is a senior partner at Cohen & Gresser. He is an adjunct professor at Fordham Law School and a visiting professor at Cornell University.*

conducted by non-lawyers. Those non-lawyer employees "interviewed personnel with potential knowledge of the allegations, reviewed documents, and obtained witness statements." Upon completing their investigation, the non-lawyers wrote up seven reports, which were then forwarded on to the defense contractor's internal legal department.

Thereafter, in subsequent qui tam litigation, the plaintiff sought the seven reports in discovery. The defense contractor demurred, citing the attorney-client privilege and the attorney work product doctrine. Upon a motion to compel, the U.S. District Court for the District of Columbia conducted an in camera review of the materials and then ruled that neither position held water.

As to the work product argument, the district court observed both (i) that the investigation was conducted by non-lawyers—not at the direction of counsel, and (ii) that it was not undertaken in anticipation of litigation. That analysis was clearly correct, and it proved not to be controversial.

On the attorney-client privilege issue, the district court ruled that a "party invoking the privilege must show 'the communication would not have been made *but for* the fact that legal advice was sought.'"[13] Citing Department of Defense requirements of self-disclosure of improper conduct, the court found that the "but for" standard had not been met. The court also noted (i) that the "employees who were interviewed were never informed that the purpose of the interview[s] was to assist the [defense contractor] in obtaining legal advice"; and (ii) that the "employees certainly would not have been able to infer the legal nature of the inquiry by virtue of the interviewer[s], who [were] non-attorn[eys]."[14]

The defense contractor was extremely unhappy with this latter ruling, asked the district court for an interlocutory appeal on the privilege issue (which was denied),[15] and then petitioned the D.C. Circuit for a writ of mandamus (which was granted). Obviously, the grant of mandamus was a sure sign that the district court's ruling was not long for this world. But would the D.C. Circuit get it right?

D.C. Circuit Gets It Wronger

The speed with which the circuit court took on and resolved the case underscored the serious concern it had with the district court's ruling. Indeed, in the higher court's view, the lower court's decision not only had the potential to "disable most public companies from undertaking confidential internal investigations," it had also so fundamentally misunderstood/misinterpreted the Supreme Court's seminal ruling in *Upjohn* that the decision "threaten[ed] to vastly diminish the attorney-client privilege in the business setting."[16] Unfortunately, not only were those dire consequences not well-founded, the D.C. Circuit's analysis justifying reversal was wide of the mark as well—with one exception.

What did the circuit court miss? Not much, only: (i) it did not understand the five C's; (ii) it misapplied 'Upjohn'; (iii) it confused the attorney-client privilege with attorney work product; (iv) it did not understand lawyers' ethical duties in these circumstances; and (v) it flouted the law vis-à-vis interlocutory appeals.

So what did the higher court get right? In rejecting the district court's "but for" test, the circuit court was right-on in observing that such a test "is not appropriate for [an] attorney-client privilege analysis"; the court was also spot-on that there is "no Supreme Court or Court of Appeals decision that has adopted a test of this kind in this context."[17] But that was all the D.C. Circuit nailed correctly.

So what did the circuit court miss? Not much, only: (i) it did not understand the five C's; (ii) it misapplied *Upjohn*; (iii) it confused the attorney-client privilege with attorney work product; (iv) it did not understand lawyers' ethical duties in these circumstances; and (v) it flouted the law vis-à-vis interlocutory appeals. One final matter: By the court's attempt to "strengthen" the privilege, the decision may well have the opposite effect.

It is axiomatic that client communications with non-lawyers, especially non-lawyers not acting under the specific guidance of lawyers (pursuant to Fed. R. Civ. P. 26 (b)(3)), are not confidential, privileged, or protected from discovery. Thus, when the D.C. Circuit wrote that the case before it was "materially indistinguishable" from *Upjohn*, it was simply wrong; in the court's own words: "In Upjohn, the communications were made by company employees to company attorneys during an attorney-led internal investigation…."[18] That clearly was not the situation in the case before the D.C. Circuit, and no amount of invoking the policy underpinnings of *Upjohn* can change that structural problem. As compliance personnel and internal auditors are regularly told (even those who are licensed lawyers), the privilege does not apply to them or to their communications. Period.

By its frequent "cf" citations, and most particularly its citation to *Hickman v. Taylor*[19]—the seminal Supreme Court decision underpinning the attorney work product doctrine and Fed. R. Civ. P. 26(b)(3)—it seems apparent that the D.C. Circuit was confusing the privilege and work product doctrine. If, in fact, the defense contractor's legal department had established the internal investigation in anticipation of litigation and had specifically designated the non-lawyer personnel as its agents to assist lawyers in the investigation, then the work product generated would have been protected— not under the privilege, but under the work product doctrine.[20] It is indisputable, however, that that is not what happened here.

With respect to the failure to inform employees that the interviews were of a legal nature, the circuit court's ethical antennae were clearly turned off. The court was simply wrong in stating: "nothing in *Upjohn* requires a company to use *magic words* to its employees in order to gain the benefit of the privilege for an internal investigation…*here as in Upjohn* employees *knew* that the com-

pany's legal department was conducting an investigation of a sensitive nature *and* that the information they disclosed would be protected."[21]

Unlike in *Upjohn*, the defense contractor's employees certainly did not know of the legal department's role/involvement; and as for the interviewees' confidentiality expectations, how would (or could) they have had an informed view on that subject?: lawyers were not conducting the interviews and thus were not giving the employees the "magic words" required by the canons of ethics—i.e., the Corporate Miranda Warning—to warn them that, in fact, the information they were disclosing might well not be confidential or protected.[22]

As if that were not enough, the circuit court then correctly cited to binding Supreme Court precedent that "an interlocutory appeal under the collateral order doctrine is *not available* in attorney-client privilege cases."[23] It also correctly noted that taking a contempt citation is the only appropriate means to get immediate appellate review.[24] Nonetheless, because it (wrongly) believed it had to step in because "the District Court's decision [had] the potential to 'work a sea change in the well-settled rules governing internal corporate investigation,'"[25] the circuit court convinced itself that "granting the writ [was] 'appropriate under the circumstances.'"[26]

Dire Predictions? Yes and No

The dire predictions contemplated by the D.C. Circuit did not justify flouting binding Supreme Court precedent; furthermore, those dire predictions would never have come to pass. Why? Because most lawyers (if not all—with perhaps the exception of those employed by the defense contractor) know how to set up internal investigations consistent with *Upjohn* (i.e., those planned and conducted by lawyers), consistent with the attorney work product doctrine, or both. It is really not that tough.

But if lawyers (and business people) read (or read of) the D.C. Circuit's decision, I can foresee not a strengthened privilege, but a weaker privilege. The privilege has traditionally been upheld by courts only when it has been strictly followed to the letter of the law.[27] This decision, however, endorses non-lawyers acting as lawyers (sans ethical protections for interviewees) and then the company being able to invoke (successfully) the privilege. Unfortunately, it is easy to predict other companies in the future trying to shield more and more internal projects under this precedent; it is also easy to predict that, at some point, the judiciary (often hostile to the privilege) pushing back: first against this dubious practice, and then going further and not shielding truly privileged materials from discovery. A strengthened privilege indeed.

1. Bentonville, Ark. (Nov. 6, 2000). Running for reelection four years later, President Bush also boasted: "Our enemies are innovative and resourceful, and so are we. They never stop thinking about new ways to harm our country and our people, and neither do we." Washington, D.C. (Aug. 5, 2004).

2. See e.g., "Whither the Attorney-Client Privilege?" New York Law Journal (Oct. 22, 1990); "The Corporate Attorney-Client Privilege: Is Nothing Sacred?" The Corp. Crim. & Const. L.R. (April 5, 1991); "Corporate Counsel and Privileges: Going, Going…," New York Law Journal (July 11, 1996); "The Attorney-Client Privilege: The Best of Times, the Worst of Times," The Professional Lawyer (1999); "The Attorney-Client Privilege and Email: Strange Bedfellows?" The Computer and Internet Lawyer (March 2007); "Will Waiving the Privilege Save It?" New York Business Law Journal (Spring 2007); "Pandora's Box and the Bank of America," New York Law Journal (Nov. 4, 2009); "Attorney-Client Privilege: Ohio Takes a Bite Out of the Big Apple," New York Law Journal (Sept. 7, 2012). During much of that time, however, many observers (mostly non-practicing lawyers and academics) believed that all was hunky dory. See, e.g., F. Zacharias, "The Fallacy that the Attorney-Client Privilege has been Eroded: Ramifications and Lessons for the Bar," The Professional Lawyer (1999).

3. See C.E. Stewart, "Good Golly Miss Molly! The Attorney Work Product Doctrine Takes Another Hit," New York Business Law Journal (Winter 2012); C. E. Stewart, "The Second Circuit Affirms the Attorney-Client Privilege," ABA Pretrial Practice & Discovery (Summer 1999); C. E. Stewart, "Policing the Corporate Beat: 'One Small Step for Man…,'" New York Law Journal (May 7, 1998).

4. See, e.g., *Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp.*, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. 1996); S.D. Solomon, "Keeping the Company's Lawyers Silent Can Shelter Wrongdoing," New York Times B9 (Aug. 27, 2014).

5. J. Wigmore, Wigmore on Evidence §2290, at 542 (McNaughton rev. ed. 1961). Grounded in the common law, the privilege is found in state court rules or state statutes (e.g., N.Y.C.P.L.R. §4503(a)) and the Federal Rules of Evidence (Rule 501).

6. See Wigmore, supra note 5 §2293, at 554; *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D. Mass. 1950).

7. *U.S. v. DeLillo*, 448 F.Supp. 840 (E.D.N.Y. 1978); *Velsicol Chemical Corp. v. Parsons*, 561 F.2d 671 (7th Cir. 1977), cert. denied, 435 U.S. 942 (1978).

8. Compare *Westinghouse Electric Corp. v. Republic of Philippines*, 951 F.2d 741 (3d Cir. 1991) (general waiver), with *In re Steinhardt Partners*, 9 F.3d (2d Cir. 1993) (held general waiver based on facts of the case; declined to apply across-the-board waiver, envisioning possible scenarios whereby a limited waiver could be upheld: e.g., the regulatory body explicitly agrees to keep the document confidential, or the regulatory body and company's interests are aligned and non-adversarial), with *Diversified Industries v. Meredith*, 372 F.2d 596 (8th Cir. 1978) (en banc) (disclosure in "separate and nonpublic SEC investigations" held to constitute only a "limited waiver"). See also C.E. Stewart, "Attorney Client-Privilege: Killing Limited Waiver," New York Law Journal (Jan. 16, 1992).

9. 449 U.S. 383 (1981).

10. 524 U.S. 399 (1998).

11. See J. McLaughlin, "Attorney-Client Privilege in Internal Investigations," New York Law Journal (Aug. 14, 2014).

12. *In re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. June 27, 2014), rev'g *United States ex rel. Barko v. Halliburton Co.*, 2014 WL 1016784 (D.D.C. March 6, 2014).

13. Id. at *2 (quoting *United States v. ISS Marine Servs.*, 905 F.Supp.2d 121, 128 (D.D.C. 2012) (emphasis added)). The court also later referenced a "primary purpose" standard. Id. at *4.

14. Id. at *3

15. *United States ex rel. Barko v. Halliburton Co.*, 2014 WL 929430 (D.D.C. March 11, 2014).

16. 756 F.3d at 762 (the first quote was taken by the Court of Appeals straight out of the defense contractor's brief).

17. Id. at 758-60. As for the "primary purpose" test, that type of standard was a gloss that many courts attempted to impose upon Fed. R. Civ. P. 26(b)(3) with respect to attorney work product, until Judge Leval properly put an end to all that in *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998). See C. E. Stewart, "Hickman v. Taylor Reinvigorated By the Second Circuit, With Important Benefits for Litigants," ABA Pretrial Practice & Discovery (July 1998).

18. 765 F.3d at 757.

19. Id. at 764. See 329 U.S. 495 (1947).

20. See C. E. Stewart, "Think Twice: The Good, Bad, and Ugly of Corporate Investigations," New York Law Journal (March 27, 2006).

21. 756 F.3d at 758 (emphasis added) (this is one of the "cf" citations to *Upjohn*).

22. See C. E. Stewart, "Thus Spake Zarathustra (And Other Cautionary Tales for Lawyers)," New York Business Law Journal (Winter 2010). For purposes of lawyers complying with their ethical obligations, the Corporate Miranda Warning (Rule 1.13) does in fact contain "magic words." This warning is sometimes mistakenly called an Upjohn warning, as derived from the Supreme Court's ruling in *U.S. v. Upjohn Co.*, 449 U.S. 383 (1981). But this is a mischaracterization of *Upjohn*, which (i) has nothing to do with lawyers' ethical duties under Rule 1.13, and (ii) stands for the proposition that all corporate employees are covered by the attorney-client privilege for purposes of discovery under the Federal Rules of Civil Procedure.

23. 756 F.3d at 761 (emphasis added) (citing *Mohawk Industries v. Carpenter*, 558 U.S. 100 (2009)).

24. The Court of Appeals, however, did not view going the contempt route as an "'adequate' means of relief in these circumstances." Id. Why that is so is quite unclear, especially since the leading case on opinion work product was established by precisely that route. See *In re Murphy*, 560 F.2d 326 (8th Cir. 1977).

25. 756 F.3d at 762 (quoting the amicus brief of The Chambers of Commerce).

26. Id. at 763 (citing *Cheney v. U.S. District Court of the District of Columbia*, 542 U.S. 367, 380 (2004), which stands for the proposition that mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes."). In support of this relief, the court also cited one of the worst opinions regarding privilege, ever: *In re Von Bulow*, 828 F.2d 94 (2d Cir. 1987). See C.E. Stewart, "Will Waiving the Privilege Save It?" New York Business Law Journal (Spring 2007).

27. See supra note 2. That many judges and legal academics are not fans of the privilege is clear. See supra note 3. And the latest controversy involving the General Motors' legal department has also fanned the flames of those who want to push back against the privilege. See, e.g., C. M. Matthews & J.S. Lubin, "Prosecutors Probe Lawyers at GM," Wall Street Journal A1 (Aug. 21, 2014).

COHEN & GRESSER LLP