CHAPTER 2

ATTORNEY-CLIENT PRIVILEGE: INTRODUCTION AND BASIC PRINCIPLES

2.1 INTRODUCTION

The attorney client privilege enjoys a unique status among all legal doctrines. For many reasons, it stands alone as the most important subject that lawyers must understand.

Lawyers deal with attorney-client privilege issues whenever they communicate with clients, would-be clients, clients' agents, their own agents, and even third parties. In today's world of balancing tests and legal nuances, the privilege remains a stark reminder that the law can be absolute—a properly created attorney-client privilege provides complete confidentiality and lasts forever.

The attorney-client privilege pervades every aspect of what lawyers do. Lawyers must understand it to help their clients create a viable privilege and avoid losing the privilege by improperly disclosing confidential information. Without this awareness, a lawyer may inadvertently destroy the privilege through inattention or neglect.

By contrast, dramatically different rules control the work product doctrine. Failing to appreciate work product doctrine principles can involve even higher stakes because, by definition, this doctrine involves litigation or anticipated litigation.

Even some courts seem confused by these doctrines, and some judicial decisions misunderstand or misapply the attorney-client privilege.[1] This book seeks to clarify these misunderstandings and provide the practitioner with guidance in this critical area of the law.

2.2 ETHICS DUTY OF CONFIDENTIALITY CONTRASTED

Some lawyers mistakenly equate the attorney-client privilege with the ethics duty of confidentiality. Although this book does not devote much attention to the ethics duty, it is worth noting the vast differences between these two legal principles.

The attorney-client privilege is an evidentiary rule that protects certain communications from a third party's efforts to discover the substance of those

[1] The courts cannot even agree about the level of difficulty in applying the privilege. In decisions issued during the same year, one federal court decision explained that the attorney-client privilege law "is fairly straightforward," *Bowen v. Parking Auth. of the City of Camden*, Civ. A. No. 00-5765 (JBS), 2002 U.S. Dist. LEXIS 14585, at *12 (D.N.J. July 30, 2002), while another federal decision admitted that the attorney-client privilege "is often litigated and little understood." *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 210 F.R.D. 506, 508 (S.D.N.Y. 2002).

communications. The ethics duty of confidentiality provides a broader protection. It differs from the privilege in its source, nature, scope, and application.

First, the ethics duty comes from each jurisdiction's ethics rules. Their violation can result in the punishment of lawyers. Second, the ethics duty is not limited to evidentiary concerns that arise only when a third party seeks to learn the substance of protected communications. Instead, the ethics duty guides lawyers' conduct at all times, even if no third party ever seeks to discover protected information or communications.

Third, the ethics duty of confidentiality extends far beyond what is protected by the attorney-client privilege. Most states follow the ABA Model Rules of Professional Conduct in prohibiting lawyers from revealing "information relating to the representation of a client" absent some countervailing duty.[2]

A comment to ABA Model Rule 1.6(a) explains the relationship between the ethics duty of confidentiality and the attorney-client privilege:

> 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.[3]

An example might illustrate the practical significance of this difference. Information available in the public record, such as a client's arrest 20 years ago on drunk driving charges, could never be protected by the attorney-client privilege. However, such information presumably would fall within the scope of a lawyer's ethics duty of confidentiality if the lawyer has learned it while representing the client. Similarly, information about a client that the client's lawyer obtains from third parties would not generally be protected by the privilege but would be covered by the ethics duty of confidentiality.

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[2] ABA Model Rule 1.6.

The previous ABA Model Code followed a different approach, requiring lawyers to preserve the confidentiality only of "confidences" and "secrets." The old ABA Model Code defined a "confidence" as "information protected by the attorney-client privilege under applicable law," and defined a "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." ABA Model Code DR 4-101(A).

[3] ABA Model Rule 1.6 cmt. [3].

Lawyers might find themselves dealing with this critical distinction in a number of contexts. For instance, the ethics duty of confidentiality covers such information as a client's identity, fees that the client has paid the lawyer, the date and time of a meeting with the client, etc. The privilege rarely if ever protects such information (or even communications containing such information). Yet a lawyer asked for such non-privileged information must refuse to provide it. This fulfills the lawyer's duty of confidentiality. Even lawyers responding to discovery seeking such information generally must resist the discovery, unless doing so would be frivolous. As one court explained

> There is some overlap between the ethical duty of confidentiality and the attorney-client privilege. By definition, all communications protected by the attorney-client privilege will be confidential and covered by the ethical duty. . . . That overlap is the reason why the ethical duty of confidentiality requires an attorney to invoke the attorney-client privilege when it is applicable.[4]

2.3 SOCIETAL BENEFITS AND COSTS OF THE PRIVILEGE

2.301 Introduction. From the very beginning, the attorney-client privilege has reflected a precarious balance between competing interests. That balance pervades both the principles underlying the attorney-client privilege and its application in specific cases.

2.302 Genesis. In 2007, the Federal Court of Claims traced the attorney-client privilege back to Roman times, when Cicero refrained from seeking to learn the substance of communications between a Sicilian governor being investigated for corruption and the governor's lawyer.[5] Other courts have pointed to the development of the attorney-client privilege during Elizabethan times.[6] Either way, the attorney-client privilege represents one of the common law's oldest protections from disclosure.[7] This contrasts sharply with the work product doctrine, which is only about 60 years old.[8]

Interestingly, the attorney-client privilege never developed into a constitutional right in the United States, despite its importance.[9]

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[4] *State v. Gonzalez*, 234 P.3d 1, 11 (Kan. 2010).

[5] *Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 128 n.6 (Fed. Cl. 2007).

[6] *United States v. (Under Seal) (In re Grand Jury 83-2 John Doe No. 462)*, 748 F.2d 871, 873 (4th Cir. 1984).

[7] *Chase v. NOVA Se. Univ., Inc.*, Case No. 11-61290-CIV-COHN/SELTZER, 2012 U.S. Dist. LEXIS 83815, at *7 (S.D. Fla. June 18, 2012) ("The attorney-client privilege is the oldest of the privileges protecting confidential information."); *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2318 (2011) ("The attorney-client privilege ranks among the oldest and most established evidentiary privileges known to our law.").

[8] Chapter 33 of this book discusses that issue.

[9] Chapter 52 of this book discusses that issue.

2.303 Societal Benefits of the Privilege. As originally envisioned and still applied, the attorney-client privilege rests on the societal interest in encouraging clients to provide full and honest information to their lawyers. Society benefits by protecting these communications from clients to lawyers because lawyers help guide their clients' conduct in lawful directions and help resolve disputes.

The First Circuit articulated this purpose in 2011. "The rationale that undergirds the privilege is easily understood: treating communications between lawyer and client as confidential encourages full and frank disclosure that better enables the lawyer to represent the client and better enables the client to conform his conduct to the law."[10] Other courts have articulated this important societal purpose.[11]

The *Restatement* provides a more extensive discussion of the privilege's underlying rationale:

> [C]onfidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services. The rationale is founded on three related assumptions. First, vindicating rights and complying with obligations under the law and under modern legal processes are matters often too complex and uncertain for a person untrained in the law, so that clients need to consult lawyers. The second assumption is that a client who consults a lawyer needs to disclose all of the facts to the lawyer and must be able to receive in return communications from the lawyer reflecting those facts . . . . The third assumption supporting the privilege is controversial—that clients would be unwilling to disclose personal, embarrassing, or unpleasant facts unless they could be assured that neither they nor their lawyers could be called later to testify to the communication.[12]

Not surprisingly, egotistical lawyers often think that the attorney-client privilege primarily protects what they tell their clients, rather than vice versa. This is wrong. The most scrupulously protected communications involve clients relating facts to their lawyers so the lawyers can provide advice to the clients. Some courts clearly understand this. For instance, as explained in Chapter 6 of this book, the United States Supreme Court's well-known *Upjohn* case[13] explains that the then-widely used "control group" theory of privilege in the corporate context erroneously focused on the level of the corporate employee who acted on a lawyer's advice. The Supreme Court instead emphasized the protection for the corporation's relaying of facts to the lawyer, thus extending privilege protection to communications from any

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[10] *In re Grand Jury Subpoena*, 662 F.3d 65, 70-71 (1st Cir. 2011).

[11] *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012) ("[T]he attorney-client privilege promotes free discourse between attorney and client, which advances the effective administration of justice."); *Goldstein v. Colborne Acquisition Co., LLC*, Case No. 10 C 6861, 2012 U.S. Dist. LEXIS 75743, at *6 (N.D. Ill. June 1, 2012) ("That purpose is to foster free and open communication between a party and his lawyer regarding legal advice."); *Tex. v. United States*, 279 F.R.D. 24, 27-28 (D.D.C. Jan. 2, 2012), *vacated in part on other grounds*, 270 F.R.D. 176 (D.D.C. Jan. 6, 2012); *Jicarilla Apache Nation*, 131 S. Ct. 2313.

[12] *Restatement (Third) of Law Governing Lawyers* § 68 cmt. c (2000).

[13] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

level of corporate employee possessing those facts. This dramatic switch in the corporate attorney-client privilege protection reflected the proper recognition that the privilege primarily protects client-to-lawyer communications rather than lawyer-to-client communications. In fact, as explained in Chapter 17 of this book, the privilege usually does not protect the latter type of communication, unless it reflects what the client told the lawyer in confidence.

Unfortunately, some courts do not seem to understand this critical principle. As explained in Chapter 16 of this book, some courts inexplicably fail to protect the factual portion of clients' communications to their lawyers. To be sure, the privilege never protects historical facts. The traffic light was either red or green, the client either transferred money out of an account or did not, etc. However, it is far different to deny protection for the client's communications relaying those historical facts to the lawyer. By denying protection for such communications, these courts mistakenly strip protection from what should be the most protected of all communications.

2.304 Societal Costs of the Privilege. The attorney-client privilege's societal benefit exacts a cost. The privilege hampers the search for truth by concealing undeniably relevant communications.[14]

One court carefully articulated the competing interests that underlie the attorney-client privilege and contribute to the privilege's subtlety and complications.

> The purpose of the attorney-client privilege is to facilitate through confidential communications the client's complete disclosure of the circumstances which brought the client to consult with the attorney and the attorney's giving of accurate and useful legal advice. But because the assertion of the privilege can prevent the discovery of information relevant to Court proceedings, the privilege is strictly construed and has limited application only as necessary to maintain its purpose.[15]

Courts recognizing the benefits of the attorney-client privilege sometimes acknowledge the cost but apply the privilege nevertheless. For instance, one court conceded a litigant's point that "suppressing [a governmental] report threatens to suppress the truth" but held that the privilege still applied.[16] That court noted that the governmental report at issue was "an honest evaluation" of the government's case and held that "such forthright analysis is necessary" for the government to do its job.[17]

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[14] *Dewitt v. Walgreen Co.*, Case No. 1:11-cv-00263-BLW, 2012 U.S. Dist. LEXIS 125493, at *6 (D. Idaho Sept. 4, 2012) ("[T]he privilege impedes the truth-finding process and must be strictly construed."); *Cont'l. Cas. Co. v. Am. Home Assurance Co.*, Civ. A. No. 2:00-0260, 2010 U.S. Dist. LEXIS 15717, at *6 (S.D. W. Va. Feb. 23, 2010).

[15] *Hanson v. First Nat'l Bank*, Civ. A. No. 5:10-0906, 2011 U.S. Dist. LEXIS 125935 (S.D.W. Va. Oct. 31, 2011).

[16] *United States v. Mallinckrodt, Inc.*, 227 F.R.D. 295, 299 (E.D. Mo. 2005).

[17] *Id.*

2.305 Tension Between Competing Societal Interests. The tension "between the policy of protecting confidential client communications and the policy of requiring every person to give relevant testimony and other evidence when called upon to do so in an official proceeding"[18] affects courts' analysis of attorney-client privilege issues.

Courts universally apply the privilege narrowly.[19] The privilege is also difficult to create and easy to lose. One court recognized that "[t]he attorney-client privilege is paradoxical, however, in that its robustness is matched by its fragility."[20]

Courts' hostility to the attorney-client privilege can also be seen in judicial comments peppered through privilege decisions. Examples include:

- The privilege is the exception rather than the rule;[21]
- The privilege is not favored.[22]

2.306 Benefits of Certainty. For obvious reasons, the privilege cannot fully provide the societal benefits mentioned above if the participants (especially clients) cannot be certain of its application. As the Supreme Court explained,

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.[23]

The Supreme Court articulated the same principle in 2011.[24]

This principle has appeared in other cases. For instance, the Sixth Circuit recognized that "[i]f we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to delineate the scope of the privilege in ways that are predictable and certain."[25]

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[18] *Restatement (Third) of Law Governing Lawyers*, Scope, ch.5, Topic 2, tit. A, introductory note (2000).

[19] Chapter 57 of this book discusses that issue.

[20] *United States v. Boender*, No. 09 CR 186-1, 2010 U.S. Dist. LEXIS 20670, at *7 (N.D. Ill. Mar. 8, 2010).

[21] *Sharp v. Trans Union L.L.C.*, 845 N.E.2d 719, 726 (Ill. App. Ct. 2006).

[22] *AVX Corp. v. Horry Land Co.*, Civ. A. No. 4:07-cv-3299-TLW-TER, 2010 U.S. Dist. LEXIS 125169, at *15 (D.S.C. Nov. 24, 2010); *Chase v. City of Portsmouth*, 236 F.R.D. 263, 267 (E.D. Va. 2006).

[23] *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

[24] *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2328 (2011) ("We have said that for the attorney-client privilege to be effective, it must be predictable.").

[25] *FTC v. Boehringer Ingelheim Pharms., Inc.*, 286 F.R.D. 101, 108 (D.D.C. 2012) ("Documents that are protected by the attorney-client privilege are thus absolutely privileged as is opinion work product."); *In re Lott*, 424 F.3d 446, 450 (6th Cir. 2005).