

Current Ethics Issues Relating to Opinions:

*The Attorney-Client Privilege,
the Work-Product Protection,
and Rules of Professional Conduct 1.6 & 2.3*

*Presenters: John K. Villa & Charles Davant
Williams & Connolly LLP*

*May 9, 2017
WGLO Spring 2017 Seminar*

Hypothetical: The Absorbco-Disolvco Merger

The year is 2019.

Two years after the Absorbco-Disolvco merger, Disolvco's former shareholder, Ornerly Capital, has sued Absorbco and its law firm Artless & Sharp LLP for fraud and negligent misrepresentation. Ornerly Capital alleges that it relied on a false or misleading legal opinion.

Unbeknownst to Ornerly Capital, the draft legal opinion was subject to intense, behind-the scenes debate before its delivery in 2017.

In discovery, Ornerly Capital has demanded production of:

- all emails pertaining in any way to the law firm's legal opinion;
- all memos or analyses by the law firm; and
- all drafts of the legal opinion

What is the law firm obligated to produce?

Hypothetical: The Absorbco-Disolvco Merger

Rewind to 2017:

Absorbco, a towel manufacturer, has decided to acquire Disolvco, a maker of drain cleaner. Absorbco and Disolvco will merge, with Absorbco surviving. Disolvco's shareholders will receive Absorbco shares plus debt.

Disolvco requires that Absorbco provide its counsel's legal opinion that the merger "will" be tax free for Disolvco's shareholders. Absorbco hires the law firm Artless & Sharp LLP to deliver the required opinion.

A Lawyer's Ethical Duty of Client Confidentiality

“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) or required by paragraph (c).”

— Ill. R. Prof. C. r. 1.6 (a)

A Lawyer's Ethical Duty of Client Confidentiality

“A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.”

—Ill. R. Prof. C. r. 2.3 (a)

Hypothetical: The Absorbco-Disolvco Merger

(cont'd)

In their initial call, Absorbco's general counsel gives Artless & Sharp some background information about the transaction, plus her understanding of the applicable tax laws.

Lawyer John Artless researches the tax issue and concludes that he lacks the confidence to opine that the merger "will" be tax-free for the shareholders. The most that he is willing to say is that "more likely than not" the merger will be tax-free. Mr. Artless prepares a memo to file that reflects his conclusion and legal analysis. He also prepares a draft legal opinion and sends it to Absorbco's general counsel, along with a copy of his memo.

The Attorney-Client Privilege

“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client,

- (1) between himself or his representative and his lawyer or his lawyer’s representative, or
- (2) between his lawyer and the lawyer’s representative, or
- (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or
- (4) between representatives of the client or between the client and a representative of the client, or
- (5) between lawyers representing the client.”

— Federal Rule of Evidence 503(b) (Proposed)

Draft Opinions Privileged?

“Case law differs on the question of whether drafts of documents intended . . . to be [shared] are covered by the attorney-client privilege.”

— *Ergo Licensing, LLC v. Carefusion 303, Inc.*, 263 F.R.D. 40, 44 (D. Me. 2009) (recognizing privilege)

Draft Opinions Privileged?

Early drafts of legal documents generally are privileged because “it seems an impossible task to determine at what point in the back and forth exchange of ideas the attorney-client privilege dissolves,” and “the very purpose of the attorney-client privilege is to encourage such exchanges.”

— *In re Rivastigmine Patent Litigation*, 237 F.R.D. 69, 83 (S.D.N.Y. 2006) (abrogated on other grounds)

Draft Opinions Privileged?

“[D]rafts of documents prepared for eventual release to third parties—such as loan documents, acceleration notices, and guarantee demands—are not protected by the attorney work product doctrine or the attorney-client privilege.”

— *In re Pappas*, No. 08-10949, 2009 WL 1574923, at *1 (Bankr. D. Del. June 3, 2009)

Draft Opinions Privileged?

“[O]pinion letters do not constitute advice to a client, but rather were written at the client’s express request for use by third parties.”

— *Vereins-Und Westbank, AG v. Carter*,
691 F.Supp. 704, 715 (S.D.N.Y. 1988) (dicta)

File Memos Privileged?

“A memorandum to a file may be protected where it records a confidential attorney-client communication.”

— *In re Rivastigmine Patent Litigation*, 237 F.R.D. 69, 83 (S.D.N.Y. 2006) (abrogated on other grounds)

Internal Emails Privileged?

“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client,

- (1) between himself or his representative and his lawyer or his lawyer’s representative, or
- (2) between his lawyer and the lawyer’s representative, or
- (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or
- (4) between representatives of the client or between the client and a representative of the client, or
- (5) between lawyers representing the client.”

— Federal Rule of Evidence 503(b) (Proposed)

Hypothetical: The Absorbco-Disolvco Merger

(cont'd)

In the initial call between Absorbco's general counsel and John Artless, the general counsel had told Mr. Artless that Disolvco's largest shareholder, Ornerly Capital, has a reputation for filing dubious lawsuits.

The Work-Product Protection

“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial”

— Fed. R. Civ. P. R. 26(b)(3)(A)

The Work-Product Protection

“[T]he documents at issue are not protected work product because GEHC has failed to show that they were created in response to a substantial and significant threat of litigation.”

— *Resurrection Healthcare v. GE Health Care*, 2009 U.S. Dist. LEXIS 20562 (N.D. Ill. Mar. 16, 2009)

The Work-Product Protection

“If it would have been prepared regardless of whether litigation was in the offing, then there is generally no reason to accord the document work-product protection.”

— *Bridgewater v. Carnival Corp.*, 2011 U.S. Dist. LEXIS 106786, at *13 n.5, 14, 22 (S.D. Fla. Sept. 20, 2011)

The Work-Product Protection

“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial”

— Fed. R. Civ. P. R. 26(b)(3)(A)

The Work-Product Protection

“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial”

. . . . But, subject to Rule 26(b)(4), those materials may be discovered if: . . . the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. . . .”

— Fed. R. Civ. P. R. 26(b)(3)(A)

The Work-Product Protection

“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial”

. . . . But, subject to Rule 26(b)(4), those materials may be discovered if: . . . the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. . . .”

— Fed. R. Civ. P. R. 26(b)(3)(A)

“If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”

— Fed. R. Civ. P. R. 26(b)(3)(B)

Hypothetical: The Absorbco-Disolvco Merger (cont'd)

Disolvco's CEO leaves Mr. Artless a voicemail asking him to call back and say whether he will be giving the requested opinion.

Fearing that his client Absorbco will “opinion shop,” Artless is tempted to return the call and tell Disolvco he cannot give the requested opinion.

A Lawyer's Ethical Duty of Client Confidentiality

“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing 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.”

—Ill. R. Prof. C. r. 1.6 (b)(2)

A Lawyer's Ethical Duty of Client Confidentiality

“When the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.”

—Ill. R. Prof. C. r. 2.3 (b)

Hypothetical: The Absorbco-Disolvco Merger (cont'd)

Absorbco's general counsel reads Mr. Artless's memo and draft "more-likely-than-not" opinion, and she becomes angry that Mr. Artless will not opine that the merger "will" be tax-free. The general counsel telephones Mr. Artless's law partner, Nancy Sharp, and criticizes Mr. Artless's analysis.

Mr. Artless, Ms. Sharp, and the general counsel debate the matter over email. The general counsel carbon-copies her cousin (an accountant who also owns shares in Absorbco) on some of the emails. The cousin initially supports Mr. Artless's view.

Third-Party Destroys Privilege?

Proponent of privilege “failed to set forth evidence that [a third party’s] assistance ... was necessary or served some specialized purpose in facilitating the attorney-client communication and the provision of proper legal advice. Under such circumstances, the attorney-client privilege does not extend to shield communications in which he was present.”

— *Filippi v. Elmont Union Free Sch. Dist. Bd. of Educ.*,
2011 U.S. Dist. LEXIS 67388, at *7 (E.D.N.Y. 2011)

Third-Party Destroys Privilege?

A third party who participated in attorney-client communications so he could interpret specialized rules and procedures for the attorney did not destroy privilege.

— *Jenkins v. Bartlett*, 487 F.3d 482 (7th Cir. 2007)

Third-Party Destroys Privilege?

No waiver when “at the time [parties] were negotiating it seemed quite likely that [they] would [both] be sued by plaintiff and that in that litigation [they] would be identically aligned.”

— *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 310, 312 (N.D. Cal. 1987)

Third-Party Destroys Privilege?

“While not required, there has never been a written record of a common interest agreement. . . . The Court finds that the record as to the creation of a common interest agreement is deficient”

— *Beyond Sys., Inc. v. Kraft Foods, Inc.*, 2010 U.S. Dist. LEXIS 40423, at *4 (D. Md. 2010)

Hypothetical: The Absorbco-Disolvco Merger (cont'd)

After Ms. Sharp's research reveals additional legal authority, Mr. Artless changes his mind. He decides his initial opinion was too timid. Mr. Artless becomes convinced that the merger "will" be tax-free.

Mr. Artless signs and delivers a final opinion letter that the merger "will" be tax-free.

Final Opinion Privileged?

“The final letter is not protected by attorney-client confidentiality because it was disclosed to third parties.”

— *Alexander v. FBI*, 198 F.R.D. 306, 312 (D.D.C. 2000)

Hypothetical: The Absorbco-Disolvco Merger (cont'd)

Two years after the merger, the government takes the position that Orner Capital owes hundreds of millions of dollars in taxes, penalties, and interest. Rather than fight the government, Orner settles. Orner then sues Absorbco, Artless & Sharp LLP, and Mr. Artless personally. Orner alleges fraud, conspiracy, and negligent misrepresentation.

In discovery, Orner demands all emails, internal memoranda, and drafts concerning Artless's legal opinion.

Waiver as to Email, Memos and Early Drafts?

“Since Carter, for his own business purposes, directed his attorney to make representations to Vereins and Rockwood, he must be deemed to have waived any claim of confidentiality as to information necessary to determine the truth or falsity of such representations.”

— *Vereins-Und Westbank, AG v. Carter*,
691 F.Supp. 704, 715-16 (S.D.N.Y. 1988)

Waiver as to Email, Memos and Early Drafts?

“The waiver extends beyond the document initially produced out of concern for fairness, so that a party is prevented from disclosing communications that support its position while simultaneously concealing communications that do not.”

— *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349-50 (Fed. Cir. 2005)
(opinion on threatened patent litigation)

Waiver as to Email, Memos and Early Drafts?

Client that “disclosed its opinion of counsel” to counterparty “to convince [it] to purchase [client]’s” product “must disclose any and all of the documents surrounding these opinion letters as well as the opinions themselves.”

— *V. Mane Fils S.A. v. International Flavors and Fragrances, Inc.*, 249 F.R.D. 152, 155 (D.N.J. 2008) (opinion on threatened patent litigation)

Waiver as to Email, Memos and Early Drafts?

“Plaintiffs argue that the release of the final draft waives the attorney-client privilege as it applies to prior drafts of the document. Drafts of documents that are prepared with the assistance of counsel for release to a third party are protected under attorney-client privilege.”

— *Alexander v. FBI*, 198 F.R.D. 306, 312 (D.D.C. 2000)

Waiver as to Email, Memos and Early Drafts?

“Indeed, most courts have found that even when a final product is disclosed to the public, the underlying privilege attached to drafts of the final product remains intact.”

— *Roth v. Aon Corp.*, 254 F.R.D. 538, 541 (N.D. Ill. 2009) (draft 8-Ks)

Waiver as to Email, Memos and Early Drafts?

“The public release of the . . . report does not waive the privilege for the drafts if they were otherwise protected by the privilege.”

— *In re Kidder Peabody Sec. Lit.*,
168 F.R.D. 459, 474 (S.D.N.Y. 1996)

Hypothetical: The Absorbco-Disolvco Merger (cont'd)

Absorbco seeks to defend the fraud claim by mounting an “advice of counsel” defense.

Who May Waive Privilege?

“The attorney-client privilege may be waived by a client who asserts reliance on the advice of counsel as an affirmative defense.”

— *Glenmede Trust Co. v. Thompson*,
56 F.3d 476, 486 (3d Cir. 1995)

Who May Waive Privilege?

Client's "waiver encompass[ed] the back-up documents to the Opinion Letter, which include Pepper Hamilton's internal research and other file memoranda."

— *Glenmede Trust Co. v. Thompson*,
56 F.3d 476, 487 (3d Cir. 1995)

Hypothetical: The Absorbco-Disolvco Merger

(cont'd)

Absorbco demands from the law firm a copy of its “client file,” including all drafts and emails.

Demand for the Client File

Minority rule: Client entitled only to the “end product” of the lawyers’ work: outside correspondence, reports, court filings, contracts, wills, corporate records, and similar documents.

— ABA Formal Ethics Op. 471 (2015)

Demand for the Client File

Minority rule: Client entitled only to the “end product” of the lawyers’ work: outside correspondence, reports, court filings, contracts, wills, corporate records, and similar documents.

Majority rule: “The entire file approach assumes that the client has an expansive general right to materials related to the representation and retains that right when the representation ends.”

— ABA Formal Ethics Op. 471 (2015)

Demand for the Client File

Minority rule: Client entitled only to the “end product” of the lawyers’ work: outside correspondence, reports, court filings, contracts, wills, corporate records, and similar documents.

Majority rule: “The entire file approach assumes that the client has an expansive general right to materials related to the representation and retains that right when the representation ends.”

Note: A few categories (e.g., internal law firm intake documents) may be withheld even in “entire file” jurisdictions.

— ABA Formal Ethics Op. 471 (2015)

THE END