

QUICK REFERENCE: THE ATTORNEY-CLIENT PRIVILEGE*

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* This reference guide is intended to be a helpful glance at important issues relating to the attorney-client privilege in South Carolina and generally. It is far from an exhaustive research guide on the topic of the attorney-client privilege. For additional information on the attorney-client privilege and the work product doctrine see Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* (5th Ed.), American Bar Association (2007).

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I. THE ATTORNEY-CLIENT PRIVILEGE: POLICY

“The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be *safely and readily availed of when free from the consequences of the apprehension of disclosure.*”

Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (emphasis added).

II. RULE OF EVIDENCE 501

A. Federal Rule of Evidence 501 – Except as required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

B. South Carolina Rule of Evidence 501 – Except as required by the Constitution of South Carolina, by the Constitution of the United States or by South Carolina Statute, the privilege of a witness, person or government shall be governed by the principles of the common law as they may be interpreted by the courts in the light of reason and experience.

The attorney-client privileged is incorporated by reference in the Rules of Evidence and interpreted and applied in case law by the courts. Federal claims existing in a federal court venue are governed by Federal Common Law, while diversity actions existing in federal court are governed by state law interpretations of the attorney-client privilege.

III. THE ATTORNEY-CLIENT PRIVILEGE IN SOUTH CAROLINA

“The attorney-client privilege excludes from evidence confidential communications of a professional nature between attorney and client, unless the client, for whose benefit the rule is established, waives the privilege.”

Floyd v. Floyd, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005)

“Attorney-client privilege protects a client and any other person from disclosing confidential communications made to counsel relative to a legal matter.”

Ross v. Medical University of South Carolina, 317 S.C. 377, 383-384, 453 S.E.2d 880, 884 (S.C.1994)

IV. THE ATTORNEY-CLIENT PRIVILEGE: ELEMENTS

1. Attorney-Client Relationship

- Even if the communicating individual is an employee of the business, he or she may, or may not, be considered a client for the purposes of the privilege.

2. Communication For the Purpose of Seeking or Providing Legal Advice

- One of the most common pitfalls in asserting the privilege is the assumption that all communications between counsel and client are protected. A common mistake is thinking that the mere presence of counsel during a communication or the mere copying of counsel on internal communications is sufficient to trigger the protection. However, if legal advice is neither sought nor given, the attorney-client privilege likely does not apply.

3. Made in Confidence, Outside the Presence of Any Third Party

- Most attorneys understand that communicating in the presence of non-clients waives the privilege. However, exceptions exist in cases where information is shared with a consultant in order for the attorney to gain a better understanding of the case. This principal, known as the Kovel doctrine, is one of the most commonly misunderstood doctrines, and fraught with peril.

4. Privilege Not Waived by the Client

- Understanding who the client is can be important in understanding who has the authority to waive the privilege.

V. EMPLOYEES OF THE CORPORATION

Upjohn Co. v. United States, 449 U.S. 383 (1981)

Prior to UpJohn, courts applied two different tests with relative inconsistency. The first test was known as the control group test. Under the control group test, only employees who exercised direct control over the managerial decisions of the company were eligible to have their communications with corporate lawyers protected.

The second test occasionally applied to an attorney-client privilege determination was the subject matter test. The subject matter test focused on whether, i) the communication was for the purpose of seeking and rendering legal advice to the corporation, ii) the communication was made at the instance of the employee's superior, and iii) whether the subject matter of the communication was within the scope of the employee's duties.

In Upjohn, the Supreme Court rejected the control group test and adopted the subject matter test, thus holding that a company could invoke the attorney-client privilege to protect communications made between company lawyers and non-management employees. Therefore, while not all communications with employees are privileged, if the communication meets the elements of the Upjohn test listed above, it is likely privileged.

VI. FORMER EMPLOYEES OF THE CORPORATION

In re Allen, 106 F.3d 582 (4th Cir. 1997)

If a corporation's lawyer has a discussion with an employee after the individual has left the corporation, the attorney-client privilege may still apply to the extent that the information given to the attorney is necessary to provide legal advice to the client.

In In re Allen, the Fourth Circuit held that the analysis applied by the Supreme Court in Upjohn to determine which employees fell within the scope of the privilege applies equally to former employees. Therefore, in determining whether a corporate attorney's communications with former employees is protected, one must simply use the Upjohn test: Determine whether,

- i.) the communication was for the purpose of seeking and rendering legal advice to the corporation,
- ii.) the communication was made at the instance of the employee's (former) superior, and
- iii.) the subject matter of the communication was within the scope of the employee's duties.

VII. "SEEKING LEGAL ADVICE"

In order for the attorney-client privilege to attach, it is not essential that the client expressly request legal advice. A request for legal advice may be implied from the context of the document at issue. However, in order to invoke the privilege, there must be a finding that each document is involved in the rendition of legal advice.

Burlington Ind. V. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974).

"The mere fact that a person is an attorney does not render as privileged everything he does for and with a client."

Id.

A common misperception is that the mere existence of an attorney during a communication renders the communication privileged. In International Tel. & Tel. Corp. v. United Tel. Co. of Florida, 60 F.R.D. 177 (M.D.Fla. 1973), the defendant claimed that documents relating to meetings which were attended by the

defendant's counsel were protected by the attorney-client privilege. The court stated that "[w]hile the defendant is claiming the attorney-client privilege for all that occurred at such meetings, it is apparent that the mere attendance of an attorney at a meeting, even where the meeting is held at the attorney's instance, does not render everything at that meeting privileged."

Based on the International Tel. & Tel. decision, it is important to remember that merely copying counsel as a recipient on a mass email to corporate employees will not render the communications privileged. Rather, the email must seek or elicit legal advice to be protected by the privilege.

In In re: New York Renu with Moistureloc Product Liability Litigation, C/A 2:06-MN-777777-DC, 2009 WL 2842745 (D.S.C. July 6, 2009), the court was faced with determining whether the attorney-client privilege applied to a number of documents sought in discovery. One of the documents was an email string describing Renu's reaction to a recent newspaper article. The email originated from the corporation's external public relations firm and contained a proposed statement in response to the article. The email was then forwarded to corporate counsel. The court found that the initial email, sent from an external public relations firm, was not privileged because the public relations firm was not necessary to the legal representation of the corporation. However, the later emails in the string were privileged because they were directed to counsel and sought legal advice.

VIII. THIRD PARTIES AND EXPERTS

Understanding whether an individual is the client is crucial in determining whether the attorney-client privilege attaches.

In Hohenwater v. Roberts Pharm. Corp., 152 F.R.D. 513 (D.S.C. 1997), the corporate defendant Roberts sought protection from the production of a four-page memorandum prepared by Roberts' in-house counsel and provided to an employee of Roberts' wholly-owned subsidiary, I.V.T. Associates, in order for the employee to prepare for his deposition. The court was asked to determine whether the memorandum provided to the subsidiary employee was protected by the attorney-client privilege. The court found that Roberts had waived the privilege by provided the internal memorandum to a third party. The court noted that, because the subsidiary employee was "not a direct employee of the defendant," the privilege did not attach.

In United States v. Kovel, 296 F.2d 918 (2nd Cir. 1961), the Second Circuit extended the attorney-client privilege to communications between a client and someone his attorney retained to provide accounting-related services in order to facilitate the law firm's understanding of the case. The court said that, just as secretaries and clerks have been recognized as necessary to providing legal service, so should accountants. Generally stated, the Kovel doctrine protects communications with an expert retained by client's counsel to assist the lawyers in understanding an aspect of the case so that counsel may provide legal advice to the client. If a third party is hired to assist the client understand his own case, without the lawyer's involvement, the privilege probably will not apply.

In In re: New York Renu with Moistureloc Product Liability Litigation, supra, the court was asked to determine whether an expert report was protected by the attorney-client privilege. The "Panzica Report" was an expert report on FDA technical and regulatory standards. The court stated that whether a consultant's report fell under the protection of the attorney-client privilege, "depends on what the consultant was hired to do. The test is whether their function is necessary for the lawyer's representation to be effective." The court found that, because Panzica was an expert in an area that lawyers cannot be expected to master in the ordinary course of legal work (FDA technical and regulatory standards), the expert's help was "certainly necessary to assist the lawyers in understanding how to get the company to comply with technical standards and thereby prepare for not only regulatory action, but also for any claims by individuals based in part on the failure to comply with those regulatory standards." Therefore, the court held that the privilege covered only those "confidential communications among Panzica, corporate personnel, and the lawyers," but did not protect factual findings contained within the report based on the underlying facts of the case.

South Carolina Rule of Civil Procedure 26(b)(4)(A):

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: ...

(4)(A) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained by any discovery method subject to subdivisions (b)(4)(B) and (C) of this rule, concerning fees and expenses.

As Rule 26 states, communications with experts are typically not privileged. However, the exception to this rule is if the expert is not an expert for trial, but

instead a consultant, specifically retained to aid the attorney in providing legal advice.

IX. WAIVER

Because the privilege belongs to the client, the client is the only party who can waive the privilege. “The power to waive the corporate attorney-client privilege rests with the corporation’s management and is normally exercised by its officers and directors.” Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343 (1985). “When control of a corporation passes to new management, the authority to assert and waive the attorney-client privilege passes as well.” Id. In Weintraub, the Supreme Court found that a trustee in a bankruptcy succeeded to management’s authority with respect to the privilege, having power to waive it over the objection of both former and present officers who had made the communications and wished to assert the privilege in respect to their own communications. Id.

Milroy v. Hanson, 875 F.Supp. 646 (D. Neb. 1995) involved an action brought by a director and minority shareholder of a corporation against the remaining directors and majority shareholders seeking money damages and liquidation of the corporation. Milroy sought the production of certain documents, which the corporation asserted were protected by the attorney-client privilege. Milroy argued that due to his status as a director of the corporation, his waiver of the privilege was enough to force production of the documents. The court held “an individual director is bound by the majority decision and cannot unilaterally waive or otherwise frustrate the corporation’s attorney client privilege if such an action conflicts with the majority decision of the board of directors.... A dissident director is by definition not ‘management’ and, accordingly, has not authority to pierce or otherwise frustrate the attorney-client privilege when such action conflicts with the will of ‘management.’” Id.

X. WAIVER: NEW FEDERAL RULE OF EVIDENCE 502

Adopted in September 2008, the new Federal Rule of Evidence 502 was designed in response to the significant problems and costs associated with the electronic production of data, comprehensive privilege reviews, and inadvertent production of privileged material. The courts recognized that the mere review of electronic data to prevent disclosure of privileged information was potentially crippling to some larger companies. Before this rule was in place, depending on what jurisdiction you were in, one inadvertently disclosed document could possibly waive the attorney-client privilege for all records concerning the same subject matter. The Rules Committee attempted to draft new, uniform rules that would make production more efficient and protect against the inadvertent disclosure of privileged information. The rule creates a uniform standard to be implemented by the courts.

Rule 502 Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

- a. **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver** – When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
 1. the waiver is intentional;
 2. the disclosed and undisclosed communications or information concern the same subject matter; and
 3. they ought in fairness to be considered together.
- b. **Inadvertent Disclosure** – When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
 1. the disclosure is inadvertent;
 2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
 3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

- c. **Disclosure Made in a State Proceeding** – When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:
 - 1. would not be a waiver under this rule if it had been made in a Federal proceeding; or
 - 2. is not a waiver under the law of the State where the disclosure occurred.
- d. **Controlling Effect of a Court Order** – A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.
- e. **Controlling Effect of a Party Agreement** – An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
- f. **Controlling Effect of This Rule** – Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.
- g. **Definitions** – In this rule:
 - 1. "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
 - 2. "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."

For application of the Rule 502 analysis, please see the following cases:

- 1. Alcon Manufacturing , LTD. v. Apotex, Inc., 2008 WL 5070465 (S.D. Ind. November 26, 2008)
- 2. Coburn Group, LLC v. Whitecap Advisors, LLC, 640 F.Supp.2d (N.D. Ill. 2009)
- 3. Relion, Inc., v. Hydra Fuel Cell Corp., No. CV06-607-HU, 2008 WL 5122828 (D.Or. December 4, 2008)
- 4. Infor. Global Solutions, Inc. v. St. Paul Fire & Marine Ins. Co., 2009 WL 2390174 (N.D. Cal., Aug. 3, 2009)
- 5. Speiker v. Quest Cherokee, LLC, 2009 WL 2168892 (D. Kan., July 21, 2009)

XI. THE MOHAWK DECISION

Mohawk Ind., Inc. v. Carpenter, 130 S.Ct. 599 (2009)

In this case, the issue before the Court was “whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine.” The collateral order doctrine provides an exception to the rule against interlocutory appeals, allowing an immediate appeal if (1) the matter is unrelated to the merits of the case, and (2) it involves an order that is important.

In Mohawk, Appellants seeking to appeal the privilege determination argued that the effect of complying with such an order may cause a party to abandon its case or force an unfavorable settlement. The Court disagreed with Appellants and suggested that the parties still had the following options:

- (1) Seeking certification of the question;
- (2) Seeking mandamus action under an abuse of discretion standard; or
- (3) Defy the order and risk sanctions.

Because the above options are still available to a party with an unfavorable attorney-client privilege determination against it, the Court held that an order adverse to the attorney-client privilege does not qualify for immediate appeal under the collateral order doctrine.

This order has been widely criticized, but it highlights the importance of being prepared in the event you receive an unfavorable order by a court on a privilege issue.