WHO'S IN YOUR CIRCLE OF TRUST? AGENTS AND ATTORNEY-CLIENT PRIVILEGE

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When a client calls to discuss your revisions to the latest draft of a purchase agreement, is it safe to assume that most (but maybe not all) of those discussions would be subject to the attorney-client privilege? What if the client's real estate broker is also on the call, or if the attorney discusses the draft just with the broker because the client is either too busy to deal with the issue or had a scheduling conflict come up at the time of the call? This article examines who is inside (or outside) of the attorney-client "circle of trust" by first providing an overview of the attorney-client privilege and then discussing cases applying that privilege to agents in the context of real estate transactions.

BACKGROUND AND BASIC PRINCIPLES

Legal recognition of the attorney-client privilege dates back to ancient Rome. Cicero, while prosecuting the governor of Sicily for corruption and extortion in 70 BCE, could not call the governor's patronus, or advocate, as a witness while the case was in progress, as that would have violated confidences protected under Roman law.[1] Later, Roman law made advocates and attorneys completely incompetent as witnesses in the cases in which they acted.[2] The basis of the exclusion, as articulated by the Romans, was the general moral duty not to violate the underlying fides (trust) between an advocate and the client.[3] The basis for the rule appears to be that the testimony was valueless either for or against a litigant, as an advocate would have a strong motive for misstatement.[4] The Romans deemed the conservation of the fides of the family—or quasi-family—superior to the settlement of controversies or punishment of offenders (with treason as a notable exception).

It is unclear whether the Roman precedent was the origin of the attorney-client privilege rule in English law.[5] There is evidence that the attorney-client privilege in English law dates back to Elizabethan times.[6] At least initially, the privilege belonged to the lawyer, as "a gentleman does not give away matters confided to him."[7] As the rule developed, however, the ownership of the privilege shifted to the client.[8] An additional consideration was that the privilege would spare the barrister from the unseemly task of having to testify in court.[9]

During the 18th and 19th centuries, the attorney-client privilege continued to evolve in English courts of law. There do not appear to be any American cases addressing the attorney-client privilege until the 1820s.[10] Early cases essentially interpret the attorney-client privilege as a special privilege against self-implication of lawyers.[11] American legal tradition throughout the 1800s sustained a privilege confined only to those communications related directly to pending or anticipated litigation.[12] As the emphasis on honor lessened and the aspiration towards truth for the ends of justice increased, the rationale for the privilege also evolved. This resulted in the principal rationale of the privilege as it exists today, which finds its basis in three theories:

- The law is complex, and expert lawyers often are necessary for the management of one's affairs and the settlement of one's disputes;
- Lawyers are unable to serve this function without as complete an understanding as possible of the client's situation; and
- The client cannot be expected to provide a complete understanding of the facts without the assurance that the lawyer cannot be compelled to reveal the client's confidences in court, without the client's consent.[13]

These principles give rise to the modern manifestation of the privilege as an evidentiary protection that protects communications between clients and their lawyers under certain circumstances. Although this statement of the privilege may seem clear and concise, the interpretation of the principle and the determination of when and to whom the privilege applies is not so clear. For example, it is often unclear what constitutes a "communication," or who is the "client" that can claim the privilege. Furthermore, the context of the communications and the presence of third parties may impact the ability of the "client" to claim the privilege.

Notwithstanding the nuances of the extension of the privilege to particular clients and communications, when the privilege does arise, it arises by operation of law. Even if the client (or attorney for that matter) has a genuine and reasonable belief that the privilege applies, such belief—whether or not mistaken—does not assure privilege protection, and in fact is generally irrelevant to the analysis of whether the privilege applies to those communications.[14] Absent a reasonable mistake of fact (such as a client's reasonable belief that a poseur was in fact a lawyer), the Supreme Court has expressly disclaimed any authority that "a client's beliefs, subjective or objective, about the law of privilege can transform an otherwise unprivileged conversation into a privileged one."[15] Courts have consistently construed the attorney-client privilege narrowly based on the policy consideration that society generally pays a heavy price for the privilege. The judicial system in the United States relies on the disclosure and development of all relevant facts in order to ensure the integrity of the system and the confidence of the public. The Supreme Court has recognized that the public has a right to every person's evidence, "except for those persons protected by a constitutional, common-law, or statutory privilege."[16] The privileges are designed to protect legitimate competing interests; the attorney-client privilege, specifically, is intended to further the protection of the Fifth Amendment against self-incrimination. The Supreme Court has explicitly clarified that privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth."[17]

The seminal case of *Upjohn Co. v. United States* addressed the scope of the attorney-client privilege in the corporate context.[18] In *Upjohn*, the Court recognized that the purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and

administration of justice."[19] The Court further recognized that a lawyer must be fully informed by the client in order to provide effective advice or advocacy, echoing the Court's prior recognition in *Fisher v. United States*[20] of the privilege's role in encouraging clients to make full disclosure to their attorneys.

At the state level, the attorney-client privilege currently results in absolute protection for privileged communications in 49 states. The notable exception is the state of New Jersey. The New Jersey Supreme Court has applied the general rule of statutory construction—that when two statutes conflict, the more specific statute must prevail over the more general—to the rules of privilege generally (e.g., the protection of children from injury, harm, or abuse by means of the statutory reporting requirement may not be blocked or hindered by the assertion of privilege).[21] As applied, this has resulted in a "public interest" exception to the rules of privilege.

In addition, other courts also have started to identify exceptions to the rule of absolute protection. For example, some courts have refused to protect the preliminary drafts of documents whose final version will be disclosed outside of the attorney-client relationship. There is also a distinction between the attorney-client privilege and the attorney's duty of confidentiality. The duty of confidentiality, as described in the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules) 1.6, is broad: a lawyer "shall not reveal information related to representation of a client." Accordingly, the duty of confidentiality is not limited to communications, as it applies generally to any client-related information obtained by the lawyer during the attorney-client relationship. The ABA Model Rules further identify several exceptions to the general rule of client confidentiality and permit an attorney to disclose confidential information under certain circumstances. For example, an attorney may disclose confidential information to the extent necessary "to prevent reasonably certain death or substantial bodily harm,"[22] or "to prevent the client from committing a crime or fraud" that is reasonably certain to cause substantial financial harm that the client is using the lawyer's services to further.[23] By contrast, the attorney-client privilege allows a party to withhold confidential communications between the attorney and the client, provided that the communications qualify as privileged.

Generally, the attorney-client privilege rests on three elements:

- The intimacy of the attorney-client relationship;
- The confidentiality that exists within the relationship; and
- The communications within the relationship.

The privilege can apply both to communications from the client to the lawyer, and communications from the lawyer to the client.

THE ATTORNEY-CLIENT RELATIONSHIP AND CONFIDENTIALITY

Types of clients

There are five types of clients that generally may be included in the attorney-client relationship:

- Prospective clients;
- Individuals (natural persons);
- Governmental entities;
- Institutional clients; and
- Corporations.

In some circumstances, prospective clients can claim privilege protection for communications with lawyers that the client does not ultimately retain. If the prospective client has engaged in confidential communications with a lawyer, and the lawyer has invited such communications and explicitly or implicitly agreed to keep such communications confidential, the rule of privilege generally would protect these communications.[24] The ABA Model Rules, however, generally do not recognize confidentiality in unsolicited communications to lawyers,[25] and so the rules of privilege accordingly would not apply to unsolicited communications.

Individual clients, or clients who are natural persons, provide perhaps the easiest application of the confidentiality rules. Individuals generally enjoy privilege protection for their communications with their

lawyers, in the proper circumstances. Courts have further recognized that the privilege protection usually survives both the termination of the attorney-client relationship and the individual client's death.[26] As discussed in more detail below, under certain circumstances, an individual client's agent can be inside the privilege protection enjoyed by that individual client.

Governmental entities, such as cities, counties or parishes, states, and state and federal governmental agencies, also can enjoy privilege protection for communications with their lawyers. In this context, however, privilege does not generally protect communications that amount to public policy advice, communications that are part of an adjudication process that must be open to the public, and communications between government lawyers and employees that carry the force of law.[27]

Although every state recognizes that corporations and other corporate juridical persons (herein referenced generally as "corporations") can enjoy the attorney-client privilege, most courts apply a heightened level of scrutiny whenever a corporation claims privilege protection. The application of the attorney-client privilege in this context is extremely nuanced: because corporations are artificial creations of the law, it is not always clear whether particular communications qualify for the privilege's protection.[28] One of the primary issues is the extent to which a corporation, as distinguished from the persons who comprise it, deserves the power to suppress information under the attorney-client privilege.[29] The corporate client context is another situation in which the attorney-client privilege may extend to the corporate client's agents.

The privilege issues that are particular to corporate clients emphasize the importance of identifying the "client" at the initiation of the attorney-client relationship.

Defining the "client"

The default rule in ABA Model Rule 1.13 is that the client in the corporate context is the incorporeal entity itself. However, this general rule is at odds with the general policy behind the attorney-client privilege. As discussed above, the privilege is designed to incentivize clients to speak candidly with their attorneys. Yet, the corporation itself cannot "speak."[30] The ABA Model Rule acknowledges that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[31] So, although the courts have consistently recognized that corporations enjoy the attorney-client privilege, numerous issues arise in the application of the privilege to the corporation and its constituents.

The courts have utilized several different standards for identifying whether a particular corporate communication is protected by attorney-client privilege. One of the earliest standards utilized by the courts is the "control group" test, which holds that a communication is privileged if the communicator is a member of the "control group," meaning a corporate decision-maker.[32] However, this test now is utilized only in a few jurisdictions.

A second standard is the "subject matter" test. This standard focuses on the content of the communication, rather than the status of the individual communicator. Most courts apply this standard to communications that concern matters within the scope of the communicator's employment and are made at the direction of a corporate supervisor.[33] Some jurisdictions have added additional requirements to this general standard. For example, Massachusetts has added the requirement that the communicating employee must be aware that legal advice is being sought for the corporation.[34] California has added a requirement that the communicating employee must be a natural spokesperson for the corporation.[35] Arizona has required either that the communicating employee must directly seek legal advice for the communication to be privileged or that the communication must concern the employee's own conduct on the job.[36]

Notwithstanding, by express agreement between the parties, lawyers may enter into an attorney-client relationship with a corporation's consultant or component (such as a board of directors).[37] A lawyer's representation of both a corporation and its individual consultants, components, or employees is a joint

representation, which can create conflicts of interest and additional issues and analysis relative to privilege and confidentiality within the joint representation.

Another issue within the scope of representation of a corporation is whether the sale of the corporation's assets (including, but not limited to, conveyance of a corporation's real property) included the transfer of the attorney-client privilege to the purchaser of the assets. Courts generally utilize one of two tests to determine whether the conveyance of the corporation's assets transferred the privilege: the "bright line" test and the "practical consequences" test.

Under the bright line test, the sale of the corporation's assets does not transfer the privilege's ownership to the asset purchaser.[38] The sale of all or substantially all of a corporation's assets (and liabilities), by contrast, generally would result in the transfer of authority to assert the corporation's attorney-client privilege.[39] Similarly, the sale of a corporation's stock generally would transfer the privilege's ownership to the stock purchaser.

Courts historically have applied the bright line test, but increasingly have begun to apply the practical consequences test in the analysis of whether a corporation's privilege has transferred to a purchaser. The practical consequences test, intuitively, turns on "the practical consequences rather than the formalities of the particular transaction."[40] As applied, if the transaction at issue is merely a transfer of assets, the purchaser does not acquire the seller's privilege.[41] If, however, the purchaser makes efforts to run the seller corporation and manage its affairs, the purchaser will "step into the shoes" of the seller corporation with respect to the attorney-client privilege.[42] As a result, the purchaser entity and its management would be entitled to all pre-acquisition confidential communications of the corporation.[43]

The transfer of privilege under the practical consequences test potentially could be a major issue for the seller corporation, as the seller corporation (and its consultants and components) may have strong motivation to prevent the disclosure of certain pre-acquisition communications to the successor corporation's management. To address this issue, some courts have stated that lawyers can prevent a potential transfer of the corporation's attorney-client privilege by adding a provision in the stock or asset transactional documents. In addition to expressly eliminating any joint representation implications in writing, the transaction documents may include a specific exclusion of the power over the attorney-client privilege from the assets being sold.[44]

Some jurisdictions—notably Illinois—have rejected the ability of the parties to exclude power over the privilege in transaction documents. Some courts have found that because the attorney-client privilege arises by operation of law, clients cannot control the privilege's ownership.[45]

Defining the "client" and application of privilege to in-house counsel

The application of confidentiality and privilege to a corporation's in-house counsel includes nuances that do not apply to outside counsel. These nuances can make it difficult to analyze whether the privilege applies to particular communications between a corporation and its in-house counsel.

Although courts recognize that in-house lawyers may engage in privileged communications with their corporate client, in-house lawyers often are involved in both legal and business matters. Attorney-client privilege generally applies to communications made for the purpose of providing legal advice; in-house lawyers, however, often are called upon to perform a dual role of legal advisor and business advisor.[46] Essentially, in-house counsel wears two hats.[47] Due to the dual role of in-house counsel, courts have identified issues regarding who should be deemed the "client" for purposes of privilege analysis.[48]

Additionally, different jurisdictions have different presumptions about communications between in-house counsel and their corporate clients with respect to privilege. It is well established that communications between a corporation and outside counsel enjoy a presumption that the communications are made for the purpose of seeking legal advice.[49] By contrast, some courts have applied the opposite presumption to in-house lawyers and instead presume that in-house lawyers' communications

constitute unprotected business advice.[50] An Illinois court has further refined this presumption, finding that the privilege protects communications involving in-house lawyers assigned to the corporation's legal department, but does not protect communications involving in-house lawyers assigned outside the legal department within the corporation.[51]

This more demanding standard, as well as the difficulty in identifying the "client," can result in a presumption that the communications between in-house counsel and a corporation's agents (such as a real estate broker) are communications involving business advice, and accordingly would fall outside the attorney-client privilege.

Communications within the attorney-client relationship

The third prong of the attorney-client privilege focuses on communications within the attorney-client relationship. Generally, privilege attaches to all forms of communication, including electronic forms of communication such as email and text messages, so long as the communications are made for the purpose of obtaining legal advice. In addition to the content requirement of the communications, in some circumstances the context of the communications also may impact whether the particular communications are privileged.

The legal advice requirement

The attorney-client privilege protects only communications within the attorney-client relationship that are made for the purpose of seeking or obtaining legal advice or assistance.[52] An important distinction made by the Supreme Court in *Upjohn* is that the privilege attaches only to the communications themselves; the privilege does not protect information, such as any underlying facts not otherwise privileged that were communicated to the attorney.[53]

Other types of information that may be communicated within the attorney-client relationship but are not privileged include:

- Background information;
- The fact of the representation of the client;
- General subject matter regarding the representation; and
- Any information excluded from privilege pursuant to the crime-fraud exception.

Another important distinction, echoing the "two hats" issue with respect to in-house lawyers, is that even when the attorney-client relationship is clear, pure business advice within that relationship does not enjoy privilege protection. Courts generally apply a "primary purpose" analysis to determine whether a communication is made primarily for the purpose of obtaining legal advice or assistance, or primarily for the purpose of obtaining business advice. Some courts take a broad view, and apply a presumption that communication with an attorney is for the purpose of obtaining legal advice or assistance.[54] Other courts, however, take a narrower approach, only applying the privilege to communications necessary to obtain informed legal advice,[55] and when legal advice and business advice are intertwined, the legal advice must predominate for the communication to be protected.[56] One court has taken this principle so far as to state that a lawyer's drafting of transactional documents involved primarily business rather than legal advice.[57]

Context of communications and privilege

Attorney-client privilege operates to protect both communications made by lawyers to their clients and communications from clients to their lawyers. Within this context, however, a few notable nuances exist. For example, pre-existing non-privileged documents do not gain privilege protection simply because the client has provided such documents to a lawyer. Additionally, even when privilege attaches to particular communications, such privilege can be waived, either by intent to disclose, express or implied waiver, or the presence of third parties.

Generally, any privilege protection that exists for documents communicated within the attorney-client relationship "evaporates" once the client forms the intent to disclose the documents outside of the attorney-client relationship. Accordingly, the final versions of transaction documents generally are not protected by privilege. Courts differ in the application

of privilege to preliminary drafts. Some courts protect all preliminary drafts, finding that all drafts prior to the final version necessarily include legal advice and are accordingly privileged communications.[58] Some courts take a narrower approach, parsing the portions of the preliminary drafts that appear in the final version and those that do not.[59] These courts find that privilege has evaporated as to the portions of the preliminary drafts that appear in the final version, and are thus ultimately disclosed outside the attorney-client relationship. In this case, privilege would allow for the redaction of the portions of the document that do not appear in the final version, but would not apply to the preliminary draft as a whole. One court has taken this analysis to an extreme, finding that privilege had evaporated for all preliminary drafts of documents whose final versions would be disclosed outside the attorney-client relationship.[60] This case, however, is an outlier, and the case law on this issue suggests that preliminary drafts would generally be protected by privilege.

A corollary to this issue that is of particular note to real estate lawyers is the application of privilege to the review of draft documents. In some cases, privilege attaches to documents a client intends to but has not yet communicated to a lawyer. The analysis then focuses on whether the document is a "work in progress" or a final draft. A work in progress generally would reflect the lawyer's input, and thus would be protected by privilege. Similarly, draft contemporaneous documents (including contracts and other transactional documents) that clients create for the purpose of obtaining legal advice about them may be protected by privilege.[61] By contrast, a final draft may not be protected because the client may intend to disclose the final draft outside the attorney-client relationship.[62]

Privilege also can be lost through waiver, which can be express or implied. Express waiver typically occurs through disclosure. Most courts hold that express waiver occurs only upon actual disclosure, and not merely giving third parties access to privileged communications through inadvertent disclosure.[63] However, if the privilege has been expressly waived, it is generally deemed destroyed. For example, the disclosure of privileged communications to one third party will cause privilege to evaporate completely and generally would allow other third parties access to the communications.[64] That said, most courts will only find a complete destruction of privilege when the communications were voluntarily disclosed. Communications disclosed by court order or other compelled disclosure generally will not destroy privilege for the disclosed communications.[65]

Additionally, in some cases, intra-corporate disclosure can waive privilege protection, even if the communication did not include a third party outside the corporation. On the one hand, most courts will sustain privilege for a corporation's disclosure to a wholly owned affiliate.[66] Additionally, *Upjohn* established that disclosure within the "control group," or otherwise with a need to know, does not necessarily waive privilege. Some courts, however, utilize the business advice versus legal advice standard discussed above when determining whether the "need to know" standard applies to preserve privilege.[67]

In the litigation context, attorney-client privilege also may be waived implicitly, that is, without the intentional disclosure of any privileged communications. An implied waiver generally occurs when the privilege owner relies on or otherwise references privileged communications, such as when testifying in court.[68] Implied waiver is highly fact-specific, and in a case in which implied waiver is at issue, generally the court will have to define the scope of the implied waiver in the privilege context.

The context of the communications further comes into play with respect to the presence of third parties and the impact of the third party's presence on privilege protection for those communications. Although, as discussed above, privilege and confidentiality are separate concepts that have disparate effects, the "expectation of confidentiality" is a factor in evaluating the context of communications for the purpose of establishing privilege.[69] The issue here is whether the presence of a third party or parties negates the expectation of confidentiality the client enjoys when communicating with attorneys. Here, courts generally focus on whether the third parties are inside or outside the circle of privilege protection. The application of this principle is simple—if the third party

is inside the circle, that third party's participation in the communication does not destroy privilege. If the third party is outside the circle, privilege is destroyed with respect to those communications.

In the context of written communications, a client's inclusion of recipients other than a lawyer generally waives any privilege protection that may attach to a particular document. One court has even held that attorney-client privilege did not attach to documents prepared for simultaneous review by both legal and nonlegal personnel within a corporation.[70] Other courts, however, have taken a broader approach, finding that inclusion of a third party, such as a consultant, does not destroy privilege when that party is the client's agent or possesses a "commonality of interest with the client."[71] In other words, the question is whether the agent is inside or outside the circle of privilege.

ATTORNEY-CLIENT PRIVILEGE AND "AGENTS"

As a threshold matter, an important point to make with respect to "agents" of a client in the context of privilege protection is that some jurisdictions have adopted the rule that only corporate clients or similar entities may have representatives.[72] The policy concern with respect to agents of individuals is that allowing individuals to designate agents, consultants, or other representatives potentially could extend the privilege well past the point of the intent of the attorney-client privilege. Other courts, however, expressly disagree with this stance, expressing that the "representative" of the client is "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or one specifically authorized to communicate with the lawyer concerning a legal matter."[73]

Inside or outside privilege?

Disclosure of communications to corporate agents or consultants normally would waive privilege protection unless the agents or consultants are deemed to be inside privilege protection, in which event the privilege would be preserved with respect to communications occurring in the presence of such agents or consultants. If the agent or consultant is inside privilege protection, privilege generally would attach to three types of communications:

- When lawyers communicate with the client's agent or consultant;
- When the agent or consultant participates in otherwise privileged communications; and
- When the client, or the lawyer, discloses pre-existing privileged communications to the agent or consultant.

Courts generally take an all-or-nothing approach with these three circumstances—if the agent or consultant is inside privilege protection, all three types of communication are privileged, but if the agent or consultant is outside privilege protection, privilege evaporates in all three circumstances.

Accordingly, the critical issue is whether the agent or consultant is inside or outside privilege protection. In addition to the following factors, the agent or consultant's role may change from time to time, so courts may analyze the following factors in the context of that agent's or consultant's role at the time of the disclosure.

Courts will apply privilege to communications with client agents that are "reasonably necessary to facilitate the client's communication," such as an interpreter or translator.[74] For agents (or consultants) that are not necessary for the actual transmission of the communications, courts differ in the application of privilege to such agents or consultants. Most courts find that privilege extends only to agents necessary—or even indispensable—to the actual transmission of the communication. However, some courts have taken a broader approach, applying the privilege to such agents and consultants as:

- Automobile dealerships (as agents of an automobile manufacturer);[75]
- Accountants;[76]
- Third-party investment bankers;[77] and
- Tax experts who facilitate communications between the client and the attorney.[78]

Additionally, the Eighth Circuit has articulated a standard for extension of attorney-client privilege to include client agents who are the "functional equivalent" of corporate employees.[79] The so-called *Bieter* standard recognizes that communications "between a company's lawyers and its independent contractor merit attorney-client privilege protection if, by virtue of assuming the functions and duties of a full-time employee, the contractor is a de facto employee of the company."[80] Some of the factors that courts applying the *Bieter* standard look to in determining whether a client agent is the "functional equivalent" of an employee include whether the consultant:

- "Exercised independent decision-making on the company's behalf";
- "Possessed information held by no one else at the company";
- "Served as a company representative to third parties";
- Had an office at the company;
- Spends a substantial amount of time working for the company; and
- "Sought legal advice from corporate counsel to guide his or her work for the company."[81]

The Ninth Circuit has expressly adopted the *Bieter* standard.[82] Few other courts, however, have directly addressed the issue of whether independent contractors should be entitled to attorney-client privilege when communicating with their contractor's attorney.[83]

"Agents" and client-to-lawyer/lawyer-to-client communications

A distinction may exist between the application of privilege to communication from a client or client's agent to the lawyer, as opposed to the lawyer's communication to the client or client's agent. Client-to-lawyer communications are the key type of communications protected by privilege. The application of privilege to client-to-lawyer communications generally includes the "request for legal advice" requirement; some courts will focus solely or primarily on the four corners of the communication to the lawyer to determine whether the client was seeking legal advice in that particular communication.[84] This could be problematic in the context of a real estate transaction, as the four corners of the communication may not explicitly include an indication that the client or client's agent is seeking legal advice. Some courts will allow extrinsic evidence to illuminate the context of the communications for the purpose of establishing the legal advice requirement, but, coupled with the issue of legal advice versus business advice, this stance may have the effect of destroying privilege.

Courts have found that lawyer-to-client communications generally deserve less privilege protection than client-to-lawyer communications. This form of communication is afforded "derivative protection," consistent with the *Upjohn* holding that if open communication is to be facilitated, then "derivative protection" for lawyer-to-client communications is necessary.[85] Courts generally subscribe to three schools of thought on the extent of the privilege protection applicable to client-to-lawyer communications:

- Some courts have held that the privilege protects all communications from lawyers to clients.[86]
- Some courts extend the privilege to protect lawyer communications only to the extent the communications are responsive communications that reveal the substance of what the client previously communicated and the legal advice that is given.[87]
- Some courts will extend the privilege to protect lawyer communications only if the communications disclose client confidences, and only to the extent the statements or writings would reveal a confidential communication by the client.[88]

The latter two schools of thought generally would not apply privilege to the communications to an attorney from a third party. As discussed above, however, this principle would not apply to third parties who are inside privilege protection, notably by virtue of the third party's reasonable necessity to facilitate the client's communication, or the "functional equivalent" doctrine.

Real estate transactions

Notwithstanding the general absence of judicial review regarding the application of attorney-client privilege to independent contractors of a client corporation, a few cases have evaluated the application of attorney-client privilege to agents, consultants, or independent contractors of a client in the real estate context.

The facts of the seminal case, *In re Bieter, Co.*, involved the evaluation of privilege protection in the context of an independent contractor working as a consultant to a partnership on a commercial development. The client in *Bieter* was a partnership formed to develop a parcel of farm land.[89] The partnership engaged an independent contractor to provide advice and guidance regarding commercial and retail development.[90] The agreement with the consultant specified that the consultant was an independent contractor and not an agent, employee, or partner of the client.[91] In performing the consultant's duties, which included securing tenants for the development, working with architects, consultants, and counsel, and appearing on behalf of the client in planning and zoning public hearings, the consultant communicated extensively with legal counsel for the partnership.[92] The Eighth Circuit found that the consultant was inside privilege protection, because:

- The consultant was the "functional equivalent" of an employee of the partnership;
- The communications in question fell within the scope of the consultant's duties;
- The communications were made at the behest of the partnership; and
- The communications were made for the purpose of seeking legal advice for the partnership.[93]

The Tennessee Supreme Court applied the "functional equivalent" test to a client's third-party property manager. In *Dialysis Clinic, Inc. v. Medley*, the client was a corporation that owned and leased various commercial properties to third parties, and did not have in-house knowledge about or experience in the management of commercial rental properties.[94] The client had engaged the services of a third-party property management company to act as the client's agent on an exclusive basis to manage and operate the commercial rental properties.[95]

By contrast, however, the US District Court for the District of Colorado found that the attorney-client privilege did not extend to a client's "managing agent" with respect to client-owned rental property.[96] In that case, the court found that the client had not made a detailed factual showing that the "managing agent" was "the functional equivalent of an employee and that the information sought from the non-employee would be subject to the attorney-client privilege if he were an employee."[97] In support of the assertion of privilege, the client had provided a Property Management Agreement, which provided that the agent's duties were to "rent, lease, operate and manage the property."[98] The court expressly noted that the agreement did not address directly the agent's management of any litigation claims on behalf of the client and concluded that the agreement itself was not persuasive to support the extension of the attorney-client privilege to the agent.[99] The court, accordingly, declined to extend the attorney-client privilege to the agent with respect to the agent's communication with the client's attorneys about litigation.

Similarly, the US District Court for the District of Massachusetts declined to extend attorney-client privilege to a real estate broker acting as agent and representative of a trust that owned property leased to a bank for use as a retail banking facility.[100] The court in this case held that a real estate broker was not the functional equivalent of an employee because the broker's agreement contemplated that she could represent a prospective tenant while also serving as the company's real estate agent, which defeated any assumption that she was to be a confidential representative of the company.[101] Additionally, the court found that the broker had no expertise in regulatory approval, and therefore would have had no need to communicate with the company's attorney on that issue.[102]

The US District Court for the District of Maryland considered the extension of attorney-client privilege to

a landscaping company engaged by a landowner.[103] In that case, the landowner had been cited by the county and the landowner's permit applications had been voided.[104] In order to comply with the requirements of the citations, the landowner engaged a third-party landscaping company to create plans and surveys.[105] In the scope of this engagement, the landscaping company communicated with the landowner's legal counsel.[106] The court held that the communications between the landscaping company and the landowner's legal counsel were protected by attorney-client privilege, as the landscaping company had been retained in anticipation of litigation, and had played an integral part in communicating with counsel on the landowner's behalf.[107]

CONCLUSION

Although this issue is not extensively explored in the jurisprudence, the cases cited above illustrate the highly fact-specific nature of the application of attorney-client privilege to third-party agents, consultants, and independent contractors, particularly in the context of real estate transactions. The analysis starts with establishing an attorney-client relationship with a client and explores the context of the communications with the client to determine the area of the circle of privilege protection that surrounds the relationship and particular communications within that relationship. The issue then becomes whether the third-party consultant, agent, or independent contractor is inside or outside the circle; such inquiry necessarily depends on the facts and circumstances of a particular representation, as well as whether the jurisdiction has adopted the *Bieter* standard for inclusion of third parties who are the "functional equivalent" of employees inside the circle.

Notes

1 Max Radin, The Privilege of Confidential Communication Between Lawyer and Client, 16 Cal. L. Rev. 487 (1928).
2 Id.
3 Id.
4 Id.
5 Id.
6 Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 Cal. L. Rev. 1061 (1978).
7 Id.
8 Daniel R. Fischel, Lawyers and Confidentiality, 65 U. Chi. L. Rev. 1 (1998).
9 Id.
10 Hazard, supra note 6.
11 Id.
12 Id.
13 1 McCormick on Evid. § 87 (7th ed).
14 In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921, 923 (8th Cir. 1997), cert. denied, 521 U.S. 1105 (1997).
15 Id.
16 U.S. v. Bryan, 339 U.S. 323, 331 (1949); Blackmer v. United States, 284 U.S. 421, 438 (1932); see also Branzburg v. Hayes, 408 U.S. 665, 688 (1972).
17 U.S. v. Nixon, 418 U.S. 683, 708 (1974).
18 449 U.S. 383 (1981).
19 Id. at 389.
20 425 U.S. 391 (1976).
21 State v. Snell, 714 A.2d 977 (N.J. App. Div. 1998). See also Hague v. Williams, 181 A.2d 345 (N.J. 1962).
22 ABA Model Rule 1.6(b)(1).
23 ABA Model Rule 1.6(b)(2).
24 Ceglia v. Zuckerberg, No. 10-CV-00569A(F), 2012 U.S. Dist. LEXIS 55367, at *16 (W.D.N.Y. Apr. 19, 2012).
25 ABA Model Rule 1.16.
26 Swidler & Berlin v. United States, 524 U.S. 399 (1998).
27 Pritchard v. County of Erie (In re County of Erie), 473 F.3d 413, 417 (2d Cir. 2007); Reed v. Baxter, 134 F.3d 351, 357 (6th Cir.), cert. denied, 525 U.S. 820 (1998).
28 27 A.L.R.5th 76 (Originally published in 1995).
29 24 Fed. Prac. & Proc. Evid. § 5476 (Wright & Miller, Aug. 2019 update).
30 Please note that corporations are generally afforded the "freedom of speech" protection of the First Amendment to the Constitution. However, the scope of the First Amendment right granted to corporate "speech" is beyond the scope of this article.
31 ABA Model Rule 1.13.
32 26 A.L.R.5th 628.
33 Id.
34 Command Transp. Inc. v. Y.S. Line (USA Corp.), 116 F.R.D. 94 (D. Mass. 1987).
35 D.I. Chadbourne, Inc. v. Superior Court of City and County of San Francisco, 388 P.2d 700 (Cal. 1964).
36 Samaritan Found. v. Goodfarb, 862 P.2d 870 (Ariz. 1993).
37 Ex parte Smith, 942 So.2d 356 (Ala. 2006).
38 Tekni-Plex, Inc. v. Meyner and Landis, 674 N.E.2d 663, 668 (N.Y. 1996).
39 In re Financial Corp. of Am., 119 B.R. 728 (Bankr. C.D.Cal. 1990).
40 Orbit One Communications, Inc. v. Numerex Corp., 255 F.R.D. 98, 104 (S.D.N.Y. 2008).

41 Id.

42 Id.

43 Id.

44 Girl Scouts-Western Oklahoma, Inc. v. Barringer-Thompson, 252 P.3d 844, 848-48 (Okla. 2011).

45 Trading Techs. Int'l, Inc. v. GL Consultants, Inc., Civ. A. Nos. 05-4120 & -5164, 2012 U.S. Dist. LEXIS 34489, at *19 (N.D. Ill. Mar. 14, 2012).

46 Santa Fe Pacific Gold Corp. V. United Nuclear Corp., 143 N.M. 215, 225 (Ct. App. N.M. 2007).

47 U.S. v. ChevronTexaco Corp., 241 F. Supp.2d 1065, 1069 (N.D. Cal. 2002).

48 Id.

49 Id.

50 Lindley v. Life Investors Ins. Co. of Am., 267 F.R.D. 382, 389 (N.D. Okla. 2010).

51 Breneisen v. Motorola, Inc., Case No. 02C50509, 2003 U.S. Dist. LEXIS 11485, at *10-11 (N.D. Ill. July 3, 2003).

52 1 Attorney-Client Privilege in the U.S. § 5:1.

53 449 U.S. at 395.

54 Cephalon, Inc. v. Johns Hopkins Univ., Civ. A. No. 3505-VCP, 2009 Del. Ch. LEXIS 207, at *4 (Del. Ch. Dec. 4, 2009). See also Williams v. Sprint/United Management Co., 2006 WL 2631938, *3 (D. Kan. 2006).

55 Pacamor Bearings, Inc. v. Minebea Co., Ltd., 918 F. Supp. 491, 510 (D.N.H. 1996).

56 Neuder v. Battelle Pacific Northwest Nat. Laboratory, 194 F.R.D. 289 (D. D.C. 2000).

57 Blau v. Harrison (In re JP Morgan Chase & Co. Sec. Litig.), MDL No. 1783, Master Dkt. No. 06 C 4674, 2007 U.S. Dist. LEXIS 60095, at *9 (N.D. Ill. Aug. 13, 2007).

58 Nesse v. Shaw Pittman, 202 F.R.D. 344, 351 (D.D.C. 2001).

59 Schenet v. Anderson, 678 F. Supp. 1280 (E.D. Mich. 1988).

60 In re Pappas, Case No. 08-10949, 2009 Bankr. LEXIS 1394, at *1-2 (Bankr. D. Del. June 3, 2009).

61 Robbins v. Myers, Inc. v. J.M. Huber Corp., 274 F.R.D. 63, 85 (W.D. N.Y. 2011).

62 Judicial Watch, Inc. v. Dep't of Army, 435 F. Supp.2d 81, 90 & n.5 (D.D.C. 2006).

63 Laethem Equip. Co. v. Deere & Co., 261 F.R.D. 127, 135-36 (E.D. Mich. 2009).

64 MPT, Inc. v. Marathon Labels, Inc., Case No. 1:04 CV 2357, 2006 U.S. Dist. LEXIS 4998, at *17 (N.D. Ohio Feb. 9, 2006).

65 In re Papst Licensing GmbH & Co. KG Litig., 250 F.R.D. 55, 61 (D.D.C. 2008).

66 Guy v. United Healthcare Corp., 154 F.R.D. 172, 177-78 (S.D. Ohio 1993).

67 Lolonga-Gedeon v. Child & Family Servs., No. 08-V-00300A(F), 2012 U.S. Dist. LEXIS 67843, at *11 (W.D.N.Y. May 15, 2012).

68 Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994).

69 In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989).

70 U.S. v. Chevron Corp., No. C 94-1885 SBA, 1996 U.S. Dist. LEXIS 8646, at *6 (N.D. Cal. May 29, 1996).

71 Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 478 (E.D. Pa. 2005) (quoting In re Grand Jury Investigation, 918 F.2d 374, 386 n. 20 (3d Cir. 1990)).

72 State v. Jancsek, 730 P.2d 14, 21 (Or. 1986).

73 Moler v. CW Management Corp., 190 P.3d 1250, 1253 (Utah 2008).

74 Restatement (Third) of Law Governing Lawyers § 70 cmt. f.

75 Audi of America, Inc. v. Bronsberg & Hughes Pontiac, Inc., 255 F. Supp.3d 561 (M.D. Penn. 2017).

76 U.S. v. Kovel, 296 F.2d 918 (2d Cir. 1961).

77 U.S. v. Ackert, 169 F.3d 136 (2d Cir. 1999).

78 Black & Decker Corp. v. U.S., 219 F.R.D. 87 (D. Md. 2003).

79 In re Bieter Co., 16 F.3d 929 (8th Cir. 1994).

80 Narayanan v. Sutherland Glob. Holdings Inc., 285 F. Supp.3d 604, 615 (W.D.N.Y. 2018).

81 In re Restatis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 352 F. Supp.3d 207, 213 (E.D.N.Y. 2019).

82 U.S. v. Graf, 610 F.3d 1148, 1159 (9th Cir. 2010).

83 Benjamin J. Robbins, Defining Attorney-Client Privilege for the Independent Contractor: A Case for the Functional Equivalent Doctrine in Washington, 93 Wash. L. Rev. 1, Dec. 31, 2017, at 19.

84 Lolonga-Gedeon v. Child & Family Servs., No. 08-CV-00300A(F), 2012 U.S. Dist. LEXIS 67843, at *12-13 (W.D.N.Y. May 15, 2012).

85 Gillard v. AIG Ins. Co., 15 A.3d 44, 57 (Pa. 2011).

86 In re N.Y. Renu with Moistureloc Prod. Liab. Litig., MDL No. 1785, C/A No. 2:06-MN-77777-DCN, 2008 U.S. Dist. LEXIS 88515, at *38-39 (D.S.C. May 6, 2008).

87 1 Attorney-Client Privilege: State Law Pennsylvania § 5:2.

88 Tex. v. U.S., 279 F.R.D. 24, 27 (D.D.C. Jan. 2, 2012), vacated in part on other grounds, 270 F.R.D. 176 (D.D.C. Jan. 6, 2012).

89 16 F.3d at 930.

90 Id. at 933.

91 Id. at 933-34.

92 Id. at 934.

93 Id. at 939-40.

94 567 S.W.3d 314 (Tenn. 2019).

95 Id.

96 Horton v. U.S., 204 F.R.D. 670 (D. Colo. 2002).

97 Id.

98 Id.

99 Id.

100 Banco do Brasil, S.A. v. 275 Washington St. Corp., No. 09-11343-NMG, 2012 WL 1247756, at *5–6 (D. Mass. Apr. 12, 2012).

101 Id.

102 Id.

103 Huggins v. Prince George's Cnty., No. AW-07-825, 2008 WL 11366503, at *4 (D. Md. Sept. 25, 2008).

104 Id.

105 Id.

106 Id.

107 Id.