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PRATT'S
**PRIVACY &
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REPORT



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Victoria Prussen Spears

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Exceptions to the Attorney-Client and Work Product Privilege

*Michael J. Lichtenstein**

This article highlights some of the exceptions to the attorney-client privilege and suggests that attorneys should be vigilant when their client seeks to protect information or communications.

The attorney-client and work product privileges have a long and protected history in the American judicial system. The purpose of the privilege is to enable clients to communicate freely with their counsel when seeking legal advice. However, as recent highly publicized events have demonstrated, the privilege, while sacred, is not absolute. This article highlights some of the exceptions to the attorney-client privilege and suggests that attorneys should be vigilant when their client seeks to protect information or communications.

THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege goes as far back as ancient Rome where advocates could not be compelled to testify against their clients.¹ The attorney-client privilege, which is part of the common law fabric in the United States, protects confidential communications that are not intended to be revealed to third parties.² As the U.S. Supreme Court has noted, the attorney-client privilege is “one of the oldest recognized privileges for confidential information.”³ The client, not the attorney, holds this privilege.⁴ Further, it is not simply the relationship that is privileged; rather, it is communications that the client intended to remain confidential that benefit from the attorney-client privilege.⁵

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¹ Max Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 Cal. L. Rev. 487, 488 (1928).

² *United States v. John Doe*, 738 F.2d 871, 8 (4th Cir. 1984); see also *In re Grand Jury Subpoena*, 696 Fed. Appx. 66, 70 (3rd Cir. 2017) (attorney-client privilege is not absolute); *In re Smith Cutuli*, (Bankr. S.D. Fla., Sept. 16, 2013) (privilege is not favored and should be construed narrowly as it seeks to obscure truth).

³ *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); see also *Flo Pac, LLC v. Nutech, LLC*, (D. Md. Dec. 9, 2010) (attorney-client privilege only protects confidential communications).

⁴ *In re Grand Jury Proceedings*, 33 F.3d 342, 348 (4th Cir. 1994).

⁵ *United States v. John Doe*, 738 F.2d at 8.

COMMUNICATIONS THAT ARE NOT PROTECTED

It is well settled that there are exceptions to the attorney-client and work product privileges which some courts have held should be narrowly construed.⁶

Intended For Third Parties

In *In re Grand Jury Proceedings*,⁷ the U.S. Court of Appeals for the Fourth Circuit concluded that if a client conveys information to his counsel with the understanding that the information will be revealed to others, that information is not privileged. In that case, even though a proposed prospectus was not published, it was not privileged because it was intended for publication and was not meant to be confidential.⁸ Similarly, in *Puckett v. Hot Springs School District No. 23-2*,⁹ the school district moved to compel disclosure of documents created by a school superintendent, arguing there was a waiver of privilege because the communication was disclosed.

Crime Fraud Exception

Under certain circumstances, the crime fraud exception will override the attorney-client privilege.¹⁰ Courts have noted that the attorney-client privilege stops operating as a safeguard when the privilege is used to commit future crimes.¹¹ While the privilege seeks to promote honest communications between the client and counsel, the purpose of the crime fraud exception is to not extend the privilege to communications related to obtaining advice for the commission of a fraud or crime.¹² Procedurally, the party asserting the privilege must demonstrate the applicability of the privilege.¹³ Then, the government has to make a prima facie case that the crime fraud exception applies.¹⁴ To evaluate the claim, the court can conduct an *in camera* review of the asserted privileged information.¹⁵ In *United States v. Regan*, the court concluded that the government had made a prima facie case and that the crime fraud exception to the attorney-client

⁶ *United States v. Regan*, 281 F.Supp.2d 795, 803 (E.D. Va. 2002) (citation omitted); see also *In re Grand Jury Proceedings*, 689 F.2d, 1351, 1355 (4th Cir. 1982) (privilege must be construed narrowly).

⁷ *In re Grand Jury Proceedings*, 727 F.2d at 1355.

⁸ *Id.* at 1358; see also *Flo Pac, LLC*, (D. Md. Dec. 9, 2010) (presence of a third party negated any purported intent to keep communication confidential).

⁹ 239 F.R.D. 572, 579 (D. S.D. 2006).

¹⁰ *United States v. Regan*, 281 F. Supp.2d at 803.

¹¹ *United States v. Zolin*, 491 U.S. 554, 562-63 (1989); see also *In re Grand Jury Proceedings*, 689 F.2d at 1353 (upholding ruling on crime fraud exception); *In re Grand Jury*, 705 F.3d 133, 151 (3rd Cir. 2012) (crime fraud exception applied to work product); *In re Grand Jury Subpoena*, 745 F.3d 681, 690 (3rd Cir. 2014) (approving *in camera* examination of attorney to determine whether crime-fraud exception applied).

¹² *Id.* at 563.

¹³ *United States v. Regan*, 281 F. Supp.2d at 804; see also *Schlossberg v. B.F. Saul Ins. Agency of Md., Inc.*, (M. Md. April 1, 2015) (party asserting privilege bears burden of demonstrating its applicability).

¹⁴ *Id.*

¹⁵ *United States v. Zolin*, 491 U.S. at 556-57.

privilege applied.¹⁶ In reaching this conclusion, the court evaluated the defendant's behavior and the content of the documents sought to be protected.¹⁷

Joint Representation or Shared Interest

As common interest privilege applies when clients with separate counsel share otherwise privileged information to coordinate legal efforts.¹⁸ There is disagreement among courts as to the scope of protection for shared interest communications. For example, in *Bank of America, N.A. v. Terra Nova Ins. Co. Ltd.*,¹⁹ despite finding a common interest between a bank and an insured to whom the bank extended a letter of credit, the court concluded the interests were not identical at the time of the negotiations such that the communications were not privileged. On the other hand, in *Tobaccoville USA, Inc. v. McMaster*,²⁰ the court concluded that the common interest privilege extended to attorneys general from several states who were parties to a settlement agreement and had executed a common interest agreement.

Chapter 7 Bankruptcy Proceedings

While this is not strictly an exception to the attorney-client privilege, corporate executives should understand that in a Chapter 7 proceeding, the trustee is now the client who holds and can waive the privilege. In *In re Smith Cutuli*, the bankruptcy court held that the ownership of the attorney-client privilege passes to the Chapter 7 trustee upon filing of the bankruptcy petition.²¹ Accordingly, the Chapter 7 trustee had access to all documents, notes, information or communications that the debtor provided to or had with her counsel.²² A similar rule applies to corporate Chapter 7 proceedings. In *Commodity Futures Trading Comm'n v. Weintraub*,²³ the U.S. Supreme Court held that the trustee can waive the corporate debtor's attorney-client privilege as it relates to pre-bankruptcy communications. In that case, the

¹⁶ 281 F. Supp.2d at 806.

¹⁷ *Id.* See also *In re Smith Cutuli*, (attempts to defraud creditors and to hide assets would render crime fraud exception applicable).

¹⁸ *In re Fisher Island Investments, Inc.*, (Bankr. S.D. Fla., January 9, 2015).

¹⁹ 211 F. Supp.2d 493, 496 (S.D.N.Y. 2002); see also *In re Fisher Island Investment, Inc.*, (refusing to apply privilege to assertion of common interest).

²⁰ 692 S.E. 2d 526, 631 (S.C. 2010); see also *Jansson v. Stamford Health, Inc.*, (D. Conn. May 7, 2018) (citing 2d circuit cases acknowledging existence of joint defense privilege); *Schlossberg v. B.F. Saul*, (agreeing that attorney-client work product extended to other parties based on common interest).

²¹ *In re Smith Cutuli*, but see *In re Ginzburg*, 517 B.R. 175, 181 (Bankr. C.D. Cal. 2014) (rejecting Chapter 7 trustee's assertion that he succeeded to debtor's attorney-client privilege).

²² *Id.* at 6.

²³ 471 U.S. 343 (1985).

Chapter 7 trustee waived the privilege asserted by the corporation's pre-bankruptcy counsel in a deposition that the CFTC took.²⁴

CONCLUSION

While the attorney-client and work product privileges have been recognized for many years, the privileges are not absolute. Lawyers should be especially mindful when engaged in joint defenses or were representing entities with financial difficulties. They might be surprised when subsequent events determine that any privilege might have been waived.

²⁴ *Id.* at 348; *see also In re Pearlman*, 381 B.R. 903, 909 (attorney-client privilege transferred to Chapter 11 trustee who could decide to waive privilege).