

# ATTORNEY-CLIENT PRIVILEGE

## CONTINUING CONFUSION ABOUT ATTORNEY COMMUNICATIONS, DRAFTS, PRE-EXISTING DOCUMENTS, AND THE SOURCE OF THE FACTS COMMUNICATED

Adapted from 48 Am. U.L. Rev. 967 (1999)

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### Introduction

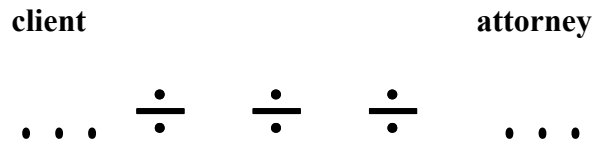
The attorney-client privilege has become one of the most complex and, therefore, litigated privileges. This has been due, in significant part, to the difficulties created by the concept of confidentiality. From the creation of the privilege, through its preservation, to the factual proof of the legitimacy of privilege claims, the requirement of confidentiality has created time-consuming and costly responsibilities for both litigants and judges. In addition, confidentiality has been interpreted as imposing a superfluous secrecy requirement that has led to conflicting decisions and practices.

As judges and lawyers have forgotten fundamental principles, confusing and other difficulties have mounted. Most prevalent among these has been the failure to remember the distinction between communications and information and the principle that the privilege protects only communications. This has led to (1) confusion about how the privilege is applicable to the attorney's communication to the client; (2) unnecessary restrictions on the source of information communicated by the client to the attorney; (3) misunderstandings about pre-existing documents communicated by the client to the attorney; and (4) erroneous decisions regarding drafts of documents prepared for dissemination to third parties.

### Whose Communications are Protected by the Privilege?

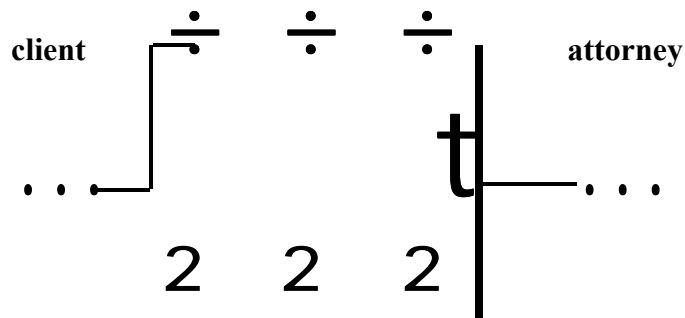
To understand which communications qualify for the protection of the attorney-client privilege, it is necessary to first understand the rationale for the privilege. It is believed that if the client is assured that what she says to a lawyer cannot later come back to harm her, she will be more open and candid in her communications with the attorney--that is, willing to communicate things that she otherwise would suppress. As a consequence, the attorney will be better informed, and therefore, able to give more accurate advice. Therefore, the client's ability to conform her conduct to the requirements of the law will be improved. *The basic privilege protects only what the client communicates to the attorney.*

# 1. Basic Protection



To adequately protect the client's communications *to the attorney*, the responsive communications *from the attorney* to the client are also protected by the privilege to the extent that the responses reveal the content of what the client previously communicated. This is a *derivative protection* that is dependent upon the continued privileged character of the previous revealed communications. Therefore, to establish the privilege for the responsive communication of the attorney, the client must prove that both sides of the conversation were privileged.

# 2. Derivative Protection

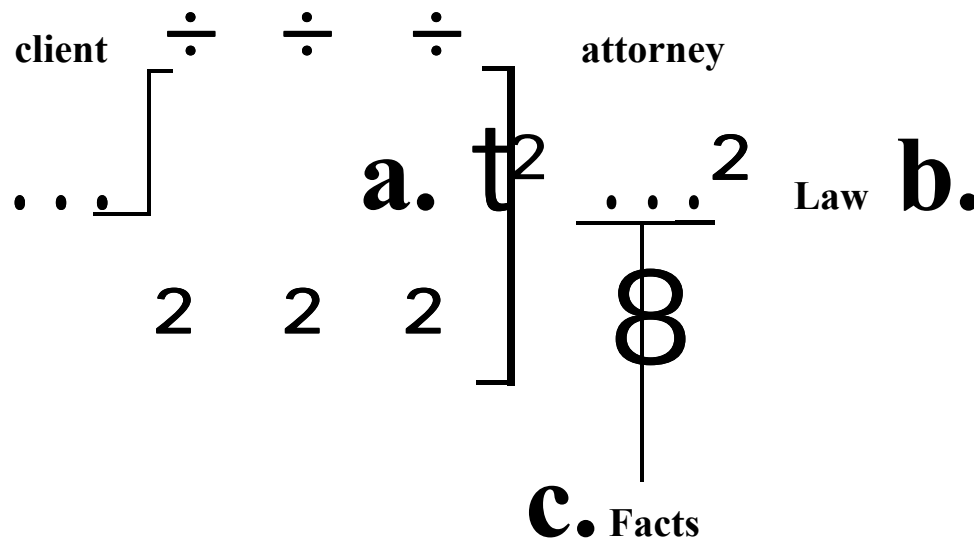


Because of inevitable disclosures in attorney communications, many courts have begun to define the attorney-client privilege loosely as protecting communications “between” the attorney and client. This was spurred, in part, by the language in Proposed Federal Rule of Evidence 503 that used the same preposition. The problem created by this characterization of the privilege is that it extends the privilege’s protection far beyond what is necessary to further its limited goal--

encouraging open and candid communications from the client. There is no apparent reason why clients would be less candid in communications with attorneys if attorney communications revealing information from other sources are discoverable.

As illustrated in the following graphic, the use of the preposition “between” obscures the scope of the protection. It could mean no more than its common law progenitor illustrated at 3.a.--communications to the attorney and responsive communications that reveal the content of what the client originally said. On the other hand, it might include any other communication from the attorney, regardless of whether it reveals only the law that the attorney communicated to the client (independent of its application to the client’s circumstances), illustrated at 3.b., or facts acquired from third parties, illustrated at 3.c..

### 3. “Between”



This recharacterization of the scope of the privilege protection resulted in a radical expansion of the protection. Without either acknowledging this expansion or appreciating its consequences, courts have widely adopted it. Although many courts have intended the expansion to include only the responsive *advice* of the attorney, 3.b., most have given no indication of any limitation. A few courts have even gone so far as to explicitly extend the privilege’s coverage to *all communications* from the attorney, even those relaying only information from third parties, 3.c..

This expansion of the privilege has been appealing to judges for two reasons. First, it is roughly accurate. Most responsive communications will reveal or depend on, to some extent, the content of prior communications of the client. Second, and more importantly, this interpretation

of the privilege simplifies the resolution process. Eliminating the derivative theory removes the need to prove two valid claims in order to successfully assert one. All the proponent has to demonstrate under this expanded definition is that the lawyer communicated legal advice or assistance to the client in confidence. The hidden dangers in this practice surfaced in the Ninth Circuit's decision in *United States v. Bauer*, 132 F.3d 504, 508 (9th Cir.1997).

*Bauer* involved the prosecution of a bankruptcy petitioner for fraudulently failing to report all of his assets in his bankruptcy petition. In his defense Bauer claimed that he innocently withheld information about certain assets believing that they did not have to be reported. Consequently, the principal focus of the trial was on Bauer's knowledge and intent. To establish a knowing misrepresentation, the government called the defendant's former bankruptcy attorney who, over the objections of Bauer, was required to testify that he had informed the defendant that as a bankruptcy petitioner Bauer had a legal obligation to report all of his property in the petition, and that any false statement would constitute perjury. On the appeal of his conviction, Bauer claimed that the trial judge's order violated his attorney-client privilege. The Ninth Circuit agreed.

The trial judge required the disclosure by the bankruptcy attorney on the belief that when an attorney advises the client about the rules of the court, he is not acting as an attorney, but as an officer of the court conveying public information. This decision was influenced by a well-established body of law holding that when an attorney notifies a client of the dates on which the client has been ordered by the court to appear for sentencing, there can be no reasonable expectation on the part of the client that such communications are confidential. Consequently, the attorney can be required to reveal that the client was advised of the appearance date when he is later tried for failing to appear. The same result obtains in ascertaining when a deficiency notice from the IRS was received by the client so that the time from which a petition for review should have been filed can be established.

Without explaining why informing a client of where and when the law (represented in an order by the presiding judge or a notice of deficiency from the IRS) requires the client to *personally appear* is not legal assistance protected by the privilege, the court held that informing the client of where and when the law (represented in an act of Congress) requires that a client's *assets "appear"* is legal advice that is privileged. This decision was a product of the recharacterization of the attorney-client privilege as protecting communications "between" the attorney and client--affording a *direct protection* to all responsive *attorney communications*.

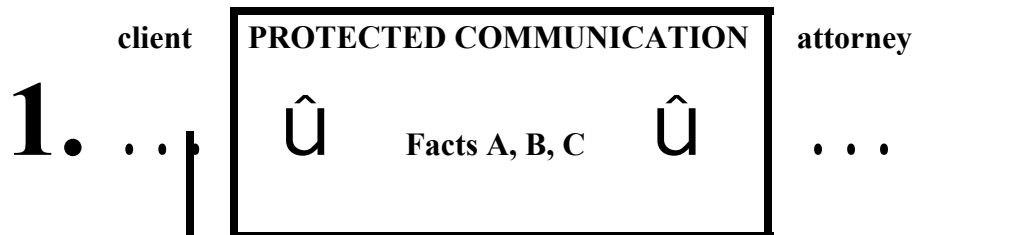
Under the classical derivative theory for responsive attorney communications, this attorney's communication about the abstract requirements of the law would not have been privileged because it did not apply or interpret those principles in light of the client's unique circumstances, and thus did not reveal prior privileged communications of the client. And this would be true regardless of whether the attorney's communications were characterized as "legal advice" or the "transmission of public information."

## **The Privilege Protects Communications, Not Information**

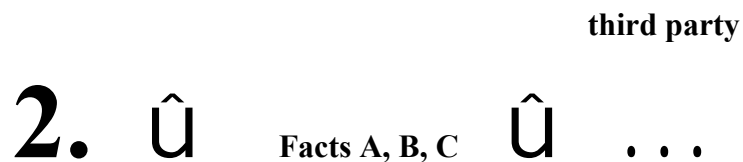
One of the more difficult principles of the attorney-client privilege has been the distinction between the privilege's protecting communications and not information. Confusing the two, courts often have denied the privilege claim because the information within communications has not been confidential, even if the communications themselves were confidential.

The privilege protects what the client communicated to the attorney in confidence for the purpose of obtaining legal advice or assistance. It protects the fact that the information was communicated (graphically illustrated below in the box at level 1), not the information itself, aside from the fact of the communication. Therefore the client's knowledge of Facts A, B, & C is not privileged and they otherwise can be disclosed by him to others or inquired about by third parties.

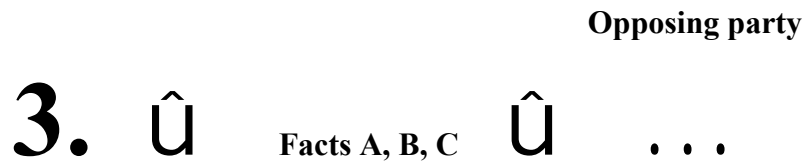
If the client voluntarily testifies to the same facts communicated to the attorney, or informally discloses them to third parties, but does not disclose that he previously related the same information to his attorney, the privilege protection is unaffected. This is illustrated at level 2 in the graphic. Similarly, as illustrated in level 3, the client can be required to disclose Facts A, B & C, because they are within his knowledge, but he cannot be required to disclose that he communicated Facts A, B, & C to his attorney.



$\hat{U}$  Client can voluntarily disclose the *same facts* to a third party without effecting the privilege



$\hat{U}$  Client can be required to disclose the *same facts* to an opposing party during discovery without effecting the privilege



The subsequent disclosure of Facts A, B, & C waives the privilege protection for the contents of the privilege box *only if* the client *also volunteers* that those same facts were communicated to the attorney--viz., discloses that they are the content of the box.

The privilege focuses on the communication. It is unconcerned about, and does not affect, the information within the communication, as it exists outside the box. It does not bestow an independent protection on that information and the privilege is not affected by the information's nature and status. *The information does not have to be confidential for the communication in which is incorporated to be confidential, and therefore, privilege.*

### **The Source and Nature of the Information Communicated to the Attorney is Irrelevant to Privilege Protection Applicable to the Client's Communications**

A persistent misperception is that a client's communication of nonconfidential information precludes the communication from being confidential, and therefore, the attorney-client privilege from being applicable.

For example, an IRS field agent may communicate with IRS attorneys in Washington, D.C., on a novel issue that he is confronting. That communication should be privileged if its purpose is to obtain legal advice, regardless of the nature or source of the facts and information included within the communication. Even if the agent's communication predominantly consists of tax information acquired from a taxpayer, the communication should be protected by the government's attorney-client privilege. However, the D.C. Circuit Court of Appeals in *Tax Analyst v. IRS*, 117 F.3d 607 (D.C. Cir. 1997), recently held that because of the nonconfidential nature of the *information* communicated, the government cannot have a reasonable expectation that either the agent's communication or the attorney's response is confidential, and therefore, privileged.

This decision was wrong. It erroneously focused on the information (the nature and source of which is irrelevant to the privilege protection), rather than on the client's communication and the attorney's response that reveals the communication's content.

The court in *Tax Analyst* concluded that the communications from the attorneys in what is called the Field Service Advice Memoranda (hereafter FSA), were not based on "confidential information obtained from the client," but rather on communications from outsiders, *i.e.*, individual taxpayers, that did not contain "any confidential information concerning the Agency." Second, the court held that since the opinions of counsel were being used as a basis for agency policy, those opinions were, in substance, law created by the IRS that should be applied with consistency to all taxpayers, and therefore, should be subject to discovery by taxpayers.

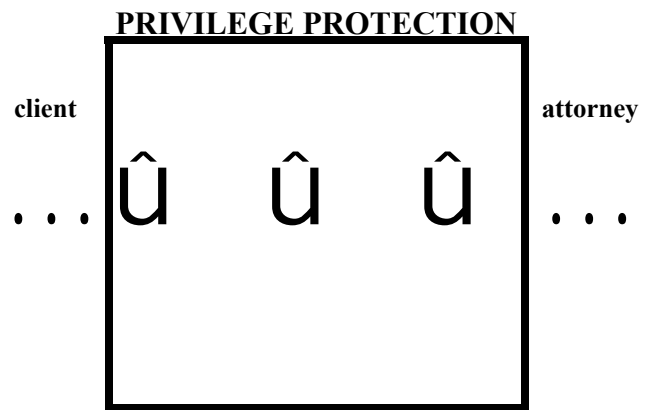
The first line of reasoning--requiring the client to communicate confidential *information* in order to assert the privilege--reflects a fundamental, albeit widely held, misunderstanding about the privilege. The nature of the information contained in the communications from the client to the attorney is irrelevant to the communications' privileged status. Regardless of where the client acquired the *information*, or of the information's confidential or public nature, the *content* of what the client communicated to the attorney is privileged. That is, if the client acquires the information in his communication from the public record, the daily newspaper, or direct communications from third parties (such as taxpayers), the content of what the client communicated is privileged, and therefore, should not be discoverable from either the attorney or the client. As illustrated in the following graphic, what is privileged is what was communicated-

-what is in the privilege box. The status of the information outside the privilege box is irrelevant to the privilege status of the communications that employ the information.

**SOURCE OR TYPE OF INFORMATION  
IRRELEVANT**

C From third parties Ú

C From public record Ú



C Nonconfidential facts Ü

C Technical facts Ü

Ú **While these facts may be discoverable from the client, that does not effect the privilege status of the communications into which they are incorporated**

In *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir 1997) the IRS field agent acquired nonconfidential facts from a third party and sought advice based on those communicated facts. The agent communicated these facts to the Office of Chief Counsel seeking *legal* advice on how best to handle a particular issue, and the agent did so with the expectation of *confidentiality*. If the responsive communications from the Office of Chief Counsel explored the legal position that

should be taken by the field agents, focusing on the unique facts of each inquiry, the responsive communication should be afforded the derivative protection of the privilege. The Court acknowledged that the FSAs gave guidance to field agents “with reference to the situation of a specific taxpayer” and included “a statement of issues, a conclusions section, a statement of facts, and a legal analysis section.” These memoranda “state any limitations or conditions to which a conclusion may be subject,” and are exploratory and descriptive in nature “so that the strengths and weaknesses of a case are presented and developed candidly, directing attention to the authorities against the conclusions arrived at as well as those which support them.”

The Court in *Tax Analysts* appeared to have followed the classical derivative definition of the privilege for responsive legal advice, but inappropriately required that it reveal or “rest on confidential information obtained from the client,” rather than on *confidential communications* of the client.

The Court’s second line of reasoning in *Tax Analysts* for requiring the disclosure of the FSA’s was the unique nature of the legal opinions of IRS counsel. Because the IRS is interpreting the law and applying it to individual taxpayers, the court characterized Chief Counsel’s opinions as “making law” that should be accessible to taxpayers.

No private attorney has the power to formulate the law to be applied to others. Matters are different in the governmental context, when the counsel rendering the legal opinion in effect is making law. Here the Office of Chief Counsel is one of the principal tax law-givers within the Executive Branch. Nearly all the interpretations of the tax laws the IRS applies in assessing and collecting taxes emanate from the Office of Chief Counsel. . . . As we have discussed previously, FSAs issued by the Chief Counsel create a body of private law, applied routinely as the government’s legal position in its dealings with taxpayers. It is this quality . . . that [makes them] significant.

While the Court had previously acknowledged that the FSAs are not binding on IRS field personnel, it still characterized documents as “making law” simply because they are held in “high regard” and “generally followed.” This, of course, is also true in the private context. Legal opinions of counsel, particularly outside counsel, are highly respected and generally followed by clients. This, however, does not change the privileged character of those opinions. It is the actions that are taken by the client, whether IRS or private entity, that converts the advice into a “body of law” controlling future actions. Although the client can be compelled to explain the rationale for its actions, which may be identical to the legal advice previously obtained, the content of that advice should remain privileged until the client chooses to waive it by *stating that the client is specifically relying on it*. If the logic of the opinion in *Tax Analysts* were generally followed it would, at the very minimum, jeopardize the privileged status of the legal advice obtained by all governmental regulatory agencies.

### **The Scope of Waiver--Drafts of Documents Prepared for Release to Third Parties**

The most frequently litigated of all attorney-client privilege issues is waiver. It involves difficult judgments about the preservation of confidentiality, and the scope of the resulting waiv-

er once it is found. Decisions concerning the existence and scope of waiver are based on the standard of fairness. The question that must be answered is “[h]as the disclosure sufficiently revealed the contents of the protected communication, so that to recognize the privilege, and thereby continue to permit the concealment of the undisclosed portions, (or, in the case of an entire communication having been disclosed, other related communications on the same subject), would be permitting the client to have his cake and eat it?” Courts often express this in terms of using the privilege as “both a sword and a shield.”

Differences of opinion are inevitable with these types of judgments. The judgments are fact- dependent; each judge perceives the relevant facts differently; and even if their perceptions were consistent, there is no way for judges to assign consistent values to each fact relative to its importance in the “fairness” calculation.

There is a limited area of waiver, however, where courts can reasonably be criticized for misinterpreting the scope of waiver. This is where documents like government reports, prospectuses, or patent applications are prepared for dissemination to third parties.

The privilege usually protects confidential communications that the client intends to continue to hold in confidence. The client communicates with the attorney with the expectation that the attorney will advise him on appropriate courses of action, and will assist in the taking of that action. Even if the recommended actions are taken, the confidential communications of both the attorney and client remain confidential and unavailable to third parties because the actions do not necessarily reveal the content of prior communications. The situation is a bit different when the client consults the attorney for the purpose of drafting an instrument that ultimately will be made public. The construction and dissemination of the instrument inevitably reveals a great deal of substance about the content of the prior communications between the attorney and client.

If a lawyer is consulted for the purpose of drafting a communication or instrument that eventually will be disclosed to third parties (a prospectus, for example), are its prior drafts protected by the attorney-client privilege? Stated differently, if those drafts were initially considered confidential, would the client’s continuing expectation be reasonable after the dissemination of the final approved version?

In the following graphic the attorney has prepared three prior drafts of the instrument that will be disseminated. When the Fourth Draft is approved for release, and expectations of confidentiality with respect to that draft are relinquished, should the scope of the resulting privilege waiver extend to the three previous drafts? A number of courts have said yes. They have held that when a document that will be disseminated to third parties is being prepared by the attorney, there can be no reasonable expectation of confidentiality in the communications leading to the creation of the final product because it has been forfeited. These decisions alternatively hold that the client never had a reasonable expectation of confidentiality. Both conclusions are unrealistic and unfair.

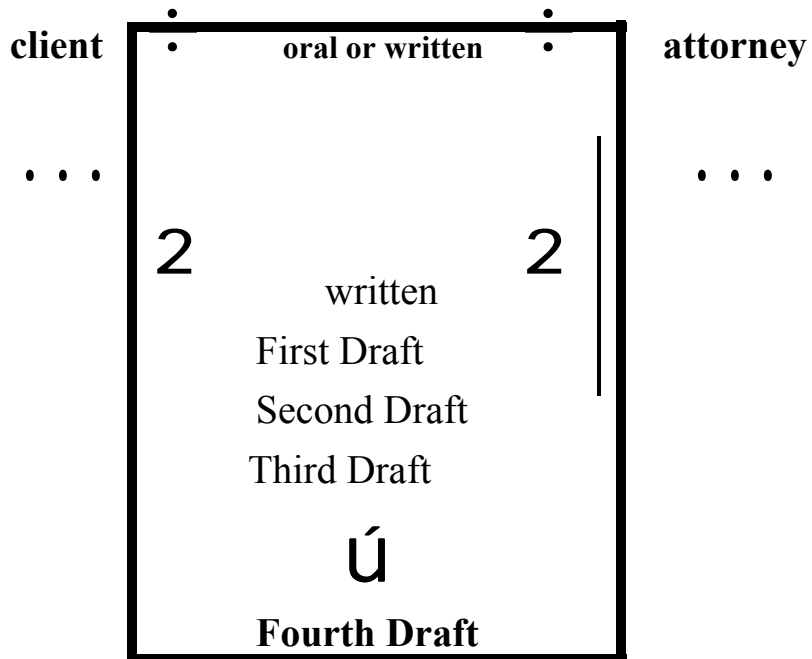
To conclude that the disclosure of an evolved instrument prepared by the attorney, after a series of exchanges with the client, results in the loss of all privilege claims for all prior exchanges would destroy the privilege protection in a large percentage of instances where legal assistance is rendered. All draft civil complaints, leases, and contracts, as well as prospectuses, patent applications and government reports would have no privilege protection after the decision to file had been made. This would strike at the very heart of the privilege because it would make clients wary of being open and candid when responding to the attorney's drafts.

More fundamentally, however, if the conclusion about relinquishing reasonable expectations of confidentiality were logically applied, the resulting waiver could not be limited to *written drafts*. It would require the disclosure of *all oral exchanges* too. After all, drafts are nothing more than written forms of what otherwise could have been oral communications, and, at the very least are often the product of those exchanges. The logic, therefore, leads to the destruction of the privilege in all consultations leading to the initiation of a civil action by the drafting and filing of a formal complaint. No court has even gone so far. Written communications that were confidential when made, and part of an attempt to obtain legal assistance, should remain as protected as the client's oral communications to counsel that precede the attorney's drafting and filing of a legal complaint or patent application.

In a vain attempt to address the illogic and unfairness of these waiver decisions, the court in *Andritz Sprout-Bauer, Inc. v. Beazer East Inc.*, 174 F.R.D. 609 (M.D. Pa. 1997) permitted the privilege to protect the drafts that "were prepared or circulated for the purpose of giving or obtaining legal advice *and contain information or comments not included in the final version.*" This approach recognizes the continued expectation of confidentiality in the contents of prior drafts, but ignores the fact that disclosing that the previous drafts contain no additional information or comments from either the client or the attorney reveals substantive information about the content of those attorney-client communications--that in fact they contain no additional information. And, more importantly, the decision permits this disclosure for no apparent reason. If the discovering party already has the information it wants and needs from the Fourth Draft, and the additional drafts that are discoverable are limited to those that will provide no additional relevant information, why are they discoverable in the first instance?

In addition, denying the privilege protection to drafts solely because of their similarity to the communication that was previously revealed, again erroneously focuses on the information, rather than communication. As the nature and source of the information in the prior communication is irrelevant to the privilege protection, the information *not* in the prior communications is also irrelevant to their privilege status. The court has no reason to inquire as to similarity in order to resolve waiver questions.

## PRIVILEGE PROTECTION



Waiver only of Fourth Draft of:

- C **judicial pleading (complaint)**
- C **prospectus**
- C **patent application**
- C **lease**
- C **contract**
- C **tax return**

Because :

- C **not in a litigation context**
- C **no adversarial advantage for client or disadvantage to others**
- C **not necessary to determine accuracy or adequacy of the Fourth Draft**

Seen as the equivalent of oral communications, drafts should have the same protection extended to them as the oral communications between Claus von Bulow and his attorney after they were revealed in the novel published by his attorney following von Bulow's acquittal. *von Bulow v. von Bulow*, 828 F.2d 94 (2<sup>nd</sup> Cir. 1987). Since the client consented to the attorney's disclosure of certain confidential communications relating to his alleged attempt to kill his wife, his children (who later sued him) sought to discover all of his communications with counsel on the same subject--the attempted murder of their mother.

The Second Circuit held the privilege had only been waived for the communications that had been included in the novel. Because the disclosures in the novel neither put the client, Claus von Bulow, in any superior adversarial position, or his children in an inferior adversarial position, the waiver that resulted extended only to the communications that were exposed--what they were shown was all that they could get.

The *von Bulow* standard of fairness has been widely followed. Once waiver is found, the scope of that waiver is roughly *defined* by the subject matter of the communication disclosed. This, however, is only the first step. Thereafter, it is *refined* by the standard of fairness. And in many instances, as in *von Bulow*, the concern for fairness has resulted in the "subject matter" of waiver being narrowly limited to four corners of the instrument disclosed or to the literal words repeated.

Therefore, whether evaluated from the perspective of an expectation of confidentiality, a distinction between communications and information, or waiver and its appropriate scope, drafts of a document that is being prepared for public dissemination should remain protected by the privilege even after the dissemination of the final version.

## **Conclusion**

Though initially grounded in the confidentiality of the attorney-client relationship, the attorney-client privilege now draws its strength from the confidentiality/secretcy of the communications a client has with his attorney. Yet as the irrelevancy of the secrecy requirement becomes more apparent, the privilege is becoming something quite similar to a right of privacy that can be selectively waived.

The scope of the protection is also changing. Though it initially protected communications of the client to the attorney, it has been expanded to protect responsive communications that reveal the content of the prior client communication. It is now being broadened further to protect communications "between" the attorney and client. This latter step has had implications that many courts have not fully appreciated.

Although evolution of the privilege is inevitable, it is unfortunately being accelerated by the jettisoning, rather than the re-evaluation, of fundamental principles. As a consequence, transformation of the attorney-client privilege has been haphazard, and only occasionally serendipitous.

However, the legal community is not dependant upon the glacial revision processes of either Congress or the Judicial Conference's Advisory Committee on the Federal Rules of Evidence. Because privilege is the only subject within the Federal Rules of Evidence that was left to the common law, what lawyers and judges can be made to understand, they still can change on a case-by-case basis--without legislation.