

# Employment Law

## Commentary

### Just Because It Looks Like Attorney-Client Privilege and Sounds Like Attorney-Client Privilege Doesn't Mean It Is Attorney-Client Privilege

By **Jessica Tipton**

The attorney-client privilege is one of the oldest and most respected privileges. The privilege was affirmed and seemingly expanded by the court in *Upjohn Co. v. United States*, 499 U.S. 383 (1981), which held that, in a corporate setting, the attorney-client privilege may extend to communications involving middle and lower level employees. Though this finding appears to offer expansive protection under attorney-client privilege, the reality is that opening up confidential communications to large groups risks waiver of the privilege. Recent decisions on the attorney-client privilege have examined the extent of the privilege. While each decision examines a different aspect of the attorney-client privilege, the take away from each is that proper steps must be taken to avoid waiver of the privilege. Below are the most recent cases on this point and practical tips for protecting confidential communications.

#### Factual Findings in Confidential Communications: *Costco Wholesale Corp. v. Superior Court*

The California Supreme Court in *Costco Wholesale Corp. v. Superior Court of Los Angeles*, 219 P.3d 736 (Cal. 2009) took an in-depth look at what communications are afforded protection under the attorney-client privilege. In the underlying case, Costco was charged with having misclassified its employees as "exempt," and thus the employees were entitled to the overtime they had not been paid. Costco hired outside counsel to advise it on the proper classification of the employees. Outside counsel interviewed a number of employees and wrote a 22-page memorandum detailing its findings and opinion on classification status. The memorandum was given to Costco's in-house counsel and appeared to be clearly privileged and confidential.

Plaintiffs sought production of the confidential memorandum during the litigation. Allegedly, Costco had asserted an "advice of counsel" defense and potentially waived the privilege. Costco denied ever asserting such a defense and maintained that the memorandum was protected by attorney-client privilege and the work product doctrine. The court appointed a referee to determine whether and to what extent the contents of the memorandum were privileged or contained work product material.

After reviewing the memorandum, the referee determined that the majority of the memorandum was in fact confidential attorney-client communications because it contained observations and mental impressions. Among the privileged information were a number of factual findings relating to job responsibilities. The referee concluded

(Continued on p.2)

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# Client Privilege

(Continued from Page 1)

this information was not protected by the attorney-client privilege and that these portions could and should be produced.

The trial court, relying on the referee's findings, held that portions of the memorandum could be introduced at trial. Costco, determined to protect its confidential information, sought a writ of mandamus in the court of appeals. After review of the memorandum, the court of appeals determined that the great majority of the memorandum was confidential communication. The court stressed that a redacted version of the memorandum left little text, none of which was confidential communication that needed protection. Ultimately, the court of appeals found that Costco failed to make the necessary showing to overturn the lower court's ruling.

Costco, understandably unsatisfied with this result, petitioned the California Supreme Court. On appeal, the California Supreme Court held that the attorney-client privilege covered outside counsel's opinion in its entirety. The Supreme Court rejected the court of appeals' rationale that producing the unredacted portions would not be harmful to Costco. Instead, the Supreme Court pointed out that the irreparable harm stems from the disclosure of the attorney-client communication itself.

## Waiving Privileged Information in Discovery: *Mohawk Inc. v. Carpenter*<sup>1</sup>

Mohawk, a Georgia-based company, litigated all the way to the United States Supreme Court to prevent disclosure of a confidential communication. The issue before the court was the timing of when a

party can appeal a judge's finding that it has waived the privilege by releasing material in discovery. The Court was asked whether such an order could be appealed before the trial, as an interlocutory appeal, or only after the final judgment at the conclusion of trial.

This case was an offshoot of a racketeering lawsuit against Mohawk in which current and former employees claimed the company hired illegal aliens, causing a depression of US resident employees' wages. Carpenter, a former supervisor, claimed he was fired after complaining to the HR department that the company was hiring undocumented employees. Carpenter alleged that the HR department pressured him not to file a complaint because it would hurt the company's position in the pending racketeering litigation. Mohawk denied any truth to the allegations. The issue of attorney-client privilege arose when plaintiffs in the racketeering case learned of Carpenter's HR complaint and sought

**THE COURT SUGGESTED A PARTY COULD IGNORE A DISCLOSURE ORDER AND FACE SANCTIONS OR SEEK RELIEF BY SEEKING INTERLOCUTORY REVIEW BY WRIT OF MANDAMUS.**

an evidentiary hearing to explore the allegations. Simultaneously, Carpenter sought the disclosure of documentation regarding his conversations with HR and the decision for his termination. Mohawk claimed the information was protected by attorney-client privilege.

The district court found that Mohawk had waived the privilege by placing HR's actions at issue in the racketeering case and ordered production of the documents. The district court stayed this order so that Mohawk could make a collateral appeal to the 11th Circuit. However, the court of appeals refused to allow the appeal to go forward because it determined that this issue was not appropriate for collateral appeal. The Supreme Court agreed to hear the matter and affirmed the court of appeals' finding that disclosure orders adverse to the attorney-client privilege do not qualify for collateral appeal. In explaining this holding the Supreme Court noted that courts of appeal could remedy improper disclosure of privileged material in the same way that they remedy other evidentiary matters, by vacating and remanding for a new trial.

In addition to finding that the court of appeals could remand the case to correct the error, the Supreme Court noted two alternative avenues a party could pursue to challenge a disclosure order short of actually disclosing the confidential information. The court suggested a party could ignore a disclosure order and face sanctions or seek relief by seeking interlocutory review by writ of mandamus.

## Documents in Anticipation of Litigation: *U.S. v. Textron*

Another recent case that chips away at protections provided by the attorney-client privilege that may go before the United States Supreme Court is *United States v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009).

The issue of attorney-client privilege involved documents prepared by Textron, a publicly-traded company. The documents were audited financial statements prepared in compliance with federal securities laws. The IRS began an investigation of Textron-related tax avoidance transactions and sought accounting papers and copies of memoranda prepared by Textron's

# Client Privilege

(Continued from Page 2)

in-house counsel expressing opinions regarding the likelihood of prevailing in possible litigation and calculating a tax reserve amount in the event that Textron did not prevail in litigation.

The First Circuit ruled that the attorney-client work product doctrine did not protect tax accrual work papers prepared by in-house counsel to support Textron's calculation of tax reserves. This holding brought to the forefront a circuit court split regarding whether a document was prepared "in anticipation of litigation." There are two different tests currently used by the circuit courts. The first is the "primary purpose" test, which determines whether the primary motivating purpose behind the creation of the document was to aid in future litigation. The second is the "because of" test that determines whether the document was prepared or obtained because of the prospect of litigation.

Textron refused to produce the documents, asserting attorney-client privilege and work product. The IRS sought enforcement of production before the district court. Denying the IRS's petition, the district court determined the memoranda were protected by the work product doctrine. On appeal, the court of appeals upheld the district court's decision in a 3-2 split with fervent dissenting opinions, inviting the Supreme Court to review the decision. If the case is heard by the United States Supreme Court, the circuit split on attorney-client privilege will no doubt be resolved.

## Practical Implications for Protecting Privilege

*Costco*, *Mohawk*, and *Textron* highlight the importance of the need for continued vigilance to protect the attorney-client

privilege. To ensure proper protection under the attorney-client privilege during an internal audit or investigation, companies should do the following:

### Consider Retaining Outside Counsel

Consideration should be given to retaining outside counsel specifically for the purpose of an investigation or audit. Inside counsel often work on multiple matters that may blur the lines of communication and risk losing attorney-client protection.

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### Policies to Avoid Waiver

Setting up policies in advance of conducting investigations will help set clear guidelines for information being sought and for limiting the dissemination group. Ensure that part of the policy is putting individuals on notice that the purpose of the investigation is for use in potential litigation.

Clearly note on all documents that investigations are being conducted at the request and advice of counsel. Pass all information obtained during the investigation directly to counsel as confidential information. Remember that communications related to business advice are not protected and should be kept separate if possible from communications containing legal advice. Make sure to advise employees being interviewed that the purpose of the interview is at the request of the company for the purpose of obtaining legal advice.

Companies should limit the number of individuals receiving the information as much as possible. All communications should be kept between attorneys and those directly involved in the investigation and should be marked "attorney-client privileged." Electronic dissemination of confidential communications should be handled with care to ensure that individuals are not inadvertently added to email chains, thus potentially waiving the privilege.

It is crucial to keep in mind that partial waiver of the communication for any reason may be a complete waiver down the road. It is often not possible to reclaim attorney-client privilege after it has been waived.

While none of these steps guarantee absolute attorney-client privilege, it is crucial for both attorneys and companies to take all steps possible to maintain the protection. Taking these steps prior to litigation will reduce the likelihood that communications believed to be confidential will be aired in open court. ■

<sup>1</sup> 130 S. Ct. 599 (U.S. 2009)

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