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STRATEGY

The collision course between privilege and the duty to preserve imposes yet another obligation on counsel and their clients: to decide whether to assert privilege claims for attorney-client communications and work product generated in implementing the duty to preserve or, by not doing so, be able to use those communications and materials in defending against allegations of spoliation.

Privilege and the Duty to Preserve: Are they on a Collision Course?

BY LESLIE WHARTON AND SARAH WARLICK

Two major principles underlie our adversarial judicial system: (1) the right to obtain discovery of relevant evidence and (2) the privileges that protect legal advice and trial preparation work from discovery.[1] Liberal discovery is essential to the truth-finding function of the courts.[2] The attorney-client privilege provides the confidentiality without which clients might not seek legal advice,[3] and the work product doctrine[4] protects counsel's trial preparation from disclosure to the adversary. Recently, the right to discovery and privilege have been colliding in a new arena: the duty to preserve.[5]

Leslie Wharton is Senior Counsel and Sarah Warlick is an associate in the Washington, D.C. office of Arnold & Porter LLP. This article is based on the far more detailed and cogent analysis in The Honorable Paul W. Grimm, Michael D. Berman, Leslie Wharton, Jeanna Beck, Conor R. Crowley, "Discovery about Discovery: Does the Attorney-Client Privilege Protect All Attorney-Client Communications Relating to the Preservation of Potentially Relevant Information?," 37 Balt. L. Rev. (2008): 101 - 144.

[1] Where no distinction between them is warranted, this article refers to both the attorney-client privilege and work product protection as "privilege" or "privileges."

[2] *See, e.g., United Medical Supply Company, Inc. v. United States*, 77 Fed. Cl. 257 (2007) (". . . no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings . . . [b]ut when critical documents go missing, judges and litigants alike descend into a world of *ad hocery* and half measures — and our civil justice system suffers.").

[3] *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (by protecting the confidentiality of attorney-client communications, the privilege promotes "broader public interests in the observance of law and administration of justice"); *Fisher v. United States*, 425 U.S. 391, 403 - 04 (1976) ("The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.") (citations omitted).

[4] *Hickman v. Taylor*, 329 U.S. 495 (1947). The work product doctrine is embodied in Federal Rule of Civil Procedure 26(b)(3), under which fact work product may be discoverable if the requesting party "has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means," but opinion work product is virtually immune from discovery.

[5] For an insightful discussion of the duty to preserve, *see* The Honorable Paul W. Grimm, Michael D. Berman, Conor R. Crowley, and Leslie Wharton, "Proportionality in the Post-Hoc

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The Duty to Preserve. The duty to preserve is the bedrock of discovery in litigation without which parties could destroy potential evidence with impunity. The duty to preserve falls on both counsel and the client. Counsel have a duty to instruct their clients about the duty to preserve.[6] Clients not only have a duty to preserve, they have a duty to keep their counsel informed about their preservation efforts.[7] Thus, the duty to preserve itself mandates attorney-client communications about the what, why, and how of that duty in the context of a specific case.

Under normal circumstances, those communications are not relevant to the substantive issues in the case and are therefore not discoverable. But with the amendments to the Federal Rules of Civil Procedure and increased focus on the need to preserve and produce ESI, attorney-client communications are increasingly subject to judicial scrutiny when there is a claim that relevant ESI was not preserved.

The Privilege and the Preservation of Evidence. When it comes to inquiring about a party's preservation efforts, every litigator is familiar with the line between privileged and unprivileged information: you can ask the witness what she did to locate and produce documents or other evidence, but you can't ask what her lawyer told her before she began that process. This traditional line is well illustrated by the recent decision in *In re eBay Seller Antitrust Litigation*.[8]

In *eBay*, the court held that eBay was not required to produce copies of its litigation hold notices (''DRNs'') nor ''any information about matters contained therein that are privileged or constitute work product.''[9] However, plaintiffs were entitled to inquire about ''the facts as to what the employees receiving DRNs have done in response, i.e., what efforts they have undertaken to collect and preserve applicable information.''[10]

Litigation hold notices are usually prepared by attorneys. They contain an attorney's evaluation of what is or may be relevant to the litigation. They are certainly work product and, as legal advice to the client, privileged communications. As many recent decisions have confirmed, litigation hold notices are privileged.[11]

Judicial Examination of Privileged Communications. Despite this long-standing line between what is and is not privileged when it comes to a party's preservation, collection, and production activities, increasingly courts are probing attorney-counsel communications relating to the duty to preserve. For instance, in *Zubulake V*, [12] Judge Scheindlin examined in great detail the communications between UBS and its counsel, including specific conversations between UBS's outside counsel and key UBS employees, and the instructions from in-house counsel advising employees to ''preserve and turn over to counsel all files, records or other written memoranda or documents concerning the allegations raised in the [EEOC] charge or any aspect of [Zubulake's] employment.''[13] The court also took note of what UBS's counsel failed to say, pointing out that there was no instruction to preserve backup tapes until after Ms. Zubulake requested e-mails stored on them.[14]

Zubulake V was not the first decision to probe deeply into counsel-client communications on preservation. Judge Scheindlin relied on prior decisions such as *Keir v. UnumProvident Corp.*,[15] in which the court examined e-mail and oral communications between UnumProvident counsel and the client discussing the preservation of relevant materials over the objection of UnumProvident that those communications were privileged.[16]

Since the *Zubulake* decisions, other courts have followed suit. For example, in *Cache La Poudre Feeds, Inc. v. Land O'Lakes*,[17] the court criticized in-house counsel's failure to ''verify the completeness of the employees' document production,'' and stop the routine wiping of the computer hard drives of departing employees, finding that counsel failed to ''discharge their obligations to coordinate and oversee discovery'' so egregious that it authorized a Rule 30(b)(6) deposition of Land O'Lakes's counsel.[18]

Similarly, in *United Medical Supply Co. v. United States*, once it became apparent that the government had negligently failed to preserve relevant documents,[19] the court authorized full discovery into the communications among the government attorneys and paralegal who handled the preservation, collection, and production of evidence, ordering one attorney and a paralegal to file affidavits detailing their conversations and production of the government's litigation hold notices.[20]

Spoliation: The Breach in the Wall of Privilege. In each of these cases, spoliation—the failure to preserve or produce relevant evidence—resulted in discovery on

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Analysis of Pre-Litigation Preservation Decisions,'' 37 Univ. Baltimore L. Rev. (2008): 381-413.

[6] *See*, ABA Civil Discovery Standards, No. 10 (August 2004); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (noting ''counsel's obligation to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information and, perhaps, more importantly, a client's obligation to heed those instructions''); David Lender and Keith Gibson, ''Ethics in an Electronic World, Part I,'' Vol. 8 Digital Discovery & e-Evidence No. 6 at 152 (June 1, 2008) (discussing Model Rules of Professional Conduct).

[7] *See, e.g.*, *Wachtel v. Guardian Life Ins.*, Nos. 01-4183 (FSH), 03-1801 (FSH), 2007 WL 1752036) (D.N.J. June 18, 2007) (finding that defendants ''violated the integrity of this [c]ourt's judicial processes by: . . . (10) keeping even their own outside counsel . . . unaware of their e-mail procedures that resulted in widespread dereliction of their discovery obligations'').

[8] *In re eBay Seller Antitrust Litigation*, No. C 07-01882 JF (RS), 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007).

[9] *Id.* at *1.

[10] *Id.*

[11] *See, e.g.*, *Capitano v. Ford Motor Co.*, 831 N.Y.S.2d 687, 688 - 89 (N.Y. App. Div. 2007) (noting that ''suspension orders'' are relevant but are ''privileged communications''); *Gibson v. Ford Motor Co.*, 510 F. Supp.2d 1116, 1123-4 (N.D. Ga. 2007) (refusing discovery of litigation hold notice as work product).

[12] *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004).

[13] *Id.* at 425.

[14] *Id.* at 424.

[15] *Keir v. UnumProvident Corp.*, No. 02 Civ. 8781(DLC), 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003), cited in *Zubulake V*, 229 F.R.D. at 434.

[16] *Id.* at *6.

[17] *Cache La Poudre Feeds, Inc. v. Land O'Lakes*, 244 F.R.D. 614 (D. Colo. 2007).

[18] *Id.* at 630.

[19] *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257 (2007).

[20] *Id.* at 262, 272-4.

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discovery. With allegations of spoliation, the activities of counsel and client in preserving and producing relevant evidence become germane to the resolution of the underlying litigation.

While courts do not always articulate the rationale behind their rulings requiring the disclosure of privileged communications carrying out the duty to preserve, many of those decisions are based on well-known exceptions to the privilege. A number of courts have invoked the crime, fraud, or tort exception, which negates privilege claims where a client communicated with counsel in order to commit a crime, fraud, or tort, and the communications were ''in furtherance'' of that alleged crime, fraud, or tort.[21]

For instance, in *In re Grand Jury Investigation*, a corporate employee destroyed e-mail and other electronic documents after meeting with counsel to discuss her preservation duties.[22] Based on a finding that the employee had used counsel's communications to commit a crime, fraud, or tort, the trial court ordered discovery of counsel's conversations of the employee, an order affirmed by the Third Circuit on appeal.[23]

Similarly, in *Rambus v. Infineon Technologies AG*,[24] when it was learned that Rambus had organized a company ''shred day'' that destroyed relevant materials, the court held that the crime-fraud exception vitiated all attorney-client communications made in furtherance of that spoliation, noting that ''any communication between lawyer and client respecting spoliation is fundamentally inconsistent with the asserted principles behind the recognition of the attorney-client privilege, namely, 'observance of law' or the 'administration of justice.' ''[25]

Other courts have invoked the doctrine of waiver to access attorney-client communications about the preservation of evidence where, faced with allegations of spoliation, the client has attempted to defend its preservation efforts. For instance, in *McKenna v. Nestle Purina Petcare Co.*[26] the court held that the company's claim that it had undertaken an ''adequate investigation'' waived claims for documents prepared by the attorneys involved in the investigation. Similarly, courts have found the privilege waived where counsel's investigation had the effect of shielding critical facts from discovery,[27] or where attorney-client communications were placed ''in issue'' by the client.[28]

In *In re Intel Corporation Microprocessor Antitrust Litigation*,[29] the Special Master considering Intel's failure to preserve all relevant e-mails and other electronic information, after an exhaustive review of waiver law, found that Intel waived privilege claims when it voluntarily produced summaries of counsel's interviews with custodians. Finally, as the *Qualcomm* case has reminded us, under the rules of ethics, if the client points the finger of blame for spoliation at its counsel, those attorneys may be permitted to disclose confidential client communications in their own self-defense.[30]

Spoliation as the Violation of a Duty. Although many courts have assumed that attorney-client communications and attorney work performed in implementing the duty to preserve are privileged or subject to work product protection, not all courts appear to agree. In *Zubulake V*, Judge Scheindlin held that, while UBS had a duty to preserve its employees' active computer files, UBS's outside counsel had an independent duty to ''oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents.''[31] Where both client and counsel are acting in fulfillment of a legal duty, their communications in fulfillment of that duty may not be privileged. Under the rationale for the privilege articulated in *Fisher*,[32] because these communications are mandated, they will take place even in the absence of a privilege and are therefore not protected by the privilege. Under this approach, counsel's purely legal advice to the client about the scope of the duty and the legal consequences of any failure to preserve would be privileged, but routine communications that occur in carrying out the duty to preserve would not.

To Claim or Not to Claim the Privilege, That is the Question. The adoption of rules focusing on the discovery of electronically stored information have resulted in a virtual explosion of litigation over alleged failures to identify, preserve, and produce ESI. When a party is accused of spoliation or other discovery misdeed, it is likely to find itself between the proverbial rock and a hard place. If the accused party asserts privilege over attorney-client communications in carrying out the party's duty to preserve, it is unable to present the strongest evidence in its own defense, the words and deeds of its counsel. And once the privilege for those communications has been asserted, to disclose even one such communication in a party's defense invites a claim of ''waiver'' with the possibility that it will be required to disclose all other communications on the same ''subject matter.''

If the party continues to stand behind its privilege claims, and the court makes a prima facie finding of spoliation, that party will likely be subjected to an in

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[21] *See, e.g., In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979) (holding that if FMC made false statements to the EPA after having consulted with counsel, the crime-fraud exception applied to counsel's work product).

[22] *In re Grand Jury Investigation*, 445 F.3d 266, 278 (3d Cir. 2006), cert. denied, *Doe v. United States*, 127 S. Ct. 538 (2006).

[23] *Id.* at 280.

[24] *Rambus v. Infineon Technologies AG*, 220 F.R.D. 264 (E.D. Va. 2004).

[25] *Id.* at 283-4.

[26] No. 2:05-cv-0976, 2007 WL 433291, at *3 (D. Ohio Feb. 5, 2007).

[27] *See, e.g., Baker v. GMC*, 197 F.R.D. 376, 391 (W.D. Mo. 1999).

[28] *See, e.g., United States ex rel. Mayman v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1252 (D. Md. 1995) (concluding that voluntary disclosure of privileged communications waives the privilege as to all communications on the same subject matter); *Rambus, Inc. v. Infineon Technologies AG*, 220 F.R.D. 264, 288-9 (E.D. Va. 2004), subsequent determination, 222 F.R.D. 280 (E.D. Va. 2004) (disclosure of some reasons for adopting document retention policy in defending against spoliation held to waive privilege for all advice of counsel that went into the preparation of the document retention policy).

[29] MDL No. 05-1717-JJF, C.A. No. 05-441-JJF, C.A. No. 05-485-JFF (Consolidated) (D. Del. May 9, 2008).

[30] *See, Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932, at *2 - *3 (S.D. Cal. Jan. 7, 2008) and 2008 WL 638108 (March 5, 2008); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2007) (permitting an attorney to disclose confidential client information ''to establish a claim or defense on behalf of the lawyer . . .'').

[31] *Zubulake*, 229 F.R.D. at 431-2.

[32] 425 U.S. at 403.

camera review of attorney-client communications under the crime, fraud, or tort exception.[33] If exonerated, that victory will come at the great expense of time-consuming and costly proceedings; if not, the party is likely to suffer reputational injury in addition to the disclosure of its attorney-client communications.

A Possible Answer. There may be an alternative. Client and counsel can agree at the outset of litigation that they will make no claims of privilege or other protection for counsel's communications and actions in carrying out the duty to preserve. The litigation hold notice and communications with company employees about the location, preservation, and collection of potentially relevant information may be used with impunity as both a sword and a shield if the opposing party alleges spoliation.

In so deciding, client and counsel do not need to forswear protection for all of counsel's legal advice on the scope and nature of the client's duty to preserve, discovery in general, and the merits and strategy of the litigation. The communications can be and will remain privileged so long as they constitute pure legal advice, are carefully labeled as privileged, and are segregated from the day-to-day communications generated in carrying out the duty to preserve.

To best ensure against ''leakage'' between privileged and non-privileged communications, it may be prudent not to employ the counsel who provide the legal advice to oversee the preservation efforts and vice versa. Following this approach, client and counsel can defend their good faith and conduct in satisfying their duties to preserve without subjecting core opinion work product and legal advice to potential waiver.

[33] *See, e.g., United States v. Zolin*, 491 U.S. 554 (1989); *In re BankAmerica Corp. Securities Litigation*, 270 F.3d 639, 644 (8th Cir. 2001) (reversing in part for failure to conduct *in camera* review of each document subject to the crime-fraud exception).

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