LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
THURSDAY, AUGUST 20, 2020

PERSPECTIVE

A new standard for determining waiver of work product privilege

By LaKeysia Beene and Jason Fellner

On Aug. 7, the 9th U.S. Circuit Court of Appeals set forth a new and clarifying standard for determining whether a party to a federal action has waived the attorney work product privilege, which is principally different than the standard applied to waiver of the attorney-client privilege. *United States v. Sanmina Corporation and Subsidiaries*, 2020 DJDAR 8299. In its decision, the court recognized the key distinctions between the invocation of the attorney-client privilege compared with the attorney work product privilege and when those privileges are waived, if at all. The 9th Circuit decision provides important case law on these two fundamental, yet distinct, sacrosanct privileges uniquely attached to the legal profession.

Attorney-Client Privilege and Waiver

It is well established that the attorney- client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice. *Upjohn Co. v. United States*, 449 U.S. 383, 389, (1981). The privilege may extend to communications with third parties who have been engaged to assist the attorney in providing legal advice, as well as to communications with third parties acting as agent of the client. However, only communications made or shared with third parties that are reasonably necessary to the lawyer's services are protected. *See Sanmina*, 2020 DJDAR at 8301.

The rationale for the privilege is to encourage clients to confide fully in their attorneys without fear of future disclosure of such confidences. This in turn will enable attorneys to render more complete and competent legal advice. Id.

The attorney-client privilege protects all documents that can be considered a communication, including emails, text messages, letters and memoranda. The privilege protects communications that are created by the client as well as those addressed to the client. If an attorney receives documents from a client, it does not necessarily mean that they are privileged. The privilege only extends to documents specifically prepared by the client for the attorney to obtain legal advice. *United States v. Richey*, 632 F.3d 559, 566, (9th Cir. 2011); *United States v. Landof*, 591 F.2d 36, 39 (9th Cir. 1978).

A party or its attorney may waive the privilege by disclosing privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public. *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003). Disclosure of privileged communications constitutes waiver of the privilege for all other communications on the same subject. *See Weil v. Inv. Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981).

A key test of whether the privilege applies depends on who receives the communication. If a document that is otherwise privileged is shared with third parties, then the privilege is lost because there is no longer "confidentialy." The attorney-client relationship affords a distinct, invaluable right to have communications protected from compelled disclosure to any third party, including business associates, competitors, and adversaries.

Work Product Doctrine and Waiver

The attorney work product doctrine is a qualified privilege that is codified in Federal Rule of Civil Procedure 26(b)(3). The doctrine protects "from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation." *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1494 (9th Cir. 1989) (citing Fed.R.Civ.P. 26(b) (3)). The work product doctrine also covers documents or the compilation of materials prepared by agents of the attorney in preparation for litigation.

At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which an attorney can analyze and prepare the client's case, and protects both material prepared by agents for the attorney as well as those prepared by the attorney himself. The primary purpose of the work product rule is to prevent exploitation of a party's efforts in preparing for litigation.

A party seeking material that has been found to be ordinary work product may obtain the material by showing a substantial need for the document and undue hardship in obtaining substantially equivalent information. Fed. R. Civ. P. 26(b) (3) (A)(ii). However, documents or portions of documents that divulge mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation are entitled to virtually absolute protection.

An adversary may also obtain an attorney's work product if the "privilege" is waived. The 9th Circuit in *Sanmina* adopted a new standard for determining whether a party waived protections of the work product doctrine. In adopting the standard, the court relied upon precedent from other circuits which embrace the generally held principal that waiver of attorney- client privilege by disclosure to a third party does not necessarily affect the work product protection since the two are designed to accomplish different results.

The court reasoned that while the attorney- client privilege is designed to protect confidentiality, so that any disclosure outside "the magic circle" is inconsistent with the privilege, work product protection is provided against adversaries, so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection.

Based on precedent regarding the unique purposes for the work product doctrine, the 9th Circuit determined that disclosure of work product to a third party does not waive the protection unless such disclosure is made to an adversary in litigation or has substantially increased the opportunities for potential adversaries to obtain the information. In other words, the voluntary disclosure of attorney work product to an adversary or a conduit to an adversary waives work product protection for that material.

Ultimately, in accordance with the 9th Circuit standard, attorneys and clients are free to share work product with third-parties — so long as the interests of the third party and the client are aligned. A party can waive the privilege, however, by disclosing it to an adversary directly or if the disclosure substantially increases the chances that the work product will get into the hands of an adversary.

The determination as to whether disclosure is to a "conduit to an adversary" is based on the totality of the circumstances, and the assessment should include, as highly relevant: (1) whether the disclosing party has engaged in self-interested selective disclosure by revealing its work product to some adversaries but not to others, and (2) whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential.

Takeaway for Preventing Waiver of Attorney Work Product Privilege

While waiver of the attorney-client privilege is fairly straightforward, waiver of the attorney work product doctrine is not a bright-line test, which depends on the unique facts and circumstances surrounding the subject information's disclosure. *Sanmina*, 2020 DJDAR 8303.

In accordance with the 9th Circuit standard for waiver of the attorney work product privilege, federal practitioners can avoid waiver by implementing the following procedures in their litigation practice:

- Incorporate impressions, conclusions, theories, opinions, etc. when writing notes, memoranda, or summarizing documents;
- Label document as attorney work product and privileged;
- Segregate privileged documents in separate files;
- Before sharing work product with third-parties, obtain a confidentiality agreement, joint defense agreement, common interest agreement or other agreement designed to ensure the work product materials are kept confidential and show that your interests are aligned; and
- Review in detail the most recent federal court decision on attorney work product privilege, which currently is *United States v. Sanmina Corporation and Subsidiaries*. ■

LaKeysia Beene *is an associate and* **Jason Fellner** *is a shareholder at Murphy Pearson Bradley & Feeney*