Supplement to M. Laredo, "The Attorney-Client Privilege in the Business Context in Massachusetts," 87 Mass L. Rev. 143 (Spring 2003)

Marc C. Laredo
Laredo & Smith, LLP
15 Broad Street, 6th Fl.
Boston, MA 02109
617-367-7984
laredo@laredosmith.com

The following are updates and/or additional cases for certain topics discussed in M. Laredo, "The Attorney-Client Privilege in the Business Context in Massachusetts," 87 Mass L. Rev. 143 (Spring 2003) ("Article").

What is the Privilege

In Comm'r of Revenue v. Comcast Corp., 453 Mass. 293, 303 (2009), the Supreme Judicial Court cited Wigmore's definition of the attorney-client privilege as the "classic formulation" of the privilege:

> The classic formulation of the attorney-client privilege, which we indorse, is found in 8 J. Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961): "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived."

Who is the Client

The states vary in how they define who is the client. Article at 146 & nn. 31-34. When attempting to analyze the question, one must review the relevant case law, statutes, and rules of evidence in each jurisdiction. For example, Texas, a state that had followed the "control group" test, National Tank Co. v. Brotherton, 851 S.W. 2d 193 (Tex. 1993), now follows the "subject matter" test as a result of an amendment to Texas Rule of Evidence 503. See In re E.I. DuPont de Nemours & Co., 136 S.W. 3d 218 (Tex. 2004).

Arizona's court-created test in Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P. 2d 870 (Ariz. 1993), is still good law in criminal cases, Roman Catholic Diocese v. Superior Ct., 204 Ariz. 225, 62 P.3d 970 (Ariz. Ct. App. 2003), but has been replaced by a broader test in civil cases. See Ariz. Rev. Stat. § 12-2234. Florida's Supreme Court has listed a five-part test that builds off the subject matter approach and applies a "heightened level of scrutiny." Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994). Again, since the law and the sources of law vary, a careful analysis is required. See T. Mulroy, "The Attorney Client Privilege and the Corporate Internal Investigation," 1 DePaul Bus. & Com. L.J. 49 (2002); B. Hamilton, "Conflict, Disparity and Indecision: the Unsettled Corporate Attorney-Client Privilege," 1997 Ann. Surv. Am. L. 629.

The First Circuit has noted the important distinction between an individual asserting the attorney-client privilege in his personal capacity as opposed to his capacity as an officer of a corporation. In Re Grand Jury Proceedings, 469 F.3d 24 (1st Cir. 2006) (individual, who was corporation's president but asserted privilege in personal capacity, could not intervene in federal grand jury investigation to assert privilege on behalf of corporation since claim was not brought on behalf of the corporation).

Public Records

Whether the attorney-client privilege can be used as a shield to resist a request under the public records law, Mass. Gen. Laws ch. 66, § 10, and Mass. Gen. Laws ch. 4, § 7, cl. 26, was resolved by the Supreme Judicial Court in Suffolk Const. Co., Inc. v. Division of Capital Asset Management, 449 Mass. 444 (2007). The case came before the Court on a reported question: "Do the provisions of the public records law, comprised of G.L. c. 66, § 10 and G.L. c. 4, § 7(26), preclude the protection of the attorney-client

privilege from records made or received by any officer or employee of any agency of the Commonwealth?" Id. at 445. The Court ruled that:

> [w]e answer the reported question in the negative. As we discuss more fully below, the attorney-client privilege is a fundamental component of the administration of justice. Today, its social utility is virtually unchallenged. Nothing in the language or history of the public records law, or in our prior decisions, leads us to conclude that the Legislature intended the public records law to abrogate the privilege for those subject to the statute.

Id. at 445-46. The Court added that '[w]e now state explicitly that confidential communications between public officers and employees and governmental entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the normal rules of the attorney-client privilege." Id. at 449.

What Communications are Privileged

In Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc., 449 Mass. 609, 619 (2007), the Supreme Judicial Court ruled that while "the identity of an attorney's client and the source of payment for legal fees are not normally protected by the attorney-client privilege... details in billing statements may reveal confidential communications between client and attorney." Thus, detailed billing statements may be communications that are protected by the privilege.

The Supreme Judicial Court addressed the distinction between legal and business advice (in this case tax advice) in the Comcast case and held that "[w]e recognize the difficulty of drawing a line between 'legal' advice and 'tax or accounting' advice...." Comcast, 453 Mass. at 311. In Comcast, an in-house attorney, who was "free to seek advice on Massachusetts tax law from a Massachusetts attorney.... chose to obtain tax

"advice on Massachusetts tax law from Massachusetts accountants...." Id. Thus, those communications were not protected by the privilege.

Joint Defense Arrangements

In Hanover Ins., the Supreme Judicial Court "also formally recognize[d] the longstanding use and validity of joint defense agreements, an exception to waiver of the attorney-client privilege under the common interest doctrine." 449 Mass. at 610 "[T]he common interest doctrine 'extend[s] the attorney-client privilege to any privileged communication shared with another represented party's counsel in a confidential manner for the purpose of furthering a common legal interest.'" Id. at 612 (citations omitted).

In its ruling in Hanover Ins., the Supreme Judicial Court, after reviewing the importance of the attorney-client privilege, "adopt[ed] the principle of Restatement (Third) of the Law Governing Lawyers § 76(1) as the law of the Commonwealth." Id. at 617. The Restatement (Third) of the Law Governing Lawyers § 76(1) (2000) provides that:

> [i]f two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

Id. at 614. The Court also noted that (a) the client does not need to give express consent to create a joint defense agreement (Id. at 617); (b) the agreement does not need to be in writing (Id. at 618); and (c) the clients do not need to have identical interests and "a common interest that is no more than a joint effort to establish a common litigation defense strategy" is sufficient (Id.).

Presence of Third Parties and Agents of an Attorney

In Comcast, the Supreme Judicial Court addressed the applicability of the Second Circuit's opinion in United States v. Kovel, 296 F. 2d 918 (2nd Cir. 1961). The Court took a narrow view of Kovel, analogizing the role of the accountant to an interpreter, and holding that it "applies only when the accountant's role is to clarify or facilitate communications between attorney and client." Comcast, 453 Mass. at 307-08. Although the Court held that the attorney-client privilege was limited, it did accord work product protection to the accountants' work. Id. at 311-19. In contrast, in United States v. Textron, Inc., 577 F. 3d 21 (1st Cir. 2009) (en banc) the First Circuit ruled that tax accrual work papers were required by statute and used for audits and so were *not* work product.

Two Superior Court opinions address whether the attorney-client privilege applied to e-mails between a company employee and his private attorney that were sent using the company's computer system. Transocean Capital Inc. v. Fortin, 21 Mass. L. Rptr. 597, 2006 Mass. Super LEXIS 504 (October 20, 2006) (Gants, J.); National Economic Research Associates, Inc. v. Evans, 21 Mass. L. Rep. 337, 2006 Mass. Super LEXIS 371 (Aug. 3, 2006) (Gants, J.)

In Evans, an employee used his company's laptop computer to access his personal e-mail account and, through that account, exchanged e-mail with his personal attorney. Unbeknownst to the employee, these communications were captured on his laptop's hard drive and, after the computer was returned to his employer, retrieved by the employer's expert computer consultant (but not reviewed by the company's counsel pending the court's guidance). The court ruled that because the company's employee manual warned employees that their e-mails could be reviewed by the company, if the e-mails had been

sent from the employee's *work* e-mail, they would not have been privileged. Here, however, the employee used his personal e-mail address. Since the employee manual did not say that the company would monitor such communications if used with company equipment, the communications were privileged.

In Fortin, the employee used his company e-mail address to communicate with his counsel. Applying its holding in Evans, the court held that the communications were privileged because the company did not have its own employee manual and the employee handbook used by the third party that it retained to handle its human resources had not been specifically adopted by the company.

Whether one is an "agent" for purposes of the attorney-client privilege depends on the nature of the relationship between the attorney and the alleged agent. For example, when a university appointed an independent investigator to examine issues concerning a student's suicide, the investigator's communications with the university's counsel were not privileged because the investigator, who was an independent contractor not subject to the university's, direction or control, was not acting as an agent of the university. Carpenter v. M.I.T., 19 Mass. L. Rptr. 339, 2005 Mass. Super. LEXIS 246 (May 17, 2005) (Connolly, J.).

Crime-Fraud Exception

In order to successfully challenge the attorney-client privilege on the basis of the crime-fraud exception, the challenger must show "(1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity." In Re Grand Jury Proceedings, 417 F.3d 18,

22 (1st Cir. 2005), cert denied, 546 U.S. 1088 (2006) (citations omitted). The court held that:

> it is enough to overcome the privilege that there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud. The circuits -- although divided on articulation and on some important practical details -- all effectively allow piercing of the privilege on something less than a mathematical (more likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud. This is a compromise based on policy but so is the existence and measure of the privilege itself

Id. at 23.

In a 2009 case, In the Matter of a Grand Jury Investigation, 453 Mass. 453 (2009), the Court held that the attorney-client privilege applied to threatening messages left by a client on an attorney's answering machine and therefore the attorney could not be compelled to testify about those messages. As in Purcell v. District Attorney for the Suffolk Dist., 424 Mass. 109 (1997), however, the attorney acted permissibly in initially disclosing the messages to the judge consistent with Massachusetts Rule of Professional Conduct 1.6.

Waiver

A party who "chooses to inform another of the advice provided by counsel" waives the privilege. Transocean Capital, Inc. v. Fortin, 21 Mass. L. Rep. 597, 2006 Mass. Super. LEXIS 504 (October 20, 2006) (Gants, J.). In Fortin, a party stated the advice he had received from counsel in an e-mail. The court noted that

> [i]f Fortin had simply stated, as he had in the previous sentence of this e-mail, that Fortin had decided to pursue a particular course after consultation with counsel, he would not have waived the privilege, because he would not have communicated the substance of the advice he received from counsel. By choosing to describe that advice, he waived his right to protect the advice under

the privilege because the advice, having been communicated to a third party, was no longer confidential.

Inadvertent Disclosure

Two Superior Court cases highlight the fact-intensive nature of the inquiry as to whether the privilege has been waived via an inadvertent disclosure. In Mira v. O'Brien, 16 Mass. L. Rptr. 707, 2003 Mass. Super. LEXIS 275 (Oct. 2003) (Gants, J.), a privileged letter to plaintiff's counsel, *William* O'Brien, was mistakenly produced to defendant *Daniel* O'Brien. The court ruled that disclosure was inadvertent and the privilege was not waived. However, the court further held that if "the inadvertently disclosed letter contained information that established the falsity of the testimony at trial," it could be used for impeachment purposes. In contrast, in McMahon v. Universal Golf Constr. Corp., 20 Mass. L. Rptr. 59, 2005 Mass. Super. LEXIS 468 (Sept. 8, 2005) (Agnes, J.), the privilege was waived where the number of documents being produced was not large, the document in question had not been segregated or reviewed by an attorney, and the disclosing party "did not act quickly to rectify its mistake once it became aware that a document had been inadvertently produced and, in fact, did not notice the disclosure at all until opposing counsel marked it as an Exhibit at least two months later."

Disputes Involving Attorneys and Their Former Employees

When an attorney is involved in litigation with his or her former employee, disclosure of materials previously prepared or reviewed by attorney raises complicated issues of the right to discovery versus professional obligations to preserve confidences and maintain the privilege. In one Superior Court case, the court attempted to balance

these competing interests. Grieco v. Fresenius Medical Case Holdings, Inc., 23 Mass. L. Rep. 588, 2008 Mass. Super. LEXIS 63 (Feb. 20, 2008) (Neel, J.). In Grieco, the court held that the question of whether such documents were discoverable was different than whether they could be used by an in-house attorney in litigation against his former employee, an issue addressed in two Supreme Judicial Court cases, GTE Products Corp. v. Stewart, 421 Mass. 22 (1995) and GTE Products Corp. v. Stewart, 414 Mass. 721 (1993) (a separate issue in Grieco was whether Rule 1.6 of the Massachusetts Rules of Professional Conduct changed the GTE holdings). The Fresenius court held that: "where former in-house counsel sues his or her former employer, the attorney-client privilege is not violated when the employer is required to produce to the plaintiff privileged documents which the plaintiff either authorized or received while acting as in-house counsel." Disclosure to the plaintiffs' attorneys also was permissible. Id. at *9.

Litigation Disputes Concerning the Privilege

One Superior Court Justice has noted that "[o]ur rules of civil procedures do not expressly impose on the party withholding documents any additional obligation. Nonetheless, the use of privilege logs by parties withholding documents in this context is a common feature of Massachusetts discovery practice." Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's London, 17 Mass. L. Rptr. 665, 2004 Mass. Super. LEXIS 182 (May 21, 2004) (Agnes, J.) (subsequent proceedings at 449 Mass. 621 (2007)). In Allmerica, the court required the use of a privilege log and held that:

> as a general rule a privilege log should include a list of individual documents accompanied by the date of each document, its author, the addressee or recipient, a description of its contents sufficient to describe its character as privileged, and the particular privilege asserted. In keeping with the view of the drafters of the

> federal rules, this general rule is not hard and fast and some flexibility is permitted when the character of a group or category of documents as privileged is evident.

Id. at *8.

In cases involving public claims of privilege, the Supreme Judicial Court has stated that "we emphasize that public officials seeking the protection of the attorney-client privilege are required to produce detailed indices to support their claims of privilege...." Suffolk Const., 449 Mass. at 460.

In Comcast, the Supreme Judicial Court set forth the standard of review for privilege decisions of a trial court. Comcast, 453 Mass. at 302. The Court held that:

> In general, we uphold discovery rulings "unless the appellant can demonstrate an abuse of discretion that resulted in prejudicial error." *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 653, 783 N.E.2d 399 (2003), citing *Solimene v. B. Grauel & Co.*, 399 Mass. 790, 799, 507 N.E.2d 662 (1987). Where the attorney-client privilege is concerned, however, our review is more textured. On appeal from any decision on a privilege claim, we review the trial judge's rulings on questions of law de novo. We generally review a judge's fact findings, at least after a bench trial, for clear error. See Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996). Where, as here, we are dealing with a motion to compel and the motion judge's findings are based solely on documentary evidence, we do not accord them any special deference. Cf. *Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2002) (under Federal law findings of motion judge on a documentary record reviewed for clear error). We review discretionary judgments for abuse of discretion. See *Matter of a Grand Jury Investigation*, 437 Mass. 340, 356, 772 N.E.2d 9 (2002) (evidentiary ruling where privilege at issue). Mixed questions of law and fact, such as whether there has been a waiver, generally receive de novo review. See 2 P.R. Rice, Attorney-Client Privilege in the United States § 11.36, at 234-236 & nn. 43-46 (2d ed. 1999) (surveying Federal jurisprudence and concluding that appellate courts generally review mixed questions of law and fact de novo).

Id. at 302-03 (footnote omitted).