

# Confidentiality and the Port Lawyer

AAPA Port Administration and  
Legal Issues Seminar  
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# Introduction

## Overview

1. Attorney-client privilege
2. Work product privilege
3. Special issues for public entities regarding privilege
4. Audits and privilege issues
5. Selective waiver

# Attorney-Client Privilege

## 1. What is it?

It is a duty and a rule that keeps certain communications between a lawyer and client confidential.

## 2. Elements

- A. A communication
- B. Made between privileged persons
- C. In confidence
- D. For the purpose of seeking, providing or obtaining legal assistance to the client

# “for the purpose of providing legal assistance to the client”

- Just because you say it or write it, doesn't make it privileged.
- The mere presence of counsel in a conversation doesn't mean what's stated is privileged.
- Putting attorney on a cc in correspondence doesn't work either.
- Also applies in public disclosure analysis.

# Upjohn v. United States

- Policy behind the privilege:  
Candor

# Sources for the duty

1. Rules of professional conduct.

An ethical duty—See MRPC 1.6

2. Rules of evidence

An evidentiary protection—See FRCP 23(b)(3)

# The Work Product Privilege

## 1. What is it?

Designed to prevent adversaries from obtaining an attorney's work prepared in anticipation of litigation.

## 2. How did it come about?

Hickman v. Taylor

Fed. Rules of Civil Procedure 26(b)(3)

# Work Product

1. What qualifies as work product?—

Documents and tangible materials prepared in anticipation of litigation

2. Intention of the rule—

protect disclosure from an adversary.



# Work Product

Types of Work Product:

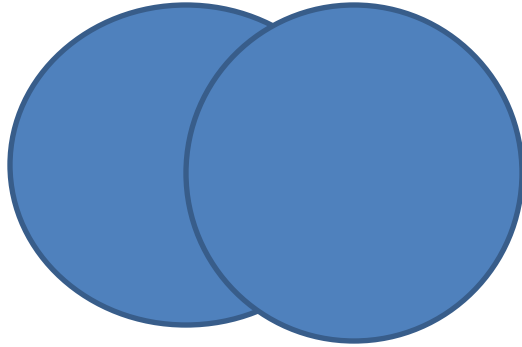
Opinion work product

attorney's opinions, mental impressions

Non-opinion or fact work product

facts, data, tangible material

# Contrasting Attorney-Client and Work Product



The two privileges overlap, but not completely.

# Contrasting Attorney-Client and Work Product

1. Attorney-Client privilege is  
a wall between the attorney/client  
relationship and the rest of the world.
2. Work-Product privilege is  
a wall between the attorney's trial  
preparation and an adversary.

# Contrasting Attorney-Client and Work Product

It is possible to waive attorney-work product without waiving attorney-client privilege.

It is also possible to waive attorney-client privilege without waiving work-product privilege.

This is a more difficult scenario.

# Waiver

## Attorney-client privilege

- A. Types of waiver:
  - i. Voluntary
  - ii. Implied
  - iii. Inadvertent
  
- B. Who can waive it?
  - i. For voluntary waiver, client owns the privilege, only client can waive it.

# Waiver--Scope

If a document containing attorney-client privileged information is released, what is the scope of the waiver?

A. Voluntary and implied

—Depending on situation, can be very broad (extending beyond the one document).

# Waiver-Scope

## B. Inadvertent

### 1. Traditional rule—

Full subject matter waiver

### 2. Modern approach—3 positions

i. Full waiver

ii. Lenient

iii. Middle approach

# Waiver-Scope

## Modern middle approach for inadvertent waiver

5 factors considered on scope of waiver:

1. Reasonable precautions taken?
2. Number of inadvertent disclosures.
3. Extent of disclosures.
4. Speed to rectify situation.
5. Overriding interests of justice.



# Waiver

## Issues for public entities

1. Grand Jury/criminal investigations—Can a government attorney assert the privilege?

Short answer—No.

See Whitewater cases.

# Public Disclosure Laws and Privileged Information

Sometimes referred to as “Sunshine Laws”, these state laws include requirements for **disclosure of documents** and

requirements that governing bodies of public entities conduct their business in **open public meetings**.

# Public Disclosure Laws and Privileged Information

What happens when these public disclosure laws collide with attorney-client and work product privileges?

Most states recognize (in varying degrees) that the two privileges are not superseded by the public disclosure laws.

# Public Disclosure Laws and Privileged Information

“Most”—but not all:

Arkansas and Nevada courts have ruled that their disclosure laws (with respect to documents) override attorney-client and work product privileges.

Correspondence from legal counsel would be available for review by outside parties.

# Public Disclosure Laws and Privileged Information

## Florida

Florida used to be as bad as Arkansas and Nevada. The courts interpreted its sunshine laws as superseding the privileges. Amendments to the law in recent years have softened the law, but it is still a challenging environment for public lawyers.

# Public Disclosure Laws and Privileged Information

Florida, Nevada, and Arkansas aren't necessarily anomalies or outliers. Demands from the media, suspicion of government, and political grandstanding are constant threats to the privilege.

# Audits and Privilege Issues

Kinds of audits:

1. Financial audits

Annual reviews of financial conditions at an agency.

2. Investigative or performance audits

Special audits conducted to examine a specific situation or to review operations to determine if efficiencies or best practices can be achieved.

# Audits and Privilege Issues

## Financial audits—Results

Reports are graded as opinions.

1. Best “grade” is an “unqualified opinion”
2. “Qualified opinion”—indicates there are departures from generally accepted accounting principles or material uncertainties.
3. “Adverse opinion”—Bad news.



# Audits and Privilege Issues

## Performance Audits

1. Many states have the ability to undertake.
2. The audit findings will indicate where there are deficiencies in operations and make suggestions for improvement.

# Audits and Privilege Issues

Where audits and privilege issues intersect:

CPA industry has felt the sting of public criticisms over its quiescent role in recent high-profile collapses of large corporations and banks. Also, the collapse of Arthur Andersen over the Enron scandal shocked the industry.

# Audits and Privilege Issues

Where they intersect—

Partially as a result of these criticisms, auditors have been more willing to demand that they inspect attorney-client privileged documents

The stick?

An opinion that may not be “unqualified.”

# Audits and Privilege Issues

What happens to the privileges attached to documents if auditors see them?

1. If the document is subject to attorney-client privilege, the privilege is waived.

# Audits and Privilege Issues

2. Work product documents shown to an auditor:

The privilege has a chance of surviving, but don't bet the farm.

# Audits and Privilege Issues

## 3. The key issue:

Does the court consider the auditor an adversary?

In other words, are the interests of the port and the interests of the auditor adverse?

It depends on the court.

Most federal circuits recognize the adversary test.

# Audits and Privilege Issues

## Audit Confirmation Letters

### Audit Confirmation Letters—

Letters required by outside auditors that provide information on the status of outside litigation or other potential liability.

The information required will often include estimates of cost as well as appraisal of risk.

# Audits and Privilege Issues

## Audit Confirmation Letters

Are the contents of these letters subject to discovery requests by opposing counsel in the litigation discussed in the letter?

A number, but not all, federal circuits say no.

They have adopted the so-called “because of” rule—the letter was prepared in the first place “because of” the fact there was litigation so its protected under work product privilege (especially opinion work product).



# Selective Waiver

## Selective Waiver

A doctrine that allows an entity to cooperate with law enforcement investigations by turning over privileged documents without waiving either attorney-client or work product privileges.

# Selective Waiver

Does it work?

Not so much.

With respect to attorney-client, only 8<sup>th</sup> Circuit recognizes it in the federal system. 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, and DC Circuits have rejected it.

# Selective Waiver

Does the doctrine apply to work product protected documents?

Among federal circuits, only 4<sup>th</sup> recognizes selective waiver applying to work product, and then only for opinion work product.

# Selective Waiver

No recognition for selective waiver on work product—

1<sup>st</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 10<sup>th</sup> Circuits.

Selective waiver might work on work product if there's a confidentiality agreement in place.  
cases in 2<sup>nd</sup> and D.C. circuits.

# Selective Waiver

General recommendation:

It's a risky proposition.

Don't rely on it if you don't have to.

If you feel you have to use it, negotiate a confidentiality agreement.

# Questions?