

Confidentiality and the Port Lawyer

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I. Introduction

One of the foundations of the legal profession is confidentiality and secrecy. The communication between lawyers and their clients is special enough that society has been willing to shield that communication from the ears and eyes of anyone outside that relationship. The rules governing that shield are narrow and specific and lawyers must exercise extreme caution to protect it. This vigilance is being tested in new ways as competing policies have eroded the privilege in recent years. One of these corrosive forces has come from external audits to which private and public bodies are required to submit. Recent financial scandals and a perceived laxness by the accounting profession have given momentum to efforts to override the attorney-client privilege in ways that would have been unimaginable twenty years ago.

This paper will discuss the issues that ports face with respect to preserving the attorney-client privilege. The paper will first cover the fundamental principles regarding the attorney-client privilege and the work product rule. The paper will touch briefly on the way public disclosure laws affect the treatment of privileged documents. The final section will turn to the issue of outside audits and how the demands by auditors threatens the privilege, requiring port attorneys to exercise a heightened degree of diligence to protect the privilege.

II. The Attorney-Client Privilege

- A. The attorney-client privilege protects the communication, written or verbal, between an attorney and his or her client from outside parties. The privilege is, from a practical standpoint, a promise to the client that the communication with the lawyer will remain confidential.

B. The most useful listing of privilege elements is in the Restatement, Law Governing Lawyers.

1. The attorney-client privilege arises when there is:
 - a. A communication
 - b. Made between privileged persons
 - c. In confidence
 - d. For the purpose of seeking, providing or obtaining legal assistance to the client¹
2. While all four elements raise issues, the fourth element provides some of the trickiest problems. The key to that element is that the advice sought or given must be related to the law. Merely because a lawyer says something does not mean that the utterance is cloaked in privilege. There are many cases where a court has ruled that an attorney's statement was not privileged because it was not connected to the rendering of legal advice or because the lawyer was not acting in the capacity of a lawyer.² When a lawyer (acting in the capacity of a lawyer) gives mixed business and legal advice, some courts are willing to recognize the existence of the privilege, so long as the predominant purpose of the communication was for the rendering of legal advice.³

C. The policy underlying the existence of the privilege.

¹ Restatement on the Law Governing Lawyers, Section 118. John Henry Wigmore outlined the original elements for privilege in 1905:

1. Where legal advice of any kind is sought
2. From a professional legal adviser in his capacity as such
3. The communications relevant 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 when the client waives the protection

Adam Chud, 84 Cornell L. Rev. 1682, 1686-1687 (September 1999), citing Wigmore, A Treatise on the System of Evidence in Trials at Common Law Sec. 2292.

² U.S. ex rel. Fago v. M&T Mortgage Corp., 238 FRD 3 (D.D.C. 2006); see 27 ALR 5th 76, sec. 38.5 suppl.; see also Ross Garber "The Government Attorney-Client Privilege", In Ethical Standards in the Public Sector, 2nd ed., Patricia Salkin, (ed.) (American Bar Association, 2008), p. 326.

³ Garber, p.325, citing In re the County of Erie, 473 F.3d 413, 421 (2d Cir. 2007).

1. The U.S. Supreme Court case of Upjohn Co. v. United States⁴ provides an oft-quoted rationale for the existence of the privilege:

“Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”⁵

2. The D.C. Circuit offered this illuminating rationale for why society is willing to recognize the privilege: “The privilege reflects society’s judgment that promotion of trust and honesty ... is more important than the burden placed on the discovery of truth.”⁶ The “trust and honesty” referred to by the court was in connection with the candor required in the communication between the attorney and client. The assurance of confidentiality supposedly encourages clients to seek out legal advice sooner.⁷
3. The attorney-client privilege has long been recognized to apply to corporations. Governmental bodies also enjoy the privilege, both at the state and federal level.⁸

D. Sources for the attorney-client privilege.

1. “Sources” as used here refers to the statutes and court rules that allow the privilege to exist within federal and state courts.
2. Note the distinction between the lawyer’s duty of confidentiality and the attorney-client privilege. The requirement that a lawyer maintain the confidences of a client are embodied in the attorney’s code of professional responsibility. The American Bar Association publishes the Model Code of Professional Responsibility and each state adopts its own version of the code. Rule 1.6 creates the ethical obligation for lawyers to protect their clients’ confidential information. Most states have adopted the main part of this section dealing with the affirmative duty to maintain confidentiality (Sec. 1.6(a)).⁹

⁴ 449 U.S. 383 (1981).

⁵ Upjohn v. U.S., 449 U.S. at 389.

⁶ Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) cited in Chud, p. 1689, footnote 26.

⁷ Patricia E. Salkin and Allyson Phillips, “Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege”, Indiana Law Review, 39 Ind. L. Rev. 561, 363 (2006).

⁸ See Chud, 1703-1704, footnote 134 and 135 for a list of federal and state cases recognizing the application of the privilege to governmental bodies and their lawyers.

⁹ The full text of MRPC 1.6 is below:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

3. The obligation to maintain confidentiality is separate from the attorney-client privilege. The attorney-client privilege is actually an evidentiary rule recognized at the state and federal level. The privilege shields either the attorney or the client from having to divulge in legal proceedings the contents of their communications.¹⁰

III. The Work Product Privilege

- A. This is a doctrine created by the Supreme Court that prevents adversaries from obtaining an attorney's work prepared in anticipation of litigation.
 1. The doctrine was created in Hickman v. Taylor in 1947.¹¹
 2. The Federal Rules of Civil Procedures and many states have effectively codified the work product doctrine in the rules governing discovery.¹²

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

¹⁰ Kathleen Clark, "Government Lawyers and Confidentiality Norms", Washington University Law Review, 85 Wash. U. L. Rev. 1033, 1041, 1044 (2007).

¹¹ 329 U.S. 495 (1947)

¹² FRCP 26(b)(3):

(3) Trial Preparation: Materials.

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

3. Two key points to remember about the work product privilege: First is that it is intended to protect documents and tangible things an attorney has assembled in preparation for a trial. The second point is that it is intended to shield disclosure from an adversary. Unlike in attorney-client confidentiality, the work product privilege is not lost if seen by non-clients so long as they are not adversaries to the client.¹³
- B. Types of work product. There are two types of work product:
1. Opinion work product: This is the mental impressions, conclusions, opinions, or legal theories of an attorney prepared in anticipation of litigation.
 2. Fact or non-opinion work product: For lack of a better description, this is everything that is not opinion work product. These include fact statements, photographs, research data, and other facts gathered to help prepare for a trial.
- C. The elements of the work product privilege: The privilege applies
1. To documents and tangible things that are otherwise discoverable. “Otherwise discoverable” means that anything which is not otherwise subject to another privilege.¹⁴
 2. To materials prepared in anticipation of litigation. What is meant by “in anticipation?” The cases suggest that this does not merely refer to the time when the materials were prepared, but that the motivation behind the preparation was because of the reasonable threat of litigation. Thus, routine work done in the ordinary course of business but nonetheless helpful in litigation would not be protected.¹⁵
 3. To materials prepared by or for another party or that party’s representative. This provision covers the people and experts who gather the materials under the direction of the attorney in anticipation of litigation.

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- (i) they are otherwise discoverable under Rule 26(b)(1); and
 - (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

¹³ Salkin and Phillips, 39 Ind. L. Rev. at 606.

¹⁴ Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine, (5th ed.) American Bar Association, p. 815 (2007).

¹⁵ Epstein, pp. 836-854.

IV. Waiver

- A. Confidentiality can be waived. If a lawyer gives up confidentiality intentionally (without the client's consent) or through carelessness or malfeasance, then that leads to a different consequence involving disciplinary hearings before the appropriate state bar association.¹⁶
- B. The general rule is that only the client can authorize waiver of the privilege. The lawyer can waive the privilege, but only if he/she is acting as agent for the client.
- C. Waiver of the privilege can be voluntary, implied, or inadvertent.¹⁷
- D. When dealing with the inadvertent or unintentional waiver, the key question centers on the scope of the waiver. The traditional rule states that "waiver as to one document waives the privilege for other documents relating to the same subject matter."¹⁸ Other courts use the "lenient approach" and state that the privilege remains intact¹⁹ although the privilege is likely lost for the particular communication imparted to a third party.²⁰ There is a third approach that is between the strict and lenient approaches with regard to the scope of the waiver. This approach has a five-part analysis:
 - 1. the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production,
 - 2. the number of inadvertent disclosures,
 - 3. the extent of the disclosures,
 - 4. the promptness of measures taken to rectify the disclosure, and
 - 5. whether the overriding interest of justice would be served by relieving the party of its error.²¹

¹⁶ See the following report on a case of a general counsel attempting to justify his disclosure of privileged information in a lawsuit against his former employer:
http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202489272936&Judge_Rules_Former_GC_Cant_Disclose_Prileged_Info_in_Whistleblower_FCA_Suit

¹⁷ Shawn T. Gaither, "The Attorney-Client Privilege: An Analysis of Involuntary Waiver", Cleveland State Law Review, 48 Clev. St. L. Rev. 311, 313-314 (2000).

¹⁸ Kenneth S. Broun, McCormick on Evidence, (6th ed.) Sec. 93, citing In re Matter of Estate of Baker, 528 N.Y.S. 2d 470 (Sur. 1988); see also Karl Tegland, "Evidence Law and Practice", (5th ed.), 5A Wash. Prac., Sec. 501.25, footnote 22.

¹⁹ Gaither, p. 315.

²⁰ Broun, Sec. 93, text +-at note 14.

²¹ Gaither, p. 316.

V. Selected privilege issues specific to public entities.

- A. Grand Jury investigations. Courts generally recognize that the attorney-client privilege applies to government lawyers and their clients. Some courts, however, have been unwilling to extend that recognition where a grand jury is investigating criminal activity by public officials.
1. The series of cases that arose out of Kenneth Starr's Office of Independent Counsel investigations during the Clinton administration echoed this theme.
 2. In re Lindsey²² and In re Grand Jury Subpoena Duces Tecum²³ gave two different federal circuits the opportunity to decide whether or not attorneys within the Clinton administration could be compelled to testify regarding communications they had with their clients.
 3. In re Grand Jury Subpoena Duces Tecum involved the disclosure of notes made by a White House attorney during a meeting with Hilary Clinton and her private lawyer. The Court's ruling was based on its research showing that there were no cases upholding the privilege for a public body when potential criminal activity was involved. It also ruled that to allow a government lawyer to assert the privilege to impede a criminal investigation was "a gross misuse of public assets."²⁴
 4. In the Lindsey case, the D.C. Circuit refused to allow Bruce Lindsey, Deputy White House Counsel, to claim privilege in testifying before a grand jury investigating the Monica Lewinsky scandal. The court cited different factors in ruling against the application of the privilege. One of the factors was the court's concern that the spectacle of one branch of the national government using the privilege to impede investigations of criminal wrongdoing was bad policy. The court also felt that government lawyers had a duty to expose wrongdoing by officials.²⁵
- B. Public Disclosure Laws (Freedom of Information Act)
1. Public disclosure laws (often referred to as freedom of information act, or FOIA, following the federal statute by that name or "sunshine laws") vary from state to state. They require state and local governments, including port authorities, to make available public records held or controlled by the government following a written request. Bear in mind that when discussing public disclosure, the issue centers on disclosure of documents. The attorney-

²² 148 F.3d 1100 (D.C. Cir. 1998).

²³ 112 F.3d 912 (8th Cir. 1997).

²⁴ Id., at 921; see also, Chud, pp. 1695-1696.

²⁵ Clark, p. 1038.

client privilege centers on communication in all its forms, so the verbal component of attorney-client communications will not be subject to these laws. Such verbal communication can, however, become ensnared in state open public meetings laws (see the examples of Nevada, Arkansas and Florida).²⁶ In Nevada and Arkansas, the courts take the position that the open meetings laws supersede the attorney-client privilege, so that any briefing by a public body's counsel to its governing board would have to be done in open session.

2. Most states' public disclosure laws recognize the attorney-client privilege and work product privilege.
3. Florida is difficult as well, although there appear to be case law interpretations about what constitutes a public record for purposes of the statute that soften the impact of disclosure of privileged information.²⁷ A public attorney's internal notes are exempt from disclosure, but only if there is a threat of imminent litigation. The situation there is far from perfect and creates difficult challenges for attorneys representing public agencies.

VI. Audits and Privilege Issues

- A. Financial audits. These are annual reviews of the financial health of an organization. All public agencies go through these audits.
- B. Investigative or performance audits. These are different from the annual financial audits in that they are looking beyond mere financial issues. These kinds of audits are often conducted under the auspices of an external and higher governing body, usually under authority of a state law. They may be ordered in response to allegations of wrongdoing within the agency or they may be to examine the business practices of the organization to determine if there are efficiencies or best practices that should be implemented. A number of states conduct performance audits, including Washington²⁸, California,²⁹ New York,³⁰ and Texas.
- C. Auditors have their own language, especially when it comes to issuing financial audits. Auditors' reports are issued as opinions. The best grade to receive from an auditor in these situations is an "unqualified opinion." This phrase indicates that the organization's "financial statements fairly and accurately present the financial

²⁶ Marion J. Radson and Elizabeth A. Waratuke, "The Attorney-Client and Work Product Privileges of Government Entities", *Stetson Law Review*, 30 Stetson L. Rev. 799, 815-816 (2001).

²⁷ Radson and Waratuke, p. 832.

²⁸ See RCW 43.09.430-460.

²⁹ See <http://www.bsa.ca.gov/aboutus/faqs>.

³⁰ See <http://www.osc.state.ny.us/localgov/audits/auditdef.htm> (local government) and <http://www.osc.state.ny.us/audits/index.htm> (state agencies).

- position of the [organization], the results of its operations and the changes in its financial position for the period under audit, in conformity with generally accepted accounting principles.” A “qualified opinion” indicates that “financial statements are fairly presented except for, or subject to, a departure from generally accepted accounting principles, a change in accounting principles, or a material uncertainty.” The worst news from an auditor is an “adverse opinion” which says that the auditor has determined that the organization’s “financial statements do not fairly present the financial position, results of operations, or changes in financial position of the [organization] in conformity with generally accepted accounting principles. An auditor can also issue a disclaimer of opinion if the auditor is unable to “draw a conclusion as the accuracy” of the organization’s financial records.³¹
- D. In addition to performing standard annual financial audits, many states have the statutory ability to carry out performance audits of state and local government agencies. These audits are typically undertaken or supervised by a branch of the state government, often a state auditor.
- E. The recent failures by large accounting firms to voice concerns over the financial practices of Wall Street have led to a heightened attentiveness by the accounting industry. The financial accounting review process has become more rigorous and stringent than in recent years.
- F. This heightened diligence by the accounting industry has led to auditors asking for materials that are subject to either attorney-client, work product, or both privileges. The stick behind their requests is a threat to issue opinions other than “unqualified.”
- G. The Waiver Danger
1. Attorney-client privilege. Disclosure of attorney-client privileged documents to outside auditors will waive the privilege.³²
 2. Work product privilege.
 - a. The waiver of work product seems to arise more frequently in the cases involving outside auditors.
 - b. The key issue in whether or not work product is waived is if the privileged documents are shown to an adversary.³³ The 2nd, 3rd, 4th, 8th, and D.C.

³¹ Ricardo Colón, “Caution: Disclosures of Attorney Work Product to Independent Auditors May Waive the Privilege,” Loyola Law Review, 52 Loy. L. Rev. 115, 116 footnote 16 (2006). This information is from Codification of Statements on Auditing Standards, Sec. 508.

³² Gideon Mark and Thomas C. Pearson, “Corporate Cooperation During Investigations and Audits,” Stanford Journal of Law, Business and Finance, 13 Stan. J.L. Bus & Fin. 1, 24 (2007).

³³ See Medinol, Ltd. v. Boston Scientific Co., 214 F.R.D. 113 (S.D.N.Y., 2002).

Circuits have concluded that parties waive work product privilege if they show materials to adversaries.³⁴ Many of the cases involving auditors have turned on whether the outside auditors are considered adverse to the company and its counsel with courts reaching opposite conclusions.³⁵ Other courts have focused on whether or not the documents would be in danger of winding up in the hands of adversaries after being turned over to outside auditors (seemingly avoiding the threshold question of whether the auditors themselves were adversaries).³⁶

- c. Auditors will usually require that the organization submit “audit confirmation” letters from outside counsel. These letters are intended to provide information regarding the possibility or uncertainty of potential legal claims. These letters may include information relating to reserves for litigation costs and settlement amounts.³⁷ The concern about this information is that it could reveal key information that would be extremely helpful to opposing counsel. The Adlman case is frequently cited as authority that such letters would be within the protection of the work product privilege:

“In addition to the plain language of the Rule, the policies underlying the work-product doctrine suggest strongly that work-product protection should not be denied to a document that analyzes expected litigation merely because it is prepared to assist in a business decision. Framing the inquiry as whether the primary or exclusive purpose of the document was to assist in litigation threatens to deny protection to documents that implicate key concerns underlying the work-product doctrine.”³⁸

Most federal circuits have ruled that such information would be protected as work product under what is known as the “because of” standard.³⁹ The concept is that an audit confirmation letter would not have been prepared in the first place but for the fact of the litigation described in the letter. Such information regarding the attorney’s assessment of pending litigation qualifies as work product.

One key component to keep in mind is that these cases are federal. State courts may not necessarily accept this analysis under their own interpretation of the work product doctrine.⁴⁰

³⁴ Colón, p. 126, footnote 68.

³⁵ Colón, pp. 116-117.

³⁶ Colón, p.128.

³⁷ Colón, pp. 138-139.

³⁸ U.S. v. Adlman, 134 F.3d 1194, 1199 (2d Cir. 1998).

³⁹ Colón, p. 125, footnote 62.

⁴⁰ See Laguna Beach County Water Dist. V. Superior Court, 22 Cal. Rptr. 3d 387 (Cal. App. Dist. 4 2004).

VII. Selective Waiver—a (very) faint hope

- A. The federal government, primarily the SEC and the Department of Justice, have been leading a 30+ year effort to compel private companies to turn over protected documents and to waive attorney-client privilege when they are investigating potential criminal activity within the companies. Such cooperation is enshrined in sentencing guidelines that provide greater leniency if the corporation does not use attorney-client or work product to hide information from investigators. The dilemma for the corporations is how to cooperate with the federal government without waiving either privilege and thereby allowing third party lawsuits to gain access to privileged information.
- B. Selective waiver is a doctrine that allows corporation to cooperate with federal investigators by turning over privileged documents without waiving privilege with respect to third party litigation.⁴¹
- C. Overview.
1. The doctrine has only been accepted in the 8th Circuit. The 1st⁴², 2nd⁴³, 3rd⁴⁴, 4th⁴⁵, 6th⁴⁶, and 7th, 10th⁴⁷ and D.C.⁴⁸ Circuits have rejected it in some or all of its applications.⁴⁹
 2. The 8th Circuit created the doctrine in 1977 in Diversified Industries, Inc. v. Meredith.⁵⁰
- D. Selective Waiver and Attorney-Client Privilege.

⁴¹ Seth Spaulding Gomm, “In Re Qwest Communications International, Inc.: The Tenth Circuit Hangs Up the Phone on Qwests Petition for Selective Waiver, But the Line is not Dead” Berkeley Business Law Journal, 4 Berkeley Bus. L.J. 251, 254 (2007); Mark and Pearson, 13 Stan. J.L. Bus. & Fin. at 29.

⁴² United States v. Mass. Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997).

⁴³ In re John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982).

⁴⁴ Westinghouse Elec. Corp. v. Republic of the Phillipines, 951 F.2d 1414, 1422 (3d Cir. 1991).

⁴⁵ In re Martin Marietta Corp., 856 F.2d 619, 623-24 (4th Cir. 1988).

⁴⁶ In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289 (6th Cir. 2002).

⁴⁷ In re Qwest Communications Int., Inc. 450 F.3d 1179 (10th Cir. 2006).

⁴⁸ Permian Corp. v. United States, 665 F.2d 1214, 1216-1217 (D.C. Cir. 1981).

⁴⁹ Gomm, p. 263. Although the 9th Circuit has not ruled on it, the district courts that have ruled have been negative: McMorgan & Co. v. First California Mortg. Co., 931 F. Supp. 703, 707 (N.D. Cal. 1997); Fox v. California Sierra Financial Services, 120 FRD 520 (N.D. Cal. 1988); U.S. v. Bergonzi, 216 FRD 487 (N.D. Cal. 2003) (disclosure to government was tantamount to disclosure to adversary, thereby waiving work product protection); Continental Casualty Co. v. St. Paul Surplus Lines Ins., 265 FRD 510, 528 (E.D. Cal. 2010); a contrary result was reached for work product but not attorney-client in In re McKesson HBOC Securities Litigation, 2005 WL 934331 p. 10 (N.D. Cal. 2005).

⁵⁰ 572 F.2d 596 (8th Cir. 1977).

In Diversified Industries, the only circuit court to recognize selective waiver, the court held that the waiver was effective only as to the government.⁵¹ It was not clear if the extent of the waiver as to the government would be complete subject matter waiver or only for the documents provided.

E. Selective Waiver and Work Product Privilege.

1. The federal courts that have examined this issue have split into three camps:

- a. Allowing selective waiver for work product (4th Cir.) and then only for opinion work product.⁵²
- b. No selective waiver for work product (1st, 3rd, 6th, 8th, and 10th Circuits).⁵³
- c. Selective waiver might be recognized if a confidentiality agreement is signed (2d and D.C. Cir.).⁵⁴

F. Conclusion on selective waiver: The courts have been very hostile to the concept of selective waiver both for attorney-client and work product privileges. There are amazingly few state cases addressing this issue. Given the lack of state court precedent and the overwhelming hostility of most of the federal circuits to the doctrine, it is best not to try and rely on selective waiver if you are ever in the position of having to turn over privileged documents to anyone outside your port.

VIII. Conclusion

The attorney's duty of maintaining a client's confidentiality is both a duty and a burden. The duty arises out of the ethical rules that govern attorney conduct between the client and the rest of the world. The duty of confidentiality is one of the oldest of the traditional privileges and is designed to encourage complete candor between attorneys and clients. The work product privilege is a creation by the courts intended to facilitate attorneys' preparation for trial by keeping the playing field equal so that one side does not gain an unfair advantage by peeking at the other side's strategy and evidence. That the privileges are burdens is manifest in the ease with which these privileges can be lost through carelessness or by the aggressive pursuit of outside forces.

The burden of protecting these privileges is even heavier for attorneys representing ports and other public agencies. In addition to the legal issues that must be understood, there are the

⁵¹ Diversified at 572 F.2d 611.

⁵² In re Martin Marietta Corp., 856 F.2d 619, 625 (4th Cir. 1988).

⁵³ Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d at 1429; In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 306-07 (6th Cir. 2002); In re Chrysler Motors Corp., 860 F.2d 844, 845-47 (8th Cir. 1988); In re Qwest Comm. Int'l, Inc., 450 F.3d 1179, 1192 (10th Cir. 2006).

⁵⁴ In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993); In re Subpoenas Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984).

additional factors of public disclosure laws, open public meeting laws, politics, and public opinion that can affect how the agency chooses to handle the privilege. The task becomes even more difficult when routine tasks such as financial audits are pushing the boundaries on what outside parties want to see in the way of privileged documents. Whatever pressures are brought to bear on government lawyers and their clients for increased disclosure, giving in carries potentially dire consequences.

If the public wants to change the rules to reduce the uncertainty surrounding the need for confidentiality in government versus the desires for more transparency, those changes would have to be made not only on the legislative side, but the judicial/court rules side as well. The legislatures can deal with the statutory requirements that govern the legal privileges. The ethical obligations governing attorney conduct, however, may need to be addressed through the judiciary since the bar associations in many states are governed by the judiciary. In those states, only the judicial branch can amend the ethical rules that obligate the attorneys to fight vigorously to preserve confidentiality. The fact that no state has taken on that challenge suggests the scale of the difficulty involved in such a task. Those in government service should, however, be aware that those changes may not be far off.