11/12/2013 Class Notes Civil Procedure

10 classes left. We are going to breeze through discovery, then talk about preclusion and Erie, more than we did in previous years.

We are in discovery, talking about the scope. Not much we can do here. Most of what we are going to do today is discuss the work-product privilege.

* Not much we do in connection with discovery.

What is AC privilege?: Applies only to communications, not the underlying facts, between privileged persons made in confidence for the purpose of obtaining or providing legal representation.

* Privilege of the client. Client owns the AC privilege. More on this later…
* An evidentiary privilege: It is a way of refusing to give over evidence in discovery and a way to refuse to testify about it during trial.
  + Can see AC privilege as a kind of “shield.”
* Not talking about the duty of confidentiality: Not evidentiary, duty of lawyer not to blab about certain things, cannot be asserted if material is requested during the process of litigation.
  + There is a good deal of information that is subject to duty of confidentiality but NOT AC privilege.
  + Duty of Con. will be discussed in Prof. Responsibility, don’t worry about that now.
* Who are privileged parties?
  + Lawyer and client, and those aiding legal representation, like translators

Why do we have the AC privilege? So that the client can divulge the full details of a case to get effective representation

HYPO: Client tells you he was looking the other way. Interrogatory asks whether client told you he was looking the other way. AC Priviliege? Yes, privileged because it was about a communication.

What if interrogatory asks whether client was looking the other way? AC Privilege? No because the interrogatory is asking about the facts. Must answer truthfully.

What if client chooses to lie?

If you know it to be false, you would be required to inform the court. You have a duty not to offer information that you know to be false.

* If client insists that he will testify information you know to be false, you must withdraw –you cannot counsel or assist crime or fraud

Privilege against self-incrimination: In a criminal proceeding, you can choose not to testify. In a civil case? That’s not possible.

* Your client is compelled to take the stand. You are obligated to speak up if he lies OR ELSE you will be disciplined for counseling or assisting crime or fraud.

What is the benefit of AC privilege, if you are going to force client to tell the truth? (True in deposition OR in courtroom setting). “Does it ever help people speak freely to their lawyers at all?”

* If you tell client you are going to reveal the truth where he wants to lie, he will either lie to you initially OR leave you for another attorney, who he will lie to once again.

Say he leaves you for another attorney because you will not allow him to lie. He will go to that other attorney and get him a false story from the beginning.

* If you as the former lawyer know that he is lying, you can do nothing.
  + Former lawyer will be sanctioned for informing someone else because it violates Attorney client confidentiality!

So what are other benefits to the AC privilege?

* Protects communications between attorney and client, which could be used to impeach your truthful testimony: for example you say “I think I was negligent” to your lawyer but he convinces you that, on the basis of the law, you were not. You can truthfully deny your negligence on the stand and your statement that you said you thought you were negligent cannot be used to impeach you
  + If no AC privilege, all the statements you made your lawyer could be admitted during trial as evidence.
  + This evidence could be used to impeach you, or would at least be highly prejudicial against the client.

In civil cases AC privilege not as powerful as in criminal cases. In criminal cases, the defendant can simply refuse to take the stand

\*Lots of things that will be revealed in professional responsibility class

Work-Product “Privilege”: Created rather late, *Hickman v. Taylor* (1947).

* It was subsequently codified under federal rules, 26(b)(3)
* What does it protect? Documents and tangible things prepared in anticipation of litigation or trial by or for another party or by or for its representative.
  + Important, a party or its representative or someone acting for its representaive, not necessarily a lawyer, can create work product.
    - MSG example, everything went south for client, who owed a billion and a half dollars. Client’s employee wrote document for employer in anticipation of litigation. There was no way to determine whether it was WP based on the document. However, it was.
    - It is not always clear whether it is WP. It matters when it was made, in what context.
    - Document was accidentally given to the other side by an associate, who didn’t see any information about a lawyer on the document. “We got the document back, but the damage was done.”
    - Take home, “Don’t need to see anything about a lawyer on document to make it WP”
* You can overcome WP (this is unlike AC Privilege) under 26(b)(3)(A): Where party shows (1) substantial need and (2) cannot without undue hardship get their substantial equivalent through other means.
* Opinion work product: 26(b)(3)(B) Protection from disclosure of mental impressions, opinions, conclusions. Cannot be overcome at all, generally.
* Fact work product, 26(b)(3): Document or tangible thing created by agent, where it is a collection of facts relevant to the case. Witness statements.

Arguments for protecting pure fact work product:

1. Free rider argument: OC will ride on counsel’s coat tails, will save time and money and rely on the other side’s fact finding.

* Good analysis?
  + NO. Do you really want to rely on the fact finding of OC? What kinds of questions are they going to ask? Will this information be truly relevant to your case?

2. Attorney could be called as a witness against friendly witness. How would that work? How would the other side use the WP to harm your witness?

* They would use communications to discredit the witness.
  + For example, OC could compare trial testimony of witness to WP testimony of witness.
  + Would allow OC to impeach friendly witness.
* This would require attorney who had created the WP to take the stand against friendly witness. “Are you lying or is your witness?”

Fact WP protects friendly witnesses from constant impeachment.

Also – lawyers would refrain from writing things down if there were no work product privilege.

HYPO: An interrogatory asks who you interviewed in connection with this case, and whether or not you created any reports, memos, etc. WP privilege?

* You can get their existence, the existence of WP is not WP.
  + Why? What’s good about this? Because WP privilege is not an absolute privilege. If you have a substantial need you *can overcome* the WP privilege. In order to know whether WP can be overcome, you need to know whether that work product exists.
  + Generally, you will tell the person to interview the person himself. However, what if the person interviewed died? The interview was conducted immediately after the event, when details were most fresh in the mind of witness.
    - This would be an example where the work product privilege could be overcome
    - Keep in mind, you cannot ask about existence of AC privilege communications. Existence of AC privileged communications is privileged.

Limitations to the WP privilege: Can’t use WP privilege to allow client or any other witness to say things you know to be false.

* As with AC, one cannot use the fact that information was communicated in work product to refuse to testify truthfully about it

When does WP privilege begin?: In anticipation of litigation

* Even large companies, insurance companies, cannot argue that they are always anticipating litigation.
* Don’t want to allow company to allow any document to qualify as WP.
  + Otherwise, everything could potentially be barred from discovery through WP privilege.
* But it is not necessary that a lawsuit actually be filed

HYPO: What if the document was an unsolicited letter from a witness? Is it WP?

* Is there a way to describe it as WP? Yes, you could go back to the language of 26(b)(3)(A), which defines WP as any document “prepared in anticipation of litigation by or for another party”
  + MSG says, there is an argument there, but it is not an easy sell.
  + You would have to conclude but the witness created the letter for your client

HYPO: Witness statement taken by your lawyer taken a few hours after the accident. WP?

Yes, but it could be overcome if the need is substantial. After all, witnesses impressions hours after the accident will be much more valuable

Impeachment evidence: Don’t have a duty to reveal impeachment evidence in disclosure or pretrial.

* This makes sense, see last class’s notes…

1. What if you want impeachment evidence on OC’s friendly witnesses?

* If it is not WP, you can get it. It is part of the scope of discovery.
* If it is WP, Could overcome WP privilege and request that information. But only if you can show it would be very good evidence to impeach their witness
  + One of the very purposes of the work product privilege is to keep the other side’s work product from constantly being used to impeach its friendly witnesses
  + There is a bit of schizophrenia here –the work product exists to screen impeachment evidence from the other side but can be overcome if the other side can show that it is very good impeachment evidence

2. What if you want impeachment evidence on YOUR friendly witness? MSG says, “You want to be able to impeach the impeachment evidence.”

* If it is not WP, you can get it. It is part of the scope of discovery.
  + OC will depose the witness, then you will be given the impeachment evidence.
  + This is to get a statement from your witness that has not yet accommodated the impeachment evidence
* If it is WP, you will need to get over the WP privilege. But this can be done if the work product we’ll be presented against your witness at trial
  + Once again, the other side will first depose your witness, to get a statement that has not yet accommodated the impeachment evidence
  + If your witness changes this testimony on the stand to accommodate the impeachment evidence, the other side will offer the deposition itself as impeachment

HYPO: In negligence case, may P request any surveillance tapes D made of P’s client?

* Courts tend to say yes.
* The first thing is that OC deposes your friendly witness. Then you get requested impeachment evidence.

Interesting tension, you want surprises, however, impeachment evidence might be faulty. This method allows you to get impeachment evidence and allows them to catch your friendly witness in a lie.

* REMEMBER, If impeachment evidence is WP, you will have to get over the WP privilege.

**Waiver**: Can waive AC, WP privilege. One way is by not asserting it.

* Can waive privileges by putting privileged material into issue.
  + For example, say you submit communications to Opposing Counsel (OC) as part of a defense. An example is when your defenses that you relied on the advice of your counsel. This will subject the entire context of the communication to discovery. Why entire context?
    - Because otherwise OC would only be subject to specific parts of the communication, could skew the information in your favor.
* Who can waive the privilege?
  + There are two questions here
    - The first is who has the right to control the privilege –the answer is the client does
      * If the lawyer waives the privilege against the client’s will the lawyer can be disciplined or sued for malpractice
      * In some instances, it will be in the interest of the client to reveal the information. Therefore, lawyer does it on behalf of the client.
    - The second question is whether a lawyer’s decision about waiving the privilege can bind a client, even if it is against the client’s will. The answer is yes. Assume the client tells the lawyer not to reveal the communication to the other side but the lawyer does so anyway. The lawyer’s decision will bind the client, in the sense that the other side will now have the right to use the communication. The privilege will have been lost. But the lawyer will be liable to the client for malpractice and could be disciplined.

\*Mapractice is not just the result of being a bad lawyer. It can also be the result of lawyer violating other duties lawyer has to his client (not blabbing, etc.).

**Experts**:

HYPO: You give an expert who you will call as a witness at trial witness statements to use in determining his opinion. Can the material obtained by the expert be protected as WP?

* No, 26(a)(2), expert testimony disclosure requires that OC receives a number of things, including “data or other information considered by the witness in forming” their opinion.
  + What is the justification? Jury needs information to determine how EW came to his decision, even where he considered documents that would otherwise qualify as WP.

FRCP with regards to EW has changed recently: WP privilege remains, allows communications between attorney and EW to be withheld from OC.

* However, OC must receive information about the facts that the expert used in arriving at his opinion, not the communication itself.
  + This was a huge problem before. When MSG was an associate, partner asked him not to give any documents to EW. Kept them in a cone of silence.
  + In the past, the entire document was required to be turned over to the other side. Drafts, etc. were also included.

Non-testifying experts: Experts whom you hire for the purpose of litigation but who will not testify at trial.

* Very difficult for OC to get discovery on non-testifying expert.
* Much more limited.

**Sanctions**: What happens if you don’t follow disclosure/discovery rules?

Signature 26(g) (very much like Rule 11 signature, but remember R11 doesn’t apply to disclosure/discovery): Every disclosure and discovery request and response is certified to be true to the best of the attorney’s “knowledge, information and belief.” Also requires that objection is warranted “by existing law or a non frivolous argument” (similar to Rule 11 language). This prevents people from acting frivolous during disclosure/discovery.

What do you do if someone is not being cooperative during the discovery process.

Rule 37 Motion.

1. First you address the problem to them directly. Hopefully they are agreeable, if not…

- must make good faith effort to resolve the matter without the court’s intervention

2. Then you make a motion to compel with the court, forcing them to respond. If court grants the motion and they still will not turn over the materials

3. Finally, R37 sanction. If they fail to provide the required information, case will be determined against them.

During Disclosure: Much simpler, if you fail to disclose the necessary information, you are immediately subject to R37 sanctions.