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OPINION

Abolish the Attorney-Client Privilege

It serves little use in practice, while the work-product privilege offers a safer harbor.

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One of the great myths of the legal profession is that the attorney-client privilege promises absolute confidentiality, to ensure clients' full disclosure to their counsel. However, as most lawyers know too well, clients have a natural propensity to engage in self-protective selective disclosure—which may be justified, given the many exceptions to the supposedly clear, certain and reliable rule and the vigor with which most counsel attack their adversaries' invocation of the privilege.

In other words, the attorney-client privilege does not serve its stated purpose of promoting disclosure between client and counsel; does not provide certainty; and is costly to protect, frequently without real reason. The potholes have gutted the highway. It is time to replace this overburdened infrastructure. The need to protect work product developed in anticipation of litigation seems better grounded. It is relatively simple to apply, based solely on logistical and temporal concepts. Current protection, however, is not absolute.

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Simply put, the attorney-client privilege may be more trouble than it is worth. Its benefits are minimal. Nonetheless, we spend endless resources protecting the privilege. Because the privilege is subject to a complicated lattice of exceptions, those efforts can be for naught, and the information we seek to protect frequently is benign or irrelevant. To protect against waiver, we scrutinize every document before production to ensure that no lawyer looked at it, discussed it, was discussed in it or had anything to do with it. When the shoe is on the

other foot, we vigorously inspect the entire production for any hint of waiver—perhaps the advice was not legal in nature, or the crime/fraud exception or "at issue" doctrine applies. When we find a misstep, we devote time, energy, and our clients' money, usually to obtain or prevent disclosure of documents or testimony of little value.

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Government involvement presents additional issues. By executing search warrants, the government can obtain a treasure trove of information, but the net is indiscriminate and the bycatch includes privileged materials. The supposed solution is a mechanism called a "taint team" that reviews the produced documents for privilege and shields privileged materials from the prosecutors. The U.S. Securities and Exchange Commission, which by policy cannot ask for a waiver of the privilege, is not reluctant to serve subpoenas on law firms seeking "all files" regarding a client. Moreover, relying on the precarious protection of the "selective waiver" doctrine, companies under SEC scrutiny sometimes hand over privileged information gleaned through independent investigations. The Federal Reserve asserts that the privilege does not apply at all to its examinations of banks.

In private civil litigation, it now seems routine for parties to demand clearly privileged documents. Although the demand is objectionable, and the documents can be withheld, the withholding party has to produce a log of the withheld documents. The log serves no real purpose, yet it is extraordinarily expensive to create and, if compiled diligently, can be quite revealing of the attorney-client relationship.

The privilege is supposed to be absolute and certain, but is neither. Given that it really does not accomplish the goal of full disclosure, likely at least in part because numerous exceptions significantly erode the certainty it is supposed to offer, and given that protecting the privilege is expensive, we confront the question: What's wrong with full disclosure? Why, for example, can clients offer as a legitimate defense that lawyers blessed their conduct, but it remains a secret when a lawyer tells a client she cannot legally do what she wants to do, but she does so anyway? The notion that there should be no attorney-client privilege is not as heretical as it seems. Certainly, it is not recognized in many countries, including most of Europe.

The work-product doctrine, however, serves its intended purpose. Like the American rule regarding counsel fees, the notion that each side should bear its own costs is deeply rooted in our culture. (Not that that makes it right, but that's a subject for another day.) From the time a litigant seeks counsel, what that counsel does on behalf of the client, at the expense of the client, ought to belong only to the client, absolutely. The identity of the rocks under which the lawyer decides to look for relevant evidence presumably reflects the intellect and experience of the lawyer—good or bad—and belongs to the client who pays him. If a lawyer decides to interview an unlikely, but ultimately important, witness, that is her good choice. If a lawyer requests documents from an unlikely source and unexpectedly strikes gold, so be it.

Our proposal is simple: no attorney-client privilege and an absolute privilege for conduct in anticipation of litigation from the time counsel is retained. The choice is equally clear: A rule that is certain, versus one that is supposed to offer certainty yet is so riddled with exceptions as to be anything but certain, leading to seemingly endless and expensive litigation with little purpose or benefit. The reasonableness of our proposal is as clear as the fact that it never will happen, at least in our lifetimes.

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