ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE IN THE CORPORATE CONTEXT

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I. Introduction

The modern in-house counsel must navigate a myriad of issues in order to maintain and maximize the protections afforded by the attorney-client privilege and work product doctrine. Basic questions such as who controls the privilege and who is the client often yield complicated answers in the corporate context. In the hopes of illuminating some of these vagaries, the following pages contain a summary of the relevant law in New Hampshire and application of that law to several scenarios that in-house counsel are likely to encounter. The end of this document contains a list of additional resources in-house counsel may find useful on this topic.

As counsel review these materials, it is important to remember that the scope of the attorney-client privilege and work product doctrine are evolving concepts, and courts have applied the existing rules in unpredictable ways. As a result, clients are best served by a careful examination of the facts and analysis animating prior decisions before they are applied to new legal questions.

II. Applicable Law

A. Attorney-Client Privilege in New Hampshire State Court

The attorney-client privilege is a common law doctrine that varies from jurisdiction to jurisdiction. In New Hampshire state court, the privilege is articulated as follows:

> Where legal advice…is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure…unless the protection is waived by the client or his legal representatives.

Hampton Police Assn., Inc. v. Town of Hampton, 162 N.H. 7, 15 (2011). This formulation identifies four requirements for establishing a privileged communication. The communication must: (1) seek legal advice; (2) from a lawyer in his / her capacity as lawyer; (3) be related to the advice sought; and (4) remain confidential.

Questions arise when these requirements are applied to a corporate client because corporations, by definition, must act through their constituents, and it is not always clear which of those constituents falls within the privileged group. Although the New Hampshire Supreme Court has not addressed this issue, it appears that New Hampshire uses the "control group" test to determine who is within the corporate privilege. The leading case is a 2007 decision from now retired New Hampshire Supreme Court Chief Justice Robert Lynn, who was then Chief Justice of the New Hampshire Superior Court. *See Totherow v. Rivier College*, 2007 WL 811734 (N.H. Super. Ct. Feb. 20, 2007). In *Totherow*, Justice Lynn surveyed the various tests courts have used to determine which corporate employees fall within the privilege and concluded that the control group test was most appropriate. He defined the control group as:

> "[T]hose top management persons who [have] the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis for any final decision."

Id. Essentially, the control group extends to those who make decisions on behalf of a corporation, and, in appropriate circumstances, those who must be consulted in the making of corporate decisions. In addition to *Totherow*, the Reporter's Notes for New Hampshire Rule of Evidence 502 provide further authority for application of the control group test.

It should be noted that the control group test represents the minority view. Other control group jurisdictions include Maine, Illinois, and Alaska. *See Harris Mgmt., Inc. v.*

Coulombe, 151 A.3d 7, 14 (Me. 2016); *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257 (Ill. 1982); *Langdon v. Champion*, 752 P.2d 999, 1002 (Alaska 1988).

B. Attorney-Client Privilege in New Hampshire Federal Court

The New Hampshire federal court will apply state privilege law if sitting in diversity jurisdiction, and federal privilege law when operating under federal question jurisdiction. F.R.E. 501. This difference is important in the corporate context because federal privilege law does not use the control group test. Rather, federal law follows what has been termed the "Subject Matter Test" or "Functionality Test," as stated in *Upjohn v. United States*, 449 U.S. 383 (1981). Under *Upjohn*, the privilege extends to corporate employees, including sometimes lower-level employees, with whom corporate counsel communicate in furtherance of giving the company legal advice. *Id.* at 391-92.

It is also important to be familiar with the *Upjohn* test because it is applied in the majority of state jurisdictions. *See, e.g., RFF Family Partnership, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1071 (Mass. 2013). Thus, when a company operates outside New Hampshire, it is possible if not likely that *Upjohn* will apply.

C. Work Product Protection

The work product doctrine protects from disclosure work done by an attorney in anticipation of or during litigation. *State v. Chagnon*, 139 N.H. 671, 673 (1995) (*citing Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)); *In re Grand Jury Subpoena*, 274 F.3d 563, 574-75 (1st Cir. 2001). By its terms, the doctrine is limited to work prepared in the context of actual or potential litigation. There are narrow circumstances in which a litigant can overcome the work product protection if the information sought is crucial and not otherwise available. *See, e.g.*, *Davis v. Emery Air Freight Corp.*, 212 F.R.D. 432, 436-37 (D. Me. 2003); *In re Vitamins Antitrust Litig.*, 211 F.R.D. 1, 4 (D.D.C. 2002); *Coogan v. Cornet Transp. Co.*, 199 F.R.D. 166, 167-68 (D. Md. 2001). Thus, unlike the attorney-client privilege, the work product doctrine does not provide absolute protection against disclosure.

III. Applying the Rules to Corporate Scenarios

A. Advising a Family of Companies / Subsidiaries & Affiliates

Courts "almost universally hold" that sharing of information amongst the corporate family does not waive privilege. *In re Teleglobe Comms. Corp.*, 493 F.3d 345, 369 (3d Cir. 2007); *see also Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1493 n.6 (9th Cir. 1989). *Teleglobe* is the leading case on these issues and various portions of the opinion have been cited with approval in state courts throughout New England. *See Fortune Laurel, LLC v. Yunnan New Ocean Aquatic Prod. Sci. and Tech. Grp. Co., Ltd.*, 2018 WL 3942230, at *3 (N.H. Super. Ct. Aug. 14, 2018); *RFF Family Partnership*, 991 N.E.2d at 1089; *Irving Oil Ltd. v. ACE INA Ins.*, 2015 WL 1756034, at *6 (Me. Bus. Ct. Mar. 17, 2015); *In re Champlain Marina Dock Expansion*, 2010 WL 2594034, at *1 (Vt. Env. Ct. 2010).

Teleglobe analyzed the relationship between in-house counsel and multiple corporate subsidiaries and affiliates as a co-client representation. 493 F.3d at 370. Under that rubric, a single attorney represents more than one client with the same or nearly the same interests, and the congruence of those interests define the scope of the representation. *See id.* at 363 (explaining that "[t]he keys to deciding the scope of a joint representation are the parties' intent and expectations"); *see also* Restatement (Third) of the Law Governing Lawyers § 75; *Sky Valley Ltd. P'ship v. ATX Sky Valley Ltd.*, 150 F.R.D. 648, 652-53 (N.D. Cal. 1993). The *Teleglobe* decision distinguished the co-client relationship from common interest or "community of interest" protection, which applies when multiple lawyers represent multiple clients with substantially the same interest. 493 F.3d at 364-65, 370; *see also Fortune Laurel*, 2018 WL 3942230, at *6; N.H. R. Evid. 502(b)(3).

Teleglobe's choice to analyze the corporate family as co-clients receiving advice from a single attorney is significant because the co-client privilege only shields privileged communications from parties outside the joint representation, so that when co-clients sue each other, all communications made during the course of the joint representation are discoverable. 493 F.3d at 366. Moreover, *Teleglobe* concluded that the same is true where the co-clients are a parent and subsidiary or affiliate. *Id.* at 368. Critically, this means that where a subsidiary becomes adverse to its parent and litigation ensues, the subsidiary may force

disclosure of privileged communications between in-house counsel and the parent. In addressing the waiver issues this rule raises, *Teleglobe* further explained that corporate officers of the parent who were also officers of a subsidiary could still receive advice from the parent's lawyer without turning the subsidiary into a co-client so long as they received that advice in their capacity as an officer of the parent. *Id.* at 372. In this way, the court reasoned, parent corporations could allow subsidiary management to participate in management of the corporate parent without accidentally creating a co-client relationship such that the subsidiary could force disclosure of privileged information in a subsequent adverse litigation. *See id.*

The *Teleglobe* opinion concluded its survey of privilege law by noting that it was advisable for in-house counsel to obtain separate counsel for a subsidiary or affiliate as soon as the potential for adversity arose in order to protect the privileged communications between in-house counsel and the parent in subsequent adverse litigation. *Id.* at 374.

B. Identifying Who Holds the Privilege

In the corporate context, management controls the privilege. *In re Grand Jury Subpoena*, 274 F.3d at 571. This rule holds even if it is new management. *CFTC v. Weintraub*, 471 U.S. 343, 349 (1985). Further, management of the surviving corporation following a merger controls the privilege. *Rayman v. Am. Charter Fed. Sav. & Loan Ass'n*, 148 F.R.D. 647, 652 (D. Neb. 1993); *Chronicle Publ'g Co. v. Hantzis*, 732 F. Supp. 270, 273 (D. Mass. 1990); *Hoffmann-La Roche, Inc. v. Roxane Labs., Inc.*, 2011 WL 1792791, at *6 (D.N.J. May 11, 2011); *Great Hill Equity Partners IV, LP v. SIG Growth Equity Funds, LLP*, 80 A.3d 155, 162 (Del. Ch. 2013). Note, however, that in transactions where only assets are transferred, the purchaser may not have control of the privilege unless provided for in the sale documents. *See, e.g., MacKenzie-Childs LLC v. MacKenzie-Childs*, 262 F.R.D. 241, 248 (W.D.N.Y. 2009) (citing cases). Further, when a corporation enters bankruptcy, the bankruptcy trustee controls the privilege. *Weintraub*, 471 U.S at 358.

Thus, when giving advice in the course of a corporate transaction or restructuring, in-house or corporate counsel should be mindful of who controls the client entity.

C. Communications Between Non-Lawyers

It is natural that, upon receiving advice from counsel, employees of the corporation will then communicate with each other in order to relay and implement that advice. Courts have held that communications between non-lawyers may still be privileged in the corporate context where the communications are: (1) between employees at the same company; (2) concerning corporate counsel's advice; and (3) among the class of persons within the control group or satisfying *Upjohn*. *See Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 442 (S.D.N.Y. 1995); *Santrade, Ltd. v. General Elec. Co.*, 150 F.R.D. 539, 545 (E.D.N.C. 1993); *Haddock v. Nationwide Fin. Servs., Inc.*, 2009 WL 3734059, at *1 (D. Conn. Nov. 7, 2009). Counsel rendering legal advice to corporate constituents may therefore consider advising them to pass on the advice consistent with the foregoing in order to protect the privilege.

D. Advising Corporate Officers in Their Personal Capacity

It is not uncommon for officers of a corporation to approach in-house counsel regarding matters that are related to the corporation but center upon the officer's individual rights and liabilities. This is a fraught area where counsel should proceed with caution in order to maintain the privilege.

The law presumes that a corporate attorney represents the corporation and not its officers. *In re Grand Jury Subpoena*, 274 F.3d at 571; *see also* N.H. R. Prof. Conduct 1.13(a). It is up to the officer, as the individual asserting the privilege, to prove otherwise. *In re Grand Jury Subpoena*, 274 F.3d at 571 (*citing United States v. Bay State Ambul. & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989)). The First Circuit looks to what is known as the "*Bevill* test" to determine whether the officer can overcome the presumption. *In re Grand Jury Subpoena*, 274 F.3d at 571-72 (*citing In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986)). The *Bevill* test considers whether:

(1) The officer approached corporate counsel for the purpose of seeking legal advice;

(2) The officer made clear to corporate counsel that he or she was seeking legal advice;

(3) Corporate counsel saw fit to communicate with the officer in an individual capacity knowing that a conflict could arise;

(4) The conversations were kept confidential; and

(5) The substance of the conversations did not concern matters within the company or its general affairs.

Id. at 572. The First Circuit clarified that an officer could satisfy the fifth factor so long as the conversation focused on the officer's *individual* rights and responsibilities even if it also touched on the affairs of the company. *Id.*

Similarly, although the New Hampshire Supreme Court has not adopted the *Bevill* test, it has declined to extend the privilege to a corporate officer in his individual capacity absent evidence that corporate counsel was advising him in that capacity. *See McCabe v. Arcidy*, 138 N.H. 20, 25-26 (1993).

As a result, in situations where a corporate officer seeks advice in an individual capacity, counsel should clarify and document the capacity the officer is acting in and the nature of the advice given in order to protect the privilege.

E. Internal Investigations

In the modern corporate environment, there are a multitude of reasons that a company may choose to conduct an internal investigation. Frequently those investigations involve counsel. Keeping in mind that a company is unlikely to know the results of the investigation prior to its completion, in-house counsel should take steps to maximize the scope of privilege and work product protection.

The typical investigation involves some combination of the following: (1) an attorney or firm is asked to investigate an event; (2) the attorney, the attorney's agents, and sometimes corporate employees interview witnesses concerning the event; (3) the investigation generates notes, draft reports, and other work product; and (4) a final report is presented to the company. At each step along the way, work product may be shared, and advice may be

given. Because internal investigations are often precipitated by an event that will give rise to litigation, privilege and work product protections are frequently tested.

When courts are called upon to determine whether a corporation can invoke the privilege or work product doctrine, they typically consider three factors.

1. Would the investigation have occurred absent the prospect of litigation?

First, courts examine whether and the extent to which the company would have done the investigation in the absence of litigation. If the investigation would have occurred even if no litigation was on the horizon, courts reason that the work product doctrine should not apply because it is limited to material prepared in anticipation of litigation. *See United States v. Aldman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir.1992); *Wultz v. Bank of China Ltd.*, 304 F.R.D. 384, 395-97 (S.D.N.Y. 2015).

Thus, it may be wise for corporate counsel to document the reason for the investigation. Further, in some instances, companies have maintained the privilege by conducting parallel investigations—one as required, and one strictly in anticipation of litigation. *See Patel v. L-3 Comms. Holdings, Inc.*, 2016 WL 4030704, at *3-4 (S.D.N.Y. July 25, 2016). If resources allow, in-house counsel should consider this option as well.

2. Employee confusion over the attorney's role and the Upjohn Warning

Courts next consider the extent of any confusion over who the attorney represented when he or she was interviewing witnesses. In order to minimize such confusion, it is recommended that counsel provide what is called an "*Upjohn* Warning," which clarifies the roles of counsel and witness. An *Upjohn* Warning—based on the *Upjohn* decision—has appeared in various formulations, but it usually includes each of the following elements:

(1) The lawyer represents the company, not the employee;

(2) The interview is privileged and confidential;

(3) The company holds the privilege, not the employee;

(4) The company might waive the privilege at a later date; and

(5) The employee has information the lawyer needs and cannot get anywhere else.

In addition to providing and documenting this warning, it is best practice to assume that counsel's communications with employees outside the control group or beyond *Upjohn* protection will be discoverable even if counsel's work product based on the interview remains confidential.

Further, counsel should proceed with caution when using non-lawyers to conduct interviews. Generally, the privilege extends to those who are employed to assist the lawyer in rendering legal advice. N.H. R. Evid. 502(a)(4). It is accepted that use of attorney staff and paralegals does not waive the privilege. *See, e.g., Thompson v. Burhs Americas, Inc.*, 2009 WL 10711525, at *3 (D. Minn. June 23, 2009); *Bowen v. Parking Auth. of Camden*, 2002 WL 1754493, at *5 (D.N.J. July 30, 2002). Some courts have interpreted the scope of this protection narrowly and concluded that the privilege was waived where attorneys relied on consultants to conduct interviews. *See Columbia Data Prods., Inc. v. Autonomy Corp., Ltd.*, 2012 WL 6212898, at *19 (D. Mass. Dec. 12, 2012). Others have applied the protection broadly and maintained the privilege where corporate employees conducted interviews at the direction of counsel. *See Fair Isaac Corp. v. Texas Mut. Ins. Co.*, 2006 WL 3484283, at *3 (S.D. Tex. Nov. 30, 2006).

3. What will the company do with the results of the investigation?

Courts next consider what the company intends to do with the results of the investigation. If the investigation and final report thereof is in furtherance of legal advice, courts are more likely to maintain the privilege. If, however, it appears that the investigation was conducted in order to assist with a business decision, courts have refused to permit companies to use the privilege to shield investigation reports. *See Doe v. Phillips Exeter Academy*, 2016 WL 5947263, at *2-4 (D.N.H. Oct. 13, 2016) (applying federal privilege law); *U.S. Bank Nat'l Assn. v. PHL Variable Ins. Co.*, 2016 WL 1258466, at *4 (D. Minn. Mar. 30, 2016). As a result, corporate counsel should document the nature and reasons for the recommendations contained in the investigative report. In some instances, it may also be

advisable to issue multiple reports in order to segregate legal advice from business recommendations.

F. Former Employees

As employees more frequently change jobs over the course of a career, in-house counsel are increasingly confronted with scenarios in which an important witness no longer works for the company, or may even be the plaintiff in a suit against the company. For obvious reasons, the continued vitality of the corporate privilege in these situations is often fodder for litigation.

Like many issues regarding privilege and work product, the New Hampshire Supreme Court has not had occasion to address whether a former employee may access privileged material that was available to him or her during employment. A decision from the Business and Commercial Dispute Docket answered this question in the negative, concluding that because it is the corporation that holds the privilege, those who leave the control group and are no longer privy to privileged information cannot waive the privilege. *See Mason v. OSR Open Systems, Inc.*, No. 2016-CV-1294, at *6 (N.H. Super. Ct. May 24, 2017) (McNamara, J.). This decision is notable because it was based on an "evolving line of cases," which bodes well for future New Hampshire decisions on this point. *Id.*

On the question of whether conversations with former employees waive the privilege, Illinois—another control group jurisdiction—has concluded that they do. *See Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515, 518 (N.D. Ill. 1990). In *Upjohn* jurisdictions, on the other hand, courts have been relatively consistent in extending the privilege to discussions with former employees who would have qualified for the privilege when they worked at the company. *See In re Allen*, 106 F.3d 582, 605-06 (4th Cir.1997); *In re Gen. Motors Ignition Switch Litig.*, 80 F. Supp. 3d 521, 531 (S.D.N.Y. 2015); *Perlata v. Cendant Corp.*, 190 F.R.D. 38, 41–42 (D.Conn.1999); *Command Transp., Inc. v. Y.S. Line (USA) Corp.*, 116 F.R.D. 94, 96-97 (D. Mass. 1987). Because the law in New Hampshire on this point is not as clear as it might be, in-house counsel would do well to proceed with caution when contacting former employees, and assume that such communications may not be privileged.

G. Fiduciary Exception

Although it only applies in limited circumstances, in-house counsel should be aware that courts have allowed shareholders pursuing derivative actions to obtain advice given to management upon a showing of good cause. *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970).

The New Hampshire Supreme Court has not addressed this issue, nor is the author aware of any New Hampshire trial court decisions applying the exception. Although many states recognize some form of the fiduciary exception, *see, e.g., Riggs Nat. Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 711-12 (Del. Ch. 1976) (applying exception to trustees), others have refused to adopt it. *See Wells Fargo Bank v. Superior Ct.*, 990 P.2d 591, 595 (Cal. 2000); *Huie v. DeShazo*, 922 S.W.2d 920, 924 (Tex. 1996).

IV. Additional Resources

The foregoing text has attempted to summarize the relevant law surrounding attorney-client privilege and the work product doctrine and apply it to scenarios that in-house counsel are likely to encounter. In addition to this material, the author consulted the following resources.

The law firm of McGuire Woods offers a comprehensive handbook entitled *The Attorney-Client Privilege and The Work Product Doctrine: A Practitioner's Guide*. In addition, it makes available a database of decisions on privilege and work product online at:

https://attorneyclientprivilege.mcguirewoods.com/default.aspx

Similarly, the law firm of Jenner & Block maintains a lengthy summary of attorney-client privilege and work product decisions known as *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine*. This document is available on the firm's website: www.jenner.com.

On the topic of internal investigations, the law firm of Jones Day publishes a guide containing relevant case law and best practices entitled *Corporate Internal Investigations: Best Practices, Pitfalls to Avoid*. The guide is available at www.jonesday.com.

Finally, for those with subscription access, Westlaw Practical Law contains several guides and practice notes on the topics of attorney-client privilege, work product doctrine, representing corporate clients, and internal investigations.