

White-Collar CRIME

An **ALM** Publication

WWW.NYLJ.COM

MONDAY, APRIL 8, 2013

Privilege Issues Arising In Prosecutions, Investigations

BY JOSEPH MARTINI
AND ROBERT HOFF

In almost every white-collar case, questions arise about the attorney-client privilege and work-product doctrine. Issues concerning the identity of the client, the holder of the privilege, and whether representation of multiple clients is proper are often present at the very start, and the fluid nature and complexity of most white-collar investigations often complicate efforts to protect the privilege against claims of waiver. This article reviews recent cases concerning attorney-client privilege and work-product doctrine issues that may arise in a white-collar case or investigation.

'Finazzo'

In *United States v. Finazzo*, the court considered an issue that is arising more frequently in the age of rampant email communications: whether the attorney-client privilege is lost when an individual communicates with his personal counsel through his employer's email account.¹ Ten years after the fraudulent scheme alleged in the indictment began, an investigative firm hired by Aéropostale to conduct an unrelated internal investigation discovered an email in an Aéropostale executive's work account that was from the executive's personal attorney. This email disclosed the executive's interest in one of Aéropostale's vendors through which he

received a secret profit. Finazzo, the executive, claimed that he never authorized his personal attorney to send privileged materials to his company email address, and asserted that when he received the email, he "forwarded it to a non-Aéropostale email account, deleted the email...and instructed [his lawyer] to send confidential information only to another email address."² Upon discovery of the email, the company's CEO and general counsel terminated Finazzo for cause.

In the criminal case, Finazzo sought to preclude introduction of the email, claiming he had a reasonable expectation of privacy in his corporate email account. The court applied a four-factor test that, while advisory, had been "widely adopted by many courts."³ The test asks: (1) Does the corporation maintain a policy banning personal email or other objectionable use; (2) does the company monitor the use of the employee's computer or email; (3) do third parties have a right of access to the computer or emails; and (4) did the corporation notify the employee, or was the employee aware of the use and monitoring policies.⁴

Because company policy fluctuated, and no firm policy was in place in the year that Finazzo received the email, the court looked to company policy from the preceding and

following years, ultimately concluding that Finazzo waived his attorney-client privilege. Each of the policies placed restrictions on personal use of the corporate email account and banned certain personal uses altogether, which lowered Finazzo's expectation of privacy. Finazzo argued that because Aéropostale failed to enforce the policies, and in fact never engaged in any actual monitoring, Aéropostale contributed to a reasonable belief that the account was private. While evidence of monitoring would make an expectation of privacy less reasonable, the court held that the company's reservation of rights to monitor was enough to weigh this second factor against Finazzo. Noting that the third factor, "right of access," focused on steps the employee took to protect the confidentiality of communications, the court held that Finazzo's deletion of



the email shortly after it arrived carried little weight because Finazzo knew the email would pass through the company's server regardless of the deletion. The fourth factor also weighed against Finazzo because he clearly was aware of the company's monitoring policy.

Even if Finazzo's use of the company email system did not defeat his privilege claim, the court concluded that Finazzo's "hour-long discussion with [the CEO and general counsel] about that same email certainly waived it."⁵ The court rejected Finazzo's claim that he couldn't waive privilege in a document already possessed by Aéropostale simply by responding to questions about it, finding that position "reflect[ed] a serious misunderstanding of the purpose of privilege."⁶ Nor was the court persuaded by his argument that his disclosure was not "voluntary" because the meeting was "hostile and coercive," finding that "Finazzo's so-called interrogators repeatedly expressed affection for him and one of them even began crying," making it hard to "imagine a less hostile meeting at which an employee is fired."⁷

'Ghavami'

We now turn to *United States v. Ghavami*, which contains an excellent discussion of the various permutations that counsel must consider when seeking to protect confidential communications with clients. The case is also a reminder that clients must be warned not to disclose privileged communications to other individuals who are not within the attorney-client relationship, even if they believe those individuals are friends or colleagues who can be trusted with the information.

In *Ghavami*, the court considered whether a group of declarants waived the attorney-client privilege or work-product protections by sharing attorney-client communications with other corporate employees who were acting as government cooperators.⁸ The defendants were charged with rigging bids for guaranteed investment contracts. In discovery, the government produced to the defendants more than 600,000 audio files, including consensual recordings and recorded conversations from trading desks, some of which included individuals describing to the cooperators communications the declarants had with personal or corporate counsel. The so-called "privilege claimants"—a group of executives, employees, financial advisors and companies—sought to "claw back" recordings and notes from the government before that evidence was disclosed to the trial team and defendants, claiming protection under the attorney-client privilege,

work-product doctrine and the parties' joint defense agreement.

The court's waiver analysis produced at least three important points. First, "[o]nly the party that possesses the privilege may assert or waive it," and corporations possess the attorney-client privilege for communications with corporate counsel.⁹ Thus, while the declarants waived the privilege with respect to communications with their personal attorneys, those who disclosed communications with corporate counsel did not for the simple reason that the privilege belonged to the corporations and the individual declarants were not authorized to waive the privilege.

Even if the attorney-client privilege is waived, the work-product doctrine may still apply. **Work-product protection is waived** when disclosure **substantially increases the opportunity** for an adversary to obtain the information.

Second, even if the privilege is waived, the work-product doctrine may still apply. Work-product protection is waived when disclosure substantially increases the opportunity for an adversary to obtain the information. In *Ghavami*, although the court found that declarants waived the attorney-client privilege with respect to some communications, they did not waive work-product protection. Importantly, the court noted that the risk of disclosure to adversaries must be evaluated from the viewpoint of the party asserting work-product protection. Because the declarants did not know they were disclosing work-product to government cooperators, but rather believed they were communicating with friends and colleagues, their disclosure, from their perspective, did not increase the risk that the communications would be disclosed to the government.¹⁰

Third, the court recognized the importance of the common interest doctrine. A joint defense agreement does not create an independent privilege, but instead, allows parties and counsel with a common legal interest to share otherwise privileged communications without waiving the attorney-client privilege. In *Ghavami*, the court held that a declarant's disclosure to a cooperator of information the declarant learned in communications pursuant to a joint defense agreement did not waive the attorney-client privilege.¹¹

'In re Refco'

*In re Refco*¹² addressed an undecided issue in the Second Circuit Court of Appeals and one that has produced differing results in the district courts: whether a company's attorney-client privilege attaches to discussions between company lawyers and a former employee. Refco and PlusFunds insiders allegedly authorized moving certain funds in order to create the deception that Refco was solvent. In investigating this matter, plaintiffs' counsel, who were authorized to assert PlusFunds' privileges, met with the former director and employee of PlusFunds shortly before his deposition. The former employee brought his own counsel to the meeting. At the deposition, plaintiffs' attorneys advised the former employee not to answer a question regarding what they discussed at the meeting.

The district court held that the attorney-client privilege did not cover discussions with the former employee at the meeting before the deposition. While under the U.S. Supreme Court's decision in *Upjohn*, current employee communications with outside counsel are privileged, the rule is unclear when it comes to former employees. Some district courts have extended *Upjohn* to "cover conversations between corporate counsel and former employees...[if] the discussion related to the former employee's conduct and knowledge gained during employment."¹³ However, even those courts that have extended the privilege to former employees "have noted that former employees should not be treated as if they were current employees in determining the applicability of *Upjohn*."¹⁴ Rather, for the privilege to apply to current or former employees, the employees must be acting "at the direction of corporate superiors."¹⁵

The *In re Refco* court concluded that it couldn't be said that the conversations with the former director were "between a corporate attorney and an employee 'client' at the direction of management."¹⁶ Plaintiffs' counsel was not communicating with the former employee to provide legal advice to PlusFunds, which was defunct, but rather to help counsel prepare for legal strategy in multiple cases, including cases that could involve potential claims against the former employee himself. Moreover, the former employee brought his own attorney to the meeting with plaintiffs' counsel prior to the deposition, and to the deposition, and expressly stated that plaintiffs' attorneys did not represent him. Under all these circumstances, plaintiffs' counsel's communications with the former

employee were not protected from disclosure. The court also concluded that the work-product doctrine was unavailing because plaintiff's counsel "shared their legal strategy" with the non-party former employee who was "not part of the attorney-client relationship" between plaintiffs and their counsel.¹⁷

'Farzan'

Ever since the Second Circuit's *Kovel* decision, courts have contended with how far to extend the attorney-client privilege and work-product protection when communications with third parties such as forensic accountants, consultants and investigators are at issue.¹⁸ *Farzan v. Wells Fargo* represents another such case, this time involving a non-attorney "EEO consultant" hired by defendant Wells Fargo to conduct an internal investigation into certain allegations of discrimination.¹⁹ When Farzan sought to depose the consultant about her investigation and communications with Wells Fargo employees, the company claimed protection under the attorney-client privilege and work-product doctrine. The court agreed with Wells Fargo, holding that the consultant conducted the investigation at the direction of corporate superiors in order to secure legal advice in anticipation of litigation, and communicated with corporate employees for the purpose of representing Wells Fargo in proceedings before the EEOC. Because the attorney-client privilege applied, and the plaintiff failed to demonstrate a substantial need for the deposition under exceptions to the work-product doctrine, the court declined to allow him to depose the consultant.

The court noted, however an important distinction that must be kept in mind when analyzing privilege issues: The attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney [or her agent]."²⁰ Thus, the court required the company to disclose the identities of those individuals the consultant interviewed because the "disclosure of *who* [the consultant] interviewed as part of her investigation does not reveal Wells Fargo's legal strategy, its analysis of Farzan's claims, or other protected information."²¹

'Matter of Ferrer and Ortiz'

White-collar attorneys may also be interested in *In the Matter of Miguel A. Ferrer and Carlos J. Ortiz*, a recent ruling by the SEC where a legal team's "overzealous" assertion of a corporate privilege led to an undesirable result for its employee.²² During a hearing, the Division

of Enforcement objected when Ortiz' lawyer asked Ortiz, a UBS employee, whether UBS' legal and compliance departments reviewed a presentation in which he made misleading representations about certain UBS-affiliated closed-end funds. The Division maintained that because UBS thwarted its efforts during the investigation to question witnesses about discussions with UBS lawyers, Ortiz should not be allowed to testify about consulting with UBS' legal counsel. Ortiz' lawyer contended that Ortiz had no power to assert or waive UBS' attorney-client privilege and had not asked UBS to do so, and further, that the purpose of the testimony was to refute a claim that Ortiz was negligent by showing that he checked with lawyers, not that lawyers approved the documents at issue.

The Administrative Law Judge (ALJ) precluded the use of the testimony, noting that UBS' counsel "over-zealously invoked the attorney-client privilege to prevent the Division from exploring how and to what extent UBS's Legal Department participated in the events at issue."²³ Applying the balancing test articulated in Federal Rule of Civil Procedure 403, the ALJ concluded that given the "considerable probative weight" of the evidence offered by Ortiz, the SEC would be "unfairly prejudiced if Respondents are allowed to show they consulted UBS' legal department and it allowed or approved use of the materials, which are the bases of the allegations."²⁴

Foreign Cases

Many white-collar investigations are now global in nature, and it is therefore important to keep abreast of how attorney-client privilege and work-product protections are developing in other countries. In 2010, in *Akzo Nobel Chemicals v. European Commission*, the European Court of Justice (the ECJ) decided not to extend the attorney-client privilege to communications between in house counsel and company employees.²⁵ The ECJ held that an in-house lawyer "does not enjoy the same degree of independence from his employers as a lawyer working in an external law firm."²⁶

However, a recent case from Brussels reached a different result. In the *Belgacom* case,²⁷ the Belgian antitrust commission sought to seize certain documents from Belgacom's in-house counsel, citing the *Akzo* decision. The Brussels Court of Appeal declined to adopt the view expressed in *Akzo*, instead reasoning that the decision did not apply to a purely Belgian matter. In the court's view, national law controlled the dispute because the searches conducted by the national agency must be

done according to Belgian law. The court also noted that the privilege rights derive from the European Convention of Human Rights, which guarantees the right to privacy.

Conclusion

The attorney-client privilege and work-product doctrine continue to lay traps for even the most diligent counsel. Failure to invoke these doctrines correctly, to know who is within the zone of privilege, to keep confidential communications secret, and to rely on these doctrines appropriately, can derail important investigations and litigations. For these reasons, protecting the confidentiality of attorney-client communications by skillfully navigating these treacherous waters must be at the forefront of every practitioner's mind.

.....●.....

1. *United States v. Finazzo*, 10-CR-457 RRM RML, 2013 WL 619572 (E.D.N.Y. Feb. 19, 2013).

2. *Id.* at *1.

3. *Id.* at *7.

4. *Id.* (citing *In re the Reserve Fund Secs. & Deriv. Litig.*, 275 F.R.D. 154, 160 (S.D.N.Y. 2011)).

5. *Id.* at *13.

6. *Id.*

7. *Id.* at *14.

8. *United States v. Ghavami*, 882 F. Supp. 2d 532 (S.D.N.Y. 2012).

9. *Id.* at 538.

10. *Id.* at 541.

11. *Id.* at 537.

12. *In re Refco Sec. Litig.*, 08 CIV. 3065 JSR, 2012 WL 678139 (S.D.N.Y. Feb. 28, 2012).

13. *Id.* at *2. For decisions that extend the privilege to cover discussions with former employees, see *Export-Import Bank of the US v. Asia Pulp & Paper*, 232 F.R.D. 103 (S.D.N.Y. 2005), and *Perlata v. Cendant*, 190 F.R.D. 38 (D. Conn. 1999).

14. *Refco*, at *2.

15. *Id.*

16. *Id.* at *3.

17. *Id.*

18. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (extending the privilege to communications to agents that assist the attorney in understanding the client's legal problem).

19. *Farzan v. Wells Fargo Bank*, 12 CIV. 1217 RJS JLC, 2012 WL 6763570 (S.D.N.Y. Dec. 28, 2012).

20. *Id.* at *3.

21. *Id.*

22. Order on Evidentiary Issue, Admin. Proc. Ruling Rel. No. 730; Admin. Proc. File No. 3-14862 / Nov. 2, 2012).

23. *Id.* at 4.

24. *Id.*

25. Case C-550/07 P, *Akzo Nobel Chemicals and Akros Chemicals v. European Comm'n*, 2010 ECJ EUR-Lex LEXIS 807 (Sept. 14, 2010).

26. *Id.* at *21.

27. *Belgacom*, Case No. 2011/MR/3, Brussels Court of Appeals (March 5, 2013).