Participation of Non-Lawyers in Antitrust Matters—Recognizing and Avoiding Privilege Waiver Pitfalls

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In antitrust matters, non-lawyers increasingly participate in communications in which attorney-client or work-product information is created or shared. By exposing non-lawyers to legally privileged communications, issues of waiver inevitably arise, and the continuing availability of the privilege may be called into question. This article focuses on some of the potential privilege pitfalls presented by non-lawyer involvement in antitrust investigations, litigation, and merger reviews.[1]

While most antitrust lawyers are familiar with the basic requirements for claiming privilege,[2] they may be less attuned to how claims of privilege can be attacked because of asserted waivers through the sharing of privileged communications with third parties. In recent years, the involvement of non-lawyers in privileged communications has been a particularly fertile source of such attacks, and antitrust attorneys who deal with non-lawyer professionals must be prepared to address these issues.

There are numerous ways such issues can arise in antitrust matters. For example, in high-profile merger reviews or cartel investigations, companies may enlist public relations consultants or government affairs specialists to present the company's rationale for the transaction to the public or to aid in "damage control." Where individuals may face potential criminal exposure for price-fixing activities, they may rely on family members for support and involve them in meetings with their lawyers where legal strategy is discussed. In a range of antitrust matters, disclosure of privileged information to external auditors may be required as part of internal investigations to comply with securities laws. Given the fact-intensive nature of antitrust investigations, lawyers may seek the assistance of industry experts, who simultaneously may be consulting for the business client in the ordinary course. Consultants retained for their industry or economic expertise later may become testifying experts. The emergence of third-party financing of litigation also brings with it a number of questions, including how privileged communications are shared with potential investors. Because technology increases the speed and breadth at which communications are created and disseminated, it is important for lawyers to be aware of the potential pitfalls associated with sharing information with these and other non-lawyer third parties.

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[1] This article does not address the privilege and waiver issues that might arise from sharing information with other lawyers, such as communications pursuant to joint defense agreements. For an analysis of this topic, see Kathryn M. Fenton, *Conflict and Ethics Issues Arising from Joint Defense/Common Interest Relationships*, ANTITRUST SOURCE, Dec. 2009, http://www.abanet.org/antitrust/at-source/at-source.html.

[2] Generally speaking, for a communication to be a privileged attorney-client communication it must (1) be a communication (2) made in confidence (3) to an attorney (or the agent of the attorney) acting as an attorney at the time (4) by a client (5) for the purpose of seeking, obtaining, or providing legal advice. *See, e.g.*, 8 WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. 1961) (provided the privilege has not been waived). To qualify for work-product immunity, a document must (1) be prepared in anticipation of litigation or for trial (2) by or for another party or by or for that party's representative. FED R. CIV. P. 26(b); *see also* Hickman v. Taylor, 329 U.S. 495 (1947).

Marketing, PR, and Government Relations Firms

The question of whether any privilege extends to communications with and/or disclosures to marketing, public relations, and government relations firms can arise in situations where the firm is engaged by a company in the ordinary course of business or where the firm becomes privy to legal communications in situations where it has been engaged specifically to assist the company's lawyers regarding contentious mergers, litigation, or investigations. For example, in a high-profile merger transaction, a public relations firm may be retained to assist in developing the company's message in support of the transaction as it fields media inquiries, seeks shareholder support, responds to Congressional hearings, develops presentations to other governmental bodies, or reacts to customer or supplier concerns. Some of these efforts may require close collaboration with antitrust counsel, who will be focused on ensuring that all public communications are consistent with the legal arguments the parties will be making with respect to the antitrust merits of the transaction. Similarly, in a criminal prosecution, public relations consultants may be retained to assist in "damage control" or to present the company's story to shareholders, customers, or even the pool of potential jurors. In the process, the non-lawyer professionals are likely to become privy to key aspects of legal strategy and to be exposed to a range of privileged communications.

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Because PR firms are often simultaneously assisting the company with a host of other, non-antitrust projects, efforts to claim privilege for their activities frequently draw challenges both in private litigation and government investigations. In evaluating these arguments, courts have taken different, and often fact-specific, approaches to the questions of whether and how attorney-client privilege and work-product questions are resolved when disclosures are made to third parties like PR and marketing firms. Some courts rely on basic agency principles to consider whether the third-party PR firm is the functional equivalent of the company so that communications between the company's lawyers and the company's PR firm are appropriately viewed as attorney-client communications.[3] Other courts have looked at the extent to which the communications were necessary and directly related to the purpose of obtaining legal services or, correspondingly, whether access to the privileged information was necessary for the PR firm to do its job.[4] Still other courts have considered whether the activities of the PR firm were efforts in furtherance of a common legal interest and thus protected under the common interest privilege.[5]

These issues have become a major source of challenges to privilege claims in antitrust and intellectual property cases. In *FTC v. GlaxoSmithKline*,[6] the FTC attacked a claim of privilege asserted with respect to documents disclosed to GlaxoSmithKline's (GSK's) PR consultants and withheld from the company's response to an FTC subpoena. In rejecting the FTC's assertion of waiver and affirming the privilege, the D.C. Circuit pointed out that the company's legal counsel had worked with the outside consultants in the same manner as it had with the company's full-time

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[3] *See, e.g.*, *In re* Copper Market Antitrust Litig., 200 F.R.D. 213 (S.D.NY. 2001) (attorney-client privilege extended to crisis management firm hired in connection with high-profile litigation).

[4] *See, e.g.*, *In re* Grand Jury Subpoena, 265 F. Supp. 2d 321 (S.D.N.Y. 2003) (public relations firm hired by attorney to help client avoid criminal indictment covered by attorney-client and work-product privileges).

[5] LG Electronics U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 958 (N.D. Ill. 2009) (no privilege for communications between a party and its third-party advertising agencies where there was no de facto employee relationship or common interest), *mandamus denied*, 597 F.3d 858 (7th Cir. 2010).

[6] 294 F.3d 141 (D.C. Cir. 2002).

employees on issues clearly intertwined with legal strategy.[7] In addition, the court concluded the PR firm had information that GSK's attorney needed to render legal advice.[8]

In contrast, the court in *Calvin Klein Trademark Trust v. Wachner*[9] held that documents and testimony from a PR firm that had a preexisting relationship with its corporate client were not protected by the attorney-client privilege, even though the PR firm was retained by plaintiff's counsel to assist in the underlying litigation. The court was not convinced that the documents at issue were communications made for the purpose of obtaining legal advice and found that the functions this PR firm performed were no different than those performed by any ordinary PR firm.[10] It thus concluded that disclosure to the PR firm waived any preexisting attorney-client privilege, although it did find that certain work-product documents did not lose that status through disclosure to the PR firm, which needed to understand the litigation strategy in order to advise on public relations.[11] The strength of the underlying privilege is a key factor that is weighed by the court as a preliminary matter before assessing other factors such as counsel's and the PR firm's specific need for and use of the information.

One way to preserve the privilege over communications between counsel and PR firms is to focus on the specifics of the relationships. Creating an express agency relationship, so that the PR firm becomes the functional equivalent of the client, supports the argument that resulting communications come within the attorney-client privilege. In the absence of an agency relationship, it will be necessary to scrutinize each interaction with the PR firm to determine whether the context of the particular communication supports a claim of privilege. Thus, to the extent the client discloses otherwise privileged attorney-client communications to its PR firm, it should take care that such a disclosure is limited to those individuals who have a need to know (and that the need to know legal strategy is necessary to the PR firm's ability to provide public relations advice).[12] Alternatively, counsel must be prepared to show that communications with the third-party firm are necessary to counsel's provision of legal advice. The more necessary each entity is to the execution of the other's responsibilities, the more likely the privilege claim will be viewed as legitimate. Another goal should be to avoid situations in which the PR firm is simultaneously assisting with clearly non-legal matters, such as product marketing strategies.[13] Such "mixed" assignments increase the likelihood that the consulting firm will be found to be engaged in commercial, not legal, pursuits. Of course, any documents prepared or shared in connection with the provision of legal advice should be clearly marked with appropriate legends.

In situations where PR firms are retained specifically to manage communications with regard to a legal matter, the parties should consider whether the company or its outside lawyers should retain the PR firm. The latter approach may be preferred because it also may support an argument for work-product protection for documents created by the consultants at the direction of lawyers and in anticipation or in the course of litigation (and possibly communications between the client

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[7] *Id.* at 148.

[8] *Id.*

[9] 198 F.R.D. 53 (S.D.N.Y. 2000).

[10] *Id.* at 55.

[11] *Id.*

[12] *See, e.g.*, FTC v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002).

[13] When the same firm is involved in multiple roles, it would be helpful to have separate individuals assigned to the legal and commercial projects.

and the consultants undertaken at the direction of legal counsel that would otherwise not be privileged). However, retention by counsel can undermine arguments that the firm is an agent or the functional equivalent of the client and should be treated as such for privilege purposes. Retention by counsel would more likely make the firm an agent of the lawyers, not the client. Therefore, in circuits that utilize the agency test, the implications of losing this argument should be considered. No matter what test is used, it will be much harder to argue for the privilege if the underlying communication or document is distributed widely to a third party without regard for the third party's need for the information or for the lawyer's need for information from the third party.

[A]uditors commonly require access to privileged documents and communications in order to undertake risk assessments and to make materiality determinations. Once legally privileged information is disclosed to independent auditors, who may rely on this information in preparing their reports, issues of potential waiver arise.

Outside Auditors

Auditors and tax professionals are another potential category of third parties that may require access to privileged information. While involvement of such professionals is most common in criminal tax and securities litigation, they also may be employed in potential criminal antitrust investigations—for example, where a company has undertaken an internal investigation and seeks input on its disclosure obligations or its need to book liability reserves.[14] In providing advice on these issues, auditors commonly require access to privileged documents and communications in order to undertake risk assessments and to make materiality determinations. Once legally privileged information is disclosed to independent auditors, who may rely on this information in preparing their reports, issues of potential waiver arise.

Several recent decisions with different outcomes provide perspectives on how waiver claims will be treated. In *United States v. Deloitte & Touche USA LLP*,[15] the court determined that disclosure of attorney work product to outside auditors did not waive legal privilege because the relevant documents (which included one prepared by Deloitte employees incorporating the company attorneys' thoughts) were prepared in anticipation of litigation regarding the company's tax treatment. No waiver occurred by disclosing the documents and information to Deloitte because the disclosure was not "inconsistent with the maintenance of secrecy."[16] This is contrary to the holdings of prior decisions emphasizing that independent auditors serve a public watchdog function so disclosure to them is fundamentally inconsistent with the secrecy required to maintain privilege.[17] Assuming the underlying work-product claim is credible, courts that take the *Deloitte* view are unlikely to agonize over the waiver issue. But the issue of whether the privilege was waived may not even be reached if the work-product claim is called into question.

A recent example, *United States v. Textron, Inc.*,[18] highlights the uncertainty in determining the availability of work-product privilege when a document has both a business and a litigation purpose. In *Textron*, the court found that tax accrual work papers reflecting legal analysis of litiga-

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[14] *See, e.g.*, United States v. Textron, Inc., 577 F.3d 21 (1st Cir. 2009) (tax accrual work papers prepared by lawyers to support calculation of tax liability reserves were not protected by privilege), *cert. denied*, 2010 U.S. LEXIS 4373 (May 24, 2010).

[15] 623 F. Supp. 2d 39 (D.D.C. 2009) (company's disclosure of work product to its auditors did not waive the work-product protection), *aff'd in part, vacated in part, remanded by* United States v. Deloitte, LLP, 2010 U.S. App. LEXIS 13226 (D.C. Cir. June 29, 2010) (ordering the district court to examine the memorandum in camera).

[16] *Id.* at 41; *see also* Merrill Lynch & Co. v. Allegheny Energy, Inc., 229 F.R.D. 441, 445–46 (S.D.N.Y. 2004) (citing *In re* Pfizer Inc. Sec. Litig., No. 90 Civ. 1260, 1993 U.S. Dist. LEXIS 18215 (S.D.N.Y. Dec. 22, 1993) and holding disclosure of reports of internal investigation to auditor did not waive work-product protection because auditor was not conduit to potential adversary); Vacco v. Harrah's Operating Co., No. 1:07-CV-0663, 2008 U.S. Dist. LEXIS 88158 (N.D.N.Y. Oct. 29, 2008) (documents generated by defendant's general counsel summarizing related litigations for outside auditors were protected by work-product privilege).

[17] *See, e.g.*, Medinol, Ltd. v. Boston Scientific Corp., 214 F.R.D. 113 (S.D.N.Y. 2002).

[18] 577 F.3d 21.

tion risks were not work product because they were not prepared "for use in litigation."[19] Given the Supreme Court's recent denial of certiorari in *Textron*, the lack of clarity on this issue is likely to persist.

Because information is often disclosed to auditors in the context of criminal matters, the issue of waiver may be additionally complicated by joint representation issues. A case that has attracted the attention of criminal antitrust attorneys is *United States v. Ruehle*.[20] The court of appeals held that the statements of a corporate officer to lawyers hired by the company, made during the course of an internal investigation, were not protected by attorney-client privilege because the officer understood that his statements ultimately would be shared with the company's outside auditors. *Ruehle* highlights both the potential privilege issues associated with communications of an individual employee to corporate counsel during the course of an internal investigation regarding potentially criminal conduct and the waiver issues potentially triggered when there is subsequent disclosure to an auditor or such disclosure is anticipated.[21]

In spite of this conflicting authority, there are some steps that should be considered to preserve privilege during internal investigations or when auditors are involved. A starting point is to maximize the strength of the underlying privilege claim. With regard to work-product claims, this means doing one's best to ensure that the documents clearly reflect on their face that they were created in anticipation of litigation and incorporate the analysis and opinion of counsel.[22] Attorney-client communications made to corporate counsel can best be protected in an internal investigation by appropriately establishing the parameters of the interview at the outset, including proper *Upjohn* warnings.[23] Where documents or information ultimately must be disclosed to outside auditors, any such disclosure should be consistent with the limited purposes of the auditor's review and the maintenance of secrecy. Although auditors are independent and do not have an agency relationship with the corporation, it is not unreasonable to expect that such disclosure will remain confidential and to remind auditors of this and of the privileged nature of materials prior to sharing privileged information with them.[24]

Non-Spousal Family Members/Friends

While neither new nor specific to antitrust matters, the disclosure of privileged communications to or in the presence of non-spousal family members can still present a risk of waiver. The marital

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[19] *Textron*, 577 F.3d at 31–32.

[20] 583 F.3d 600 (9th Cir. 2009).

[21] For more on this case and the potential ethical pitfalls of joint representation of corporations and their individual employees, see Kathryn M. Fenton & Ryan C. Thomas, *"The Rules of Professional Conduct Are Not Aspirational": Joint Representation of Corporations and Their Employees*, ANTITRUST SOURCE, June 2009, http://www.abanet.org/antitrust/at-source/09/06/Jun09-Fenton6-29f.pdf.

[22] As *Ruehle* highlights, in cases involving independent auditors who are not construed as agents of the company, creating and/or preserving an attorney-client privilege is more difficult than protecting legitimate work product from waiver when disclosed to such auditors. *See, e.g.*, Comm'r of Rev. v. Comcast Corp., 901 N.E.2d 1185 (Mass. 2009) (communications between in-house corporate counsel and outside tax accountants consulted regarding the structure of a divestiture mandated by an antitrust consent judgment were not protected by attorney-client privilege but were protected by work-product immunity).

[23] The Seventh Circuit recently held that attorney notes created during the course of interviewing school district employees and disclosed to the school board as part of an internal investigation were protected by both work-product and attorney-client privilege. The court advised that proper documentation of the engagement, appropriate *Upjohn* warnings, absence of third parties in interviews, and disclosure of the results in private and in confidence decrease the likelihood of finding any waiver in internal investigations. Sandra T.E. v. South Berwyn School Dist. 100, 600 F.3d 612 (7th Cir. 2010).

[24] *See, e.g.*, United States v. Deloitte & Touche USA LLP, 623 F. Supp. 2d 39, 41 (D.D.C. 2009).

privilege has long provided some protection for disclosure of privileged communications to a spouse,[25] but there are no comparable protections for other close family members or friends. In the antitrust context, an individual employee facing possible criminal liability for price fixing may seek support from a spouse, other adult family members, or close friends and even may request their participation in meetings with legal counsel. Yet, there is some question whether this is prudent given potential waiver issues.

The breadth of privilege with respect to non-spousal family members and the definition of family are evolving, and both are raising new issues. For example, notwithstanding the well-established marital privilege, will this privilege apply to same-sex marriages, which may not be recognized in all states? It is unclear whether a comparable privilege would protect discussions with a domestic partner or significant other. There also is no generally recognized privilege for non-spousal family members, such as children, parents, or siblings.[26]

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As a result, lawyers need to be sensitive to possible claims of waiver arising from participation of children or siblings in privileged communications. At least with regard to work-product protection, where waiver most often turns on whether the disclosure to a third party increased the likelihood that a potential adversary would obtain the information, disclosure to a trusted and close family member, such as a parent or child, is not likely to be viewed as creating this opportunity. Depending on the circuit, however, intentional disclosure of an attorney-client communication to a parent or child may be more risky.[27]

As a result, clients should be counseled regarding the potential impact of disclosure of privileged communications to any third party, even close family members. In this era of constant connectivity, when people forward e-mails, take work home, and otherwise communicate frequently with family members or significant others, careful consideration of privilege issues may not always occur prior to the disclosure. Therefore, ongoing reminders and control of attendees at meetings in which legal strategies will be discussed probably are the only tools counsel will have in avoiding claims of waiver.

Consultants-Turned-Testifying-Experts

Non-lawyer consultants, including economists, accountants, and industry experts, may be retained in antitrust matters for a variety of reasons—to analyze the feasibility or community benefit of a merger, to estimate the potential efficiencies of a transaction, or to use their industry expertise to analyze the competitive dynamic of a particular market. These same consultants also may be used by the client for ongoing projects in the ordinary course of business. Many of the same principles discussed above in connection with PR firms and government relations consultants apply here as well: Were the consultants agents? Did they have a need to know certain privileged information to perform their jobs? Was their involvement necessary to the provision of legal advice by lawyers? However, additional issues are raised when a consultant with access to privileged information later is tapped to testify as an expert witness on behalf of its client.

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, the consultant-turned-testifying-expert may be required to turn over all information, including privileged communications, to which

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[25] *E.g.*, Solomon v. Scientific Am., Inc., 125 F.R.D. 34, 36 (S.D.N.Y. 1988) (disclosure of communications protected by the attorney-client privilege within the context of the marital privilege does not constitute waiver of the attorney-client privilege).

[26] *But see* United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003) (forwarding an e-mail from lawyer to adult daughter does not waive work-product protection).

[27] *Id.* at 464.

he had access prior to designation as an expert and regardless of whether it was provided as the basis for his consulting activities.[28] It has been a longstanding rule that legal privileges are lost when documents and information are disclosed to and considered by testifying experts. Some courts have taken the view that all information to which an expert was exposed are discoverable whether or not the expert ultimately relied upon the materials in forming his or her opinion. Even courts which require for discoverability that the information must have been considered by the expert usually require more than a representation by counsel that the information was not considered.[29] These requirements make all information to which a testifying expert is exposed discoverable regardless of its privileged nature and the expert's role at the time of disclosure.

Current proposed amendments to Rule 26 recognize some of the practical problems associated with this interpretation and the methods that have developed to protect privileged communications.[30] The proposed rule would recognize work-product protection for draft reports and for communications between experts and counsel.[31] Under the proposal, facts, data, and assumptions provided to and considered by the expert by counsel are still discoverable. While the proposed rule would mitigate the need for some of the excruciating steps counsel currently employ to protect their exchanges with testifying experts, whether previously consultants or not, the rule does not protect the underlying information, so caution would still be warranted.

Practically speaking, until the amendments to Rule 26 become effective, the best way to avoid exposing privileged information received by a testifying expert while serving as a consultant is to avoid allowing the consultant to morph into a testifying expert. Using the common approach of employing different consulting and testifying experts and adopting careful controls over the information to which the testifying expert has access remain the best practices. Even if the Rule 26 amendments take effect and will decrease the need for such practices, caution still should be used for all consultants, whether retained in connection with litigation or not, and disclosure of privileged information to such a consultant should be limited to only what is necessary for both the consultant and the lawyers to do their respective jobs.

Third Parties Paying for Litigation

The current economic environment has spawned new models for funding significant corporate commercial litigation, including antitrust claims. Under the so-called third-party litigation funding model, large financial services firms, hedge funds, or specialized legal claim investment firms provide funding to plaintiffs in exchange for a portion of any recovery.[32] When third-party investors finance litigation, ethical issues for which the lawyer-client relationship is central, such as conflicts

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[28] *See, e.g.*, Oklahoma v. Tyson Foods, Inc., No. 05-CV-329, 2009 U.S. Dist. LEXIS 72022 (N.D. Okla. June 2, 2009) (consultant turned testifying expert was required to disclose all material to which he had access as a litigation consultant); Kelley v. Microsoft Corp., No. C 07-475, 2009 U.S. Dist. LEXIS 8290 (W.D. Wash. Jan. 23. 2009) (accounting consultant identified as Rule 30(b)(6) witness fell outside of both the attorney-client privilege and the work-product protection).

[29] *Tyson Foods*, 2009 U.S. Dist. LEXIS 72022, at *34 (citing *In re* Air Crash at Dubrovnik, Civ. No. 3:98cv2464 (AVC), 2001 U.S. Dist. LEXIS 14334 (D. Conn. June 4, 2001)).

[30] Summary of the Judicial Conference Committee on Rules of Practice and Procedure 10–14 (Sept. 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined_ST_Report_Sept_2009.pdf.

[31] The amendments to Rule 26 have been approved by the Supreme Court and are currently before Congress. Barring action by Congress, they will take effect on December 1, 2010.

[32] For more information on this trend, see ABA/BNA Lawyers Manual on Professional Conduct, *Third-Party Investors Offer New Funding Source for Major Commercial Law Suits*, 26 LMPC 207 (Mar. 31, 2010).

of interest and privilege, can become tricky. Potential claims of waiver of privilege as a result of communications to such third parties is one such issue.

While this phenomenon is relatively new, it is one that antitrust litigators may be more likely to encounter in the future. What happens when a third-party investment firm, looking for litigation in which to "invest," becomes privy to privileged information? Is the privilege waived, or is there a sufficient common interest between the two parties even though they are not co-litigants? What if the privileged information is shared with the third party as part of its evaluation of whether to invest in the lawsuit, but such investment never occurs?

While the principles of waiver in this context have not yet been tested, both defense and plaintiff lawyers should be aware of this (and other) potential ethical issues and be prepared to address them. A starting point is to structure the relationship thoughtfully to minimize potential waiver claims. For example, at a minimum, confidentiality and common interest agreements should be employed. Another strategy is for separate counsel to act as an intermediary between the investors and the party with the claim.[33]

Conclusion

Non-lawyers continue to be involved in antitrust transactions, litigation, investigations, and even ordinary business matters in which legal issues may arise, and non-lawyers will likely be involved in increasingly novel ways which courts have not yet addressed. Therefore, being well-grounded in privilege basics and knowledgeable about the ways courts have analyzed the involvement of non-lawyers in matters like those discussed above will help counsel to be sensitive to the potential privilege pitfalls of such involvement and should ideally aid counsel as he or she seeks to minimize the risk of waiver that non-lawyer involvement may create. Given the varied ways courts have approached these issues within and across jurisdictions (and the increasing opportunities for opposing parties to assert waiver), however, it is unlikely that the risks created by non-lawyer participation can be eliminated. The cautionary tales of another's unintended waiver challenge, like those above, should be informative but may not be determinative if and when the involvement of a non-lawyer becomes an issue for a client. Therefore, implementing practical and deliberate efforts to limit disclosures to those who need to know and ensuring the client is counseled on the efforts that should be taken to minimize risk are essential to protecting privileged communications in this context. ●

[33] *Id.*