

ATTORNEY-CLIENT PRIVILEGE, CONFIDENTIALITY, AND THE WORK PRODUCT DOCTRINE: TRAPS FOR THE INATTENTIVE LITIGATOR

It's Time For Another Lawyers Mutual Pop Quiz

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START WITH THE PRINCIPLES

The Atty-Client Privilege -- Under North Carolina privilege law, the attorney-client privilege protects communications from disclosure if:

1. the relation of attorney and client existed at the time the communication was made,
2. the communication was made in confidence,
3. the communication relates to a matter about which the attorney was being professionally consulted,
4. the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and
5. the client has not waived the privilege.

Raymond v. N.C. Police Benevolent Ass'n, (NC 2011)

The Work Product Doctrine

Under Rule 26(b)(3) of the North Carolina Rules of Civil Procedure, as interpreted by the North Carolina courts, a party who invokes the work product doctrine has the burden to show:

1. That the material consists of documents or tangible things,
2. Which were prepared in anticipation of litigation or for trial, and
3. By or for another party or its representatives which may include an attorney, consultant, or agent.

Boyce & Isley, PLLC v. Cooper, (NC App 2009)

Ethical Duty of Confidentiality

Rule 1.6(a) of the North Carolina Revised Rules of Professional Conduct states that:

A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) [which **allows** disclosures to prevent commission of a crime, to prevent reasonably certain death or bodily harm, to defend against allegations of malpractice, or to comply with a court order].

CASE STUDY – ZOOM-BOMBING!



CASE STUDY – ZOOM-BOMBING– HYPO #1

Hackers bombed a Zoom teleconference held by Amazon for all of its investors with pictures of Jeff Bezos sitting on his toilet made of gold. Immediately, the call is shut down. Zoom conducted a cyber-security investigation by interviewing its own employees monitoring the call and investors who witnessed the incident. In a subsequent lawsuit by Bezos against Zoom, will the Incident Report created by Zoom's own investigation team be shielded from discovery by the Work-Product Doctrine?



CASE STUDY – ZOOM-BOMBING – HYPO #1

No – As a general rule, ordinary investigations that a business may conduct, even if there is a small prospect of litigation, will not be accorded work-product protection. The test is “whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”

In re Ernst & Young, LLP, (NC App, 2008)

CASE STUDY – ZOOM-BOMBING – HYPO #2

Zoom contacted and hired you today to investigate and advise it on responding to the media controversy caused by the backlash to the public disclosure of Bezos' Golden Throne. At the county bar luncheon today, others at your table start discussing news about the incident. You tell the table, "Zoom just hired me to represent it."

Permitted Disclosure?

CASE STUDY – ZOOM-BOMBING – HYPO #2

No – RPC 1.6(a) prohibits the disclosure of any information acquired during the professional relationship unless an exception applies.

The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality is much broader and applies in situations other than those where evidence is sought from the lawyer through compulsion of law.

CASE STUDY – ZOOM-BOMBING – HYPO #3

Just before the Zoom call's abrupt ending, Bezos yelled loudly, "I'm going to own Zoom after my lawyer gets through with you. You are violating my civil rights!" Zoom asks you to investigate and advise the company on whether there is a valid legal claim against it. You tape the investor-witness interviews and take notes during the interrogations. Are the taped interviews and your notes protected work-product?

CASE STUDY – ZOOM-BOMBING – HYPO #3

Tapes – Yes, but. Work-product protects documents and tangible things prepared in anticipation of litigation. But may have to produce if the party seeking discovery can show that it has “substantial need” of the tape and is “unable without undue hardship to obtain” the equivalent elsewhere. Witness may obtain tape of his own interview. R. Civ. Proc., Rule 26(b)(3).

Attorney notes – Yes. Mental impressions, opinions, legal theories of an attorney concerning the litigation are absolutely protected.

CASE STUDY – ZOOM-BOMBING – HYPO #4

Following Bezos' threat to sue, you also interview the Zoom tech-support employees and their managers who were monitoring the call for fact-finding so that you may provide legal advice to Zoom on its defense against the anticipated lawsuit. Are your communications with the company's employees protected by the attorney-client privilege?

CASE STUDY – ZOOM-BOMBING – HYPO #4

Probably – Generally the atty-client privilege applies to communications made by corporate employees to counsel (1) at direction of corporate superiors, (2) about matters within the scope of employees' corporate duties, and (3) employees aware that they were being questioned so that corporation could obtain legal advice. Upjohn v. US, (USSCt 1981).

CASE STUDY – ZOOM-BOMBING – HYPO #4 -- CONTINUED

However, NC has not specifically adopted the Upjohn test. Brown v. Am. Partners, (NC Ct App, 2007).

Upjohn Test – Emphasis is on the subject matter and purpose of the communication between the lawyer and the employee.

Vs.

“Control Group” Test – Is the employee in a position to control or have a substantial part in a decision about action the corporation may take on the advice of the attorney.

CASE STUDY – ZOOM-BOMBING – HYPO #5

During your investigation you need to interview the supervisor who trained the Zoom tech-support employees on how to block hackers from bombing teleconferences to determine if Zoom may have liability for inadequate training of its employees. You interview the training supervisor who is now retired. Is the communication atty-client privileged?

CASE STUDY – ZOOM-BOMBING – HYPO #5

Under the “Control Group” test, absolutely not. The supervisor is not even an agent of the company. Newman v. Highland School, (Wash. Sup. Ct. 2016).

Under the Upjohn test, maybe. Drew no distinction communications with present or former employees. Still have to look at all of the factors in light of the purpose of the atty-client privilege.

CASE STUDY – ZOOM-BOMBING – HYPO #6

During an interview with one of the Zoom Techies, you discuss your preliminary legal theories about the case. Then the Techie says, “I hate Jeff Bezos and purposely left a hole in our security for hackers to exploit.” Can the Techie prevent you from disclosing her revelation by saying it was atty-client privileged?

CASE STUDY – ZOOM-BOMBING – HYPO #6

Probably Not – When you represent Zoom, you represent the corporation not the individual employees. However, NC R. Prof. Conduct 1.13 requires lawyer to make clear to employees that the corporation, not any individual employee, is the client whose interest the lawyer must protect.

“CORPORATE MIRANDA WARNING”

I am a lawyer for Zoom. I represent only Zoom, and I do not represent you. If you want an attorney, you must hire your own [or the corporation will hire one for you].

Your communications with me are protected by the attorney-client privilege. The attorney-client privilege belongs solely to Zoom. Accordingly, Zoom may elect to waive that privilege and reveal your communications with me to third parties, including the government, at its sole discretion.

Thanks To Matt Sawchak for manuscript with sample Corporate Miranda Warning

CASE STUDY – ZOOM-BOMBING – HYPO #7

Eventually, Bezos and his new wife file a 150-page complaint against Zoom and the production company who produced the investor teleconference alleging invasion of privacy, IIED, mental anguish, loss of consortium, and \$1 billion in punitive damages. Can you share otherwise privileged information with the production company and its lawyers without waiving the privilege?

CASE STUDY – ZOOM-BOMBING – HYPO #7

Yes – The “common interest doctrine” allows parties with a common interest to communicate with their attorneys and with each other to effectively prosecute or defend their claims if there is an actual agreement between the parties. US v. Duke Energy, (MDNC, 2003).

Agreement should probably be in writing so that lawyers will not have to testify to prove the existence of the agreement. However, the written agreement is probably discoverable and admissible.

COMMUNICATIONS WITH INSURER

Similarly, NC courts recognize a common interest in the tri-partite relationship created when an insurance company employs counsel to defend its insured against a claim. Therefore, the exchange of information between the three is protected by the attorney-client privilege as long as the elements of the privilege are met. Raymond v. NC Police Benevolent Ass'n, (NC 2011).

CASE STUDY – ZOOM-BOMBING – HYPO #8

Contemporaneously with your investigation of the incident, in-house counsel at Zoom has been conducting a regularly-scheduled internal compliance investigation required by the watchdog company that certifies Zoom's cyber-security protocols and procedures. During the investigation, the in-house counsel interviewed the Zoom Techies who had monitored the Bezos call. Are those communications between in-house counsel and the employees privileged?

CASE STUDY – ZOOM-BOMBING – HYPO #8

Maybe – Privilege only applies if one of the significant purposes of the communication was to obtain or provide legal advice. However, if the only purpose was to comply with a routine corporate compliance investigation required by regulatory law and corporate policy and not provide legal advice, then not privileged. In re Kellogg, Brown & Root, (D.C. Circuit, 2014). Government enforcement agencies are likely to view in-house lawyer compliance officers as providing business advice as opposed to legal advice.

CASE STUDY – ZOOM-BOMBING – HYPO #9

As you take the deposition of Bezos you discover that he met the previous day with his lawyer and a law student mentee at the lawyer's office. You ask Bezos to recount all of the communications during the previous day's meeting. The opposing lawyer objects on the grounds that the communications are privileged. Is he right?



CASE STUDY – ZOOM-BOMBING – HYPO #9

Probably Not – The presence of a third party who is not an agent of the attorney for the purpose of assisting the attorney in giving legal advice will waive the privilege for the communications during the meeting. Berens v. Berens, (NC Ct App, 2016).

2014 FEO 1 – *Opinion encourages lawyers to become **mentors** to law students and new lawyers (“protégés”) who are not employees of the **mentor’s** firm, and examines the application of the duty of confidentiality to client communications to which a protégé may be privy.*

CASE STUDY – ZOOM-BOMBING – HYPO #10

While you are taking the deposition of Bezos' new wife, you discover that she brought a close friend and neighbor as moral support to meetings with her attorney and to serve as her advisor and consultant. You ask her to recount all of the communications during those meetings. Are the communications privileged?

CASE STUDY – ZOOM-BOMBING – HYPO #10

Maybe – If the neighbor is an actual “agent” of the wife for the purposes of assisting her in communications with legal counsel, there is no waiver of the privilege. Berens v. Berens, (NC Ct. App. 2016).

However, the facts of the Berens case illustrate how easily the privilege may be waived without careful lawyering.

CASE STUDY – ZOOM-BOMBING – HYPO #11

In preparing a Teleconference Cyber-Security Specialist as a standard of care expert to testify at trial, he sends you a rough draft of his expert report. You call him back and ask him to remove part of the report containing his opinion of the picture quality during Zoom calls because it is beyond the scope of his expertise. Is the rough draft of the report protected work product? Is your phone call to the expert privileged?

CASE STUDY – ZOOM-BOMBING – HYPO #11

The actual draft report would be protected work product IF you are in federal court. Rule 26(b)(4) of the Fed Rules of Civ. Proced. protects drafts of any expert report or disclosure as work product. There is no similar rule in state court where expert reports are not required.

The phone call may be privileged unless the expert's opinions given in the final report or during a deposition rely upon information considered during the conversation. Azalea Garden v. Vanhoy, (NC Bus. Ct. 2009).

CASE STUDY – ZOOM-BOMBING – HYPO #12

As you prepare for trial of the case, an associate reveals that he just realized that he missed a case of controlling authority that would have capped Bezos’ damages at the price of his Zoom “Corporate Membership Fee” if the defense had been properly pled. You and the associate immediately call the firm’s in-house general counsel to address the firm’s possible liability and what to do in response to the discovery of the mistake. Is the communication with the in-house counsel privileged from discovery in Zoom’s subsequent legal malpractice case against your firm?

CASE STUDY – ZOOM-BOMBING – HYPO #12

Yes, probably – Although there is no NC case on point, the emerging trend nationally is a recognition of intra-firm privilege. St. Simons v. Hunter, (Ga. 2013). Elements are (1) designated in-house counsel, (2) purpose of the communication is risk management, (3) communication is confidential, and (4) No exception to the privilege (such as crime-fraud exception) applies.

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