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Court: Public Discussions Don't Cause Attorney-Client Privilege Waiver

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Special to the Legal

In these days of discovery requests that can require the production of millions of pages of documents and electronic communications in a single case, we have to be more vigilant than ever to avoid the potential for a subject-matter waiver of the attorney-client privilege through inadvertent disclosures. But what about intentional disclosures of information related to a representation?

According to the May 25 decision issued by the 3rd U.S. Circuit Court of Appeals in *In re Chevron Corp.*, when attorney-client communications are not made "in confidence" and are not privileged to begin with, they cannot create a subject-matter waiver and the interest of fairness requires no different result.

To understand the origins and context of the 3rd Circuit's decision in *Chevron,* we need to take you back 18 years to the U.S. District Court for the Southern District of New York, where the plaintiffs — appellants in the 3rd Circuit — filed an environmental class action suit against Texaco Petroleum Co., a subsidiary of Texaco Inc., which would later merge with Chevron in 2001. The plaintiffs alleged that pollution from Texaco Petroleum Co.'s oil exploration and extraction activities caused health problems for residents and damaged the natural ecosystem in the Lago Agrio area of the Amazon.

In 2002, the Southern District of New York dismissed the case on forum non conveniens grounds, and in 2003 the plaintiffs re-initiated suit against Chevron in Ecuador. Approximately eight years later, on Feb. 14, 2011, the Lago Agrio Court in Ecuador entered judgment against Chevron, calculating compensatory damages at nearly $9 billion, with the threat of an equal figure in punitive damages if Chevron failed to issue a public apology.

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As part of its response to the judgment and award issued against it, Chevron aggressively sought relief in the American courts, alleging fraud in obtaining the award and seeking discovery in support of its allegations pursuant to 42 U.S.C. § 1782, a federal statute that permits discovery for use in foreign judicial proceedings. In 2010, the 2nd Circuit permitted Chevron to obtain the entire case file and thousands of e-mails from Steven Donziger, the plaintiffs' lead American attorney. Chevron was also permitted to image Donziger's hard drives, and Donziger was ordered to sit for nearly two weeks of sworn depositions. (See the 2010 2nd Circuit opinion in *Lago Agrio Plaintiffs v. Chevron Corp.*)

According to the 3rd Circuit's *In re Chevron Corp.* opinion, Philadelphia-based attorney Joseph C. Kohn and his firm, Kohn Swift & Graf, also represented the Ecuadorean plaintiffs in connection with the Lago Agrio litigation. In November of last year, the opinion said, Chevron filed a Section 1782 discovery application in the U.S. District Court for the Eastern District of Pennsylvania seeking to obtain information relating to its contention that Kohn, along with several other counsel for the plaintiffs, conspired to commit a fraud by, among other things, financing the work of environmental consultants who supposedly ghost-wrote a global damages expert report submitted to the Lago Agrio Court by a purportedly neutral scientific expert. Chevron's discovery action directed at Kohn was but one of many such actions it initiated against approximately 40 individuals and entities in 16 different federal judicial districts, all in an effort to uncover support for Chevron's allegations of fraud and other misconduct that potentially could be used to render the Ecuadorean judgment against it unenforceable.

The evidence in support of Chevron's discovery action against Kohn in the Eastern District of Pennsylvania came primarily from nearly 600 hours of outtake footage from the production of a video documentary concerning the Lago Agrio litigation titled "Crude," the 3rd Circuit opinion said. The outtake footage, which was obtained by Chevron in response to discovery granted by the U.S. District Court for the Southern District of New

York, included many hours of strategic conversations between the Ecuadorean plaintiffs and their attorneys, although Kohn appeared in less than two hours of the outtake footage and less than two minutes of the released version of the documentary. Chevron claimed the footage suggested that Kohn and his law firm were linked to the alleged fraud.

Following a hearing on the matter, the district court granted Chevron's discovery application, allowed it access to the entirety of Kohn's files regarding the Lago Agrio litigation and authorized Chevron to depose Kohn. The court reasoned that the plaintiffs waived the attorney-client privilege by allowing the "Crude" documentary filmmakers to listen in on their conversations with counsel, resulting in a broad subject-matter waiver of the attorney-client privilege for all of Kohn's communications related to the Lago Agrio litigation. The district court further concluded that "to allow the Lago Agrio plaintiffs to waive [the] privilege expansively for favorable documents and information as part of a calculated public relations campaign and then shield related documents behind the screen of privilege would be to permit the use of privilege and the work product doctrine as both sword and shield, an abuse that courts have discouraged."

In general, a waiver of the attorney-client privilege occurs whenever the client voluntarily discloses or consents to the disclosure of privileged communications and typically extends in such situations to other privileged communications relating to the same subject matter. However, if the intentional disclosure is limited in nature, the courts apply a fairness balancing test to determine whether subject-matter waiver is appropriate, as opposed to a limited waiver of only the disclosed communications.

According to the 3rd Circuit opinion, Kohn did not object to producing the written discovery Chevron requested in the first place, and just weeks before the district court's ruling Kohn and his firm voluntarily produced an 833-page privilege log, an effort that required hundreds of attorney hours to review and catalogue more than 15,000 e-mails, approximately 40,000 pages of hard-copy documents and nearly 5,000 electronically stored documents. The Ecuadorean plaintiffs and the Republic of Ecuador, however, intervened as interested parties to oppose Chevron's discovery application and ultimately appealed the district court's decision granting Chevron's discovery application. Upon motion to the 3rd Circuit, the district court's order and discovery were stayed pending appeal.

On appeal to the 3rd Circuit the Ecuadorean plaintiffs and the Republic of Ecuador argued first that the presence of strangers during the attorney-client meetings appearing in the outtakes of the "Crude" documentary precluded the privilege from ever attaching to the communications. In the alternative, they contended that the extrajudicial nature of the disclosures compelled a finding that any waiver was limited to the communications appearing in the outtakes — as opposed to the broader, subject-matter waiver found by the district court.

The prejudice that stems from disclosures outside the courtroom does not create unfairness in the courtroom, even when these disclosures are part of a public relations campaign that is part of the overall litigation strategy.

In support of the latter argument, appellants cited *In re von Bulow*, where the 2nd Circuit in 1987 held that extrajudicial disclosures of otherwise privileged information in the public arena, even if "one-sided or misleading," do not create any "legal prejudice that warrants a broad court-imposed subject-matter waiver." In response, Chevron argued that the touchstone of waiver analysis is fairness, not whether the disclosure was extrajudicial or in court, and that the district court correctly concluded that the selective disclosures made by the Ecuadorean plaintiffs and their counsel, designed to gain a strategic advantage in the Lago Agrio litigation, effected a broad subject-matter waiver of the privilege as to Kohn and his firm.

The 3rd Circuit reversed the district court, rejecting its conclusion that any waiver, much less a broad subject-matter waiver, had occurred. As the 3rd Circuit noted, in order for the attorney-client privilege to attach to a communication, it must be made between privileged persons, in confidence, for the purpose of obtaining or providing legal assistance for the client.

Considering the attorney-client communications appearing in the "Crude" documentary outtakes, the 3rd Circuit concluded that they were never privileged to begin with because they were never made in confidence. Rather, they were intentionally made in "the presence of filmmakers ... so the protections of the attorney-client privilege never attached to [them]." Thus, the court found, there was "no justification for finding any waiver of the attorney-client privilege for Kohn's communications relating to the Lago Agrio litigation on the basis of [the] disclosures made during the filing of 'Crude' and its outtakes, even if those disclosures were selective."

Our court system handles matters that have wide-ranging social, political and economic implications. As we head into the Fourth of July holiday, it is appropriate to be reminded that the ability to publicly speak out about these matters shouldn't be chilled by the fear of waiving the privilege as to communications that are kept confidential.

As the courts point out, the prejudice that stems from disclosures outside the courtroom does not create unfairness in the courtroom, even when these disclosures are part of a public relations campaign that is part of the overall litigation strategy. The 3rd Circuit's decision in *In re Chevron Corp.* and the 2nd Circuit's decision in *Von Bulow* strike a sensible balance that protects the fair use of the privilege without chilling the First Amendment rights of litigants and lawyers to discuss cases in the media. •