IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC., PINNACLE HIP IMPLANT PRODUCTS LIABILITY LITIGATION	§ § § §	MDL Docket No. 3:11-MD-2244-K
This Document Relates to all Cases	§ § §	CASE MANAGEMENT ORDER No. 6

CASE MANAGEMENT ORDER NO. 6
ATTORNEY-CLIENT PRIVILEGE AND
WORK-PRODUCT PRIVILEGE PROTOCOL

This Order is entered to provide guidelines that shall govern the grounds upon which a party may seek to assert either attorney-client or work-product privilege, the protocols that shall be followed with regard to privilege logs, and the method of determining privilege disputes.

A. **Grounds for Asserting Privilege**

1. General Principles. The attorney-client privilege traditionally applied where:

   a. The asserted holder of the privilege is or sought to become a client;

   b. The person to whom the communication was made:

      (1) is a member of the bar of a court, or his subordinate; and

      (2) in connection with this communication is acting as a lawyer;

c. The communication relates to a fact of which the attorney was informed:

(1) by his client

(2) without the presence of strangers

(3) for the purpose of securing primarily either

(a) an opinion on law or

(b) legal services or

(c) assistance in some legal proceeding, and not

(d) for the purpose of committing a crime or tort; and

d. The privilege has been:

(1) claimed and

(2) not waived by the client.

In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 795 (E.D. La. 2007). This definition was adopted by the Fifth Circuit Court of Appeals in 1975 in *In re Grand Jury Proceedings*, 517 F.2d 666, 670 (5th Cir. 1975).

Courts have since recognized that privilege applies to both communications from the client to the attorney and communications from the attorney to the client. *Id*. Five elements are common to all definitions of the attorney-client privilege: (1) an attorney, (2) a client, (3) a communication, (4) confidentiality anticipated and preserved, and (5) legal advice or assistance being

the purpose of the communication. *Id*. The attorney-client privilege applies where the primary purpose of a communication is to seek, or convey, legal advice. *In re Vioxx*, 501 F. Supp. 2d at 796. The burden is on the party seeking to invoke privilege to prove that it applies. *See id.* at 798-99.

The work-product privilege applies to communications that are created in preparation for litigation. As the U.S. Court of Appeals for the Fifth Circuit put it: "litigation need not necessarily be imminent [for a document to be prepared in anticipation of litigation]. . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation." *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981); *see also In re Vioxx*, 501 F. Supp. 2d at 813 (citing *Hickman v. Taylor*, 329 U.S. 495 (1947)); *In re Vioxx Prods. Liab. Litig.*, No. 05-1657, 2007 U.S. Dist. LEXIS 23164, at *9 (E.D. La. Mar. 5, 2007) ("the existence of litigation is not a prerequisite; materials qualify for work-product protection if the 'primary purpose' for their creation was related to potential litigation").

While the attorney-client privilege protects only confidential communications, the work-product doctrine generally protects from disclosure documents prepared by or for an attorney in anticipation of litigation. *In re Vioxx*, 2007 U.S. Dist. LEXIS 23164, at *8.

B. Specific Guidelines

1. The attorney-client privilege protects communications, including memoranda and email messages, addressed to an attorney (or attorneys), containing an explicit or implied legal question raised by the author (whether or not it was answered by the attorney). *See In re Vioxx*, 501 F. Supp. 2d at 809; *Gateway Senior Hous., Ltd. v. MMA Fin., Inc.*, No. 1:06-CV-458, 2008 U.S. Dist. LEXIS 109947, at *23 (E.D. Tex. Dec. 4, 2008) ("Client communications intended to keep the attorney apprised of business matters may be privileged if they embody an implied request for legal advice based thereon."). The attorney's response - including any comments made by the attorney on any draft materials attached to the communication - is also privileged if its primary purpose is to provide legal advice. *See In re Vioxx*, 501 F. Supp. 2d at 809-11.

2. The attorney-client privilege protects communications, including memoranda and email messages, authored by an attorney for the purpose of providing legal advice - even if those communications are not made in response to an explicit request for advice from the client. *See id.* at 798; *see also Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44, 46 (N.D. Cal. 1971) (attorney-client privilege protects "self-initiated attorney communications intended to keep the client posted on legal developments and implications").

3. The attorney-client privilege protects communications, including memoranda and email messages, addressed to both lawyers and non-lawyers for review, comment, and approval if the primary purpose of the communications is to seek legal advice from the lawyer(s) and the non-lawyers are included on the communication to notify them of the legal services sought. *In re Vioxx*, 501 F. Supp. 2d at 809; *see also In re Buspirone Antitrust Litig.*, MDL No. 1413, 2002 U.S. Dist. LEXIS 23463 at *9-10 (S.D.N.Y. Dec. 10, 2002) (memorandum sent to outside counsel and several non-legal personnel at the corporation remained privileged where the document was "being provided to [corporate employees] for the purpose of informing them that legal advice has been sought or obtained").

4. If a communication is sent to both lawyers and non-lawyers - and it is sent for both legal and non-legal purposes, even though the primary purpose is not legal - any portion of such a communication that specifically addresses the lawyer(s) and/or requests legal advice may be redacted. *In re Vioxx*, 501 F. Supp. 2d at 809. An attorney's response to such a communication is similarly privileged to the extent it provides legal advice. *Id.* at 810. If the attorney provides legal comments on an attachment to the communication in the form of line edits or other comments embedded in the document), those comments may be redacted. *Id.* at 810-11.

5. The attorney-client privilege protects what independently is not privileged only if it is attached to, or incorporated in, a communication that is protected by privilege. *Id.* at 811.

6. The attorney-client privilege protects communications, including memoranda and email messages, from a non-lawyer to another non-lawyer where the purpose of the communication is to: (1) convey privileged legal advice to those within the corporate structure who need the advice in order to fulfill their corporate responsibilities; or (2) gather information necessary for a lawyer to provide legal advice. *Id.*; *see also In re Grand Jury 90-I*, 758 F. Supp. 1411, 1413 (D. Colo. 1991) (letter from corporate board to company president was privileged because it relayed legal advice from corporate counsel); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 442 (S.D.N.Y. 1995) (attorney-client privilege "protects form disclosure communications among corporate employees that reflect advice rendered by counsel to the corporation").

7. Where an attorney was involved in the process of drafting an otherwise non-privileged document, drafts of the document are privileged to the extent they reveal the attorney's legal advice (or confidential client information provided to the attorney for the purpose of giving such advice). *See Muller v. Walt Disney Prods.*, 871 F. Supp. 678, 682 (S.D.N.Y. 1994) ("preliminary drafts of contracts are generally protected by attorney-client privilege, since preliminary drafts may reflect not only client confidences, but also the legal advice of opinions of attorneys, all of which is protected by the attorney-client privilege").

8. The attorney work-product doctrine shelters the mental processes of an attorney and protects communications created in preparation for current or pending litigation. *See In re Kaiser Aluminum and Chem. Co.*, 214 F.3d 586, 593 n. 19 (5th Cir. 2000) (materials qualify for work-product protection if the "primary purpose" for their creation was related to potential litigation, even if litigation has not yet been initiated). The work-product doctrine does not protect all materials prepared by a lawyer. Excluded from the scope of work-product are materials assembled in the ordinary course of business or for reasons unrelated to litigation. *See id*.; *U.S. v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982). The test is whether the primary motivating purpose behind the creation of the document was to aid in existing or possible future litigation. *See id*.

C. Privilege Log Protocol

1. General Principles. The party asserting a privilege shall provide sufficient information in its privilege logs to enable the opposing party to assess the applicability of the privilege. Fed. R. Civ. P. 26(b)(5). A privilege log should "indentify[] documents or other communications by date and by the name of the author(s) and recipient(s), and describe their general subject matter (without revealing the privileged or protected material)." Manual For Complex Litigation (Fourth) § 11.431 (2004); *see also* Fed. R. Civ. P. 26(b)(5) (a privilege log should: (a) "expressly [identify the privilege asserted]"; and (b) "describe the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that . . . will enable other parties to assess the claim"); *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992) (privilege log sufficient when it provided basic information about the authros, recipients, dates and subject matters of the documents); *S.E.C. v. Beacon Hill Asset Mgmt. LLC*, 231 F.R.D. 134, 144-45 (S.D.N.Y. 2004) ("[t]ypically, [privilege] logs will identify each document and the individuals who were parties to the communications"). A party asserting privilege is required to provide reasonably specific, rather than generic, information about the withheld information. *In re Pabst, GmbH Patent Litig.*, No. CIV A. MDL 1298, 2001 WL 1135268, at *2-3 (E.D. La. Sept. 19, 2001).

2. Specific Privilege Log Protocols

a. Privilege logs provided in lieu of producing requested documents shall be produced no more than 45 days after the date upon which the documents were required to be produced or were partially produced.

b. Privilege logs shall comply with Rule 26(b)(5), which requires a party to:

(1) Expressly identify the privilege asserted; and

(2) Describe the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess this claim. Fed. R. Civ. P. 26(b)(5).

c. Any party asserting privilege shall provide a separate entry for each document as to which the party asserts a privilege. The entry should list:

(1) the Bates number of the document;

(2) the nature of the privilege asserted (e.g., "attorney-client privilege" or "attorney work product");

(3) the name(s) of the author(s) of the document (if known) (to the extent a document is comprised of an email chain, the name of the author on the most recent email in the chain will be identified);

(4) the name(s) of the recipient(s) of the document (if known) (to the extent a document is comprised of an email chain, the name(s) of the recipient(s) on the most recent email in the chain will be identified);

(5) the date the document was created (if known); and

(6) the general nature of the legal advice requested or provided therein (e.g. "request for legal advice regarding draft regulatory submission"; "request for legal advice regarding proposed marketing"; "legal advice regarding draft advertising") or explanation of the work-product claim (e.g. "attorney memo regarding potential product-liability litigation"). *See In re Grand Jury*, 974 F.2d at 1071 (corporation's privilege log was sufficient where it identified: (a) the attorney and client involved; (b) the nature of the document; (c) all persons or entities shown on the document to have received or sent the document; (d) the date the document was generated or prepared; and (e) the subject matter of the document).

(a) It is not adequate to provide descriptions that state only "request for legal advice," "legal advice," or "attorney communication."

d. To the extent any non-DePuy employee sent or received a document that is included on the log, DePuy agrees to denote that on its privilege logs.

e. The privilege log should indicate which individuals listed on the log are attorneys.

D. Redaction of Confidential and Privileged Information

1. To protect against inappropriate disclosure of information subject to the attorney-client or other privileged and confidential information as defined in the Court's May 7, 2012 Stipulated Protective Order of Confidentiality, ECF No. 131, and to comply with all applicable state and federal law regulations, the Defendants or Plaintiffs shall redact from produced documents, materials or other things, or portions thereof, the following items, or any other item(s) agreed upon by the parties or ordered by the Court:

a. The names, addresses, Social Security numbers, tax identification numbers, e-mail addresses, telephone numbers, and other potential identifying information of

patients (including plaintiffs), health care providers, and individuals enrolled as subjects in clinical studies or adverse event reports. Other general identifying information, however, such as patient or health care provider numbers, shall not be redacted unless required by state or federal law;

b. Materials that contain information protected from disclosure by the attorney-client privilege, the work product doctrine or any other recognized privilege;

c. Those portions of documents that contain information relating to Defendant's other products;

d. The street addresses, Social Security numbers, tax identification numbers, dates of birth, home telephone numbers, cellular telephone numbers of employees in any records, and other irrelevant personal information pertaining to employees; and

e. The names, addresses, Social Security numbers, tax identification numbers, e-mail addresses, telephone numbers, and other potential identifying information of any clinical investigator in any records.

2. The parties shall redact only those portions of a document that are within the scope of the permitted subject matter set forth above, and not the entire document or page unless the entire document or page is within such scope.

3. The parties shall list on their privilege logs all documents that have been redacted to excise privileged information or attorney work product. The parties shall submit an additional log that lists all documents that have been redacted for any other reason and indicates the reason for the redaction (e.g., "privacy," "non-responsive"). Where a redaction is subsequently lifted by order of the Court or by agreement of the parties, the producing party shall produce a non-redacted version of the document pursuant to the requirements of Case Management Order No. 4.

4. Privilege logs shall promptly be supplemented under Fed. R. Civ. P. 26 (e)(1) as to any document that becomes producible thereafter.

5. Any failure to redact information described above does not waive any rights to claims of privilege or privacy, or any objection, including relevancy, as to the specific document or any other document that is or will be produced.

E. Privilege Dispute Procedure

1. The Court understands that the privileged documents at issue in this action will overlap significantly with the privileged documents at issue in the ASR litigation, *In re: DePuy Orthopaedics, Inc., ASR Hip Implamnt Products Liability Litigation*, Case No. 1:10 MD 2197, currently pending in the United States District Court for the Northern District of Ohio. The Court and the Special Master will coordinate with Judge Katz in the ASR litigation regarding overlapping privilege disputes.

2. Any party seeking to challenge a claim of privilege shall meet and confer with the party asserting the privilege to attempt to resolve the issue(s) prior to submitting a challenge to Special Master Stanton.

3. If a meet and confer does not resolve all issues, any party seeking to challenge a claim of privilege shall submit a motion identifying the specific entries on th adverse party's privilege log that it believes to be inadequate or improper and providing the basis for the challenge. Special Master Stanton shall review all privilege challenges.

4. If the Special Master finds that the content of a party's privilege log is inadequate, the Special Master shall identify the privilege log entries that he believes are insufficient and provide the party asserting the privilege with a reasonable time to supplement the information in the privilege log in light of the number of inadequate entries at issue.

5. If a party challenges the assertion of privilege with regard to certain documents as a substantive matter, the Special Master shall conduct an *in camera* review of either:

   a. the contested documents; or

   b. a reasonable number of representative documents selected by the responding party, as well as a reasonable number of additional documents selected by the requesting party. *See Vioxx Prods. Liab. Litig. Steering Comm. V. Merck & Co.*, Nos. 06-30378, 06-30379, 2006 U.S. App. LEXIS 27587, at *8 (5th Cir. May 25, 2006) (recommending that the district court "review [contested] documents against the log . . . whether each document is examined or the examination is a random sampling from the universe" of documents at issue); *United States v. KPMG LLP*, 237 F. Supp. 2d 35, 38 (D.D.C. 2002) (court selected a random sample of documents falling within each category of the privileges asserted in the log); *State ex rel Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 694 (Minn. Ct. App. 2000) (court appointed special master to randomly select and review documents and allowed defendant to decide the category to which each contested document belonged).

6. The party asserting the privilege shall have the opportunity to provide affidavits, argument and *in camera* explanations of the privileged nature of the documents at issue to ensure that the Special Master has complete information upon which to base his privilege determinations. *See, e.g., Vioxx Prods. Liab. Litig. Steering Comm.*, 2006 U.S. App. LEXIS 27587, at *9 (party asserting privilege "should have the opportunity to support its claim of privilege" by submitting factual information to explain the privileged nature of documents subject to *in camera* review and "plac[ing] personnel at hand to answer questions of" the special master conducting the review); *Beacon Hill*, 231 F.R. D. at 144 (where a claim of privilege is challenged, the party asserting privilege "typically" has the opportunity to provide "affidavit or deposition testimony" to explain the basis of the claim).

7. The Special Master shall provide an initial ruling as to whether or not claims of privilege should be upheld. If the Special Master determines that a claim of privilege is not valid with regard to one or more documents, the party asserting the privilege shall have14 days to produce the documents at issue or file objections to the Special Master's finding with the Court.

F. Privilege Log - Exempt Documents. The parties do not need to log any withheld documents created for purposes of prosecuting of defending the Pinnacle Cup System or ASR litigation or communications between counsel and their clients about the Pinnacle Cup System or ASR litigation.

G. Inadvertent Production. Inadvertent production of documents ("Inadvertently Produced Documents") subject to the work-product doctrine, the attorney-client privilege, or other legal privilege protecting information from discovery shall not constitute waiver, provided that the party producing the document shall notify lead counsel for the opposing party in writing within a reasonable period of time from the discovery of the inadvertent production.

1. If such notification is made, such Inadvertently Produced Documents, and all copies thereof, including any copies provided to experts or other outside consultants, shall, upon request, be returned to the party making the inadvertent production.

2. In addition, all notes or other work product of the receiving party reflecting the contents of such materials shall be destroyed, and such returned or destroyed material shall be deleted from any litigation-support or other database.

3. If the party receiving the production disputes in writing the claim of privilege, that party may retain possession of the Inadvertently Produced Documents, as well as any notes or other work product of the receiving party reflecting the contents of such materials, pending resolution of the matter by the Court.

4. If the Court determines that the material is privileged, the receiving party shall promptly comply with the immediately preceding

provisions of this paragraph or such other directives as may be issued by the Court.

5. No use shall be made of such Inadvertently Produced Documents during depositions or at trial; nor shall they be disclosed to anyone who was not given access to them prior to the request to return or destroy them.

IT IS SO ORDERED.

Signed June 20th, 2012.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE