When the Accused Knocks, the Constitution Answers

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It may come as a surprise to many practitioners that their zealously guarded client confidences could one day be subject to disclosure. When the defendant in a criminal case knocks on your client's door with a subpoena calling for production of privileged attorney-client communications one's reflexive response might be that these communications are not discoverable. But before the experienced litigator dismissively rejects the defendant's claims out of hand, he should consider what might happen when the accused's constitutional right to present a defense meets the seemingly inviolable attorney-client privilege.

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The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law."[1] For any number of reasons, including its age, this privilege is often viewed as impenetrable. But what happens when the venerated policy favoring confidentiality of attorney-client communications conflicts with the right of a defendant to obtain and present evidence in his favor? Simply put, the defendant's constitutional rights will likely trump the privilege.

A defendant's right to present evidence is protected by the Sixth Amendment of the United States Constitution.[2] Likewise, the due process clause of the Fourteenth Amendment "guarantees a

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criminal defendant a meaningful opportunity to present a complete defense."[3] Supreme Court cases have established "at a minimum, that criminal defendants have the right . . . to put before a jury evidence that might influence the determination of guilt."[4] Federal Rule of Criminal Procedure 17(c) implements the Sixth Amendment guarantee that an accused have compulsory process to secure evidence in his favor.[5]

1. Defendant's Right to Access Privileged Evidence under the Confrontation Clause of the Sixth Amendment.

Generally, the Sixth Amendment's confrontation clause requires that a defendant be given an opportunity for effective cross-examination and to present a defense through evidence of bias and motive. That is to say a defendant has a constitutional right to show bias and motive on the part of the witness, and thereby "'expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'"[6] Courts have recognized that where the government's case is largely dependent on informant or accomplice testimony, serious questions of credibility are raised and thus defense counsel "must be given a maximum opportunity to test the credibility of the witness."[7] Since unreliable testimony exists in all types of criminal cases from run-of-the-mill drug cases to high-profile corporate corruption cases, the accused will use every constitutional protection available to impeach unreliable witnesses.

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor . . . ." The Supreme Court has broadly defined the Sixth Amendment rights, including the right to present evidence, to mean that an accused has "the right to present a defense:"

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has a right to present his own witnesses to establish a defense.[8]

Although the Supreme Court has not yet decided a case involving the intersection between the Sixth Amendment and the attorney-client privilege, we know from well-established precedent involving other privileges that the Court will use a fact-specific, balancing test when determining whether an evidentiary rule requiring exclusion is outweighed by the defendant's asserted need for the evidence.[9] Indeed, its precedents provide that evidentiary privileges or other state laws must yield if necessary to ensure that an accused receives his Sixth Amendment protections.[10]

Notably, in the relatively recent Ninth Circuit case of *Murdoch v. Castro*, the court considered a habeas petition that presented a conflict between the attorney-client privilege and a criminal defendant's Sixth Amendment rights under the confrontation clause.[11] Murdoch, the petitioner, was accused of committing a murder during the robbery of a bar. One of the persons involved in the crime (the "accomplice"), who had already been convicted, had agreed to testify against Murdoch hoping to receive a lighter sentence.[12] Before opening statements, the prosecutor informed the court and defense counsel that during an interview with the accomplice, she had learned of a letter the accomplice wrote to his attorney exonerating Murdoch. The trial court took possession of the letter without allowing Murdoch's counsel or the prosecutor to see it. Murdoch sought to impeach the accomplice with the letter.[13] The trial court concluded that the accomplice was entitled to the privilege and refused to permit Murdoch to use the letter to cross-examine the accomplice. The court then returned the letter to the accomplice's attorney.

On appeal, the Ninth Circuit vacated the district court's denial of the habeas petition, and remanded the case to allow the lower court to consider the contents of the privileged letter, which was not part of the record on appeal. The *Murdoch* court concluded that because of the importance of the right conferred under the confrontation clause "[t]he attorney-client privilege should not be an unequivocal bar to access the only evidence of inconsistent statements and ulterior motives made by accomplices turned government witnesses."[14] In remanding the case, the *Murdoch* court essentially directed the lower court to use a balancing test to resolve the conflict and determine whether denying the petitioner access to the letter resulted in an unconstitutional denial of his Sixth Amendment right to confront witnesses.[15]

The Ninth Circuit is not alone in this emerging area of law. As the *Murdoch* court observed, at least two circuits have acknowledged and applied this precept in the context of the attorney-client privilege. Chief Judge Posner of the Seventh Circuit acknowledged the value of evidentiary privileges but noted that they are not absolute. "Even privileges recog-

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nized when the Constitution was written can be trumped by constitutional rights, such as the right of confrontation conferred by the Sixth Amendment."[16] Similarly, the Eleventh Circuit has implicitly acknowledged that the attorney-client privilege might have to give way in certain circumstances to accommodate the Sixth Amendment.[17]

At the outer limits, a "defendant's confrontation rights are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of the witnesses and enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable."[18] By using a balancing test, courts may find that there is sufficient information available to satisfy the accused's confrontation rights without having to pierce the attorney-client privilege. If an accused can effectively cross-examine a witness without use of privileged material because it is cumulative of other inconsistent statements, then the court will find that the accused has not been prejudiced.[19]

2. Defendant's Right to Privileged Communications under the Due Process Clause of the Fourteenth Amendment.

Notwithstanding the limitations on the defendant's right to obtain privileged information under the confrontation clause, the defendant might also seek to obtain privileged material under the broader due process clause of the Fourteenth Amendment. Because an accused's Sixth Amendment right to confront witnesses against him attaches at trial, it does not allow for pretrial discovery of material, exculpatory evidence. In other words the confrontation clause is a <u>trial</u> right that provides access to privileged material solely for purposes of cross-examination.

Due process is an equally important constitutional protection because it guarantees the fundamental fairness of trials and also ensures a defendant's right to obtain material favorable to his defense.[20] And in contrast to one's trial-based confrontation rights, the due process clause provides the accused with access to <u>pretrial</u> discovery in criminal cases.

Although the conflict between privileges and the defendant's right to secure favorable evidence is less developed under the due process clause, there is also Supreme Court precedent supporting an accused's claim that he is entitled to access privileged communications pretrial under the broader protections of the due process clause.[21] As noted earlier, Federal Rule of Criminal Procedure 17(c) implements the constitutional guarantee that an accused have compulsory process to secure evidence in his favor <u>before</u> trial.

While Rule 17(c) is not intended to be a discovery device, it facilitates the accused's right to procure documents that are evidentiary and relevant before trial recognizing that he could not otherwise properly prepare for trial without such production.[22] Importantly, the accused need not describe fully the contents of the materials sought (indeed, such a requirement would put an undue burden on the moving party since he could never know precisely the contents of the privileged materials.) Rather, he need only show that "there [is] a sufficient likelihood" that the records contain information "relevant to the offenses charged in the indictment."[23]

In the recent case of *United States v. W.R. Grace*, the district court dealt directly with the question of whether the attorney-client privilege must yield to a defendant's right to obtain evidence supporting his defense; in effect, evidence that would demonstrate a lack of criminal knowledge or intent.[24] In a lengthy, well-reasoned opinion, the court rejected the argument that the attorney-client privilege will *only* yield in cases where the defendant seeks to confront the witness.

Specifically, the *W.R. Grace* defendants wanted to use privileged corporate communications in their defense (i) to show that a particular defendant was not involved in certain aspects of company decision-making that related to the charges; (ii) to prove an individual defendant's lack of intent to defraud; and (iii) to establish a defense based on the advice of counsel.[25] The district court found that a defendant had a constitutional right "to present[ ] exculpatory proof that could provide a defense to one or more counts of the indictment."[26] The court then reviewed the "nature and contents of the privileged evidence" *ex parte* and "weighed it against the purposes served by the attorney-client privilege" to determine whether any of the documents are of such value that the right to the privilege must yield to the defendant's right to present evidence.[27] Ultimately, the district court concluded that the evidence defendants sought might "be of such probative and exculpatory value as to compel admission of the evidence over Defendant Grace's objection as the attorney-client privilege holder."[28]

Just as the district court in *W.R. Grace* analyzed the right to obtain and present exculpatory evidence under the Sixth Amendment, the fundamental principle applies with equal force under the due process clause.[29] Therefore, a defendant may invoke his due process rights to obtain pretrial privileged communications that could be material to his defense.

Finally, practitioners faced with a court order compelling production of

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attorney-client communications in a criminal case can take steps to protect the confidentiality of their clients' privileged communications. Under established Ninth Circuit law compelled disclosure does not constitute a waiver of the attorney-client privilege.[30] The producing party should, nevertheless, insist on disclosure subject to a carefully-worded protective order limiting use to the specific criminal case and trial at issue. The protective order should contain explicit language preserving the confidentiality of any documents the court compels the producing party to disclose pretrial.[31]

Moreover, the protective order should limit access to the privileged documents to those persons assisting in the accused's defense or who have a direct and identifiable interest in reviewing the material pretrial. The producing party thereby ensures that the attorney-client privilege is not lost. Although some may be chagrined to learn that this hallowed privilege is not sacrosanct after all, steps can be taken to protect the privilege when disclosure is compelled. ❐

(Endnotes)

1 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

2 *Rock v. Arkansas*, 483 U.S. 44, 51 (1987).

3 *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

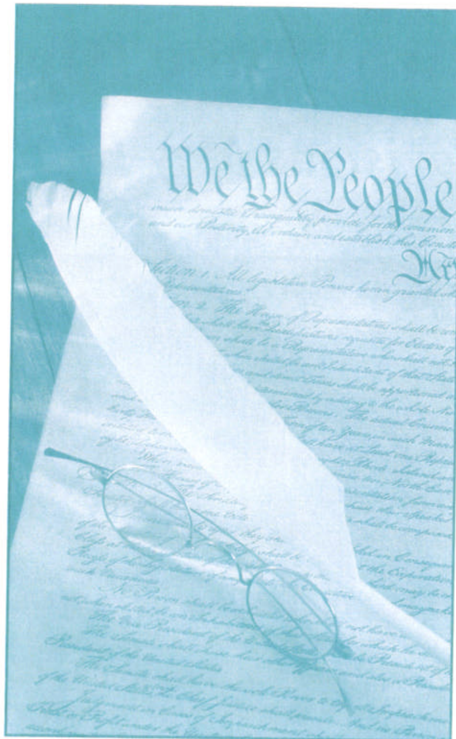
4 *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (defining the specific right secured by the compulsory process clause of the Sixth Amendment).

5 *California v. Trombetta*, 467 U.S. 479, 485 (1984).

6 *Id.* at 705.

7 *Id.* at 704 (quoting *Burr v. Sullivan*, 618 F.3d 583, 587 (1980)).

8 *Washington v. Texas*, 388 U.S. 14, 19 (1967).



9 *See United States v. W.R. Grace*, 439 F. Supp.2d 1125, 1140 (D. Mont. 2006) (analyzing Supreme Court precedent and noting that the Court has used "a balancing test in which the evidence or testimony sought is weighed against the policy behind the rule requiring that the evidence be excluded").

10 *See, e.g., Olden v. Kentucky*, 488 U.S. 227, 232 (1988); *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (holding Sixth Amendment right must prevail over state's legitimate policy interest in keeping juvenile adjudications confidential).

11 365 F.3d 699 (9th Cir. 2004).

12 *Id.* at 701.

13 *Id.* at 701-02.

14 *Id.* at 704.

15 *Id.* at 706.

16 32 F.3d 1203, 1206 (7th Cir. 1994).

17 *Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998).

18 *Id.* (quoting *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1370 (1994)).

19 *Id. Accord Rainone*, 32 F.3d at 1206-07.

20 *United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963).

21 *Pennsylvania v. Ritchie*, 480 U.S. 39, 55-57 (1987). *Cf. United States v. Nixon*, 418 U.S. 683, 713 (1974) (concluding in the context of the presidential privilege "that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial").

22 *Nixon*, 418 U.S. at 699.

23 *Id.* at 700.

24 *See* note 9, *supra*.

25 *Id.*

26 *W.R. Grace*, 439 F. Supp.2d at 1142.

27 *Id.*

28 *Id.*

29 *See Pennsylvania v. Ritchie*, 480 U.S. at 55-57 (1987).

30 *Transamerica Computer Co., Inc. v. Int'l Business Machines Corp.*, 573 F.2d 646, 651 (9th Cir. 1978). *See also United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992) (citing to *Transamerica* and holding that privilege was not lost for documents obtained pursuant to court-ordered search warrant).

31 *Bittaker v. Woodford*, 331 F.3d 715, 720-21 (9th Cir. 2003).