"Shield" Misuse: Overcoming Improper Assertions of the Attorney-Client Privilege by Defense Attorneys in Medical Malpractice Cases

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I. Introduction

Defense attorneys routinely assert the attorney-client privilege on behalf of their clients to preclude the disclosure of relevant facts despite the lack of any basis to do so. In medical malpractice cases, defense counsel often attempt to prevent their clients from answering deposition questions about their knowledge of the plaintiff's subsequent treatment or conditions by asserting the attorney-client privilege. Similarly, defense attorneys frequently instruct their clients not to answer deposition questions regarding the clients' knowledge about the prior testimony of the other parties to the litigation. In a recent medical malpractice case, for example, we deposed a defendant doctor and asked her what her understanding was about the prior testimony of our client. We made clear that we were only seeking what she was told about what our client testified to and that we did not want to know defense counsel's thoughts, mental impressions, or comments about the testimony. Nevertheless, defense counsel instructed her not to answer based on the attorney-client privilege, arguing that the defendant's knowledge of the testimony was protected from disclosure because defense counsel was the source of that knowledge. This is a common defense tactic and should be prohibited.

Defense counsels' expounded justification for instructing their clients not to answer questions about their state of knowledge is a misguided interpretation of the privilege, at best. The law in New Hampshire and in jurisdictions across the country is clear: the protection afforded by the attorney-client privilege does not encompass underlying facts, regardless of the source of the information. This article will discuss the law in New Hampshire and in other states concerning the attorney-client privilege and will explain why this defense tactic should be barred.

II. Discussion

In New Hampshire, the attorney-client privilege is set forth in Rule 502 of the New Hampshire Rules of Evidence, which provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or his or her representative and the client's lawyer or the lawyer's representative…[1]

Notably, the rule expressly states that the privilege only applies to communications, not facts. The New Hampshire Supreme Court recognized this limitation over one hundred years ago in La Coss v. Lebanon.[2]

In La Coss, a town employee was injured at work when a "hoisting apparatus" broke.[3] Following the incident, the town's officers sketched the scene of the accident, photographed the apparatus, and gave these materials to the town's counsel.[4] The employee filed suit and sought to discover the photograph and the sketch, however, the town refused to produce the materials on the basis of the attorney-client privilege.[5] The court, holding that the assertion of the privilege was inappropriate, ordered the town to produce the sketch and the photograph.[6] Finding the documents relevant to the plaintiff's cause of action, the court explained:

> [T]he sketch and photograph are not communications…but documents that [the defendant] prepared to perpetuate the evidence of the facts on which it relies as a defense…the mere fact these documents are now in the possession of the defendant's counsel does not help it for if the defendant can be compelled to discover them its counsel also can be compelled to produce them.[7]

The court emphasized that a party cannot avoid the "duty of discovering material documents by merely handing them to his attorney."[8] Simply put, the defendant could not rely on the attorney-client privilege to shield its knowledge of relevant factual information from discovery.

In the seminal case, Upjohn Co. v. United States,[9] The United States Supreme Court also recognized that the discovery of communications is distinct from the discovery of the underlying facts of those communications. In Upjohn, the Internal Revenue Service ("IRS") requested from Upjohn Company's general counsel questionnaires sent to corporate employees by the general counsel.[10] When Upjohn Company refused to produce the materials on the grounds of the attorney-client privilege, the IRS moved the court to compel the production of the questionnaires.[11] Although the Court found that the questionnaires constituted privileged communications, it concluded that the facts contained within the questionnaires were not protected by the privilege.[12] The IRS, therefore, could question the corporate employees about the information, despite the fact that the information had been communicated through the privileged questionnaires because the attorney-client privilege "only protects disclosure of communications;" not the "disclosure of the underlying facts by those who communicated with the attorney."[13] The Court elaborated:

> A fact is one thing and a communication concerning the fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge

> merely because he incorporated a statement of such fact into his communication to his attorney.[14]

La Coss and Upjohn demonstrate that defendants may not withhold knowledge of relevant factual information on the basis of privilege because the defendant discussed the facts with counsel. It follows, therefore, that a defendant's knowledge of facts is not insulated from discovery simply because the defendant was apprised of those facts by his or her counsel. Indeed, courts have routinely held under Upjohn that it is completely appropriate to ask "for facts from a deponent even though those facts may have been communicated to the deponent by deponent's counsel."[15]

For example, in Protective Nat'l Ins. Co.,[16] the U.S. District Court for the District of Nebraska noted there was an "essential distinction" between discovery of attorney-client communications and discovery of underlying facts and found that the facts that a defendant learned from defense counsel were clearly discoverable.[17] In Protective, the defendant's spokesman was deposed and defense counsel objected—on the grounds of the attorney-client privilege—to all questions seeking the factual basis of the defendant's allegations.[18] In doing so, defense counsel "essentially took the position" that the defendant's spokesperson could not testify to facts that were communicated to her by defense counsel on the basis of the attorney-client privilege.[19] Citing Upjohn, the court disagreed and stated that the privilege "does not protect facts communicated to an attorney" nor can the client "refuse to disclose facts which their attorney conveyed to them and which the attorneys obtained from independent sources."[20] Importantly, the court noted that the facts sought by the plaintiff were undoubtedly discoverable because plaintiff's counsel "made clear that he was 'not asking [the deponent] to relate the opinion'" of the deponent's counsel and he only sought the facts that supported the defendants' allegations.[21]

Similarly, in Kan. Wastewater, Inc. v. Alliant Techsystems, Inc.,[22] the United States District Court for the District of Kansas also relied upon The Supreme Court's decision in Upjohn and held that the privilege "does not protect facts that an attorney conveys to his client."[23] In Wastewater, the plaintiff declined to answer questions about his understanding of the status of actions taken by the Kansas Department of Health and Environment during his deposition.[24] He argued that doing so would reveal privileged attorney-client communications because he learned the information from his lawyer.[25] The defendant subsequently moved to compel the answers to these questions. In granting the motion, the court explained that a "privileged communication and the facts recounted within it are two different things," therefore, "a client does not normally lose the privilege as to communications with his attorney merely because he testifies during his deposition or at trial to the same events or facts that his/her lawyer discussed with him."[26] As the court succinctly stated, "the discoverability of a communication depends on its nature, rather than its

source. A fact is discoverable regardless of how the deponent came to possess it."[27]

Likewise, the United States District Court for the District of Southern California has held that facts communicated to a party by his or her counsel are not protected by the attorney-client privilege. In Thomasson v. Gc Servs.,[28] the defendant moved to compel responses to three deposition questions that the plaintiff was instructed by his attorney not to answer—on the basis of the attorney-client privilege—because they sought facts supporting the allegations in the complaint that the plaintiff learned from his lawyer.[29] The defendant argued that such an instruction was improper because he was entitled to the factual information known to the plaintiff. The Thomasson court agreed, and partially granted the motion. The court reiterated the well-settled principle that:

> [t]he attorney-client privilege does not extend to facts known to a party that are central to that party's claims, even if such facts came to be known through communications with counsel who had obtained knowledge of those facts through an investigation into the underlying dispute. Facts gathered by counsel in the course of investigating a claim or preparing for trial are not privileged and must be divulged if requested in the course of proper discovery. Opposing counsel is entitled to obtain through discovery the names of witnesses, facts underlying the cause of action, technical data, the results of studies, investigations and testing to be used at trial, and other factual information.[30]

By instructing the plaintiff not to answer questions regarding the facts supporting the allegations of the complaint, the court explained, plaintiff's counsel inappropriately prevented defense counsel from obtaining discovery information that "he was entitled to obtain."[31]

The New York District Courts have similarly held that the attorney-client privilege does not reach facts within the client's knowledge, even if the client learned those facts through communications with counsel.[32] For example, In Tribune Co. v. Purcigliotti,[33] the defendant moved to compel the production of documents and disclosure of information to which plaintiff's counsel objected based on the attorney-client privilege.[34] In granting the motion to compel, the court explained "the privilege does not protect the client's knowledge of relevant facts, whether or not they were learned from his counsel, or facts learned by an attorney from independent sources."[35]

The above cases clearly stand for the proposition that a party may not use the attorney client privilege to shield from discovery relevant facts solely because the party learned that information from his or her counsel.

III. Analysis

Despite this well-established law, defendants in medical negligence cases regularly try to avoid disclosing their knowledge of the plaintiff's testimony, subsequent treatments, and medical conditions under blanket assertions of privilege. Presumably, defense counsel strategically instruct their clients to avoid reviewing pertinent discovery materials such as the plaintiff's deposition transcript and records from the plaintiff's subsequent treating physicians. Defense counsel will then disclose the relevant facts to the defendant. When the defendant is then deposed and plaintiff's counsel attempts to probe the defendant's knowledge, defense counsel instructs the defendant not to answer and improperly assert the attorney-client privilege.

This defense tactic is unsupported by the law and deprives plaintiffs of discovery to which they are entitled. Plaintiffs have a right to know whether the defendants' state of knowledge is complete and accurate. Without such information, plaintiffs would be greatly prejudiced because plaintiffs' counsel would be unable to conduct meaningful and informed examinations of the defendants.

Defendants are entitled to read plaintiffs' deposition transcript and subsequent treatment records and plaintiffs' counsel is entitled to examine the defendant about his or her understanding of the facts in those materials. As the cases above clearly demonstrate, it does not matter if the defendant ultimately learned those facts from his or her attorney—they are still discoverable. The source of the information is immaterial.

IV. Conclusion

It is up to plaintiffs' lawyers to stop this defense tactic. This practice will continue unless plaintiffs' lawyers make a concerted effort to challenge defendants on their assertions of privilege and seek judicial intervention when necessary. Given that the party asserting the privilege has the burden of proving the privilege applies, a plaintiff 's lawyer who encounters this defense tactic should put the defendant to his burden and require him to prove the underlying facts are actually privileged. The state of the law in New Hampshire and across the country suggests that the courts will, more likely than not, order discovery if the questions are carefully tailored to seek only factual information.

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[1] N.H. R. Ev. 502(b).
[2] 78 N.H. 413 (1917).
[3] *Id.*
[4] *See id.*

[5] *See id.*
[6] *See La Coss*, 78 N.H. at 413. The court noted that a defendant "can be compelled to discover any facts within the knowledge, information, or belief of its officers…that are relevant to the plaintiff's cause of action." *Id.* at 414.
[7] *Id.* at 414 (explaining that "when a writing evidences facts on which both parties rely either may call for its discover").
[8] *See id.*
[9] 449 U.S. 383 (1981).
[10] *See id.* at 395-396.
[11] *See id.* at 386-388.
[12] *See id.* at 395-396.
[13] *See Upjohn*, 449 U.S. at 396.
[14] *See id.* at 395-396; *see also Robinson v. Tex. Auto Dealers Ass'n*, 214 F.R.D 432, 439 (E.D. Tex. 2003) (holding "a client may not refuse to disclose facts…simply because they were communicated or given to an attorney"); *Langley v. Providence College*, No. PC 2005-5702, 2009 R.I. Super. Lexis 74 at *122 (R.I. Sup. Ct. 2009) (recognizing Upjohn's holding that the attorney client privilege "extends only to communications and not to facts").
[15] *Protective Nat'l Ins. Co. v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 280 (D. Neb. 1989) (noting "there is simply nothing wrong" with such requests); *see also United States v. Educ. Mgmt. LLC*, No. 2:07-cv-00461, 2014 U.S. Dist. LEXIS 50519, at *27 (W.D. Pa. 2014) (stating "the fact that [a party] may have learned information from attorneys does not, by itself, implicate privilege or work product protection"); *Robbins & Myers, Inc. v. J.M. Huber Corp.*, 274 F.R.D. 63 (W.D.N.Y. 2011) (explaining "[a]lthough a communication among counsel to a party may be privileged, a privileged communication of facts does not prevent discovery of the underlying or asserted facts nor, absent an intention to convey legal advice…constitute a privileged communication"); *In re Grand Jury Proceedings*, 616 F.3d 1172, 1182-1183 (10th Cir. 2010) (noting that the "prevailing rule [of the attorney-client privilege] does not bar divulgence by the attorney of information communicated to him or his agents by third persons[, n]or does information so obtained become privileged by being in turn related by the attorney to the client in the form of advice"); *Mineaba Co. v. Papst*, 228 F.R.D. 13, 19 (recognizing that "[c]ommunications from attorney to client are shielded [by the attorney-client privilege] if they rest on confidential information obtained from the client. . . . Correlatively, when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged"); *Antoine v. Atlas Turner, Inc.* 66 F.3d 105, 110 (6th Cir. 1995) (pointing out that "[i]t is clear that when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged"); *In re Sealed Case*, 737 F.2d 94, 99, 237 U.S. App. D.C. 312 (D.C. Cir. 1984) (explaining that "when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged"); *Sedco International, S.A. v. Cory*, 683 F.2d 1201, 1205 (8th Cir. 1982) (explaining "[n]o contention can be made that the attorney-client privilege precludes disclosure of factual information. The privilege does not protect facts communicated to an attorney").
[16] 137 F.R.D. 267 (D. Neb. 1989).
[17] *See id.*
[18] *See id.* at 272.
[19] *See id.* at 278
[20] *Protective*, 137 F.R.D. at 278-279.
[21] *Id.* at 279.
[22] 217 F.R.D. 525 (D. Kan. 2003).
[23] *Id.* at 528 (noting that it is "well established that a party may not withhold relevant facts from disclosure simply because they were communicated to, or learned from, the party's attorney); *see also Sprint Communs. CO., L.P. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 529 (D. Kan. 2006) (finding that the "attorney-client privilege does not protect facts communicated to an attorney…[and] clients cannot refuse to disclose facts which their attorneys conveyed to them and which the attorneys obtained from independent sources).
[24] *See Wastewater*, 217 F.R.D. at 528.

[25] *Id.* at 526.
[26] *See id.* 529.
[27] *Id.* (emphasis added).
[28] No. 05c0940-LAB, 2006 U.S. Dist. LEXIS 108727 at * (S.D. Cal. 2006).
[29] *See id.* at *3.
[30] *See id.* at *4. (granting the motion with respect to two of the three deposition questions because the judge found that the plaintiff had adequately responded to one of the questions).
[31] *Id.*
[32] *See e.g., B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of N.Y.*, 168 F.R.D. 161, 165 (S.D.N.Y. 1996) (holding "the attorney-client privilege simply does not extend to facts known to a party that are central to that party's claims, even if such facts came to be known through communications with counsel who had obtained knowledge of those facts through an investigation into the underlying dispute"); *Allen v. West Point-Pepperell Inc.*, 848 F. Supp. 423, 428 (S.D.N.Y. 1994) (finding "[a] party's knowledge of facts, from whatever source, is not privileged"); *Rattner v. Netburn*, No. 88 Civ. 2080, 1989 U.S. Dist. LEXIS 6876, at *12 (S.D.N.Y. 1989) (holding that a client could not refuse to disclose his knowledge of a court ruling even if the client learned of the ruling from counsel); *Standard Chartered Bank PLC v. Ayala International Holdings (U.S.), Inc.*, 111 F.R.D. 76, 80 (S.D.N.Y. 1986) (stating the defendant must disclose all facts of which it was aware, regardless of whether defendant learned those facts from counsel).
[33] No. 93 Civ. 7222, 1997 U.S. Dist. LEXIS 228 (S.D.N.Y. 1997).
[34] *See id.* at *9.
[35] *See id.* at *21.