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.

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 oppor-
tunity to present a complete defense."3
Supreme Court cases have established
"at a minimum, that criminal defend-
ants 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 pre-
sent 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 approp-
riately draw inferences relating to the
reliability of the witness."6 Courts have
recognized that where the government's
case is largely dependent on informan or
accomplice testimony, serious questions
of credibility are raised and thus defense
counsel "must be given a maximum op-
portunity 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 wit-
nesses.

The Sixth Amendment provides in
relevant part that "[i]n all criminal pros-
ecutions, the accused shall enjoy the right
. . . to be confronted with the witnesses
against him [and] to have compulsory
process for obtaining witnesses in his fa-
vor . . . ." 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 tes-
timony, 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 intersec-
tion 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 un-
der 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 let-
ter.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 accom-
plice. 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 Mur-
doach 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 re-
manding the case, the Murdoch court
essentially directed the lower court
to use a balancing test to resolve the
conflict and determine whether deny-
ing 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 Sev-
enth Circuit acknowledged the value of
evidentiary privileges but noted that they
are not absolute. "Even privileges recog-
nized when the Constitution was written can be trumped by constitutional rights, such as the right of confrontation conferred by the Sixth Amendment. 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.

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." 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.

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 trial 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. And in contrast to one's trial-based confrontation rights, the due process clause provides the accused with access to pretrial 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.

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 before 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. 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." 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. 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. 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." 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. 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."

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. 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 evidence would have to weigh the importance of the evidence in question against the potential for a violation of the attorney-client privilege.
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. 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.

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)

4 Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987) (defining the specific right secured by the compulsory process clause of the Sixth Amendment).
6 Id. at 705.
7 Id. at 704 (quoting Burr v. Sullivan, 618 F.3d 583, 587 (1980)).

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").

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.
22 Nixon, 418 U.S. at 699.
23 Id. at 700.
24 See note 9, supra.
25 Id.
27 Id.
28 Id.
30 Transamérica 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 Transamérica 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).