Privilege

United States

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Gibson, Dunn & Crutcher

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Scope of the privilege

1 Are communications between an attorney and client protected? Under what circumstances?

Yes. Although the precise definition of attorney–client privilege varies among state and federal courts, there are four basic elements to establish attorney–client privilege: (i) a communication; (ii) made between counsel and client; (iii) in confidence; (iv) for the purpose of seeking, obtaining or providing legal assistance to the client.

2 Does the privilege only protect legal advice? Does it also protect non-legal communications between an attorney and client, such as business advice?

Only legal advice is protected by the attorney–client privilege. Non-legal communications, including business advice, are not protected. This distinction is particularly important for in-house counsel who may be involved in non-legal aspects of the client's business. If a communication's primary purpose is to obtain legal advice and the non-legal information conveyed is an integral part of the communication, the privilege will apply. If a communication primarily has a business purpose and any legal advice is incidental, then the privilege may not apply. See Neuder v Battelle Pac. Northwest Nat'l Lab., 194 F.R.D. 289, 293 (D.D.C. 2000).

Recently, the court in In re Kellogg Brown & Root, Inc, No. 14-5319, slip op. (D.C. Cir. Aug. 11, 2015) strengthened the privilege by holding that the privilege will stand as long as "one of the significant purposes" of the communication was to provide legal advice.

3 Is a distinction made between legal advice related to litigation and other legal advice?

No. The attorney–client privilege attaches regardless of whether the legal advice is related to a potential or actual lawsuit. However, a related privilege called the work product doctrine protects materials prepared in anticipation of litigation and, therefore, does turn on this distinction.

4 What kinds of documents are protected by the privilege? Does it cover documents that were prepared in anticipation of an attorney-client communication?

The attorney–client privilege protects all documents that can be considered a communication, including emails, text messages, letters and memoranda. The privilege protects communications that are created by the client as well as those addressed to the client.

If an attorney receives documents from a client, it does not necessarily mean that they are privileged. The privilege would extend to documents specifically prepared by the client for the attorney to obtain legal advice.

5 To what extent must the communication be confidential? Who can be privy to the communication without breaking privilege?

To be considered attorney–client privileged, the communication must be confidential when made and the client must intend that the communication remain confidential. The client's intent must be a reasonable one and precautions taken against inadvertent disclosures to third parties are considered.

Such communications can be made or shared with third parties reasonably necessary to the lawyer's services. Clients must be careful not to include non-essential third parties because sharing such communications with those parties may jeopardise the privilege. For example, in United States v Evans, 113 F.3d 1457 (7th Cir. 1997), the court held that the privilege was broken because of the presence of a third party attorney who was not acting as an attorney but as a friend and prospective character witness for the client.

6 Is the underlying information privileged if it can be obtained from a non-privileged source?

No. The attorney–client privilege protects the communication but not the underlying information. If the client is questioned in court about the underlying information or ordered by the court to disclose a non-privileged document containing the underlying information, he or she cannot invoke the protection of the privilege. At the same time, disclosure of the underlying information does not waive the privilege with respect to the communication.

7 Are there any notable exceptions or caveats to the privilege?

Yes. Among the notable exceptions is a fiduciary exception to the attorney–client privilege where a beneficiary may be able to pierce through the privilege claim of the fiduciary. The court in Garner v Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970) held that a corporation cannot invoke attorney–client privilege against its shareholders if they show good cause for disclosure. In creating the good cause requirement, the court balanced two competing interests. On one hand, a corporation "acts wholly or partly in the interests [of its shareholders]". On the other hand, a corporation must be able to seek legal advice without fear of undue disclosure.

In determining good cause, the following factors are considered:

- the number of shareholders involved and the percentage of stock they represent;
- the shareholders' good faith;
- the nature of their claim;
- the necessity of obtaining the information and its availability from other sources;
- whether the alleged misconduct of the corporation was criminal, illegal, or of doubtful legality;
- whether the communication related to past or to prospective actions;
- whether the communication included advice concerning the litigation itself;
- whether the shareholders were "blindly fishing;" and
- the risk of revealing trade secrets or other confidential information.

8 Are there laws unrelated to privilege that may protect certain communications between attorney and client?

Each US state has its own ethical rules that its licensed attorneys must abide by, which include a duty of confidentiality. The duty of confidentiality is broader than the attorney–client privilege and applies not only to matters communicated in confidence (whether legal or non-legal) but also to all information relating to the representation. The attorney is bound by the duty of confidentiality in all situations and cannot use confidential client information to the detriment of the client. An attorney who violates this duty may face sanction by the state in which he or she is licensed.

It is important to note, however, that the duty of confidentiality is not a rule of evidence and will not stop an attorney from disclosing confidential client communications if he or she is legally compelled to do so (and no attorney–client privilege exists).

Protected parties

9 To what extent does the privilege extend to in-house counsel?

The privilege extends to in-house counsel but only in his or her capacity as a legal adviser. The mere fact that a corporate officer has a law degree does not shield all his or her communications with the attorney–client privilege. At the same time, if in-house counsel has additional non-legal duties, he or she will not automatically lose the privilege. See In re Grand Jury Proceeding, 68 F.3d 193, 196 (7th Cir. 1995). Courts will take a close look to determine whether the communication with in-house counsel is for the purpose of obtaining legal advice.

10 Does the privilege protect communications between an attorney and a corporate client's employees? Under what circumstances?

Federal courts and most state courts apply a "subject matter" test to determine if the privilege extends to communications with a corporate client's employees. In Upjohn Co v United States, 449 U.S. 383 (1981), the Supreme Court held that the employee communications were privileged because: (i) they were made to counsel at the direction of corporate superiors; (ii) the information was not available from upper-level management; (iii) they concerned matters within the scope of the employees' work duties; and (iv) the employees were aware that the purpose of the communications was for the corporation to obtain legal advice. Since then, the Upjohn test has been widely applied in the corporate context.

However, a few states utilise a "control group" test, which focuses on whether the communication was made by an employee who is in a position to control, or take a substantial role in the determination of, the course of action a corporation may take based on legal advice rendered. Only those individuals could invoke the privilege in communications with counsel.

11 Does the privilege protect communications between non-lawyers if they are acting at the direction of counsel or gathering information to provide to counsel?

Communications between non-lawyers at the management level is permitted, so that they may discuss legal advice and prescribe a course of action. Federal courts apply a "need to know" test to determine if the employee's work duties reasonably include being privy to the privileged communication with the attorney.

In addition, the privilege may extend to information gathered by non-lawyer employees at the request of counsel or for the transmission to counsel for legal advice. For example, in Santrade, Ltd v General Elec Co, 150 F.R.D. 539 (E.D.N.C. 1993), the court held that "where the client is a corporation, documents subject to the privilege may be transmitted between non-attorneys to relay information requested by attorneys".

The privilege may even extend to non-employee agents or outside contractors, if they are necessary for the transmission of privileged materials. For example, in Caremark, Inc v Affiliated Computer Serv, Inc, 192 F.R.D. 263 (N.D. Ill. 2000), the court held that communications between the attorney and non-employee agent were privileged because the agent had express authority to coordinate the legal review of certain contracts.

12 Must the attorney be qualified to practise in your country to invoke the privilege?

Some courts have held that foreign attorneys who are not licensed to practise in the United States can still invoke the attorney–client privilege. For example, in Renfield Corp v E Remy Martin & Co SA. 98 F.R.D. 442, 444 (D. Del. 1982), the court held that the privilege protects communications with French in-house counsel because, although they are not licensed in the United States, they are the "functional" equivalent of US attorneys and are able to give legal advice.

At the same time, other courts have held that communications with foreign counsel are only privileged where parties have a reasonable expectation of confidentiality under the relevant

foreign laws. For example, see Louis Vuitton Malletier v Dooney & Bourke, No. 04 Civ 5316 (RMB)(MHD), 2006 WL 3476735 (S.D.N.Y. Nov 30, 2006).

13 Is there an analogous privilege extended to non-lawyer professionals?

Yes, the privilege can "attach to reports of third parties made at the request of the attorney or the client where the purpose of the report was to put in usable form information obtained from the client." See United States v Kovel, 296 F.2d 918 (2d Cir. 1961). The privilege is much more likely to attach if the attorney (i) advised the client to enlist the assistance of the third-party professional in the first instance and (ii) directs the third-party professional to communicate all findings to counsel.

In short, there must be a "close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body." See In re Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 330-31 (S.D.N.Y. 2003). If an attorney recommends an accountant to a client for purposes of assisting with a tax audit (and not providing legal advice), then communication between the client and accountant will likely not be privileged.

14 Does the privilege apply to communications with potential clients?

Yes, the privilege protects potential clients who are seeking legal representation. Moreover, the communication with the attorney will remain privileged even if the attorney is not hired. However, once the attorney refuses to represent the potential client, any further communications between potential client and attorney are not privileged.

Ownership of the privilege

15 Does the attorney or the client hold the privilege? Who has rights under the privilege?

The client technically holds the privilege and has the right to assert it. However, the attorney, as the client's agent, can assert the privilege and is usually expected to do so (even in the client's absence). It is important to note that if the client is a corporation, then the privilege belongs to the members of the control group (eg, the board of directors). See Commodity Futures Trading Comm'n v Weintraub, 471 U.S. 343 (1985), where the court held that the "power to waive the corporate attorney–client privilege rests with the corporation's management and is normally exercised by its officers and directors."

The privilege will then shift to whoever currently controls the company – whether that be a new board of directors, a trustee-in-bankruptcy, or a parent company. However, in a sale of corporate assets, the privilege does not necessarily transfer to the buyer of the assets. For example, see Telectronics Proprietary Ltd v Medtronic, Inc, 836 F.2d 1332, 1336, where the court held that the transfer of a patent did not transfer the attorney–client privilege.

16 Can the privilege be waived? Who may waive it?

Yes. The client, as the holder of the privilege, has the ultimate right to waive the privilege. There is little consensus on which employees of a corporate client (other than the board of directors) have the right to waive the privilege. For example, see Jonathan Corp. v Prime Computer, 114 F.R.D. 693 (E.D. Va. 1987) (holding salesman's disclosure of a private memorandum waived corporation's privilege).

The attorney, acting as the client's agent, may waive the privilege but not if the client expressly forbids it. If the client wishes to contest the attorney's waiver after the fact, then he must do so affirmatively (otherwise, it is assumed that the waiver was authorised).

The attorney–client privilege can be waived unknowingly, carelessly, and inadvertently by either the client or the attorney.

17 Is waiver all or nothing? Is it possible to waive the privilege for certain communications but not others?

Generally, a client cannot partially disclose a portion of a privileged communication and still maintain the privilege as to the remainder. For example, in an adversarial proceeding, a party may not disclose or use one privileged document on a particular subject matter without disclosing all the privileged documents on that subject matter.

It is important to note that a client will not waive privilege by answering background questions as to whether certain privileged communications took place without revealing any of the actual content of the communication. In Western United Life Assur. Co v Fifth Third Bank, 2004 U.S. Dist. LEXIS 23073 (N.D. Ill. Nov 10, 2004), the court held that a deponent did not waive privilege by answering background questions regarding privileged communications.

Some courts may allow parties to enter into an agreement that disclosure of certain matters will not constitute a blanket waiver of privilege. This "selective waiver' doctrine may allow corporations to cooperate with an investigating government agency without waiving privilege. However, it is important to note that selective waiver doctrine has been rejected by nearly all federal circuits. For example, the DC Circuit rejected the doctrine in Permian Corp v United States, 665 F.2d 1214 (D.C. Cir. 1981).

18 If two defendants are mounting a joint defence, can they share privileged information without waiver? What about two parties with a common interest?

Some courts treat "joint defence" and "common interest" as interchangeable, while others view joint defence as a narrower concept and tied to actual litigation. They both function as exceptions to the confidential element in establishing privilege – privilege is not broken when the third party has a common interest.

To maintain a common interest or joint defence, parties must show that the communications were made in the course of and to further the goals of the common interest or joint defence. The parties' legal interests must be closely aligned; some courts require that they be identical. It is best practice to enter into an agreement that dictates the scope, duration, boundaries and parties to the joint defence privilege. Moreover, information should be shared between the two attorneys rather than the two clients.

If the parties no longer have a common interest, the privilege continues to apply against third parties not privy to the privilege. Neither party may unilaterally waive the privilege.

19 Is it common for attorneys and clients to agree to a confidentiality provision in a contract?

Generally, no. The attorney is already bound by a duty of confidentiality. If that duty is violated and the client suffers an injury and financial harm, the client can sue the attorney for professional malpractice.

Enforcement considerations

20 Describe the legal basis of the rules governing the privilege. Are these rules found in a constitution or statute, or in case law?

In the United States, the concept of attorney–client privilege has been primarily developed in the common law and dates back to at least the Elizabethan times. Although some states have incorporated their privilege law in statutes, the privilege in most state courts is governed by the case law of that specific state court.

Similarly, the federal court system has its own common law governing claims of attorney–client privilege. The common law is explicitly incorporated by Federal Rule of Evidence (FRE) 501. One notable exception to this common law tradition is FRE 502, which substantively changed how inadvertent disclosure of privileged communications is treated in federal courts.

21 Is the privilege primarily characterised as a procedural or evidentiary rule, or is it characterised as a substantive right?

Generally, attorney–client privilege is seen as substantive law. See Republic Gear Co. v Borg-Warner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967). However, for choice of law purposes, some courts have characterised privilege law as procedural while others have characterised it as substantive. This distinction is significant because a forum court will apply its own privilege laws if it considers privilege law to be procedural. If a forum court is applying another jurisdiction's substantive law, it may also use that jurisdiction's privilege law if it considers privilege law to be substantive.

22 Describe any differences in how the privilege is applied in the criminal, civil, regulatory or investigatory context.

The attorney–client privilege is fully recognised in the civil, regulatory, and criminal context. The privilege must be respected even in front of a grand jury, which has broad authority to investigate and collect information. See In Re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corporation), 348 F.3d 16, 21 (1st Cir. 2003). Whether the privilege applies to matters before Congress is a contested issue. However, Congress has not yet gone so far as to override a valid claim of privilege. See Bradley J Bondi, No Secrets Allowed: Congress's Treatment and Mistreatment of the Attorney–client Privilege and Work-Product Protection in Congressional Investigations and Contempt Proceedings, 25 J. L. & Politics 145 (2009).

23 Are the rules regarding the privilege uniform nationwide or are there regional variations within your country?

Each state has adopted its own attorney–client privilege rules. Although differences exist, most states follow a similar formulation of the privilege. The federal system has developed its own set of attorney–client privilege rules, but there are variations in how the different circuits apply those rules.

24 Does a professional organisation enforce the maintenance of the privilege among attorneys? What discipline do attorneys face if they violate privilege rules?

No. The extent of the attorney–client privilege is determined by a court. Moreover, the privilege is not absolutely maintained and may be waived by the client or by the attorney on behalf of the client. Attorneys will not typically be disciplined for waiving of the attorney–client privilege, but they may be disciplined for any violation of the ethical duty of confidentiality owed to the client.

25 What sanctions do courts impose for violating the attorney–client privilege?

Courts will not typically sanction an attorney for waiving the attorney–client privilege against his or her client's wishes but they may sanction the attorney for violating his ethical duty of confidentiality owed to the client. He or she may be subject to formal reprimand, suspension or debarment. Often, the attorney is reprimanded not for an inadvertent disclosure but for an intentional disclosure where the attorney was benefited and the client disadvantaged. For example, see Stark County Bar Association v Osborne, 1 Ohio St. 3d 140 (1982), where an attorney was sanctioned for using a client's serious illness to enter into various business relations that benefited the attorney.

26 How can parties invoke the privilege during investigations or court proceedings? Can the privilege be invoked on the witness stand?

Attorney–client privilege can generally be raised in all instances where an adversary or third party seeks to legally compel disclosure of privileged communications. Therefore, it can be raised in response to a discovery request, subpoena or interrogatory. It can be raised during depositions or while being questioned on the stand. In fact, a claim of privilege must be raised in a timely fashion or risk being waived. Generally, the privilege is used as a shield during specific instances; a blanket reservation of privilege at the outset is generally ineffective.

When a witness is asked whether a certain matter was discussed with an attorney, it is best practice to raise the attorney–client privilege rather than responding "no" which may entitle the opposing party to disprove that negative. For example, in United States of America v Pinho, 2003 Dist. LEXIS 12244 (E.D. Pa. 8 July 2003), the defendant testified to a grand jury that she had not discussed a particular issue with her former attorney; the court subsequently granted the government's motion to question the former attorney as to the truthfulness of the defendant's assertion.

27 In disputes relating to privilege, who typically bears the burden of proof?

Typically, the party claiming the privilege must prove that the sought-after communication is shielded by the attorney–client privilege. See In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998). The party must make at least a prima facie case, requiring the "minimum quantum of evidence necessary to support a rational inference" that the allegation is true. See In re E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004).

28 Does the privilege protect against compulsory disclosures such as search warrants or discovery requests? Is there a distinction between documents held by the client and documents held by the attorney?

Yes. The attorney–client privilege may be raised during discovery requests and other compulsory disclosures. It may also be raised in response to a search warrant but not to the point of obstructing the ability of the government to search the premises. The search of a law office would likely trigger attorney–client privilege concerns. In this situation, the US Attorney's Manual states that a "privilege team" should be designated, consisting of agents and lawyers not involved in the underlying investigation to review potential privileged material and advise the search team. Moreover, it states that the "least intrusive approach" be taken consistent with "vigorous and effective law enforcement". See US Attorney's Manual, 9-13.420E.

There is no distinction between documents held by the client and documents held by the attorney. Documents merely in the possession of the attorney are not automatically attorney–client privileged.

29 Describe the choice-of-law rules applied by your courts to determine which country's privilege laws apply. To what extent does your country recognise the validity of choice-of-law provisions in contracts, particularly as they apply to privilege?

There are multiple approaches used by state courts to decide which country's privilege laws apply. Under the "territorial approach", the forum court will use the privilege law of the state in which it sits, regardless of where the relevant events of the lawsuit took place. Under the "most significant relationship" approach, the forum court will generally allow the admission of a potentially privileged communication if the state or country with the most significant relationship allows it (unless there are countervailing policy reasons not to do so).

If a federal court is entertaining a case under federal question jurisdiction, then all questions of privilege will be determined by federal common law. See Reed v Baxter, 134 F.3d 351, 355 (6th Cir. 1998). A federal court is more likely to apply the privilege laws of another country if it is applying the substantive law of that country.

There is little case law on the subject, but courts have taken a strict view of the scope of general choice-of-law provisions as they relate to privilege. For example, see Hercules, Inc v Martin Marietta Corp., 143 F.R.D. 266 (D. Colo.1992). It may be best practice to expand the language of these general choice-of-law provisions to explicitly include privileged communications.

Termination of the privilege

30 Does the privilege terminate on the death of either the attorney or the client?

Most courts have held that the attorney–client privilege exists in perpetuity unless the attorney is released by the client, meaning the privilege still exists upon the death of the client. However, there are special circumstances that warrant breaking the privilege, including litigation between the heirs, legatees, devisees or any other parties claiming under the deceased client. For an example, see United States v Osborn, 561 F.2d 1334, 1340 (9th Cir. 1977), where the court held that attorney–client communications are "privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs".

If the client is a corporation, the privilege still survives the "death" of the corporation if there is a surviving entity, such as a trustee-in-bankruptcy. If there is no surviving entity, courts have recently held that the privilege no longer exists. For example, see SEC v Carrillo Huettel LLP, 2015 U.S. Dist. LEXIS 45988 (S.D.N.Y. 1 April, 2015).

The duration of the privilege also continues upon the death or any change in status of the attorney. If the attorney is living but retired, the privilege rests with the law firm with which the attorney was associated. If the attorney dies, the estate (and the executor) of the deceased attorney would be expected to maintain the privilege.

31 Does the privilege terminate on the conclusion of the attorney-client relationship?

No, the privilege survives the termination of the attorney–client relationship. For example, the court in United States v Kleifgen, 557 F.2d 1293, 1297 (9th Cir. 1977) held that "confidential communications had between appellant and his former counsel retain the protection of the attorney–client privilege beyond the termination of the attorney–client relationship."

32 Is the privilege destroyed if the client communicates information to the attorney to further a crime or perpetuate a fraud?

Yes, the privilege will not protect legal advice sought by the client to help effectuate a crime or fraud. For the exception to apply, it must be an ongoing or future-contemplated action. Seeking an attorney's advice on how to deal with a crime or fraud already committed is privileged, unless the client is contemplating covering up the completed crime. The attorney need not be aware that his or her advice is perpetuating a crime or fraud.

In order to claim that the crime/fraud exception applies, the proponent must make a prima facie case, meaning mere allegation of criminal activity is not enough. Technically, the contested documents themselves cannot be used to bootstrap a finding of criminal activity. However, some courts are willing to inspect the contested documents in camera (in private) to make this determination.

33 Is the privilege terminated if the attorney makes an inadvertent disclosure? If such a disclosure is made, can the attorney retrieve the privileged information or otherwise correct the error?

It is common for parties to enter into confidentiality agreements, which could then be incorporated by the court as a consent protective order. In such an agreement, the parties can avoid ambiguities in the law of waiver and agree that no production will create a subject-matter waiver or that an inadvertently produced document can be clawed back by either party.

The vast majority of states use a balancing test to determine whether inadvertent disclosure is considered waiver of the privilege. Generally, the factors considered are:

- reasonableness of the precautions taken;
- number of documents inadvertently produced;
- extent of the inadvertent production;
- promptness of the actions taken to retrieve the privileged documents; and
- fundamental fairness to the respective parties.

The federal courts have adopted a similar balancing test with Federal Rule of Evidence 502, which states that privilege is not waived if (i) the disclosure was inadvertent; (ii) the holder of the privilege took reasonable steps to prevent disclosure; and (iii) the holder promptly took reasonable steps to rectify the error. FRE 502 was drafted to reduce the costs of privilege reviews in complex cases.

34 Is the privilege terminated if a third party is included in the communication or is subsequently forwarded the communication?

An otherwise privileged communication may not be privileged if a third party is included (or overhears the communication) because there is no longer "confidentiality". For example, in United States v Evans, 113 F.3d 1457 (7th Cir. 1997), the court held that the privilege was broken because of the presence of a third party attorney who was not acting as an attorney but as a friend and prospective character witness for the client.

However, if the presence of a third party was unforeseeable, many courts have held that the privilege is not broken. In addition, third parties such as secretaries, assistants and associates who are part of the attorney's staff do not break privilege.

Showing a third party a privileged communication (even inadvertently) may waive the privilege. The vast majority of states use a balancing test to determine whether inadvertent disclosure is considered a waiver of the privilege. Precautions that can be used in the office setting include:

- label privileged documents, especially emails, as client–attorney privileged;
- segregate privileged documents in separate files where possible;
- limit by established procedures those individuals who have access to any privileged documents;
- destroy or shred privileged documents that are no longer necessary; and
- if unauthorised third parties gain access to privileged documents, take immediate remedial steps.

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From 2008 to 2012, Mr Chung served as an Assistant United States Attorney in the Southern District of New York. He investigated and prosecuted a wide range of complex federal criminal cases, involving securities fraud, Ponzi schemes, bank fraud, mail fraud, wire fraud, healthcare fraud, insurance fraud, immigration fraud, money laundering, complex racketeering, murder, terrorism and international drug cartels. In 2012, he received the Federal Law Enforcement Foundation's "Prosecutor of the Year" award.

Mr Chung is a 2003 cum laude graduate of Harvard Law School. He graduated magna cum laude from Harvard College in 2000 with a Bachelor of Arts degree in history. Following law school, Mr Chung served as a law clerk for the Honorable Norman H Stahl on the US Court of Appeals for the First Circuit, and then for the Honorable Michael B Mukasey on the US District Court for the Southern District of New York.

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Mr Syarief received his law degree from the University of Virginia School of Law, where he was an editor of the Virginia Law Review. He graduated from Rutgers University with a degree in political science.