Maybe "Waiver" is the Wrong Term to Use When Describing Clients' Loss of Privilege Protection

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In his August 21, 2013 “Privilege Points” release, Tom Spahn discusses whether a client must understand that they are waiving the privilege and intend to do so.

Courts universally use the term "waiver" when describing clients' loss of privilege protection upon disclosure of privileged communications. However, elsewhere in the law, the term "waiver" usually involves a knowing relinquishment of some legal right.

Clients can lose privilege protection without such knowledge. In Hollis v. O'Driscoll, No. 13 Civ. 01955 (AJN), 2013 U.S. Dist. LEXIS 83885 (S.D.N.Y. June 11, 2013), the court analyzed the waiver impact of a pro se defendant attaching to her answer a privileged document created during her communications with a lawyer she had not ultimately hired. Through her newly-hired lawyer, the defendant argued that she had not waived her privilege – "because she did not know or fully understand the nature of the privilege or know that she was waiving it." Id. at *29. The court bluntly rejected her argument, noting that she "cites no case law - and the Court has found none - to support her argument that a party, whether proceeding pro se or represented by counsel, must thoroughly understand the nature of the attorney-client privilege before it can be waived." Id.

Clients can waive their privilege protection if they intentionally disclose privileged communications – even if they did not realize that the privilege protected the communication, and failed to appreciate the legal significance of their disclosure.