Preserving the Attorney-Client Privilege

in the Employment Environment

By John F. Birmingham, Jr. and Jennifer L. Neumann

In reaction to the proliferation of laws and regulations governing the employment relationship and the concomitant growth of employment litigation, the role of attorneys in the employment environment has expanded. Additionally, the evolving business culture, which increasingly demands that in-house attorneys act as business counselors as well as legal advisors, has also changed the dynamic. Consequently, attorneys frequently provide counsel during decision-making processes or lead the investigation of workplace misconduct before any litigation. This role is especially prevalent in the context of reductions-in-force (RIF) and investigations after an employee has complained about an alleged employment law violation. Attorneys and their clients rely on the premise that the counseling and related communications will be protected by the attorney-client privilege or work-product doctrine or both.[1]

Generally, this counseling is a positive development, as it promotes compliance with the law and allows for a better understanding of the risks associated with a particular decision. However, it has also resulted in challenges to the assertion of the attorney-client privilege and increased the likelihood that attorneys will be compelled to testify in litigation. With careful planning, employers can take steps to

preserve the privilege, which is an absolutely justified and imperative element of the attorney-client relationship in RIFs and other situations. Alternatively, there may be occasions when the employer affirmatively decides up front to waive, or partially waive, the privilege and acknowledges that the attorney will be a testifying witness in the case. A failure to appreciate these issues and plan accordingly, however, could result in a court ordering the disclosure of privileged information or presenting the employer with the unenviable choice of either making the attorney available to testify or waiving the right to present favorable evidence.

Background of the Attorney-Client Privilege

The attorney-client privilege, which is one of "the oldest privileges for confidential communications,"[2] protects confidential communications between a client and legal adviser made for the purpose of securing legal advice.[3] The privilege helps to ensure that attorneys and their clients engage in open, honest dialogue, which allows the attorney to advise the client based on complete information.[4] Moreover, the privilege, with its promise of confidentiality, encourages individuals to seek legal advice. This serves the greater public interest of promoting compliance with the law.[5]

Corporations and similar entities are considered clients for purposes of the attorney-client privilege.[6] Michigan, like most jurisdictions, applies the "subject-matter" test, in which communications between a corporate employee and corporate counsel are privileged as long as they occur to secure legal advice regarding matters within the scope of the employee's duties.[7]

For almost as long as it has been recognized, the privilege has also been criticized on the grounds that it obstructs the search for truth.[8] Modern civil procedure encourages full discovery and allows parties to discover any relevant, non-privileged information that is admissible at trial or is reasonably calculated to lead to admissible evidence.[9] The attorney-client privilege, in contrast, reduces the amount of information available during the course of a lawsuit.[10] As a result, courts often closely examine the invocation of the attorney-client privilege.[11]

The Attorney-Client Privilege in Employment Law Counseling

The ongoing tension between the communication-motivating and truth-inhibiting effects of the attorney-client privilege is readily apparent in the employment law arena. Certain aspects of employment law, such as RIF analyses, as well as internal investigations of alleged employment law violations—often involving harassment allegations—provide particularly acute examples of this tension. Moreover, in-house attorneys are increasingly asked to occupy multiple roles. In addition to providing legal advice, they are expected to act as business partners. During the course of a day, and sometimes during the course of a meeting, attorneys may be asked to perform administrative, human resources, operational, management, and legal roles. This increases the difficulty in assessing when the privilege applies. Even outside attorneys are increasingly asked to participate in the decision-making or investigatory process, exposing the very necessary privilege to potential challenge.

Reductions in Force

Companies contemplating a RIF often seek the advice of legal counsel to promote legal compliance as well as risk assessment and avoidance. Candid and frank communications with counsel foster the best possible advice as to the effects of a possible RIF.[12] Consequently, courts often apply the attorney-client privilege to corporate communications in which attorneys provide legal advice regarding a RIF.[13]

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The privilege, however, may not be used to shield otherwise discoverable facts, such as race, gender, and hire date of employees, as well as the reasons for termination. While such facts may have been part of attorney-client communications, the privilege applies only to communications regarding the facts, not to the facts themselves.[14] The facts are discoverable, therefore, but analysis of the facts is generally privileged.[15] Typically, such analytic tools as tables, graphs, statistical analyses, and even the format of lists of such data are considered sufficiently "evaluative" to be subject to the privilege.[16] If the only remaining source of the facts is contained in a document or communication protected by the attorney-client privilege or work-product doctrine, a court may require the document or communication to be produced with the confidential communications redacted or may require the company to produce the underlying facts in another format.[17]

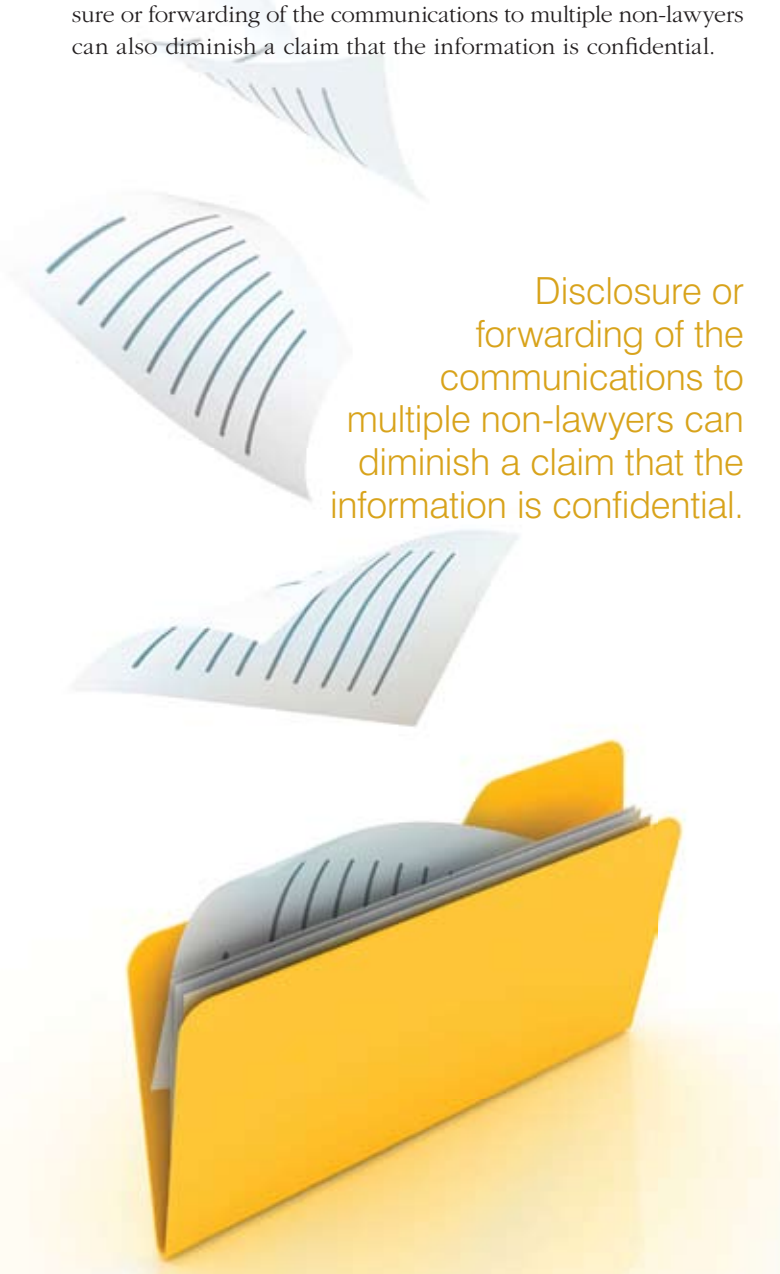
Purpose of the Communication

Communications taking place in the context of RIFs are also susceptible to claims that they were for business, rather than legal purposes, and, therefore, are not protected by the attorney-client privilege.[18] For example, many sophisticated employers use attorneys to conduct disparate impact analyses designed to identify whether a RIF has a disproportionate impact on a protected class. Such an analysis is often followed by an attorney assessment of the validity of the reasons supporting particular termination decisions. The difficulty arises when it is unclear whether the attorney is providing legal recommendations or actually acting as the decision-maker. Courts are particularly vigilant in analyzing the appropriateness of the privilege in cases involving in-house counsel, where legal and business duties are often difficult to distinguish.[19] Nonetheless, an argument that communications were for business purposes can be overcome, for example, by witness testimony that the communications were for legal purposes[20] or by producing written memoranda that make explicit the legal purposes of the communications.[21]

Confidentiality of Communication

Communications must have been intended to be kept confidential for the attorney-client privilege to apply. Without that, persons who seek legal advice may be reluctant to be forthcoming in their communications with counsel.[22] As a result, when analyzing whether the privilege applies, the court must determine whether the client, in seeking out legal advice, engaged in communication "with the intention that it not be known by anyone other than the lawyer."[23]

A failure to designate communications as "confidential" is one factor courts will review in determining whether communications were intended to be kept secret.[24] In other words, although marking a document "confidential" does not necessarily immunize against discovery, failure to so designate the document may lead the court to conclude that the communications were not intended to be confidential, and are therefore not privileged. Disclosure or forwarding of the communications to multiple non-lawyers can also diminish a claim that the information is confidential.



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Waiver of Privilege

Similarly, the privilege may be waived by voluntary disclosure of the confidential communications to third parties.[25] Waiver is a particularly relevant issue in the electronic communications arena, especially when attorney-client communications are part of e-mail strings. E-mail strings typically consist of the sender's message, along with the text of a "chain" of all prior e-mails to which the instant message is responding.[26] These strings create a sort of "electronic dialogue" in which those who receive the instant message may or may not have been included in the previous messages. Each part of the chain will be considered an individual communication, and should be described separately in a privilege log.[27] Even if an individual e-mail within a chain is otherwise privileged, disseminating it to a large group of people as part of a string along with other, unprivileged information may remove the element of confidentiality, and undermine assertion of the privilege.[28]

Internal Investigations

When an employee complains about harassment, discrimination, or some other misconduct, it is imperative that a company respond with an investigation of the allegations. These investigations may involve the company's in-house counsel and, less frequently, external attorneys. The role of the attorney-client privilege in the context of these internal investigations is particularly complicated for two reasons. First, the party seeking protection of the privilege must be able to establish that these investigations constituted legal work, rather than business operations. Second, the company's internal investigation—responding promptly and appropriately to the misconduct allegations—is often an indispensible defense to charges of harassment or discrimination. A defense based on an attorney investigation may result in a waiver argument. Additionally, the attorney may be the best, or only, witness to support the prompt-and-appropriate remedial action defense.[29]

Legal Work?

Whether the privilege will apply in investigatory situations often depends on whether an attorney is evaluating risk and acting as a legal advisor or investigating to determine what occurred and to take action. In other words, is the attorney investigating in preparation for litigation or to analyze legal risk, or is the attorney enforcing the company's human resources policies or acting as a decision-maker? For the privilege to apply, the attorney must be acting as a legal, not business, advisor. If the attorney is acting as a legal advisor, related written work product may also be protected by the work-product doctrine.

Waiver?

Many employers, when facing claims of discrimination or harassment, will rely on internal investigations and resulting

remedial action(s) as part of their defense to claims of hostile environment sexual harassment.[30] An employer may avoid liability by showing that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior."[31]

By raising this defense when an attorney has conducted the investigation, the employer may waive the privilege that might otherwise apply. By relying on the investigation as the basis of an affirmative defense, the employer may assume the risk that privilege will be lost for all communications related to the investigation.[32] If the employer provides no actual evidence as to the content of the investigation and fails to call a witness who can testify and be cross-examined, a court may reason that the fact-finder cannot determine the adequacy of this defense.[33] As a result, considerations of fairness, as well as a desire to avoid a prejudicial effect on the plaintiff, may require waiver when an investigation is the primary basis of defense.[34]

There have been cases in which courts have upheld the privilege when the employer relied solely on the remedial action taken[35] or on the fact that an investigation occurred, rather than the substance or results of the investigation. However, if an attorney alone performs the investigation and it is used as part of a defense, the employer should assume that the privilege may be deemed waived and the attorney will be a testifying witness.

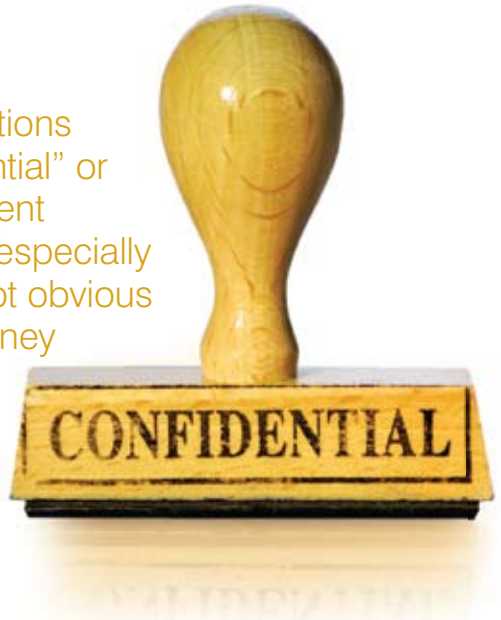
Self-Critical Analysis Privilege

The self-critical analysis privilege arose as a theory to prevent or limit disclosure of potentially damaging information uncovered as a result of an internal evaluation or analysis. However, this doctrine has not been widely accepted and is not absolute. The privilege that protects the results of a self-critical analysis or review originated in the medical field with the practice of peer review procedures.[36] The principle underlying the privilege is that performing a self-critical analysis is in the public interest as it may prevent harm from occurring; however, if the results of such an analysis are subject to discovery, an argument can be made that the analysis will not be performed. The existence of such a privilege outside of the medical peer review context is controversial, and the scope of such privilege is uncertain. Some courts have recognized that, at least in certain, limited circumstances, the results of a self-critical internal investigation may be privileged and protected from discovery. For example, the privilege has been held to protect conclusions and evaluative information, but not objective data or statistics or only when information has been gathered pursuant to a government mandate.[37] Until this area of the law is clarified, it would be unwise to rely on such a privilege when performing any self-critical analysis or review.

Practical Tips

The employment arena presents many unique challenges regarding the attorney-client privilege. However, its existence is absolutely crucial to effective, informed decision-making. The following practical tips may aid employers and counsel in preserving the privilege or making informed waiver decisions in the employment law context:

Label communications as "confidential" or "attorney-client privileged," especially when it is not obvious that an attorney is involved.



1. Expressly label all confidential attorney-client communications.

Labeling communications as "confidential" and "attorney-client privileged" does not provide immunity from judicial scrutiny. It helps, however, and failure to label may lead to a presumption that the communications are *not* confidential or privileged and were *not intended* to be confidential or privileged. Label communications as "confidential" or "attorney-client privileged," especially when it is not obvious that an attorney is involved.

2. Take special care to maintain confidentiality in the electronic context by limiting the scope of e-mail strings.

The privilege may be waived when confidential individual e-mails are included as part of e-mail strings that are widely disseminated. To avoid such waiver, take steps to ensure that confidential attorney-client privileged e-mails are designated as such electronically. If available, electronic barriers should be used to prevent such e-mails from being forwarded. If such technology is not readily available, the e-mails should at least contain an explicit subject line designation such as "Privileged Attorney-Client Material—DO NOT FORWARD."

3. Explicitly label communications in which legal, rather than business, advice is sought or is provided.

Similar to marking a document "confidential" or "attorney-client privileged," expressly designating a communication as created "for the purpose of legal advice" does not immunize it from challenge. Failure to so designate, however, may lead to a presumption that the communication was for purposes other than provision of legal advice.

4. When attorney-client communications refer to specific data, make sure the data is readily available elsewhere.

Some courts will decline to apply the privilege when the confidential attorney-client communications are the only source of underlying factual data. To maintain the privilege, ensure that alternate sources of such data are available.

5. Be prepared to waive the privilege if you want to use the investigation as an affirmative defense.

Claiming that "we conducted a thorough internal investigation" as a defense to a hostile environment sexual harassment claim typically waives the privilege. On the other hand, by claiming "we took actions x, y, and z" in response to a complaint, an employer may be able to raise the prompt-and-appropriate remedial action defense without waiving the privilege. Consider your willingness to waive the privilege as you set forth your defenses. In addition, if you later plan to rely on an investigation should any claims arise, do not have an attorney conduct the investigation.

6. Avoid placing an attorney in a decision-making role.

Employment decisions must be made by the employer, not the attorneys offering legal advice. Make sure that there is a non-attorney who is the decision-maker and can be designated as such should litigation arise.

7. Decide up front, and take precautions, if an attorney will be a witness.

Sometimes, an attorney may be the best witness. But this decision should be made at the outset of a matter, with a view toward potential disclosure and testimony, rather than as a result of an order compelling disclosure. And consider that a testifying attorney will likely be disqualified from representing his or her client at trial.[38] ■

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FOOTNOTES

1. A detailed discussion of the attorney work-product doctrine is beyond the scope of this article.
2. *Upjohn Co v United States,* 449 US 383, 389; 101 S Ct 677; 66 L Ed 2d 584 (1981).
3. *Walker v County of Contra Costa,* 227 FRD 529 (ND Cal, 2005) (internal citation omitted).
4. *Id.*
5. See *Upjohn,* 449 US at 389.
6. *Reed v Baxter,* 134 F3d 351, 356 (CA 6, 1998) (internal citation omitted).
7. *Leibel v General Motors Corp,* 250 Mich App 229; 646 NW2d 179 (2002); *Upjohn,* 449 US at 393–394.
8. Mueller & Kirkpatrick, Evidence Under the Rules 759 (5th ed) (internal citation omitted).
9. See FRCP 26(b)(1).
10. *EEOC v Woodmen of the World Life Ins Soc,* 2007 WL 1544772 (D Neb, 2007).
11. *In re Grand Jury Subpoenas,* 454 F3d 511, 520 (CA 6, 2000).
12. *Evans v Atwood,* 177 FRD 1 (D DC, 1997).
13. See, e.g., *Woodland v Nalco Chem Co,* 2003 WL 22928808 (ED La, 2003); *Motley v Marathon Oil,* 71 F3d 1547 (CA 10, 1996); *Sperling v Hoffman-LaRoche, Inc,* 924 F Supp 1346 (D NJ, 1996); *Di Mascio v General Elec Co,* 307 AD2d 600; 762 NYS2d 696 (NY App Div, 2003).
14. *Freiermuth v PPG Indus, Inc,* 218 FRD 694 (ND Ala, 2003); *Smith v Texaco, Inc,* 186 FRD 354 (ED Tex, 1999).
15. *Smith,* 186 FRD at 356.
16. *Id.*
17. *Abel v Merrill Lynch,* 1993 WL 33348 (SD NY, 1993).
18. See *Motley,* 71 F3d at 1551.
19. See *id.; Williams v Sprint/United Mgmt Co,* 2006 WL 2631938 at *4 (D Kan, 2006).
20. *Motley,* 71 F3d at 1551.
21. *Williams,* 2006 WL 2631938 at *4.
22. *Evans,* 177 FRD at 4.
23. *Id.* at 5.
24. *Id.* at 5 n 3; *Freiermuth,* 218 FRD at 700.
25. *McDonnell Douglas Corp v US EEOC,* 922 F Supp 235, 243 (ED Mo, 1996).
26. *Muro v Target Corp,* 243 FRD 301 (ND Ill, 2007).
27. *Id.*
28. See *id.* at 309.
29. Interestingly, a plaintiff's employment attorney can also become a necessary witness and thus be disqualified from, at a minimum, representing the employee at trial if the attorney plays a key role in the investigation.
30. See *McGrath v Nassau County Health Care Corp,* 204 FRD 240, 245 (ED NY, 2001).
31. *Id.* (internal citation omitted).
32. *Harding v Dana Transport, Inc,* 914 F Supp 1084, 1095–1096 (D NJ, 1996).
33. *Id.*
34. *McGrath,* 204 FRD at 244.
35. *Pray v The New York City Ballet Co,* 1997 WL 266980 (SD NY, 1997).
36. See *Bredice v Doctors Hospital, Inc,* 50 FRD 249, 250 (D DC, 1970).
37. See, e.g., *Roberts v National Detroit Corp,* 87 FRD 30, 32 (ED Mich, 1980); *Clark v Pennsylvania Power and Light Co,* 1999 WL 225888 (ED Pa, 1999).
38. Generally, pursuant to the Michigan Rules of Professional Conduct, a disqualified attorney's law firm can continue to represent the client at trial. MRPC 3.7.