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The Attorney-Client Privilege

Dos and Don'ts, and Progress Against Erosion

This article provides a brief overview of the attorney-client privilege and a few practical ideas to protect the corporate client's privilege rights. While this short article cannot provide a comprehensive analysis of the problems or detailed practices counsel may employ to protect a client's rights, it touches on the key points.

An in-house attorney (or outside counsel acting as corporate counsel) establishes attorney-client privilege and work-product protections for the corporate client when rendering requested legal advice to management. Generally, a client is also afforded protection when the attorney is conducting investigations or employee interviews (which collect facts) or reviewing or commenting on factual matters in an effort to render counsel to the client in anticipation of litigation. This includes interviewing employees and others to better understand legal problems or engaging in research before providing advice.

On a practical level, before the attorney-client privilege can attach to a lawyer's communications with clients, the following requirements must be satisfied:

- The corporation that wishes to assert the privilege must be the lawyer's client.
- The lawyer receiving the client communication must be a practicing member of the bar or a subordinate of such a person.
- The lawyer to whom the communication is made must be acting as a lawyer (and not, for instance, as a business person or business department's representative).
- The communication must be made without non-client and non-essential third parties present. (It could be made, for instance, at a crowded restaurant, but not at a table with other non-clients around to overhear; or it could be conducted as an e-mail exchange, but not if non-client, "unnecessary" parties are copied or are later forwarded the e-mail.)
- The communication must be made for the purpose of securing legal services or assistance, and not for the purpose of committing a crime or fraud.
- The client must claim, and not waive, the privilege.[1]

The privilege attaches to almost all communications that satisfy these requirements,[2] but what it protects is actually narrow in scope. The privilege does not protect the client from discovery through other means and sources of relevant facts. It just protects the "consult." In reality, one of the best arguments in favor of privilege protection is precisely that it *doesn't* prevent anyone from discovering all the facts necessary to make a case, whatever that may be: it simply requires the government or civil litigants to do their own work to prove their case, so as not to deprive the client of its ability to communicate openly with its attorney.

A unique twist for corporate attorneys is that if the application of the privilege to a conversation, documents, or a written communication between lawyer and client is challenged, the party claiming the benefit of the privilege has the burden of proving its applicability.[3]

One of the most contentious and difficult issues for corporations concerned about privilege issues is the production of the internal investigation notes of the company's lawyers (and their agents). Usually such investigation notes are protected, if at all, by the work-product doctrine. Actual interviews conducted may be both work-product and attorney-client privileged. Many companies self-investigate and self-report problems; indeed, the number of self-reports is increasing as a result of Sarbanes-Oxley and related legislation and regulation at the federal, state, and agency levels. But self-reporting a problem, by its very nature, confirms to an adversary or prosecutor that the ideal place to begin an evaluation of the company's problems would be a thorough review of the company's internal investigation and any communications between lawyers and the company regarding the problem. Producing these investigation summaries, employee interviews, and related reports entails disgorgement of the attorney's work-product and attorney-client confidences.

What should corporate counsel do? Here are some ideas to assist in navigating the twists and turns on the privilege path as in-house counsel render legal advice to their corporate clients.

Practical Dos and Don'ts

1. **Don't** be the client's worst enemy. Sometimes, lawyers understand the concept and professional responsibilities of lawyer-client confidentiality in general, but do not know as much as they should about how to protect the attorney-client privilege,

FAST FACTS:

Be careful of what you write and whether you need to record your thoughts; try to document facts separate from lawyer impressions or advice.

Don't overassert your client's privilege; it hurts your case when you really need to protect a document if you appear to be trying to protect everything you've ever touched as counsel.

Do not simply acquiesce when a client's privilege rights are contested.

which is a judicially created and enforced procedural right that arises in the context of a controversy between parties.

Don't place the "attorney-client privileged" imprimatur on every e-mail, fax cover sheet, letter, and document, as if labeling alone will create a privilege that might not otherwise exist. It won't. Over-asserting privilege can weaken an argument over what should be properly excluded from the other side's production requests. It may be hard to earn the trust of others if an attorney asserts that everything he or she has ever produced is privileged. By the same token, the legend should be attached to documents that should be protected—it's not required to make them privileged, but it helps evidence this intent.

Don't forget to document that the client requested the legal advice by writing words to this effect: "In response to your request for legal counsel on this issue" or "In my capacity as legal counsel for the company." Also, ensure that the distribution of the privileged work is limited solely to those parties intended to receive it in the client group.

2. **Do** try to segregate the "facts" (say, results and a summary report from internal investigations that in-house counsel want to offer as proof) from documents prepared for the client that outline legal strategies, draw inferences or conclusions, offer direct transcripts of witness interviews, and so on, *before* the document is created. The privilege doesn't protect facts from being produced—only lawyer-client communications (privilege) or lawyer impressions and work product in anticipation of litigation. Thus, once the privileged material is segregated, corporate counsel may be able to provide everything that is appropriate and necessary in response to a request for production of material, without waiving a client's confidences or any rendered legal opinions. Also, it is prudent to *think* before writing at all. What is not memorialized cannot be produced (unless the attorney is called as a witness, which is less likely to be allowed). There are times when lawyers create paper or send e-mails with information that they later wish they had conveyed simply by walking down the hall to talk with the client. Or they later wish they had kept quiet until all the facts were in, when early assumptions perhaps erroneously drawn are more damning than the facts as fully investigated and reported.

3. **Do** take a hands-on, proactive approach to client education about the privilege, what it protects, and how it is likely to be used, waived, or lost within the client company context. Be upfront about the extent to which an attorney can (or can't) offset employees' concerns that sensitive conversations with counsel will end up being used against them personally in the future. This hands-on approach will often help bolster employees' confidence about what they can do to preserve privilege themselves and what they should expect privilege to protect (or not). Then, be as proactive, engaged, and interested as in the past, soliciting the trust of the client company's employees, and providing them with realistic and honest expectations.

4. **Do** maintain confidences and report up (and potentially outside of) the company chain of command when allegations of wrongdoing surface, knowing that general lawyer obligations in this regard have not changed all that much. Even the passage of Sarbanes Oxley Section 307/the Securities and Exchange Commission's (SEC's) regulation of attorney conduct (codified at 17 CFR Part 205) and the amendment of American Bar Association Model Rule 1.13 (the "reporting up" rule that is the basis for every state's rule equivalent) have not changed the general requirements that lawyers for organizational clients owe their loyalties to the entity and must report problems that are not resolved up the line of management, including reporting to the board when management is not responsive. Remember that the scrutiny of in-house counsel actions and decisions, as well as the likelihood of becoming a target for prosecution in the event of a failure, is far greater today than it was 5–10 years ago.

   Today, the corporate counsel work environment seems different and more highly charged: stakeholders often view corporate lawyers as serving the function of internal cops, deputies of enforcement officials, and gatekeepers of stakeholder interests. The issue of who holds the privilege at any given time (since a "corporation" is a legal "person" and is made up of individuals), and where allegiances in terms of confidentiality lie, are difficult and shifting sands to navigate when the company finds itself in some kind of pickle.

   Even more treacherous are the decisions to be considered when corporate counsel offer advice regarding illegal activity that falls on deaf ears, and an attorney must decide how to disassociate from the representation to avoid joining the fraud: quietly (just leaving), noisily (giving notice to others within the company that he or she is leaving for reasons of professional concern and inappropriate corporate behaviors), or turning the client in to prosecutorial or enforcement officials. The only practical advice is that no answer will feel or be 100 percent satisfactory; each attorney must define his or her obligations as attaching to the individual executives of the company for only so long as an executive acts within the entity's best interests. The minute an executive leaves that ground, corporate counsel no longer represent the person, and must treat the person as hostile to the client's interests. The hardest determination to make is whether anything the executive has told the attorney—even before he or she was targeted—that relates to the underlying matter is now something that should be claimed as privileged or something that should be divulged to outsiders who are looking for culpable parties.

5. **Do** learn how to give the so-called "corporate Miranda" and talk with executive management about how they wish to treat employees at any level who are accused or suspected of wrongdoing. Corporate counsel do not represent any individual employee interviewed about a company failure or problem; but an employee is owed that reminder, and, if his or her actions were innocent, he or she remains a part of the

client group. **Do** advise that what is said between corporate counsel and the individual employee may be divulged at the company's discretion to others inside the company or to outside officials. And that is the *minimum* disclosure needed. What else is said is dependent on the company and the specific situation, but may include the reminder that corporate employees who do not cooperate with company investigations can be disciplined or terminated (especially if that is stated in the company's employee handbook as a condition of continued employment).

6. **Do** consider the best involvement of non-lawyer or lawyer (not practicing law) employees who work in company compliance, internal audit, risk management, and reporting functions. Non-lawyers working for in-house counsel are seen as agents of lawyers for purposes of protecting the privilege. However, they may also perform corporate or business tasks unrelated to the protected agency relationship. Corporate counsel (and by extension, their internal clients) should have a clear understanding about when their work is protected and when their work must be turned over in response to a document production request. This can help insulate legal work from discovery (and lawyers from becoming witnesses) upon proof that all necessary information can be obtained from non-legal team members.

   Some corporate compliance offices or internal audit functions are staffed with lawyer and non-lawyer employees; some of these functions report up through the general counsel's office and others through corporate compliance or internal audit officers who are separate from the legal function. Corporate counsel should consider the organizational composition and reporting of company compliance and internal audit functions to maximize counsel's ability to protect client legal confidences. In some industries, this will suggest compliance reporting through legal; in others, compliance can report through a non-lawyer officer and receive segregated, arm's-length legal consultation and advice as needed. And yet in other industries, it is accepted among all parties that privilege doesn't generally exist (for instance in financial institutions, where the relationship between banks and their regulators under law can make privilege assertions moot). These unique considerations should be carefully weighed for the particular company and industry.

7. **Do** avoid executing affidavits that contradict accusations against the company; otherwise, corporate counsel may become fact witnesses, and any hope of asserting privilege may disappear. Counsel may also find that such actions as signing the company's Sarbox 404 reports can act as a verification of company assertions and can lead to waiver assertions.

8. **Do** watch out for "advice of counsel" defenses. Some employees targeted by prosecutors may assert that they were only following legal advice of in-house or outside counsel; this assertion may draw what might otherwise be privileged material directly into the limelight. Corporate counsel can do little to avoid waiver if a court wishes to examine their advice and counsel in such a matter.

9. **Do,** when faced with a demand for privileged material, try to negotiate some kind of protection from future third-party discovery; also, try to limit waiver to certain categories of information to avoid entire subject-matter waivers. The jurisdictions are split on whether to recognize so-called limited waiver agreements (the majority have held that such agreements are not enforceable). These efforts may not succeed, but it is the only insurance against future third-party claims that counsel may have if forced to waive to the government, so try to either secure it or evidence the intention to limit the scope of waiver in some other way. (Note: the Federal Courts Study Commission is considering amendments to FRE 502 that would "codify" enforcement of limited waiver/confidentiality agreements. This may not be such a big win if the result is that the government feels it is entitled to waiver so long as the company can be protected from future third parties.)

10. **Do** think proactively about how to protect the client's rights to confidential counsel, and **do not** simply acquiesce when a client's privilege rights are contested. By providing some practical pointers about privilege protection in a world in which it is often attacked, the authors are not suggesting that the privilege is dead or that its application is no longer meaningful.

The DOJ has made an important step toward reform, but has not yet toed the line it needs to reach to address the corporate bar's concerns about governmental coercion of privilege waivers. And so the battle continues…

The legal and business press are filled with stories about attorney-client privilege erosion concerns, especially those arising under the mantle of coercive prosecutorial tactics designed to force corporations under investigation by state attorneys general, federal prosecutors, and regulatory enforcement officials to waive their rights to confidential counsel. The erosion of protections previously provided by the privilege can have an extremely negative impact on corporate compliance, according to surveys by the Association of Corporate Counsel (ACC).[4] But privilege erosion issues are not just for companies in trouble: outside auditors operating under the heightened scrutiny and tighter rules governing the post-Anderson/Public Company Accounting Oversight Board (PCAOB) world are more aggressive than ever in demanding access to documents and information that would otherwise be protected by the attorney-client privilege and work-product doctrines. Citing their own risk management concerns, auditors claim

they can leave no stone unturned when examining a company's yearly financials—and disclosures to auditors may lead to a complete waiver of privilege rights vis-a-vis third-party claimants who later want to view the same information on litigation reserves, tax opinions, advice of counsel, and more.

The best way to stop such attacks on privilege rights is for in-house counsel and the outside bar, in concert with their corporate clients, to push back. After all, an uncertain privilege is the same as no privilege at all, according to the U. S. Supreme Court in *Upjohn Co v US,*[5] the landmark decision affirming the rights of corporate clients to assert attorney-client and work-product privileges. Corporate counsel should be engaged in the battle to ensure that privilege rights for corporate clients are certain, and that they survive attacks from those who have confused the desirability for transparency and accountability in the post-Enron world with the important public policy purposes underlying the traditional protection of our clients' attorney-client privileges.

The ACC, along with a coalition of partnering bar and business-interest organizations, is pushing back—before Congress, the Department of Justice (DOJ), the SEC, the judicial conferences, the United States Sentencing Commission, the PCAOB, and elsewhere, looking for policy reforms that will stop the creep of erosion into our clients' fundamental rights to counsel. State Bar of Michigan members will also be pleased to know that a local task force on privilege erosion issues has been established and is working on these issues as well, cooperating with the ACC and the American Bar Association and its Attorney-Client Privilege Task Force. In fact, progress resulting from these cooperative efforts occurred this past year on April 5, 2006 (with a November 1, 2006, effective date), when the United States Sentencing Commission voted unanimously to eliminate language from the Federal Sentencing Guidelines that required corporations to waive the attorney-client privilege and work-product protections in certain circumstances to gain credits to earn sentence reductions if convicted of a federal crime.

Also, at Senate Judiciary Committee hearings in September 2006, both Chairman Arlen Specter and Ranking Member Patrick Leahy asked pointed questions of the DOJ representative (Deputy Attorney General Paul McNulty) about their concerns over privilege waiver policies and practices at the DOJ; Senator Specter introduced legislation on December 7, 2006, as a result of the hearing and a lack of DOJ response to the Judiciary Committee's concerns. The Attorney-Client Privilege Protection Act of 2006 (see links referenced in footnote 4) would force the DOJ and other federal agencies to curb their privilege waiver practices. Because of these pressures and the coalition's and ABA's work, Paul McNulty issued what is already being dubbed the "McNulty Memo," revising and amending the Thompson Memo as the new DOJ charging policy for corporations. You can read commentary, analysis, and the actual McNulty Memo on the ACC website at the links offered in footnote 4.

Long and short: the DOJ has made an important step toward reform, but has not yet toed the line it needs to reach to address the corporate bar's concerns about governmental coercion of privilege waivers. And so the battle continues, as Senator Leahy will hopefully reintroduce Senator Specter's legislation in the new session beginning in January. The ACC and other groups will focus increased attention in the coming months on privilege waiver in the audit context, as well. If you have questions or comments, we welcome your input. ■

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FOOTNOTES

1. These criteria were laid down by the court in *United States v United States Mach Corp,* 89 F Supp 357, 358–59 (D Mass 1950), and have set the standard for privilege qualification ever since.
2. The related "work-product doctrine" offers qualified protection for materials prepared by or for an attorney when litigation is anticipated (even if the litigation never arises or ends up taking on a different form). Attorney work-product material can enjoy the same protection as attorney-client privileged materials, but if the work product does not disclose the mental impressions of the attorney, a court may order its production if good cause for the documents' production is established (such as it would be unreasonable or impossible for the other side to replicate the work on its own). The U.S. Supreme Court set forth the standard for protecting attorney work product from discovery in *Hickman v Taylor,* 329 US 495 (1947). The attorney work-product protections are grounded in the belief that it is inherently unfair for the other side to have access to a party's attorney's thought process, his or her impressions and thoughts, and even his or her strategies in unlocking and mapping a potential case by the selection of which employees to interview (and which to skip), which files he or she reviews, what follow-up questions are relevant, and so on.
3. *Federal Trade Commission v Lukens Steel Co,* 444 F Supp 803 (DDC 1977).
4. Association of Corporate Counsel members can find survey information, background material, and additional resources on privilege issues at <http://www.acca.com/advocacy/attyclient.php> or at <http://www.acca.com/Surveys/ attyclient.pdf> (2005 survey on privilege) and <http://www.acca.com/Surveys/ attyclient2.pdf > (2006 survey on privilege) (each accessed November 29, 2006). See also Damren, *A proposal to amend the rules of professional conduct: Prohibiting Thompson-styled waiver requests,* 85 Mich B J 44–49 (October 2006); Allen, *Protecting the privilege—MRPC 3.4(g) is NOT the way,* 85 Mich B J 48–51 (November 2006); <http://www.michbar.org/generalinfo/attorney-client.cfm> (accessed November 29, 2006).
5. *Upjohn Co v US,* 449 US 383; 101 S Ct 677 (1981).