THE ATTORNEY-CLIENT PRIVILEGE
Trying to Keep Pace with Technology

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The attorney-client privilege is one of the most important tools in the litigator□s arsenal shielding materials from disclosure and an adversary. However, if used improperly, this powerful tool can explode, causing the destruction of a litigant . s case. It is instructive to examine the historical background of the attorney-client privilege to put this protection created by the common law into perspective. The genesis of the privilege was the need for an attorney to act as a zealous advocate for his or her client, and also to "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[1] Courts have found that for an attorney to carry the burden of being a zealous advocate, he or she must "know all that relates to the client's reasons for seeking representation."[2]

This paper will address some common misconceptions surrounding the attorney-client privilege, and also how the ubiquity of electronic communications has threatened to undermine the attorney-client privilege.

Myth #1: *If documents are given to in-house counsel, they will automatically be protected by attorney-client privilege.*

Short Answer - Wrong! Documents and or communication will not ***automatically*** be protected simply because they passed through a corporate in-house counsel. Unless the in-house counsel is served in his role as an attorney providing legal counsel, those documents will not be shielded simply because he or she obtains a copy of said documents. A common misconception is that in-house counsel can be included as a copy on a distribution list of material for the purpose of protecting that document. That will not work. Once the document is disclosed to non-lawyers and contains information that is fact specific information, as opposed to seeking legal guidance, the privilege will be lost.

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1 *Upjohn v. United States*, 449 U.S. 383, 389 (1981)

2 *Trammel v. United States*, 445 U.S. 40, 51 (1980)

Analysis

First we must look at how the attorney-client privilege attaches. The attorney-client privilege extends to confidential communications between a client (or a potential client) and an attorney (and his or her representatives) for the purpose of seeking or obtaining legal advice, unless waived.[3] Thus, it must first be determined who is the attorney and who is the client. For purposes of the attorney-client privilege, a corporation can invoke the attorney-client privilege to protect confidential communications with its in-house or outside counsel. It is a well-established principle that the privilege applies only to members of the bar of a court or their subordinates.[4] Examples of such protected subordinates would include any law student, paralegal, secretary, investigator or other person acting as the agent of a duly qualified attorney.[5]

Now that we have determined who the attorney is, the next area of inquiry is who is the client. In broad general terms, the client is the beneficiary of legal services. While this is straightforward in the private sector, it can be a convoluted exercise in the corporate arena.

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[3] *United States v. United Shoe Machine Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950)

[4] *Id.*

[5] Wigmore, Evidence . 2301

Up until 1981, courts would limit the extent of the attorney-client privilege to protect only communications between the corporation . s lawyer and members of the "control group" of the corporation -- that is, those who are in a position of authority and control within the corporation. However, in 1981, once and for all, the Supreme Court rejected this □control group□ standard in the landmark case of *Upjohn Co. v. United States*.[6] Although there was no bright line test set forth by the *Upjohn* Court, the decision expanded the corporate attorney-client privilege to protect counsel . s communications with employees of a corporation; even though those employees were not in a position to direct the company's actions in response to the legal advice. That court decided that communications between counsel and lower level employees would also be privileged if these employees were in possession of information that was required by counsel as a basis for providing legal services to the corporation.[7] The underlying rationale for expanding the protection of the attorney-client privilege is that □middle level and indeed lower level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by the corporate counsel if he [or she] is adequately to advise the client with respect to such actual or potential difficulties.□[8] Furthermore, by allowing for access to more information that is to be cloaked with the protection of the attorney-client privilege, an additional objective is furthered by ensuring that the attorney has all relevant information at his disposal, thereby allowing the attorney to provide sound legal advice. It is a basic tenet that the quality of this advice depends upon the client being allowed to fully disclose information to counsel.

Myth #2: *E-mail communication is protected because it is an intra-corporate communication.*

Short Answer - Electronic discovery is the □new frontier□ of document production in the electronic age. In general, there is an emerging trend for those who communicate via e-mail to be cavalier with the tone of the information conveyed electronically. It would appear that the absence of the formality that normally accompanies a □hard copy□ of a document leads people to be a little more careless when communicating by e-mail. This is a recipe for disaster. There are many examples of this, most notably the one that turned into a crucial piece of evidence in the Microsoft antitrust litigation. As you may recall, Bill Gates had sent an internal e-mail wherein he told one of his chief advisors that Microsoft□s goal was to □cut-off their [rival Netscape□s] air supply.□ Electronic information is discoverable just like paper documentation. Given the ease of transmitting this information, extra care must be taken to prevent disclosure of sensitive information. If loose terms are used in an e-mail, and that e-mail is discovered, a talented plaintiff . s attorney will easily put a spin on the material to make the defendant appear villainous. Cottage industries are springing up to allow desperate adversaries to scour computer hard drives to ascertain changes made to documents; the date changes were made; the author of the changes and other damaging information.

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6 449 U.S. 383 (1981)

7 *Id.* at 392

8 *Upjohn,* 449 U.S. at 391

Analysis

There have been some concerns raised recently due to the fact that Systems Administrators of corporations and law firms can have access to privileged communications. The question raised is whether or not this disclosure to a third party would waive the attorney-client privilege. As a preliminary matter, most courts have refused to treat e-mail and facsimile transmissions differently than traditional documents for evidentiary purposes. In addition, most have also seemed to accept that receipt or inspection of an e-mail by a systems administrator does not in and of itself constitute a waiver.

Other concerns have been raised due to the supposed ease with which an e-mail can be intercepted. While no Court has addressed this issue directly, a Military Court case found that there is a reasonable expectation of privacy when using e-mail with regard to search and seizure issues protected by the Fourth Amendment of the United States Constitution.[9] Thus, by implication, the attorney-client privilege should not be waived simply by using this media. New York is probably the first state to add a section in its Civil Procedure to expressly preserve the attorney-client privilege for e-mails. New York Civil Practice Law & Rule 4547 provides:

> *No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.*

From a practical standpoint, it is much more likely that a privilege will be waived inadvertently. There is a tendency to have a large distribution on corporate e-mail which may affect the attorney-client privilege protections afforded documents had they been specifically sent to an in-house counsel and/or outside counsel. If non-attorneys outside the corporation are included in the distribution list, this should raise a red flag that the attorney-client privilege is in jeopardy. Depending on the role of those receiving the e-mail, it is possible that the work product doctrine could protect the document; but in any event, extra care should be taken when distributing documents to a large group of people. In addition, sarcastic, condescending, libelous or similar tones should never be used in an e-mail. Likewise, admissions of liability should never be contained in an e-mail. The rule of thumb governing all of these transactions is simply, □if you wouldn□t want to see it on the front page of your local newspaper, then don□t put it in an e-mail.□

Myth #3: *The work of my in-house investigator is protected by the work product doctrine.*

Short Answer - Not necessarily. This area is not one of attorney-client privilege, but could fall into the province of another protection - the work product doctrine. This is a very difficult area that often turns on fine distinctions.

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[9] *United States v. Maxwell*, 42 M.J. 568 (1995).

Analysis

This scenario has proven to be difficult for many corporations. The work product doctrine is closely tied to the attorney-client privilege in that the work product doctrine protects work done under an attorney . s direction, in anticipation of litigation.

When an accident occurs, time is of the essence. With time, memories fade, and witnesses disappear. Unfortunately, for the work of an investigator to be protected by the work product doctrine, it must be carried out under the direction of counsel. Thus, if a corporation has an investigator on staff, whose job is to go to an accident site involving his company; take statements from witnesses; photograph the accident scene; and obtain incident reports and the like, unless done under the direction of an attorney, all this information would be discoverable. It should be noted that incident reports would always be discoverable in any event, but the point is that many times lawsuits are not commenced for years after the accident. By that time, after several personnel changes, it is possible that incident reports are not even available; or that adverse witnesses are no longer obtainable. The safest course of action is to develop a corporate structure that provides for investigators to operate under the direct supervision of the legal department. The purpose served by this is twofold: first, it is likely that many documents would be protected by the work product doctrine that would otherwise be unprotected, and it allows the legal staff to offer guidance on how to maximize the possibility of obtaining information that is helpful to the defense of a case.

Conclusion

The attorney-client privilege, like many other areas of the law, is slowly adapting to keep pace with the sweeping changes of the way business is conducted. It is now commonplace to communicate by e-mail, to use the Internet for advertising, and to fax - rather than mail - documents. These conveniences also contain potential pitfalls, waiting to attack the unwary. As with most areas of litigation, the best protection is sound preparation, and sticking with a well thought-out plan, to ensure that the vital attorney-client privilege, and equally important work protect doctrine, remain an available weapon in the battle of litigants.