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The Attorney-Client Privilege

A Primer for In-House Attorneys

By Kevin Curry and Mikiesha Mayes

In-house counsel, and the outside counsel they hire, regularly handle product liability lawsuits. Attorney-client privilege issues are woven into the fabric of such suits. Written and oral communications between attorney and client may touch upon vital subjects such as product history, case strengths and weaknesses, negotiation posture, witness selection and trial strategy. However, many attorneys do not understand the limitations of the attorney-client privilege, particularly as it applies to in-house counsel. This article provides a short primer on the boundaries of the attorney-client privilege as applied to in-house counsel.

The Attorney-Client Privilege

The attorney-client privilege, at its foundation, recognizes that sound legal advice serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). By safeguarding communications between attorney and client, the privilege ensures that an individual who seeks legal advice will be free of fear that his secrets will be revealed. In other words, shielded by the privilege, the client is induced to communicate things that he might not otherwise disclose. As the Supreme Court explained in *Upjohn*, the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Id*. at 390.

Although the attorney-client privilege serves an important role in our legal system, the Supreme Court has also recognized that evidentiary privileges "are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Thus, like other evidentiary privileges, the attorney-client privilege is narrowly construed. For the privilege to exist: 1) the individual asserting the privilege must be or seek to become a client; 2) the person to whom the communication is made must be an attorney, acting as an attorney in connection with the communication; 3) the communication must be confidential and relate to a fact of which the attorney was informed by his client for the purpose of securing legal advice and not for the purpose of committing a crime or tort; and 4) the privilege is claimed and not waived by the client. *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-359 (D. Mass. 1950).

Corporate Attorney-Client Privilege

It is well established in the United States that communications between a corporation's employees and in-house counsel are privileged. Nonetheless, because in-house counsel may be involved in giving advice on many issues that are more business-oriented rather than legal, conversations in which in-house counsel is a participant — as well as documents addressed to or from in-house counsel — are readily susceptible to discovery on the ground that business advice is being given and not legal advice. Epstein, The Attorney-Client Privilege and Work Doctrine (4th ed.), Section of Litigation, American Bar Association. The upshot is that in order for the attorney-client privilege to attach to communications between a corporation's employees and the corporation's lawyers, certain criteria must be satisfied. Two tests — the control group test and the modified subject matter test — have developed in federal courts to determine whether a corporate employee's communications with in-house counsel are privileged.

Control Group Test

Under the control group test, a corporate employee's communications with in-house counsel are privileged if — in addition to satisfying the general requirements of the attorney-client privilege — the employee making the communication is in a position to control or take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F.Supp. 483, 485 (E.D. Pa. 1962).

Modified Subject Matter Test

In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court essentially replaced the control group test with the modified subject matter test. Unlike the narrow scope of the control group test, under the modified subject matter test, employees are considered to be the client if they possess relevant information regarding the subject matter at issue, regardless of their role within the corporation, so long as: 1) the communication is necessary for the purpose of securing legal advice; 2) the information was not available from individuals in the control group; 3) the communication concerned matters within the scope of the employees' corporate duties; 4) the employees were aware they were being questioned in order for the corporation to secure legal advice; and 5) the communication was confidential when made and kept confidential.

The *Upjohn* test is consistently applied in federal courts when a case requires application of federal common law. While some states have adopted this test, it is important to note that a significant number of states continue to follow the control group test.

Corporate Attorney-Client Privilege and Individual Employees

The corporate attorney-client privilege protects the corporation, not its individual executives, officers, or employees. Because a corporation can only act through individuals, conflicts can arise when an individual employee's interests do not align with those of the corporation. This situation can pose problems concerning communications between corporate employees and in-house counsel.

For example, an executive may assume that his communications with in-house counsel during an internal investigation are privileged. However, if the executive's interests conflict with those of the corporation, *i.e.*, where the executive is implicated in wrongdoing, the corporate attorney's duty is to the corporation. In situations like this, the executive's communications may or may not be privileged. To claim that they were, the employee must prove he had an individual attorney-client relationship with in-house counsel. Because of the potential for such issues, an in-house attorney is obligated to inform the employee that the attorney's duty is to the corporation. However, at least one court has found that failure to do so does not by itself protect the communications from discovery. *See United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

Recent Trends and Cases

The following cases address various issues that may arise when attempting to assert the corporate attorney-client privilege.

Sandra T.E. v. South Berwyn School Dist. 100

In *Sandra T.E. v. South Berwyn School Dist. 100*, 600 F.3d 612 (7th Cir. 2009), an elementary school teacher was criminally charged for inappropriate interactions with several students. Reacting to the criminal charges, the school board hired outside counsel to conduct an internal investigation and provide legal advice to the Board. As part of the investigation, current and former school-district employees were interviewed. The attorneys took handwritten notes and later drafted memoranda summarizing the interviews. They ultimately delivered their findings and legal advice to the Board in an oral report and written executive summary. Plaintiffs, who brought a civil suit against the school district and principal, issued a subpoena for the internal memoranda relating to the employee interviews and other legal memoranda prepared in connection with the investigation.

The district court ordered the firm to produce the documents, concluding that counsel had been hired to provide investigative services, not legal services. The Seventh Circuit Court of Appeals reversed, holding that "because the … lawyers were hired in their capacity as lawyers to provide legal services — including a factual investigation — the attorney-client privilege applies to communications made and documents generated during that investigation."

United States v. Ruehle

In *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009), Broadcom Corp. retained counsel to conduct an internal investigation of its stock option practices. William J. Ruehle, Broadcom's CFO, knew that the information obtained during the investigation, which included an interview with him, would be reported to Broadcom's outside auditors. In fact, Ruehle was present when the information was disclosed to the auditors. The government began investigating the company for potential stock option backdating, and obtained permission from Broadcom to interview its attorneys regarding their conversation with Ruehle during the investigation. Ruehle was subsequently indicted on charges of conspiracy and securities fraud for allegedly backdating stock options. He sought to apply the attorney-client privilege to exclude statements made during the internal investigation, arguing that he believed Broadcom's attorneys were representing him personally. The district court agreed with Ruehle.

The Ninth Circuit unanimously reversed. Applying federal common law, the court held that Ruehle failed to demonstrate that the communications were confidential because at the time he made the statements, he knew they would be disclosed to outside auditors. Moreover, he failed to meet his burden of establishing that his statements, made during the internal investigation, were made within an individual attorney-client relationship. The court further highlighted the necessity for corporate counsel to provide a so-called *Upjohn* or corporate Miranda warning. "Such warnings make clear that the corporate lawyers do not represent the individual employee; that anything said by the employee to the lawyers will be protected by the company's attorney-client privilege subject to waiver of the privilege in the sole discretion of the company; and that the individual may wish to consult with his own attorney if he has any concerns about his own potential legal exposure."

Mohawk Industries, Inc. v. Norman Carpenter

The issue in *Mohawk Industries, Inc. v. Norman Carpenter*, 130 S.Ct. 599 (2009), was whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine. Carpenter, a shift supervisor, reported to Mohawk that several of its temporary employees were illegal aliens. As part of its investigation of the matter, Mohawk required Carpenter to speak with its outside counsel, who was defending the company in a class action regarding the issue. Mohawk's counsel allegedly pressured Carpenter to recant his statements. Carpenter alleged that when he refused to do so, he was terminated. Carpenter later sought discovery of information regarding his interview with Mohawk's attorneys, to which Mohawk objected as protected by the attorney-client privilege. The district court ordered production of the information on the grounds that Mohawk had impliedly waived the privilege by putting the protected communications in issue during the lawsuit. Mohawk appealed the matter to the Eleventh Circuit Court of Appeals, arguing that the district court's order was immediately appealable under the collateral order doctrine. The court disagreed, holding that the collateral order doctrine did not apply because the discovery order was not effectively unreviewable on appeal from the district court's final judgment. The Supreme Court affirmed, explaining that "the combination of standard post-judgment appeals … mandamus, and contempt appeals will continue to provide protection to litigants ordered to disclose materials purportedly subject to the attorney-client privilege."

Costco Wholesale Corp. v. Superior Court

In *Costco Wholesale Corp. v. Superior Court*, 47 Cal.4th 725 (Cal. 2009), Costco was charged with misclassification of certain warehouse managers as exempt. Costco retained outside counsel to obtain legal advice regarding the matter. As part of their services, counsel interviewed a number of employees, and ultimately produced a 22-page opinion letter detailing their findings and opinions. Plaintiffs sought to compel discovery of the opinion letter, arguing, among other things, that the letter contained unprivileged matter. After an in-camera review of the letter, the court-appointed referee determined that the majority of the letter was privileged, but that the remaining portions — which included factual information about various employees and their job responsibilities — were not privileged and should be produced. Costco sought a writ of mandamus in the appeals court, which upheld the decision of the trial court. However, the California Supreme Court rejected the lower court's rationale that producing un-redacted portions of the letter was not harmful to Costco. In reversing the judgment of the court of appeals, the court explained that "when the communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material is privileged."

United States v. Graf

In *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010), the Ninth Circuit Court of Appeals examined the issue of corporate attorney-client privilege and individual employees. In *Graf*, the defendant-appellant was indicted for his involvement in the fraudulent operation of the company. The defendant sought to exclude the company's attorneys from testifying against him at his criminal trial. The district court found that the attorneys represented only the company and that the defendant had no individual attorney-client relationship to establish the attorney-client privilege. The court of appeals agreed, finding that the

defendant did not hold a personal attorney-client privilege over any of his communications with the attorneys because he: 1) failed to make it clear to the attorneys that he was seeking legal advice in his individual rather than in his representative capacity; 2) failed to show that the attorneys saw fit to represent him personally, knowing a conflict could arise; and 3) failed to show that the substance of his conversations with the attorneys did not concern matters within, or the general affairs of, the company.

Summary

As the above cases illustrate, in-house attorneys must be aware of the limitations of the attorney-client privilege. A corporation cannot exempt ordinary business documents from discovery, even when those documents were prepared by an attorney. Further, the privilege only protects confidential communications which include or seek legal advice. Accordingly, in-house counsel should take precautions to draft correspondence in a manner that clearly distinguishes between legal and business communications. Additionally, where necessary, in-house counsel must make clear they represent the corporation and not the individual employee. Finally, to prevent waiver, in-house counsel should take care to share sensitive information only with those who need to know the information.

Kevin Curry, a member of this newsletter's Board of Editors, is a partner, and **Mikiesha Mayes** is an associate, at Bowman and Brooke LLP in Minneapolis, MN.