Preserving the Attorney-Client Privilege: A Lawyer’s Guide To Protection of Client Communications

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Introduction

The attorney-client privilege is one of the oldest and most well-established evidentiary privileges in our legal system. Despite a long history, it has become one of the most complex, and consequently, most litigated privileges. This is due, in significant part, to the application of the privilege in the constantly evolving corporate environment, where large-scale litigation involving massive document production has become commonplace.

There are several common--and avoidable--mistakes that can lead to waiver of the attorney-client privilege. These mistakes often result from confusion and uncertainty among attorneys and persons to whom legal advice is provided about the parameters of the privilege and from inconsistent application of privilege principles by courts. Defense counsel can use a number of practical strategies to ensure not only that the privilege is claimed, but to effectively defend the privilege when it is challenged in litigation. To assist counsel in avoiding some of the common pitfalls with regard to the attorney-client privilege, this article will provide some practical ways to preserve the privilege.

The Distinction Between Business Communications and Legal Advice Can Be Determinative

As a general rule, the attorney-client privilege only applies to communications involving an attorney acting in his or her legal capacity, and only if the communication relates to seeking or
rendering legal advice. Because the roles of corporate attorneys and their resulting communications are not always limited to purely legal concerns, it can be difficult to differentiate between business advice and legal advice for the purposes of attorney-client privilege. Frequently, corporations seek advice of in-house counsel with regard to a variety of issues, some of which may be clearly legal, some of which may be clearly business, and some of which may be a mix of both legal and business advice. In this environment, an attorney’s communications to his or her client may become inextricably intertwined with facts, legal issues, and business matters. Consequently, an attorney’s advice and communications may be found in prepared documents, letters, and memoranda that contain business as well as legal considerations.

Courts have attempted to formulate workable standards for determining when an attorney renders legal versus business advice. This can be a difficult task given the inherent tension between the case law guidance (1) that the attorney-client privilege is to be narrowly construed; and (2) that, even though the privilege traditionally only protects communications for the purpose of seeking or rendering legal advice, the privilege can also protect communications if legal advice is mixed with business advice. See In re Bieter Company, 16 F. 3d 929, n.9 (8th Cir. 1994)(attorney-client privilege applicable to communications that mix business and legal advice); Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1974)(attorney-client privilege is to be strictly construed); Bituminous Casualty Corp. v. Tonka Corp., 140 F.R.D. 381, 386 (D. Minn. 1992)(attorney-client privilege must be narrowly construed because it excludes truthful evidence).

As a result of the intertwined nature of corporate representation, many courts have required corporations to prove that it sought “primarily” legal advice, service, or assistance, or have required in-house counsel to prove that they rendered “primarily” legal advice with regard to a particular communication. See, e.g., Sedco Int'l, S.A. v. Cory, 683 F.2d 1201 (8th Cir. 1982), cert. denied, 459 U.S. 1017 (1982)(“primarily legal advice”); Griffith v. Davis, 161 F.R.D. 687, 697 (C.D. Cal. 1995)(“primarily for the purpose of generating legal advice”)(quoting McCaugherty v. Siffermann, 132 F.R.D. 234, 238 (N.D. Cal. 1990); Pippenger v. Gruppe, 883 F. Supp. 1201, 1207 (S.D. Ind. 1994)(communications "primarily for the purpose of securing legal opinions and legal services"). Other courts require that the “legal advice given to the client must be the predominant element in the communication,” or that, with regard to the communication, the corporation sought “predominantly” legal advice, service, or assistance. See, e.g., Allendale Mutual Ins. Co. v. Bull Data Sys., Inc., 152 F.R.D. 132, 137 (N.D. Ill. 1993)(“legal advice given to the client must be the predominant element in the communication”); United States v. Davis, 132 F.R.D. 12, 16 (S.D.N.Y. 1990)(“where the advice given is predominantly legal, as opposed to business, in nature the privilege will still attach”); Cuno Inc. v. Pall Corp., 121 F.R.D. 198, 204 (E.D.N.Y. 1988)(the court's inquiry is focused on whether "the communication is designed to meet problems which can fairly be characterized as predominately legal").

Courts, however, have not devised useful guiding principles for applying the “primarily legal advice” or “predominantly legal advice” standards. Given the fact that the privilege decision usually involves in camera review of documents, the party asserting the privilege has the burdensome task of proving the legal nature of each individual communication that is claimed to be privileged. The outcome of the in camera review will often hinge on whether the claim of privilege can be justified based upon the extent to which the fact that legal advice was
being asked for or given is reflected in the document. Because an unsubstantiated assertion on a privilege log that the communication contains legal advice or is “primarily” legal advice will generally not be adequate for most courts, to maintain the privilege it is important to implement the following measures:

- **Ensure That the Document / Communication Discloses Legal Advice On Its Face** -- Because critical documents are often reviewed by a judge or special master years after they are created, it may be difficult, if not impossible, to reconstruct the facts establishing the privilege if there is no indicia of privilege on the face of the document. Indeed, the people involved in a particular communication or who created a specific document may no longer be working for the corporation when these issues are litigated or will have difficulty remembering the facts to support a claim of privilege. Accordingly, it is critical that the document itself reveal facts that will support a claim of privilege. Again, the mere assertion on a privilege log that the matter involves primarily legal advice will probably not suffice if the document itself does not support such a claim.

- **Segregate Legal and Business Advice** -- To the extent practicable, in-house counsel should avoid handling matters that are usually the responsibility of business managers. If counsel cannot avoid providing business advice, it should be carefully segregated from legal advice.

- **Educate Clients** -- Inform clients of the nature of legal versus business advice and that acting in a business capacity may jeopardize the privilege.

- **Label Privileged Communications** -- Clearly mark communications “confidential” and “subject to the attorney-client privilege.” Although this label may not have much meaning in court, it will help to prevent widespread dissemination of the communication.

### Drafts of Documents Can Be Particularly Problematic

It is often unclear whether draft documents that are prepared by or at the direction of a lawyer, and that will eventually be disclosed to third parties, are protected by the attorney-client privilege. Draft documents with redlines, written comments, or even un-marked drafts are frequently circulated between counsel and client to facilitate the rendition of legal advice or to obtain legal input relative to the content of or changes to a document.

Although some courts have held that dissemination of documents to third parties eliminates the expectation of confidentiality with respect to the draft, the more recent trend is to protect the draft versions of the document as privileged. In *Kobluk v. University of Minnesota*, 574 N.W. 2d 436, 442-444 (Minn. 1998), for example, the Minnesota Supreme Court concluded that such drafts are communications which can be afforded lawyer-client protections, much the same as if a lawyer and a client discussed changes, deletions or additions to a draft in a private telephone conversation or meeting. The threshold issue for the court in determining whether to afford the attorney-client privilege was whether the document “came into existence as a communication” between lawyer and client—whether the “draft was created as an implicit request for, or as a means of rendering, legal advice.” *Id.* Similarly, other courts require that a draft document contain “confidential information communicated by the client to the
attorney that is maintained in confidence” for the privilege to apply. SEC v. Beacon Hill Asset Mgmt. LLC, 2004 U.S. Dist. LEXIS 18390, at *36 (S.D.N.Y. 2004); see also In re Grand Jury Subpoenas Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1037 (2nd Cir. 1984)(the mere fact that documents might eventually be disclosed to third parties did not mean the communications were foreclosed from protection by the privilege); Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 490 (S.D.N.Y. 1993)(a draft document prepared by an attorney is privileged if it contains information provided in confidence by the client and subsequently maintained in confidence).

In order to meet these factual predicates that the document “came in existence as a communication” between lawyer and client or that the document contain “confidential information communicated by the client to the attorney that is maintained in confidence,” in-house and outside counsel should consider the following solutions to preserve the privilege:

- **Communications Regarding Draft Documents Must Include an Attorney** -- Any communication with respect to a draft document should be to or from an attorney. Simply copying an attorney on such communications is inadequate to establish that the document came into existence as a communication between lawyer and client.

- **Communications Regarding Draft Documents Must Indicate that Legal Advice Is Being Sought Regarding the Draft** -- The content of the communication should be explicit that legal advice is being sought with respect to the draft document *(i.e. “I am seeking your legal advice regarding the attached draft document”).*

- **Label Draft Documents** -- The draft document should be labeled “DRAFT” or otherwise evidence on its face that the document is not a final version *(i.e. handwritten comments, redlines, iterations of drafts to show changes, etc.)*.

### Privileged Retention of Outside Consultants

As many cases, particularly medical device and pharmaceutical cases, are becoming larger in scope and more complex, it is not surprising that defense lawyers have turned to public relations firms and other outside consultants for help. As these relationships become more common, questions arise as to whether communications between lawyers and outside consultants are privileged. Generally, the attorney-client privilege will apply if a company provides strong proof that its outside consultant enables counsel to provide legal advice. If the outside consultant is acting in his or her ordinary non-legal capacity, however, the privilege will not apply.

Courts are more likely to apply the attorney-client privilege when a company presents evidence that the outside consultant assists its lawyer in providing legal advice to the client. In In re Copper Market Antitrust Litigation, 200 F.R.D. 213, 215 (S.D.N.Y. 2001), for instance, defendant Sumitomo Corp. hired a public relations firm to provide assistance in dealing with issues relating to publicity from high profile litigation. As Sumitomo was facing litigation, the public relations firm provided damage control for Sumitomo by issuing press statements pertaining to the investigation, acting as spokesperson and preparing memoranda for Sumitomo’s employees informing them what they could and could not say to the press. Id. at 215-216. Both in-house and outside counsel reviewed and approved these statements and memoranda. Id. at 216.
The court held that the communications between Sumitomo and the public relations agency were covered by the attorney-client privilege because the agency was the “functional equivalent of a Sumitomo employee" and possessed information needed by the company’s lawyer to provide legal advice.  Id. at 220. A key part of the decision was its view that Sumitomo’s lawyer could not adequately defend the company without professional PR advice.  See also, H.W. Carter & Sons Inc. v. William Carter Co., 1995 WL 301351 (S.D.N.Y. 1995)(communications between outside public relations consultant and counsel were privileged because the public relations consultant had “assisted the lawyers in rendering legal advice which included how defendant should respond to plaintiffs’ lawsuit.”).

Courts are less likely to uphold the privilege if the consultant is acting in its ordinary capacity. This was the case in Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54-55 (S.D.N.Y. 2000) where the court did not uphold the claim of attorney-client privilege where consultant was providing ordinary public relations advice, including reviewing press coverage, making calls to media, and finding friendly reporters.  See also Labatt Ltd. v. Molson Breweries, 1995 WL 23603 (S.D.N.Y. 1995), aff’d, 100 F.3d 919 (Fed. Cir. 1996)(communications with in-house counsel and public relations agency were not privileged because the agency served purely a public relations function).

In light of the case law on this subject, the following steps must be considered in order to ensure that communications between in-house counsel and outside consultants remain privileged:

- **Select A Specialist** – Select and hire a consulting firm that specializes in litigation-related crisis management.
- **Establish The Role of the Outside Consultant At The Outset** -- Any contracts, consulting agreements, or engagement letters should be between the lawyers and the outside consultant (not between the consultant and the client). If the outside consultant has previously worked with your client, prepare a new document.
- **Ensure That Documents Clearly Define the Consultant's Limited Role** -- Specify in the document that the services of the consultant are being sought because of the prospect of governmental investigation and/or litigation, or due to actual litigation.
- **Clearly Communicate Role Of Outside Consultant** -- Ensure that the outside consultant knows that the retention is to provide litigation-related advice in order to facilitate the provision of the lawyer’s legal advice to the corporate client.
- **Label Documents** -- Clearly mark and written communications as “confidential” and “subject to the attorney-client privilege.” Although this label may not be dispositive, it may help to prevent widespread dissemination of the communication.
- **Clarify Why The Advice of Consultant is Being Sought On The Face Of Documents** -- Include a brief discussion on the face of the written communication as to why the advice of the outside consultant is being sought (i.e. for the purpose of facilitating your legal advice to the client, or if you are the corporate client, for the purpose of seeking legal advice from your attorney).
- **Include An Attorney in Each
Communication --
Communications with an outside consultant should always include either in-house or outside counsel. In the event a non-lawyer corporate client (i.e. an in-house media person) is communicating directly with the outside consultant as an agent of the in-house attorney but without the presence of counsel, ensure that it is clear that the communication is for the purpose of seeking or providing legal advice to the corporate client.

Protecting Communications of “Agents” of In-House Counsel

It is well established that communications to or from agents, including paralegals, legal secretaries, translators, and private investigators can be regarded as communications of or to a lawyer. In addition to these agents, it is not uncommon for an in-house legal department to “deputize” other non-lawyer business managers to act under the direction of and as an extension of counsel. It is not clear, however, how far this notion can be extended beyond those persons who typically assist lawyers.

As a general rule, courts will only uphold an agency claim if it is clear the communication was for the purpose of communicating legal advice (as opposed to business advice) and that the agent was acting under the authority and control of counsel. To the extent the agent is not involved in communications for the purpose of communicating legal advice, however, the communications are not privileged. See, e.g. Cuno Inc., 121 F.R.D. at 205 (the mere request by a lawyer that a client-employee take notes of a meeting was not sufficient to implicate the attorney-client privilege); Carter v. Cornell University, 173 F.R.D. 92, 94 (S.D.N.Y. 1997)(privilege upheld where human resources manager conducted interviews of certain potential witnesses because this was a typical lawyering activity). Given the narrow construction of the attorney-client privilege generally, courts are unlikely to extend agency beyond these parameters.

As a practical matter, in-house and outside counsel should consider the following steps to ensure that communications by agents acting under the authority and control of counsel maintain the privilege:

- **Document Must Evidence "Agency" On Its Face --** The face of the document or communication should demonstrate that, in respect to the creation of the document, the person was acting under the authority and control of counsel. Simply providing an affidavit in an in camera review stating that a communication or document was prepared at the direction of counsel is inadequate. The document itself must evidence such a relationship.
- **Clearly Define Role As Agent --** The attorney must clearly communicate to the agent that the agent has been "deputized" for the purposes of assisting the attorney and his or her rendition of legal advice to the client.
- **Document Must Evidence Legal Purpose On Its Face --** The document or communication (either expressly or by implication in the document and surrounding related documents) itself should be evidence that the document originated for a legal purpose as opposed to a business purpose.
- **All Communications Should Include An Attorney --** All communications should include a lawyer, even if the communication is merely copied to the lawyer.
Conclusion

Although the attorney-client privilege is well-established, it is often the subject of attack in litigation. These attacks are not aimed at the fundamental privilege principles, but rather to the application of the privilege to new and evolving circumstances in today’s complex litigation environment. By adherence to the rules which define and set the parameters of the attorney-client privilege and by employing the practical solutions provided here, attorneys can better protect and defend this critical privilege.