ARTICLE: THE ATTORNEY-CLIENT PRIVILEGE--DIFFERENTIATING BETWEEN A LAWYER'S LEGAL AND BUSINESS COMMUNICATIONS

By Steven T. Voigt, n1

n1 Copyright (C) 2008 Steven T. Voigt. Steven T. Voigt is counsel to Reed Smith, LLP. In 2007, he was one of 35 lawyers in Pennsylvania distinguished as a "Lawyer on the Fast Track" by the Legal Intelligencer and the Pennsylvania Law Weekly, and in 2005, he was named a Rising Star Super Lawyer by Law & Politics and the Philadelphia Magazine. Mr. Voigt's writings have appeared in several law journals and other publications, and two universities and several radio programs have invited him to speak about current issues in law and public policy. The opinions expressed in this article are solely those of the author and are not intended to serve as legal advice.

TEXT:

[*65] INTRODUCTION

Differentiating between a lawyer's legal and business communications is, from my experience, typically more difficult than one would anticipate. A necessary precursor to document production, this analysis is often time-intensive. Not uncommonly, litigators fail to give this inquiry the attention it requires. As a result, they find themselves embroiled in discovery disputes over the nature of documents that they withheld from production.

Indeed, in multiple cases that I have litigated, I believe that opposing counsel has been more than a little careless with this aspect of document production. The result tends to be the same every time--motions to compel and supporting briefs that could have been avoided, an in camera review by the court of the documents withheld, and more often than not, a judge frustrated to find that many documents withheld under claims of supposed privilege were not in fact privileged and should have been produced from the start of discovery.

I have litigated disputes over privilege logs numerous times in multiple jurisdictions, in lawsuits involving U.S. corporations and witnesses and also corporations and witnesses from Europe and abroad. To my frustration, it seems that lengthy battles over privilege logs are almost commonplace. To my even greater frustration, the same issue--improperly withholding from document production a lawyer's business communications--appears time and again.

[*66] Recently, after encountering business communications on privilege logs one more time than I prefer to count, I decided that I should pen a primer to assist others with determining whether a lawyer's communications are business-related and should be produced. This article is not meant to serve as an exhaustive survey of the law, but I hope fellow practitioners will find it useful as a starting point for their consideration of this issue.

THE IMPORTANCE OF A RIGOROUS SUBSTANTIVE ANALYSIS TO DETERMINE PRIVILEGE

In some of my cases where there were disputes over the business nature of a lawyer's communications, disputes surfaced because my opposing counsel took an unduly broad interpretation of privilege to, in my opinion, withhold as many documents as possible from production. In other instances, however, I believe business communications found their way onto a privilege log inadvertently through poor case management techniques.
The risk for carelessness is more pronounced in larger cases, where counsel will often assign the tedious task of reviewing the hundreds of thousands of documents in a potential document production set to a team of junior associates and paralegals. These teams of junior associates and paralegals often do not have the same intimate understanding of the facts of the dispute as do their partners. Unfortunately, I believe some individuals staffed on review teams also do not have a sufficient understanding of the legal framework for ascertaining privilege. As a result, some privilege reviews consist of nothing more than looking at the "to" and "from" lines of a communication, without considering the substance of the communication. In these instances, if in-house counsel sent or received a communication, regardless of the substance of the communication, the team of reviewers will flag the document for a growing pile of "privileged" documents. If that pile is not thereafter reviewed by one of the senior trial counselors on the case to double-check the work product of the rest of the team, non-privileged documents will have a tendency to show up on a privilege log.

As with nearly everything in the practice of law, in document productions and when preparing privilege logs, there is no substitute for hard work and careful analysis. Decisions about privilege cannot be made solely on the basis of the author and recipient of a communication. In every case, an examination of the substance of the documents withheld by those having proficiency with the facts of the case is necessary. If a careful and diligent culling of a production set for potentially privileged documents does not take place prior to a document production as it should, then the alternative is a less pleasant process, where determinations of privilege are made with adversarial briefs, arguments, and an in camera review by the court.

A lawyer's communications having a business--as opposed to a legal--purpose are found in every conceivable attorney-client relationship, but I have found this most often appears with in-house counsel who are communicating with officers and directors of their company. Indeed, in a corporate setting, an in-house counsel's regular duties often extend beyond providing legal advice. Some corporate counsel are involved in business decision-making on a regular basis. Others have a business role in only specific transactions. As a consequence of this tendency for lawyers to sometimes wear multiple hats within the structure of a company, a litigator's review of a potential production set should begin with the client thoroughly educating the attorney about the titles and roles of all of the individuals whose names appear in the company's potential document production.

[*67] APPROACHES COURTS USE TO SEPARATE LEGAL AND BUSINESS COMMUNICATIONS

After learning the facts, the next step when separating a lawyer's non-privileged business communications from communications showing the attorney providing legal advice is to understand the legal standard employed by courts and apply the standard to the facts and the documents. The purpose of the attorney-client privilege is to encourage an open dialogue between client and attorney with full disclosure of information needed for legal representation. n2 The burden of proof to establish the existence of attorney-client privilege rests on the one asserting it. n3

Federal courts in Pennsylvania have pointed to a description of privilege by the District of Massachusetts in United States v. United Shoe Mach. Corp.n4 as one of the most frequently cited formulations of the privilege. The United Shoe court stated:

The privilege applies only if

(1) the asserted holder of the privilege is or sought to become a client;

(2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;

(3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and

(4) the privilege has been (a) claimed and (b) not waived by the client. n5

Distinguishing between business and legal communications is often more time-intensive when the lawyer on a communication is an in-house attorney, because an in-house attorney may wear several hats, including that of a business
advisor or financial consultant. n6 When a corporate attorney transacts the general business of a company or otherwise acts in a non-legal capacity, his communications are not privileged. n7

"When a corporation seeks to protect communications made by an attorney who serves the corporation in a legal and business capacity, the corporation must clearly demonstrate that the advice to be protected was given in a professional legal capacity." n8 "This showing is necessary to prevent corporations from shielding their business transactions from discovery simply by funneling their communications through a licensed attorney." n9

As a preliminary observation, business communications cannot be insulated from discovery by simply directing a copy of those communications to in-house or outside counsel or including counsel in the discussion. n10 Thus, a company cannot shield its business communications by merely directing a communication to an attorney or including the attorney in the "cc" fields of an email. n11 Likewise," [a] document is not privileged simply because it was created by an attorney or is contained in an attorney's file." n12

To be privileged, a communication must involve legal services and not simply have an attorney present who functions in some other capacity. For instance, "[w]here the attorney serves merely as a scrivener, communications concerning the drafting of the instrument or the instrument itself are not privileged and must be admitted." n13 In addition, when "[a] lawyer is . . . employed without reference to his knowledge and discretion in the law--as where he is charged with finding a profitable investment for trust funds," his communications are not privileged. n14

One way to examine a document for privilege is to understand and identify its primary purpose. A communication that is privileged has as its primary purpose the solicitation or rendering of legal services. n15 Documents that are reports "of general corporate business decisions as opposed to legal advice based upon confidential information" are not privileged. n16

Privilege is not necessarily lost when non-legal information is part of a communication seeking or giving legal advice. n17 "In reported opinions, most courts have resolved the issue of mixed communications by applying privilege only when legal considerations are predominant." n18 For instance, to ask a legal question, it is often necessary for a corporate officer to provide background transactional details to in-house counsel. In such an instance, where business facts are a necessary foundation for a legal inquiry that is the predominant focus of the communication, privilege would remain.

Beyond identifying the primary purpose of a document, another way to distinguish between business communications and legal advice is, as the District Court for the District of Puerto Rico stated in *Oil Chem. and Atomic Workers Mt. Union v. American Home Prods.*, n19 to consider "whether the task could have been readily performed by a non-lawyer." The *Oil Chemical* court stated:

One factor which must be evaluated in order to determine whether an attorney communicated in her professional capacity as a lawyer is: whether the task could have been readily performed by a non-lawyer--as when facts are gathered for business decisions. A related factor is whether the function that the attorney is performing is a lawyer-related task such as: applying law to a set of facts; reviewing client conduct based upon the effective laws or regulations; or advising the client about status or trends in the law ... Thus, there is a distinction between a [*69] conference with counsel, and a business conference at which counsel was present. Documents which do not ordinarily qualify for the privilege are: business correspondence; inter-office reports; file memoranda; and minutes of business meetings. n20

In addition to an analysis of the primary purpose of a document and whether a non-lawyer would be capable of handling the task, another approach courts have used to ascertain privilege was enunciated in *The Attorney-Client Privilege as Applied to Corporations*, n21 a law review written by David Simon, Esquire. This law review article is frequently cited by federal court opinions that discuss business communications of lawyers. n22 In the article, the author distinguished between "pre-existing" and "communicating papers," stating:

Again, the problem should be handled in terms of the order of proof. Once the person seeking disclosure demonstrated that the particular record was one that the company would ordinarily maintain for itself without regard to counsel, it would be prima facie the equivalent of a "pre-existing" record; it would then be unprivileged unless its disclosures were affirmatively shown to have been prompted by the need for
legal advice. The imminence of litigation would be merely one way—and not necessarily a conclusive one—of demonstrating the significance of the lawyer's intention. n23

The author suggested that this approach would lead, in practice, to a result where "form reports, routine questionnaires and the like would almost never be privileged, but detailed interviews conducted by an attorney and recorded by him would frequently qualify." n24

**SOME EXAMPLES OF DOCUMENTS WITH A BUSINESS OR LEGAL PURPOSE**

A final tool that will help guide an understanding of how courts discern business communications from legal advice is to view descriptions of documents in opinions where courts resolved disputes over privilege logs. Surprisingly, there is not an abundance of opinions that are so factually detailed that they provide specific descriptions of the documents at issue. A few of those opinions that do provide such descriptions follow.

In *United States v. Massachusetts Institute of Technology*, n25 the court found that minutes of corporation's regular meetings and committee meetings reflecting reports on pending legal issues were not subject to protection under the attorney-client privilege, because they were not confidential communications between attorney and client for purpose of securing legal advice, but rather they were prepared in the ordinary course of business.

In *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, n26 an action arising out of efforts to recoup environmental cleanup costs, the defendant sought to compel production of certain documents withheld by the plaintiff. Among other documents, the court made the following determinations about privilege:

[*70] . regarding drafts of regulatory reports:

Drafts of required reports to state regulators circulated among the environmental consultants and attorneys for comment and review are protected under the attorney client privilege if the drafts contain comments or notations of counsel ... and contain information or provisions not included in the final version; n27

. regarding interpretation of technical data:

Documents provided by ... environmental consultants to in-house or outside counsel for [the Plaintiff] for the specific purpose of explaining or interpreting technical data so as to allow counsel to provide legal advice ... in connection with, among other things, responding to demands and requests of the state or federal environmental regulators are protected under the attorney client privilege; n28

. regarding the role of in-house counsel:

Documents circulated among, by and between ... in-house counsel ... and outside environmental counsel. . . for the purpose of obtaining or giving legal advice--Such documents are protected by the attorney client privilege so long as they were not circulated to other individuals outside this circle who did not have a need to know what decisions were made or provide input and so long as [in house counsel] was acting solely in the role of legal advisor in receiving or generating such documents--To the extent that he was not acting in the role of legal advisor, that is if and to the extent that certain documents were circulated to his attention based on his role as an officer or administrator or business advisor to the corporation--the privilege was waived and the documents are subject to disclosure . . . n29

In *United Postal Service v. Phelps Dodge Refining Corp.*, n30 an action involving an alleged breach of contract in removing toxic wastes from a property, the court in camera reviewed approximately 265 documents withheld from production and determined that many of those documents were not privileged. Among the documents that the court ordered produced were the following communications that involved one or more in-house or outside counsel:

. Letter, "No client confidences disclosed--simply a transmittal letter."
. Memorandum, "No confidence disclosed. No legal opinion sought or given."

. Letter, "Not confidential. Letter states that information is a matter of public record."

. Letter, "Letter dated 6/28/88 is from house counsel to outside attorneys who are lobbyists and did not render legal services covered under privilege. Attachments all involve third parties not covered by the privilege."

. Draft letter from officer, "Although it seeks legal comment, draft is of document addressed to third party. No confidence revealed in transmittal."

. Memorandum, "This is a summary of a meeting ... Factual information only. No client confidence disclosed."

. Handwritten notes, "Not proven that communication is with client and confidential."

. Memorandum, "Draft of intra-corporate memo between officers who are not counsel. Attorney comments editorial."

[*71] . Inventory of documents from file, "Summaries of documents do not constitute legal advice. However, redact discussion of contents of privileged documents."

. Draft memorandum to third party, "Draft of document to third party and transmittal memo." n31

CONCLUSION

The task of differentiating between privileged and business communications cannot be distilled into any single universally applicable rule having no exceptions. The attorney-client relationship is a personal relationship, and every representation is unique. The litigations I have handled related to this issue were resolved by trial judges making commonsense conclusions about the nature of documents, followed by arguments by both sides in briefs and then in camera analyses of the documents.

I do not mean to propose one standard or set of standards for resolving all disputes, nor do I think one or more all-encompassing rules is possible. In writing this article, my goal has been to convey that it is necessary for litigators to make a rational decision about the nature of documents after a proper and diligent review and analysis of those documents. In some instances, disputes over privilege can be avoided in their entirety when a little elbow grease is applied to a document production set--counsel rolling up their sleeves, pouring through the documents, conducting an appropriate analysis, and making well-reasoned decisions about the nature of documents. In the majority of instances, that same dose of elbow grease will reduce to a manageable number the number of documents on a privilege log that later become the subject of dispute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawCivil ActionsDamagesEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewLegal EthicsProfessional ConductOpposing Counsel & Parties

FOOTNOTE-1:


n3 Barr Marine Prods., 84 F.R.D. at 636.

n5 See In re Grand Jury Investigation, 599 F.2d 1224, 1233 (3rd Cir. 1979); Barr Marine Prods., 84 F.R.D. at 633.


n7 United Shoe, 89 F.Supp. at 359.


n9 Id.

n10 Barr Marine Prods., 84 F.R.D. at 635.

n11 United States Postal Service v. Phelps Dodge Ref. Corp., 852 F.Supp. 156, 160 (E.D. N.Y. 1994) ("the mere fact that a communication is made directly to an attorney, or an attorney is copied on a memorandum, does not mean that the communication is necessarily privileged.").


n14 8 J. Wigmore Evidence §2296 (1961).


n16 Barr Marine Prods., 84 F.R.D. at 635.

n17 Id.


n20 Id. (internal citations omitted).


n23 Simon, supra, at pp. 980-81.
n24 *Id.* at p. 981.


n27 *Id.* at 635-36.

n28 *Id.*

n29 *Id.*


n31 *Id.* at Table 1.