

Developments in Waiver of Attorney-Client Privilege

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Current Climate

- Justice Department's Thompson Memorandum
- U.S. Sentencing Guidelines
- Federal Rules of Evidence 502(c)

Protecting the Privilege

- American Bar Association
- State Bar Associations
- Association of Corporate Counsel

Today's Focus

- Sharing of privileged information with corporate auditors
- Repercussions of waiving attorney-client protections in connection with government investigations
- Communications with both inside and outside counsel based upon the reliance on counsel defense

Case Law

- In re Swidler & Berlin, 524 U.S. 399 (1998)
- Commonwealth v. Downey, 793 N.E. 2d 377, 381 (Mass. App. Ct. 2003)
- In re Disciplinary Proceeding Against Schafer, 66 P. 3d 1036, 1041 (Wash. 2003)
- In re Bryan, 61 P.3d 641, 656 (Kan. 2003)
- Kala v. Aluminum Smelting & Ref Co., 688 N.E.2d 258, 262 (Ohio 1998)
- In re Gonzalez, 773 A.2d 1026, 1031 (D.C. 2001)

Duty of Confidentiality

“The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of a client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.” Ethical Consideration 4-4

Waiver

- In re Martin Marietta Corp. 856 F.2d 619, 623 (4th Cir. 1988)
- United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982)
- In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982)

Disclosure to Auditors

- Sarbanes-Oxley
- Cases:
 - Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc., 2004 U.S. Dist. LEXIS 21543 (S.D.N.Y. Oct. 22, 2004)
 - In re Pfizer, Inc. Sec. Litig., 1993 U.S. Dist. LEXIS 18215, No. 90 Civ. 1260 (S.D.N.Y. Dec. 23, 1993)
 - Medinol, Inc. v. Boston Scientific Corp., 24 F.R.D. 113 (S.D.N.Y. 2002)

Government Investigations

The decision to waive must take into account potential civil litigations growing out of the investigation and the effect of the waiver on those litigations.

Exception: The Eighth Circuit

(Diversified Industries, Inc. v. Meredith)

The Tenth Circuit

(In re: Qwest Communications International Inc.)

The Second Circuit

Waiver Premised Upon Reliance on Advice of Counsel

In re Echostar Communications
Corporation, 2006 U.S. App. LEXIS
11162 (Fed. Cir. May 1, 2006)

How to Protect the Privilege:

- A. The lawyer with whom communications will be made should hire and pay for all outside parties who confer in litigation (i.e., CPAs, investment bankers, e-discovery vendors).
- B. In general, outside counsel is preferable to inside counsel to take on the role as attorney and for retaining such parties.
 - 1. One may preserve the privilege when communications are made by an agent of either the attorney or client to facilitate legal communications. *In re: Stenovich*, 756 N.Y.S. 2d at 381
 - 2. The attorney must specifically instruct the agents in that situation that are necessary for communications not to disclose the information contained in the communication. *Id.*
 - 3. Send all reports and bills directly to the attorney and not the client.
 - 4. The privilege should be upheld when the information is given to an agent who is in the best position to utilize the information and there is no intent to waive the privilege. *See Upjohn*, 449 U.S. 383 (1981).
 - a. When sharing information with non-lawyer consultants, return the information to the client after the transaction is consummated to avoid disclosure.
- C. Label communications “for the purpose of receiving legal advice.”
- D. Describe legal considerations in memoranda to bolster argument that it is legal advice.
- E. Keep communications within the knowledge of only those who need to know.
 - 1. If communications are exchanged between different companies, those companies must be in the same community of interest to preserve the privilege-joint defense document.

How to Protect the Privilege:

- F. Telephone communications
 - 1. Land lines are confidential
 - 2. Cell and cordless phones may not be protected
- G. Fax machines
 - 1. Protected because they use a land line
 - 2. Can further protect misdirected faxes with a cover sheet stating the material is privileged and confidential
- H. E-mail
 - 1. Internal e-mail systems are protected via monitoring and privacy policies.
 - a. For example, “AOL does not read or disclose private communications except to comply with valid legal process such as a search warrant, subpoena or court order, to protect the company’s rights and property, or during emergencies when we believe physical safety is at risk.”
 - b. Recently, courts have viewed the risk of interception no greater than commercial mail, land-line telephones or faxes.
- I. Main Inquiry: whether the intent to communicate in confidence was objectively reasonable.
 - 1. This also depends on the above mentioned corporate e-mail policies, access to the system and notice provided to employees.

How to Protect the Privilege:

J. Application Service Providers (ASPs)

1. Most systems ensure access is restricted to those who need to view the appropriate material, however, these systems give rise to security issues involving the integrity of the attorney/client relationship and confidentiality of documents.

a. The ASP should have security standards to protect information from inadvertent disclosure.

b. An administrator should be appointed who dictates access according to document type and the individual's function.

2. The attorney is responsible for ensuring the ASP's conduct is compatible with applicable ethical requirements.

a. Analogy: bar associations have reasoned that a lawyer who stores paper files of a client in an off-site storage facility owned by a third-party should take reasonable assurances that certain measures are taken to preserve confidences:

i. Ex: who has access, security agreements, security procedures, virus protection to avoid mass distribution, encryption (i.e., only allowing in-house counsel and the control group to access the materials).

Thank You

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