

ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT

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Our Speakers



Rob Fluskey
Partner

Rob is an experienced litigator and a partner in the firm's Litigation Practice. He has represented clients in dozens of complex, high-stakes cases in federal and state courts, including class actions and collective actions. While Rob's practice covers many areas of business and commercial litigation, he focuses principally on intellectual property cases and employment disputes.

Our Speakers



Melissa N. Subjeck Partner

Melissa is an experienced and dedicated business litigator, representing national corporations in complex contract, intellectual property, banking, employment, and business disputes, as well as professional malpractice matters. Her extensive experience litigating intellectual property matters includes patent, trademark, copyright, and trade secret disputes. Melissa also represents banks and financial institutions in class action and complex civil litigations, including matters involving allegations of fraud and breach of fiduciary duty, as well as those implicating their BSA/AML programs. In addition, as a member of the firm's COVID-19 Litigation and Employment Action Team, Melissa regularly represents and counsels suppliers, manufacturers, distributors, and vendors on a variety of contract and supply chain disputes, including force majeure.

Introduction

- Communications where you are involved
- Communications where your non-lawyer staff members – but not you – are involved
- Communications among business people where you are not involved
- Trends and some miscellaneous scenarios
- Q & A

General Standard for Attorney-Client Communications

- Confidential communication
- Between lawyer and client
- For the purpose of obtaining legal advice or services

General Standard for Attorney-Client Communications

- Communication must be primarily or predominantly of a legal character
 - *Federal Housing Finance Agency v. UBS Americas Inc.*, 2013 WL 1700923, at *2 (S.D.N.Y. Apr. 16, 2013) (“[Factual material] is not rendered privileged simply because it was contained in a memorandum prepared by an attorney or because that memorandum was relayed to [a party] by its attorney”)
- Not enough that statement was uttered by an attorney
 - *Choi. v. Liberty Mutual Ins. Co.*, 2021 WL 790381 (E.D.N.Y. Feb. 9, 2021); *Spectrum Sys. Int’l Corp. v. Chemical Bank*, 78 N.Y.2d 371 (1991); *Delta Fin. Corp. v. Morrison*, 15 Misc.3d 316, 829 N.Y.S.2d 884 (Nassau Co. 2007)
 - *Ambac Assur. Corp. v. Country* (privilege is narrowly construed)
 - *Wide Home Loans, Inc.*, 27 N.Y.3d 616, 624, 36 N.Y.S.3d 838, 842 (2016) (“Because the privilege shields from disclosure pertinent information and therefore ‘constitutes an “obstacle” to the truth-finding process,’ it must be narrowly construed”)
- Interferes with truth-finding process

Meeting the Burden

- Proponent of privilege bears the burden
 - *Ambac*, 27 N.Y.3d at 624, 36 N.Y.S.3d 838, 842-43 (“The party asserting the privilege bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client for the purpose of facilitating the rendition of legal advice or services”)
- Conclusory or boilerplate assertions are inadequate
 - *Castro v. Admar Supply Co., Inc.*, 159 A.D.3d 1616, 73 N.Y.S.3d 856 (2018) (boilerplate claims of privilege asserted in defendant’s moving papers were insufficient to establish the existence of confidential communications); see also *Anonymous*, 32 A.D.3d 353, 820 N.Y.S.2d 573
- Party claiming privilege must establish it on a document-by-document basis
 - See *Hugley v. The Art Inst. of Chicago*, 981 F. Supp. 1123 (N.D. Ill. 1997)
- Evidentiary submissions supporting assertion of privilege – affidavits or deposition testimony
 - See *U.S. v. Construction Prods. Research, Inc.*, 73 F.3d 464 (2d Cir. 1996); see also *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993) (“If this showing is made through a privilege log, then it must be ‘adequately detailed’ and used ‘in conjunction with evidentiary submissions to fill in any factual gaps’”)

Polling Question #1

When courts apply the standard for attorney-client privilege, the privilege is narrowly construed.

- True
- False

Communications Between In-House Counsel and Internal Client

- Basic elements of the attorney-client privilege apply
- But burden is more difficult in the in-house context
- In-house counsel is often involved in the business matters of the company

Communications Between In-House Counsel and Internal Client

- Outside Counsel
 - Presumption: Client consults outside counsel for the purpose of seeking legal advice from that attorney
- In-House Counsel
 - Presumption is diluted
 - Communications to and from in-house counsel are privileged only to the extent that in-house counsel gave advice in a legal capacity

Communications With In-House Counsel

- “[A] document created for business purposes does not acquire protected status merely because a copy of it is sent to an attorney, even if the attorney may ultimately render legal advice on it”
 - *In re Omnicom Group, Inc.*, 233 F.R.D. 400 (S.D.N.Y. 2006)
- “The corporate attorney-client privilege is not available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure”
 - *People v. Belge*, 59 A.D.2d 307, 399 N.Y.S.2d 539 (4th Dep’t 1977)
- Communicating with, mentioning, or copying a lawyer on an otherwise non-privileged communication, will not transform the non-privileged communication or attachment into a privileged one, even if the otherwise non-privileged communication was at the behest of the lawyer
 - *Miller UK Ltd. v. Caterpillar, Inc.*, No. 10 C 3770, 2015 WL 13652752, at *1 (N.D. Ill. Feb. 11, 2015)
- A corporation cannot “funnel” its records and documents into the hands of its attorneys and then claim privilege
 - *Choi*, 2021 WL 7903811, at *4; *Aurateq Sys. Int’l, Inc. v. Black-NYC, LLC*, 21 Misc. 3d 1142(A), 880 N.Y.S.2d 222 (Sup. Ct. 2008)

Practice Tips

- Tell internal client what privilege means
- Explain that all modes of communication are discoverable
- Make an explicit record that legal advice is being sought
- Resolve legal issues before disseminating drafts to third parties
- Avoid distributing drafts to third parties (outside consultants, public relations professionals)

Polling Question #2

Do you work with in-house paralegal personnel?

- Yes
- No

Communications with Non-Lawyers in the Legal Department

- Paralegals
- Contract Administrators
- Licensing Specialists/Consultants
- Patent Agents

Communications with Non-Lawyers in the Legal Department

- Generally no independent privilege for individuals who perform quasi-lawyer functions and report to lawyers, such as paralegals and in-house legal staff
 - *Hpd Labs. v. Clorox Co.*, 202 F.R.D. 410 (D.N.J. 2001) (paralegal/“legal specialist” within company’s legal department; communications are not protected merely because they solicited legal advice or because they were directed to a paralegal; to invoke the attorney-client privilege, a client’s statement must at minimum “be made in confidence for the purpose of obtaining legal advice from the lawyer”)
 - *Tovey v. Nike, Inc.*, No. 1:12-CV-0448, 2013 WL 12131314, at *1 (N.D. Ohio Oct. 10, 2013) In the context of paralegals, one federal court has observed that their statements and correspondence are protected by the privilege where they “pass on [an] attorney’s advice to the client,” or where “they convey advice formulated under the supervision and at the direction of an attorney”

Communications with Non-Lawyers in the Legal Department

- For the privilege to attach, non-lawyer personnel must be acting under the supervision or direction of an attorney
 - *Cf. Byrnes v. Empire Blue Cross Blue Shield*, 1999 W.L. 1006312 (S.D.N.Y. Nov. 4, 1999)
- Communications by non-attorneys are generally only protected by privilege if those non-attorneys are “employed to assist the lawyer in the rendition of professional legal services”
 - *Loftin v. Bande*, 258 F.R.D. 31, 34 (D.D.C. 2009) (e-mail between non-attorneys with attorney copied was privileged, since one of the non-attorneys was employed by legal department and communication was made for purpose of obtaining legal advice)
 - *See John Labatt Ltd.*, 898 F.Supp. at 477 (privilege applies where agent is a conduit from attorney to client)
- Even then, extension of privilege to non-lawyer personnel may be “strictly confined within the narrowest possible limits”
 - *Blumenthal v. Drudge*, 186 F.R.D. 236 (D.D.C. 1999) *see also In re Cendant Corp. Sec. Litig.*, 343 F.3d 658 (3d Cir. 2003)

Practice Tips

- Instruct non-lawyers to include counsel on communications
- Consider moving quasi-legal personnel into legal department

Businessperson Communications

- Litigation Committee Hypothetical
 - Board Committee with lawyers as members
 - Lawyers not present at meeting
 - Members discuss litigation and risk exposure
- There is no per se privilege, or blanket privilege, for every communication between members of a litigation committee, based solely upon their membership in such committee
 - *Delta Fin. Corp. v. Morrison*, 829 N.Y.S.2d 877 (Nassau Co. 2007)

Businessperson Communications

- “Legal told me that . . .”
- “I asked legal whether . . .”
- “Do we need legal’s input on this? . . .”
- “Looks to me like we have to pay . . .”

Businessperson Communications

- Communications presumptively **not** privileged
 - **Not** a communication between lawyer and client
 - **Not** clearly made for the purpose of seeking legal advice
 - Potential waiver issues raised by distribution

Businessperson Communications

- Category 1: Distribution of legal advice among corporate personnel (“Legal told me that . . .”)
 - Starting premise: The attorney-client privilege protects communications between the principals of a corporation and the corporation’s attorneys
 - *Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588 (1989); *Parneros v. Barnes & Noble, Inc.*, 332 F.R.D. 482, 491 (S.D.N.Y. 2019)
 - Inference Commonly Drawn: Communications among corporate representatives disclosing legal advice may be privileged, even if outside the presence of counsel
 - *Choi v. Liberty Mut. Ins. Co.*, No. 16-CV-5392 (WFK), 2021 WL 790381, *4 (E.D.N.Y. Feb. 9, 2021) (“[I]n the corporate context, the privilege may extend to communications among non-attorneys if they were made at the direction of counsel to gather information to aid counsel in providing legal services”)
 - Caution – Courts may enforce a “need-to-know” restriction on distribution
 - *Scholtisek v. Eldre Corp.*, 441 F. Supp. 2d 459 (W.D.N.Y. 2006); *Garvey v. Hulu, LLC*, No. 11-CV-03764-LB, 2015 WL 294850, at *2 (N.D. Cal. Jan. 21, 2015)

Businessperson Communications

- Category 2: Communications among corporate personnel about legal opinion actually sought from counsel (“I asked legal whether . . .”)
 - While not frequently litigated, these communications are arguably privileged
 - *Nalco Co. v. Baker Hughes Inc.*, 2017 WL 3033997, *3-5 (S.D. Tex. July 18, 2017)
 - *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198 (E.D.N.Y. 1988)

Businessperson Communications

- Category 3: Communications among corporate personnel about the potential need to seek legal advice
 - There is little authority on point
 - Arguably privileged. See *Nalco*, 2017 WL 3033997, at *3-5 (“communications between non-attorney corporate employees may be privileged when they were made ‘for the purpose of securing legal advice’”)
 - At least one decision holds that these communications are not privileged. See *Duttie v. Bandler & Kass*, 127 F.R.D. 46 (S.D.N.Y. 1989)

Businessperson Communications

- Category 4: Communications among corporate personnel about their views on litigation or risk exposure
 - Not privileged, absent special circumstances

Practice Tips

- Tell internal client what privilege means
- You are primary addressee – not a cc
- Find a point person to avoid wide distribution beyond a control group
- Limit distribution of the document to non-lawyers

Other Topics

- Litigation Hold Memos
- Consultants

Questions



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