PEPPERDINE UNIVERSITY

Journal of the National Association of Administrative Law Judiciary

Volume 8 | Issue 1 Article 6

3-15-1988

The Attorney-Client Privilege

Thomas E. Spahn

THE ATTORNEY-CLIENT PRIVILEGE

Thomas E. Spahn [1/]

As the practice of law becomes more complex, we must constantly remind ourselves not to overlook some of the basic elements of our trade. One of the most important, yet often misunderstood or misapplied, doctrines governing our activity is the attorney-client privilege. This brief article summarizes the privilege and offers practical suggestions for its creation and maintenance.

Introduction

Issues involving the attorney-client privilege pervade every aspect of our practice. In litigation, cases are won or lost every day because the privilege has not been properly created or, once created, has been lost. Ignorance of the privilege can also jeopardize our clients' interests in non-litigation contexts. The importance of the attorney-client privilege to lawyers is heightened because the creation and maintenance of the privilege is almost exclusively the lawyer's--not the client's--responsibility. A lawyer who neglects the privilege can subject himself to malpractice liability as well as the loss of this client.

Rationale for the Privilege

The attorney-client privilege dates from at least the 1500's. As originally envisioned and still recognized today, the privilege fosters the creation of satisfactory arrangements and the resolution of disputes among members of society by assuring that clients can freely communicate with their lawyers--upon whom society has placed the burden of

---

1/ Mr. Spahn is a partner in the Richmond, Virginia office of McGuire, Woods, Battle & Boothe. He received his BA degree from Yale University and his JD degree from Yale Law School. This article first appeared in the Virginia Bar News, Vol. 36, No. 4, p. 23 (Oct. 1987) and is reprinted here by permission.

creating those arrangements and resolving those disputes. [2] However, this societal benefit has a cost--the privilege hampers the search for truth by concealing undeniably relevant communications. This tension has been apparent from the beginning, and results in the attorney-client privilege being narrowly construed. [3]

Scope of the Privilege

The source of the privilege varies by state. Some jurisdictions have codified their privilege, while others (including Virginia) continue to rely on the common law. Fortunately, most jurisdictions have reached a general consensus on the privilege's contours.

2/ North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 513 (M.D.N.C. 1986); United States v. (Under Seal), 748 F.2d 871, 873-74 (4th Cir. 1981); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

3/ North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 513 (M.D.N.C. 1986); Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 327 (N.D. Cal. 1985); O'Leary v. Purcell Co., 108 F.R.D. 641, 644 (M.D.N.C. 1985); United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984); NLRB v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977). Furthermore, the party claiming the privilege has the burden of establishing it. Attorney General of United States v. Covington & Burling, 430 F. Supp. 1117, 1122 (D.D.C. 1977).

The most common formulations of the attorney-client privilege [4] can be distilled as follows:

The attorney-client privilege protects from disclosure communications

(1) from a client;

(2) to his lawyer or his lawyer's agent;

(3) relating to the lawyer's rendering of legal advice;

(4) made with the expectation of confidentiality;

(5) and not in furtherance of a future crime or tort;

(6) provided that the privilege has not been waived.

Perhaps the most common mistake made by lawyers today is not taking time to carefully analyze each component of the attorney-client privilege. The privilege is specific and limited. For instance, the existence of an attorney-client relationship does not create a presumption that a communication is privileged. [5] A party seeking to immunize communications from discovery must bear the burden of proving the privilege's existence. [6] Even if the privilege exists, it is circumscribed. For example, it does not protect from disclosure all correspondence between a client and his lawyer, or all correspondence with a lawyer's name on it. Similarly, the privilege does not protect all documents in the lawyer's possession.

4/ There are a number of traditional formulations for the privilege. The most common are Judge Wyzanski's in United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) (quoted in NLRB v. Harvey, 349 F.2d 900, 904 (4th Cir. 1965)), and Wigmore's (cited by a number of courts, such as In re Fischel, 557 F.2d 209, 211 (9th Cir. 1977)). These and other similar formulations contain the common denominators cited in the text of this article.

5/ O'Leary v. Purcell Co., 108 F.R.D. 641, 644 (M.D.N.C. 1985); In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984).

6/ Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1161 (D.S.C. 1974).

In every instance, it is necessary to assess each of the six factors listed above.

(1) Communication from a Client

This is an important factor, since the privilege belongs to the client and not the lawyer. [7] As the client's agent, the lawyer must therefore be sure to properly create the privilege on all occasions and take care not to waive it (see below).

The term "client" is defined expansively. Communications to a lawyer from a prospective client are privileged, even if the contact never blossoms into an actual attorney-client relationship. Moreover, the privilege lingers even after the attorney-client relationship ends. [8] The lawyer's obligation to keep his client's confidences secret lasts forever, as does a third party's inability to discover those communications. [9]

When the "client" is a corporation, special problems arise. A corporation's lawyer represents the legal entity and not any directors or employees. [10] Yet, a corporation can only act through such individuals. An obvious question poses itself--which corporate directors or employees fall within the attorney-client relationship.

Some courts ruled that only individuals in upper management--called the "control group"--were within the scope of the privilege. [11] In Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981), the United States Supreme Court rejected this "control group" rule in certain aspects of federal law, and most states have followed suit. Under the

---

7/ See, e.g., Seventh Dist. Comm. of Virginia State Bar v. Gunter, 212 Va. 278, 286-87, 183 S.E.2d 713, 719 (1971).

8/ Virginia Code of Professional Responsibility EC 4-6.

9/ Taylor v. Taylor, 45 Ill. App.3d 352, 2 Ill. Dec. 961, 359 N.E.2d 820, 823 (1977).

10/ Virginia Code of Professional Responsibility EC 5-18.

11/ See, e.g., Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397 (E.D. Va. 1975).

Upjohn analysis, any corporate employee is within the scope of the attorney-client relationship if all six criteria are met. Whether the corporation's lawyer is talking to the president or a janitor, the privilege applies if the traditional criteria are satisfied.

While easily stated, the Upjohn rule does not eliminate the need for a lawyer's care. In fact, this area of practice poses the greatest risk of not properly creating the privilege. For instance, the privilege will not arise if the corporate employee does not know (1) that the person with whom he is dealing is the corporation's lawyer and (2) that the communication is necessary for the lawyer to advise the corporation. Corporate employees talk daily with people "sent by headquarters"--including fellow employees, consultants, accountants, as well as lawyers. In order to create the privilege, the corporation or its lawyer must identify the lawyer as such, and describe the purpose for his communication with corporate employees.

(2) Communication to a Lawyer

Technically, the privilege protects from disclosure only communications from a client to his lawyer (and his agents) [12] --not vice versa. However, the privilege also covers communications from lawyer to client to the extent they would reveal what the client told his lawyer. [13] As a practical matter, nearly every communication from a lawyer will fall within this rule.

Still, to assure that the privilege arises, it is best to communicate precisely. If a lawyer writes his client with advice, the letter should make it clear that the client

---

12/ Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 40 (D. Md. 1974).

13/ North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 514 (M.D.N.C. 1986); United States v. (Under Seal), 748 F.2d 871, 874 (4th Cir. 1984); Brinton v. Department of State, 636 F.2d 600, 603 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill. 1980); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 37 (D. Md. 1974).

has provided information to the lawyer and sought advice based on that information.

(3) Communication Relating to the Rendering of Legal Advice

In some cases, this test is easy to apply. For instance, lawyers constantly withhold as privileged cover letters to their clients. In nearly every case, these lawyers are misapplying the privilege. [14/] A cover letter normally does not reflect any confidential communication from the client, and certainly contains no legal advice.

In other cases, it is more difficult to determine if the communication relates to the rendering of legal advice. Lawyers can play many roles--business advisors, draftsmen, marriage counselors, etc. [15/] Only the rendering of legal advice gives rise to the privilege. [16/] To the extent that there might be a dispute, a lawyer should be careful to include within each communication to his client an explanation that he is rendering legal advice.

(4) Communications with the Expectation of Privacy

As explained above, the attorney-client privilege arose from society's encouragement of complete candor between a client and his lawyer. However, this justification for the privilege exists only if the client and lawyer expect their communication to remain secret. [17/] If a client knows that

---

14/ Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 145 (D. Del. 1977); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1168 (D.S.C. 1974).

15/ J.P. Foley & Co. v. Vanderbilt, 65 F.R.D. 523, 526 (S.D.N.Y. 1974).

16/ North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 514 (M.D.N.C. 1986); Diversified Indus. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977). At least one court has applied a "primary purpose" test to determine if a communication containing both legal and nonlegal advice is privileged. Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 147 (D. Del. 1977).

17/ United States v. (Under Seal), 748 F.2d 871, 874 (4th

(Footnote Continued)

a communication with his lawyer will be revealed, the privilege never arises. For instance, if a client directs his lawyer to reveal the substance of a communication to a third party, there is no expectation of privacy and therefore no privilege. 18/

In most cases, the analysis is not that simple. For this reason, lawyers must treat all communications with their clients as confidential unless the client explicitly orders otherwise.

Of course, there is automatically no expectation of privacy if a stranger is present when the lawyer and his client communicate. Sometimes, the third party is not explicitly invited. For example, a lawyer who is foolish enough to speak with his client about legal advice on a crowded elevator will find that the privilege does not protect the communication.

In other cases, the third party is invited to hear the communication. For example, it is risky to have other family members present when discussing a client's will. Similarly, many lawyers politely ask their client's accountants or financial advisors to leave the room when legal advice is being discussed. 19/

In a business context, the concept of a "third party" is often difficult to define. Businessmen working toward a compromise have a common goal and may be trying their best to cooperate with one another, but are legal adversaries. A lawyer should never discuss legal matters with his client in the presence of a business adversary.

(Footnote Continued)
Cir. 1984); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 33 (D. Md. 1974).

18/ In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984); United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984); United States v. Pipkins, 528 F.2d 559, 563 (5th Cir.), cert. denied, 426 U.S. 952 (1976).

19/ If the accountant or other professional is assisting the lawyer in rendering legal advice, his presence during such conferences will not vitiate the privilege. United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972).

In at least one aspect of the litigation arena, the law allows the privilege to arise even if third parties are present. If the third party is a codefendant or otherwise shares the client's interests in litigation, a "joint defense" theory envelopes such joint discussions with the privilege. [20] However, lawyers must still exercise caution. Today's codefendants creating a joint defense can be tomorrow's cross-claim adversaries.

(5) Communications not in Furtherance of a Future Crime or Tort

On first consideration, this factor would seem to preclude any criminal defendant from safely communicating with his lawyer. But the key is the word "future". A defendant can freely discuss past crimes or torts with his lawyer. But to the extent that the client communicates with his lawyer about a crime or tort which he is planning to commit, society does not permit the privilege to cloak the discussion in secrecy. [21]

(6) The Privilege has not been Waived

For lawyers, this is the most important component of the privilege. Mistakes are easy to make and can cause appalling consequences. There are two kinds of waiver--express and implied.

(a) Express Waiver

Express waiver of the privilege occurs if a client or his lawyer reveals a privileged communication to a

---

20/ See, e.g., Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 29 (N.D. Ill. 1980); In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 394 (S.D.N.Y. 1975); Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964).

21/ See, e.g., Coleman v. American Broadcasting Co., 106 F.R.D. 201, 206 (D.D.C. 1985); Cogdill v. Commonwealth, 219 Va. 272, 276, 247 S.E.2d 392, 395 (1978); Seventh Dist. Comm. of Virginia State Bar v. Gunter, 212 Va. 278, 183 S.E.2d 713, 719 (1971); Union Camp Corp. v. Lewis, 385 F.2d 143, 144 (4th Cir. 1967).

third party. As mentioned above, the presence of a third party when a communication is initially made between a lawyer and client precludes the privilege from ever arising. The privilege is waived when that confidential communication is later shared with a stranger to the attorney-client relationship.

An express waiver can be intentional. For instance, the client might boast to an adversary that "my lawyer tells me . . ." Such a client would be chagrined to learn that he may just have waived his privilege. Similarly, a lawyer might voluntarily provide privileged documents in cooperating with a government probe. Despite society's interest in such cooperation, the lawyer might well have waived the privilege. [22/] A more understandable express waiver occurs if a client or his lawyer voluntarily reveals a privileged communication in order to gain an advantage in litigation. [23/]

An intentional express waiver can occur in as mundane a circumstance as a lawyer's dinnertime conversation with a spouse or in as bizarre a setting as a lawyer writing a book about his client. This lesson was brought home to Professor Alan Dershowitz of Harvard, who recently found that he had waived the privilege protecting his communications with his client Claus von Bulow by describing those communications in a book. [24/] Lawyers must be careful to never intentionally waive the privilege themselves, and advise clients of the risk they undertake in speaking with adversaries or third parties about privileged communications.

An express waiver can also be inadvertent. In large document productions, for instance, privileged

---

22/ See, e.g., Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (plaintiff waived privilege by voluntarily producing documents to SEC, and thus could not object to the SEC sharing the documents with the Department of Energy).

23/ Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976).

24/ American Lawyer (March 1987) at 9.

documents can be accidentally produced. Courts' reactions to such unintentional production of documents have been mixed. Some courts hold that the inadvertent production of documents during a large document production cannot accurately be characterized as "voluntary" and thus is not a waiver. [25] Other courts hold that the accidental production of documents is "voluntary" even if not intentional--and thus waives the privilege. [26] The scope of any waiver is discussed below.

If a lawyer finds that he has inadvertently produced a privileged document, it is best to immediately request its return. Some lawyers facing large document productions agree upon nonwaiver pacts under which accidentally-produced privileged documents will be returned by both sides upon specified notice. These agreements are not without risk, since some courts ignore them in finding a waiver. [27]

The most frightening form of express waiver is exemplified by Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254 (N.D. Ill. 1981). In

---

25/ See Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105-06 (S.D.N.Y. 1985); Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1983); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 954-55 (N.D. Ill. 1982); Transamerica Computer Co. v. International Business Mach. Corp., 573 F.2d 646 (9th Cir. 1978) (refusing to order IBM to produce privileged documents accidentally disclosed in an earlier litigation).

26/ See, e.g., In re Howard Indus., Inc., 67 Bankr. 291, 293 (D.N.J. 1986); In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984); Diotima Shipping Corp. v. Chase, Leavitt & Co., 102 F.R.D. 532, 537 (D. Me. 1984) (finding a modified subject matter waiver); In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.), cert. denied sub nom. Sea Land Serv., Inc. v. United States, 444 U.S. 915 (1979).

27/ Chubb Integrated Sys. Ltd. v. National Bank, 103 F.R.D. 52, 67-68 (D.D.C. 1984); W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 775 (W.D. Okla. 1976).

Suburban, plaintiffs sifted through defendants' trash dumpster for two years. This unpleasant task netted them hundreds of privileged documents that defendants had discarded. The court held that defendants had not taken reasonable steps to assure confidentiality of the documents (such as shredding) and therefore expressly waived the privilege. Under this approach, the negligent handling or destruction of documents--not just the negligent production of documents to an opponent--can amount to a waiver.

While a merciless rule like that applied in Suburban Sew 'N Sweep might seem counter-instinctual, the same cannot be said of other forms of inadvertent express waiver. Lawyers discussing their client's business in restaurants or elevators run the terrible risk of waiving the privilege. There is a story--perhaps apocryphal--about a New York City law firm which periodically sent secretaries and paralegals to ride up and down the elevators of its opponent's law firm's building. Using this simple method, the law firm was able to acquire valuable--and privileged--information about its adversary. Avoiding this form of inadvertent express waiver requires only common sense and self control--lawyers should never discuss their client's business if a third party can overhear them.

(b) Implied Waiver

The attorney-client privilege can also be impliedly waived. Although an express waiver arises from revealing confidences to a third party, an implied waiver occurs when other societal or legal considerations outweigh the need for secrecy. The two most common forms of implied waiver demonstrate this principle.

First, a lawyer is free to waive the privilege if his client attacks him (as in a malpractice action).[28/] In that setting, the client cannot challenge the lawyer and then block the lawyer from defending himself.[29/] Second, an implied waiver occurs if the

---

28/ Pruitt v. Peyton, 243 F. Supp. 907, 909 (E.D. Va. 1965).

29/ State v. Bastedo, 253 Iowa 103, 111 N.W.2d 255, 260 (1961).

client or his lawyer injects into the litigation the advice given by the lawyer. [30] The most common example is a malicious prosecution action, in which the client can escape liability by proving that he initiated criminal process on his lawyer's advice. As in the first example, the client cannot take advantage of this defense without waiving the secrecy created by the privilege. To hold otherwise would immunize the client from cross-examination.

(c) Scope of Waiver

If a party is found to have waived his privilege, a second question presents itself. What is the scope of the waiver?

When addressing truly voluntary disclosure of privileged communications, the courts faced an easy analysis. Simple fairness precludes a party from voluntarily revealing some privileged information to gain an advantage, and then cloaking other privileged communications in secrecy. In those situations, courts have routinely held that voluntary disclosure of some privileged communications is a waiver as to "the remainder of the privileged communication about the same subject." [31] The same is generally true of implied waiver.

When the express waiver is inadvertent rather than intentional, the analysis becomes more difficult. For example, since even an inadvertent production of documents can be considered "voluntary," some courts have held that the unintentional production of privileged documents results in a broad subject matter

---

30/ In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982); Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976); Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2d Cir. 1964), cert. dismissed, 380 U.S. 249 (1965).

31/ In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982); Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976).

waiver. [32] Other courts conclude that any waiver resulting from the inadvertent disclosure of privileged information extends no further than those communications themselves. [33]

Although most decisions addressing this issue involve document productions, the same considerations would govern the other forms of inadvertent express waiver discussed above. Given these divergent approaches to waiver, lawyers must take all possible precautions against even the inadvertent disclosure of privileged documents or communications.

Conclusion

To a large extent, lawyers hold in their own hands the power to properly create the privilege and avoid its waiver. All written communications with clients should document the privileged nature of the communication. Lawyers should warn their clients not to share privileged communications with any third parties. Most importantly, lawyers should scrupulously avoid discussing their clients' business with any third parties (even their spouses or friends) or in any setting in which the conversation could be overheard. This rule sounds simple enough, but remember it the next time you are on an elevator or at a restaurant and realize that you are listening to lawyers waiving their clients' privilege.

32/ In re Grand Jury Proceedings, 727 F.2d 1352, 1357 (4th Cir. 1984); Chubb Integrated Sys. Ltd. v. National Bank, 103 F.R.D. 52, 63 (D.D.C. 1984); Nye v. Sage Prod., Inc., 98 F.R.D. 452, 453 (N.D. Ill. 1982); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1161-62, 1191 (D.S.C. 1974).

33/ Champion Int'l Corp. v. International Paper Co., 486 F. Supp. 1328, 1333 (N.D. Ga. 1980). See also Diotima Shipping Corp. v. Chase, Leavitt & Co., 102 F.R.D. 532, 537 (D. Me. 1984).