Attorney-Client Privilege Within the Client Organization - Part I

BY JAMES A. MATTHEWS III
Special to the Legal

The attorney-client privilege is both the oldest and most often misunderstood of the privileges for confidential communications. While most lawyers - and many clients - use the term on a daily basis, they often do so casually and uncritically. Because the party asserting the privilege has the burden of proving that it applies, such a casual approach can have serious consequences. While the issues are difficult enough between an individual attorney and client, the difficulty increases substantially where the putative client is an organization acting though its constituents and agents.

This article is the first in a series that will explore the application of the privilege within the client organization, using the context of an internal investigation as a point of reference. Part I will review the basics of the privilege and focus on the question of “who is the client?” Part II will address who is not (and should not become) the client, the necessity that the lawyer involved in the communication be acting as such and the expectation of confidentiality required for the privilege to apply. Part III will discuss intentional and unintentional waivers of the privilege. In each case, it will suggest some practical means for dealing with those issues, most of which derive from the sad truth that privilege issues typically arise not because of what some third party has done, but because of what the attorney or client has done to itself. These are often self-created problems.

Privilege Basics

As the U.S. Supreme Court has explained in what has become the seminal case on the attorney-client privilege in the organizational context, *Upjohn v. United States*, 449 U.S. 383 (1981), the privilege serves the purpose of “foster[ing] disclosure and communication between the attorney and the client” and “recognizes that sound legal advice or advocacy depends upon the lawyer’s being fully informed by the client.” At the same time, because “the privilege obstructs the search for the truth and because its benefits are, at best, indirect and speculative, it must be strictly confined within the narrowest possible limits consistent with the logic of its principle.”

In Pennsylvania, the privilege is, at least in theory, established by Section 5928 of the Judicial Code, which provides:

“In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall counsel be compelled to disclose same, unless in either case this privilege is waived upon the trial by the client.”

Section 5928’s generally recognized elements are:

- Communication from a client,
- to an attorney acting as such or his or her subordinate,
- of facts intended to be kept confidential,
- for the primary purpose of obtaining legal advice,
- not for the purpose of committing a crime or tort,
- as to which the privilege is claimed,
- and not waived.

The first element requires both a “communication” and a “client.” While identifying (and limiting) the latter is normally more difficult than the former, it does bear emphasis that it is a particular communication of facts, and not the underlying facts themselves, that are potentially privileged. As a result, each potentially privileged communication, even of the same subject matter, must be evaluated independently.

Who is the Client?

In the context of an organization, the client, at least in the first instance, is clearly the organization itself. The simplicity of that principle is, however, quickly undone by the practical reality that the organization can act only through its “constituents” or agents. This begs two questions: First, who are the constituents whose communications are potentially protected by the organization’s privilege? Second, under what circumstances can one of those constituents become a client in his or her own right?

The first question has been one of the principal areas of legal development and remains a point of difference among jurisdictions. The traditional view is that the organizational client’s privilege extended only to the control group of senior executives with authority to act on behalf of the entity. The competing, and now majority, view was articulated by the Supreme Court in *Upjohn*, which has become the seminal case on the operation of the privilege within an organization. Both its facts and rationale are instructive.

In *Upjohn*, counsel conducted an internal investigation of potential violations of the Foreign Corrupt Practices Act. A large number of employees were required to complete questionnaires about their knowledge of the facts and a smaller group was then interviewed by counsel. When they began their own investigations, both the SEC and IRS sought production of the questionnaire responses and interview notes of anyone.
outside the agencies’ characterization of the control group. Ultimately, the Supreme Court squarely rejected the agencies’ effort to limit the privilege to the control group, reasoning that:

“In the corporate context, ... it will frequently be employees who possess the information needed by the corporation’s lawyers. Middle-level — and indeed lower-level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.”

While Upjohn’s clear appreciation for the reality of the modern organization quickly made it the majority view, some jurisdictions still apply the control group test.

Is there a difference between a client-to-attorney communication and one going in the opposite direction? The law in many jurisdictions remains unclear on this point, as did Pennsylvania’s until Gilliard v. AIG Insurance, 15 A.3d 44 (Pa. 2011), in which the Pennsylvania Supreme Court found the privilege to be, indeed, a “two-way street.” The confusion that existed prior to Gilliard, however, gave rise to the first of several illustrative cases in point.

**Nationwide**

The issue ultimately resolved in Gilliard had also been at the heart of the years-long litigation in Nationwide Mutual Insurance v. Fleming, 924 A.2d 1259 (Pa. Super. 2007), affirmed on other grounds by an equally divided court, 992 A.2d 65 (Pa. 2010). While both Nationwide and Gilliard have already been discussed at length in these pages by other commentators, Nationwide provides a valuable lesson entirely apart from its holding.

Nationwide was a suit by that company against a number of departing agents alleging the typical panoply of bad behavior with the equally typical counterclaim by the agents for tortious interference with their new employment. The privilege dispute surrounded three internal Nationwide emails discussing litigation strategy, two of which were written by in-house counsel and addressed to a group that clearly met the Upjohn definition of “constituents” of the organization. Nationwide voluntarily waived the privilege as to two of the emails, but sought to assert it as to the third (Document 529). There followed five years of appellate proceedings with no clear resolution of whether Document 529 was privileged in the first place and, if it was, whether that privilege had been waived.

Aside from the legal issue, however, the tortured procedural history of Nationwide begs some very practical questions. First, how much did all that litigation cost? Second, what was in Document 529 that was worth that much money? Remember the agents’ counterclaim against Nationwide for tortious interference? Its gist was that Nationwide was engaged in what it knew to be baseless litigation in retaliation for their departure. Nationwide, of course, insisted that it was pursuing the litigation for only the most righteous of reasons. In the Document 529 email, however, an in-house counsel had told the recipients that the company “cannot reasonably expect the lawsuits to succeed” and, according to the Supreme Court opinion, that the “primary purpose” of the litigation is to send a message to current employees contemplating defection.”

**Lessons Learned**

- **Don’t be your own worst enemy.** Nationwide is as clear an illustration as can be that most privilege problems are self-inflicted. The simplest way to ensure that you don’t have to produce a troublesome document is not to create it in the first place.
- **Remain sensitive to the need to treat each potentially privileged communication on its own merits.** The fact that a given individual may be an Upjohn “privileged person” for the purpose of communicating facts known by them to counsel doesn’t necessarily make them a privileged person as to communications back from counsel relating to the same subject matter. If that person has no business need to know anything other than the facts he or she has already communicated.
- **Use the safest means of communication, not simply the easiest.** Even when all parties to the communication have the requisite need to know, many don’t automatically have a need to read and most don’t have a need to keep their own souvenir copy. It is often more judicious to have such communication by way of a personal conversation rather than a document. Using the easier means of communication reaches the height of absurdity when a potentially privileged communication is made in writing between people in adjoining offices. Even more specifically, and despite the almost unbelievable technological advance that it represents, little good can come of email, which encourages quick and casual, rather than deliberate and thoughtful, communication — and lives forever in cyberspace.

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Attorney-Client Privilege Within the Client Organization - Part II

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Editor’s note: This article is the second in a series.

This series of articles explores the application of the attorney-client privilege within the client organization, using the context of an internal investigation as a point of reference. In this installment, I address who is not (and should not become) the client, the necessity that the lawyer involved in the communication be acting as such and the expectation of confidentiality required for the privilege to apply.

Potential Representation

One of the difficulties in dealing with an organizational client through its constituents — particularly as Upjohn v. United States, 449 U.S. 383 (1981), and related cases have expanded that definition — is avoiding establishing a distinct attorney-client relationship with the individual constituent. To avoid doing so, some form of the Upjohn or Corporate Miranda warning is advisable prior to any interview or other discussion:

- I am the company’s lawyer (or am working at the direction of the company’s lawyer) and not your lawyer.
- I can tell the company anything you tell me.
- Anything you tell me is protected by the attorney-client privilege between me and the company.
- The company, and only the company, can waive that privilege and disclose something you’ve told me to third parties. You may not do so on your own. At the same time, the company can authorize me to tell someone else what you have told me.

Anticipating the practical response of, “That’s easy for you to say, I’ve got to keep these witnesses from freaking out,” the temptation is to give the Upjohn warning “for the record” and then reassure the individual at ease by saying something like: “Don’t worry, my job here is just to get the facts.” Such a statement is a problem on at least two levels.

First, Rule 4.3(a) of the Rules of Professional Conduct specifically provides that “in dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.” More practically, though, if the lawyer actually has been hired to be disinterested, he or she by definition isn’t acting as the organization’s lawyer. Conversely, the attorney who gives a substantive answer to the not-infrequent question — “Do I need my own lawyer?” — risks establishing a distinct attorney-client relationship with the individual (as well as courting discipline under Rule 4.3).

Best practice is to reiterate that the attorney represents the company and whether or not to retain individual counsel is a decision for the individual. Under certain circumstances, it may be permissible to tell a witness to seek counsel, who can then advise him or her further on the issue, without offering the opinion that he or she needs counsel, which is clearly legal advice. Under no circumstances should an attorney or someone working for an attorney tell an unrepresented individual that he or she doesn’t need or shouldn’t obtain counsel. That is a recipe for disaster, or at least very likely joint representation.

Is the Lawyer Acting as a Lawyer?

Even assuming a communication between a putative client and a person who is a lawyer (or to a person working at the direction of a person who is a lawyer), that communication still isn’t privileged, unless the person who happens to be a lawyer is actually acting as a lawyer. In theory, there is no distinction in principle between in-house and outside counsel for this purpose. In practice, however, courts routinely take a much harder look at the former rather than the latter. As Judge Louis Pollak put it, the fact that the privilege is construed narrowly is especially so when a corporate entity seeks to invoke the privilege to protect communications to in-house counsel.

Because in-house counsel may play a dual role of legal adviser and business adviser, the privilege will apply only if the communication’s primary purpose is to gain or provide legal assistance.

As the U.S. Court of Appeals for the Third Circuit has explained, even where both legal and business concerns are involved, related attorney-client communications are still privileged as long as the matter “was infused with legal concerns and [a decision] was reached only after securing legal advice.” The more titles and responsibilities the lawyer has in addition to a strictly legal role, the more difficult it will be to establish the privilege.

It is extremely difficult to extend the privilege to communications with a person who is a lawyer but who is not employed by the organization in a legal capacity. This can be a particular problem when an in-house lawyer whom people are used to dealing with as an attorney leaves the legal department for a related, but nonlegal, position. Common examples include the attorney responsible for regulatory issues being named chief compliance officer or the attorney responsible for employment law matters becoming vice president of human resources.

Applying these principles to commonly encountered business situations serves to demonstrate the eternal verity of the principle that “if it sounds too good to be true, it probably is.” The idea that any communication can be cloaked...
with the privilege simply by involving a lawyer is one of those things. You can try. It might even work some of the time. But it shouldn’t.

**Are the Facts Confidential?**

In much the same vein as the previous points, if the facts being communicated are already widely known, the mere fact that they, or documents containing them, are stamped “privileged” or simply entrusted to counsel doesn’t make them privileged.

A more complicated issue is the expectation that the communication will remain confidential. In many cases, it is clear from the outset that the organization has a legal obligation to self-report to a regulator or that the organization intends to rely on the conduct of the investigation as a defense to the underlying claim (e.g., in a sexual harassment case) or to rely upon the “advice of counsel” defense.

The “real world” application of these principles is illustrated by the case of United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

**The Ruehle Case**

William Ruehle was the CFO of Broadcom Corp., which had become embroiled in a controversy over backdated stock options. Outside counsel conducted an investigation with the understanding, of which Ruehle was aware, that counsel would report the results of the investigation to Broadcom’s outside auditors so that the auditors could advise whether financial statements would need to be restated. Following Ruehle’s departure from the company and indictment, he sought to exclude from his criminal trial the statements he made during the internal investigation as to which Broadcom had waived any privilege, according to the opinion.

At the evidentiary hearing, counsel testified that they were acting at the time solely as Broadcom’s counsel and that they had begun each interview, including Ruehle’s, with an Upjohn warning (although they had not memorialized that fact anywhere). Ruehle testified that he understood counsel to be acting, at least in part, as his individual counsel in the pending civil litigation, that he did not recall any Upjohn warning and believed that he was speaking with them under the privilege. Following the hearing, the U.S. District Court for the Central District of California “strongly condemned” the actions of outside counsel, credited Ruehle’s “reasonable belief,” not disproven by the government, that his statements would be held in confidence necessary to establish the privilege under California law, excluded the statements and referred the attorneys to California disciplinary authorities, according to the opinion. All in all, it was not a good day for the prosecution or Broadcom’s counsel.

Following an expedited appeal, the Ninth Circuit reversed the district court on each point. First, it held that the district court erred in shifting the burden of proof because the federal, rather than California, law of privilege applied. It then reversed, as clearly erroneous, the district court’s conclusions about Ruehle’s expectations that this statement would be held in confidence given his repeated admissions at the hearing that he knew from the outset the investigative report would be disclosed to the outside auditors. In doing so, the court made clear that, once Ruehle knew that the conversations would be disclosed to the auditors, no privilege applied even if he didn’t fully understand who else the conversations might be disclosed to and the purposes for which they could be used.

Ruehle was exonerated when a federal judge dismissed his case in 2009, Legal affiliate The National Law Journal reported.

**Lessons Learned?**

- Don’t begin an investigation, project or other process potentially implicating the privilege without a plan. Try to establish at the outset its purpose and the ultimate use(s) to be made of the results. Based upon the identified purpose, consider whether you even want to try to assert a privilege as to any or all related communications.

- If you plan to assert that a document is privileged, treat it as privileged. Limit copies and recipients, provide for secure storage (of both the electronic and hard copies) and, perhaps most fundamentally, mark the document privileged. A rubber stamp costs a lot less than a brief.

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Attorney-Client Privilege Within the Client Organization - Part III

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Editor’s note: This article is the third in a series.

Part I reviewed the basics of the privilege and focused on the question of “who is the client.” Part II addressed who is not (and should not become) the client, the necessity that the lawyer involved in the communication be acting as such and the expectation of confidentiality required for the privilege to apply.

In this installment, we will touch quickly on the “crime-fraud exception” and turn to a more detailed discussion of waiver.

The Crime-Fraud Exception

There is little unclear or controversial about the principle that the attorney-client privilege does not protect communications seeking legal advice for the purpose of committing a fraud or a crime. The aspect of this principle that is less understood is that, consistent with the idea that the privilege belongs to the client, the focus here is on what the client intends or accomplishes.

Traditional Principles?

Traditional waiver principles are easily stated: Any disclosure of a privileged communication to a third party, even if inadvertent, waives the privilege for all purposes. (See Westinghouse Electric v. Republic of Philippines, 951 F.2d 1414, 1427 (3d Cir. 1991).) This traditional Westinghouse view flatly rejects the principle of “selective waiver,” under which, for example, a client may disclose a privileged communication to the government (perhaps to avoid prosecution or other sanction) but maintain it as to private third parties (such as the plaintiffs in the follow-on civil litigation). An agreement that a particular disclosure will not waive the privilege or that the nonprivileged recipient will preserve the privilege by not making further disclosures is binding only between the parties to the agreement and cannot affect the rights of third parties.

At the same time, and remembering the discussion of Nationwide Mutual Insurance v. Fleming, 924 A.2d 1259 (Pa. Super. 2007), in Part I of this series, once the privilege is waived that waiver extends generally to all related communications, “so that a party is prevented from disclosing communications which support its position while simultaneously concealing communications that do not.”

Of course, the question all that begs is: Who is a third party? The initial answer is both simple and circular: If the person is for that specific communication within the scope of the organization’s privilege under Upjohn, then the individual is not a third party for waiver purposes. Remembering William Ruehle’s argument discussed in Part II of this series, from United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009), multiple people or entities represented by common counsel on a matter of interest to all are not third parties. But what of distinct persons or entities, each with their own counsel, who nevertheless share a common interest in the subject matter?

As the U.S. Court of Appeals for the Third Circuit has explained, what used to be referred to as the “joint defense privilege” has almost completely been replaced by a “Community of Interest” analysis that preserves the privilege where the distinct parties “share an identical legal interest” with respect to the subject matter of an attorney-client communication. (See In re Teleglobe Communications, 493 F.3d 345, 365 (3d Cir. 2007).) The necessity that the parties share an identical legal interest serves both to emphasize the importance of evaluating each potentially privileged communication separately and represents the segue to our next illustrative case, Ryan v. Gifford, 2008 WL 43699 (Del. Ch. 2008).

Ryan

Ryan was a shareholder derivative action against a corporation’s directors relating once again to the alleged backdating of options. When the problem first came to light, the board had established a special committee (of one disinterested director) with its own counsel. That counsel performed an internal investigation, the results of which were later sought by the plaintiff shareholders.

Before turning to the specifics of Ryan, a brief word on a corporation’s assertion of the privilege against its own shareholders. Not surprisingly, given that they are its ultimate owners, a corporation bears a heavier burden in asserting the privilege against them and, at least at some point, will not (or will no longer) be permitted to do so. For example, if the corporation can demonstrate that disclosure of the
The Rule 502 View

As amended in 2007, Rule 502 of the Federal Rules of Evidence attempts to avoid the harshest results of the traditional waiver principles with respect both to privilege and work product. In summary, it provides that:

- An intentional waiver in a federal proceeding or to a federal agency waives the privilege only as to the disclosed communication or document unless the undisclosed material concerns the same subject matter and “they ought in fairness to be considered together.”
- Other disclosures in a federal proceeding or to a federal agency are not waivers if (a) inadvertent, (b) the party took reasonable steps to prevent disclosure and (c) the party promptly took reasonable steps to remedy (including, in litigation, the steps provided for in Civil Rule 26(b)(5)(b)).
- Disclosures in a state proceeding are not a waiver in a federal proceeding if (a) would not have been a waiver under this rule if made in a federal proceeding or (b) not a waiver under law of that state.
- A federal court in litigation pending before it can provide by order that a particular disclosure will not operate as a waiver and that is controlling in federal and state proceedings. Conversely, a private agreement as to nonwaiver is binding only on the parties to the agreement unless incorporated into a court order.

Contrary to normal Erie principles, Rule 502 governs in all federal proceedings, including diversity cases in which state law provides the rule of decision and controls in state proceedings as to disclosures made in a federal proceeding. State law continues to govern as to nonfederal disclosures in state proceedings.

Lessons Learned?

- Yet again, almost all privilege problems are self-inflicted. Don’t be your own worst enemy.
- Ryan illustrates once again that, for each potentially privileged communication, it should be clear (and, ideally, clearly documented) who the client is, the purpose for which the communication is being made and the privileged role of each recipient. In any situation involving any “special,” “independent,” “disinterested” or similar investigation, process, committee or counsel, there will almost always be “who is the client” and “what is the purpose of the communication” issues.
- Particularly in a situation in which the protection of Rule 502 may be available, wherever possible make intentional waivers and resulting disclosures only in writing and make the document “self-proving” as to privilege by reciting the claim of privilege, the nature and purpose of the disclosure and the intent to otherwise preserve the privilege on the face of the document. If a disclosure must be oral, as in an interview or other testimony, at least confirm the same circumstances in writing and, where possible, obtain the protection of a court order.

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