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Check Your Privilege: Is the Scope of the Attorney-Client Privilege Narrowing?

The “attorney-client privilege” may be the most well-known and misunderstood legal principle. Both attorneys and clients often make broad assumptions about its scope and application. When these assumptions turn out to be wrong, the protection of the privilege may be lost. Recent decisions suggest caution is warranted.

The basic principle of the privilege seems simple: Confidential communications between an attorney and client for the purpose of seeking or rendering legal advice are protected from disclosure because our adversarial judicial system is most efficient when attorneys and their clients can engage in open and frank communication. The privilege belongs to the client, not the attorney, and may be waived by the client (sometimes inadvertently) if the client discloses the communication to others. Barring longstanding (and rather obvious) exceptions to the rule, such as the crime-fraud exception,[1] U.S. lawyers and clients can rest assured that their communications will be protected from disclosure, right? Not so.

The exact contours of the privilege can vary based on jurisdiction and even area of the law. For instance, in corporate law, attorneys may be consulted about business issues as well as legal ones. Which communications are protected from disclosure by the privilege are often disputed if the transaction ends up in litigation. Disputes concerning the privilege often come down to two questions: Who is included in the scope of the privilege when communication with an attorney? And what content is protected? Corporations are legal entities that make decisions through boards of directors comprised of individual human beings. They act through officers, employees, and agents. Historically, U.S. courts recognized a broad scope of corporate agents who could be included within the scope of the privilege. In the 1981 case *Upjohn Co. v. United States*, the Supreme Court rejected a narrow standard limiting the scope of the privilege to communications with members of a “control group” who played a “substantial role in deciding or directing the corporation’s legal response.”[2] Subsequent decisions recognize application of the privilege to communications with non-attorneys “if made at the direction of counsel, to gather Information to aid counsel in providing legal services.”[3] Older decisions applying this standard communications with even low-level employees and some independent contractors of corporate clients would fall within the scope of the privilege. [4]

Earlier U.S. decisions applied a “because of” test to determine whether the contents of an attorney client communication fall within the scope of the privilege. Under this test, a communication is privileged “when it can fairly be said that the ‘document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation.’”[5] This test also reflected a broad scope of the privilege, covering a communication if the purpose of its creation was to provide legal advice in light of possible litigation.

On the other hand, European Union and other non-U.S. jurisdictions have historically recognized a much narrower scope and application where the attorney client privilege does not extend to in-house counsel or communications not related to a “client’s right of defense.”[6] This standard is generally recognized as much narrower than that applied by U.S. courts.[7]

Recent decisions may reflect a narrowing of the privilege in the U.S. In 2007, the Second Circuit adopted the “primary purpose” test concerning the contents of an attorney client privilege.[8] This test protects a communication only if its “primary purpose” is to render legal advice. Courts have interpreted this standard to mean that even if a communication has more than one purpose only one can be a “primary purpose.”[9] In its January 2022 *In re Grand Jury* decision, the Ninth Circuit adopted the same standard.[10] Thus, these decisions reflect a more restrictive standard applicable to determinations as to whether the content of a communication falls within the scope of the privilege. Will other aspects of the privilege also narrow? Some more recent lower court decisions could also be read as reflecting a trend towards narrowing the scope of persons who can be included within the scope of the privilege.[11]

The Supreme Court recently had an opportunity to clarify application of the privilege when it granted certiorari to hear an appeal of the Ninth Circuit’s decision in *In re Grand Jury*. But, after hearing oral argument, the justices apparently could not agree that there was a problem to be fixed and dismissed the appeal as having been improvidently granted.

In light of these recent developments, counsel and clients should evaluate their approach to communications that they would seek to protect from disclosure. U.S. clients facing a possible dispute or investigation should involve counsel as early as possible to identify the likely persons from whom information and records will be required and which independent contractors may be needed to provide outside services. Counsel should engage independent contractors directly, not the client. Competent counsel should manage and direct the collection of records and information. Old assumptions about how courts view the privilege should be cast aside. Communications should be conducted with an eye towards the possibility that future disputes about the privilege be subject to a level of review that is more strict than what U.S. courts have applied in the past.

[1] United States v. Zolin, 491 U.S. 554 (1989)

[2] Upjohn Co. v. United States, 449 U.S. 383 (1981).

[3] In re Rivastigmine Patent Litig. (MDL No. 1661), 237 F.R.D. 69, 106 (S.D.N.Y. 2006)

[4] In re Bieter Co., 16 F.3d 929, 939-40 (8th Cir. 1994).

[5] United States v. Torf (In re Grand Jury Subpoena), 357 F.3d 900, 908 (9th Cir. 2003) quoting United States v. Adlman, 134 F.3d 1194, 1195 (2nd Cir. 1998).

[6] Akzo Nobel Chemical Ltd. v. European Commission (C-550/07 P) 2 A.C. 338 [2011]. *See also* Shire Dev. LLC v. Cadila Healthcare LTD, No. 1:10-cv-00581-KAJ, 2012 U.S. Dist. LEXIS 97648, at *14 (D. Del. June 27, 2012); Heineman, *European Rejection of Attorney-Client Privilege for In-House Lawyers; 'Oblivious!' Ex-GC Sounds Off on EU Limiting Privilege for In-House Counsel*, Corporate Counsel (online) (Oct. 18, 2010).

[7] Shire Dev. LLC, 2012 U.S. Dist. LEXIS 97648 (D. Del. June 27, 2012).

[8] In re County of Erie, 473 F.3d 413 (2d Cir. 2007).

[9] In re Grand Jury, 23 F.4th 1088 (9th Cir. 2022).

[10] In re Grand Jury, 23 F.4th 1088 (9th Cir. 2022).

[11] *See*, *e.g.*, Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113-14 (S.D.N.Y. 2005); In re Bristol-Myers Squibb Sec. Litig., No. 00-1990, 2003 U.S. Dist. LEXIS 26985, 2003 WL 25962198, at *4 (D.N.J. June 25, 2003).