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Email Poses Challenges to Attorney - Client Privilege

***Target* case offers lesson for corporations and their counsel**

Before information technology broadened our ability to communicate through electronic mail, protecting the attorney-client privilege was a matter of keeping a confidential communication confidential. If it was a document, it might be stamped "confidential" and placed in a file marked "confidential" or "attorney-client communication." It would only be copied to those who needed to be involved in the communication. If it was a meeting with the company's lawyers, only necessary personnel were invited, and again, notes were filed confidentially. However, in today's world, corporate emails and the ability to forward with just a couple of clicks have changed the landscape of protecting the privilege and is changing the way courts evaluate the assertion of the attorney-client privilege.

Unfortunately for Target Corporation, the lesson came too late. In *Muro v. Target Corporation, et.al*, 2007, a federal judge overruled the corporation's assertion of attorney-client privilege and ordered it to produce numerous email communications between and among the corporation's lawyers and employees even though some of the emails were clearly attorney-client communications. Not only was the ruling in this case a sharp lesson for corporations, but an alert for the attorneys who represent them.

In *Muro*, the Federal Court was tasked with evaluating Target's assertion of attorney-client privilege to numerous email strings between employees and company lawyers. Target was ordered to produce a privilege log in compliance with Federal Rule of Civil Procedure 26(b)(5). This Rule requires the proponent of a privilege to make the claim of privilege "expressly" and to "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Thus, Target had the burden to establish that "not only the original communication was made with the expectation of confidentiality, but also that the confidential nature of the communication was not compromised by disclosure to individuals outside of the attorney-client relationship."

A communication seeking legal advice between an attorney and client would ordinarily be privileged. However, the privilege can be compromised by the presence of third persons who are not necessary to the communication. After giving Target and its attorneys several chances to establish the bases for its assertion of privilege, the Court ruled that Target "failed to satisfy its burden of providing the factual information necessary to sustain the privilege."



Unfortunately for Target, its privilege log was inadequate. Although the privilege log contained the requisite categories of information, "the descriptions were void of any factual detail," and in some instances, failed to identify the attorney claimed to be a part of the communication. In describing a document, Target merely "cut and pasted" the information contained in the subject line of the underlying document. With respect to many email strings, Target only disclosed the last email in the string of communications. The Court held that this manner of disclosure failed "to disclose important information about what [was] being withheld from production."

Target also failed to provide information demonstrating that the communication was limited to persons within the scope of the privilege. Many of the emails were distributed to numerous employees, and in some instances unidentified distribution lists. Further, the privilege log lacked information about the role of the recipient. While Target revised its log to include the job titles of the various authors and recipients, the Court noted that many of the job titles would have "little if any significance to those outside the Target family." As such, the job titles were meaningless and of little assistance to the Court. The information provided was not enough to determine whether the communication was limited to persons within the scope of the privilege. Since it was Target's burden to provide a sufficient factual basis to assess whether a privilege applied, the Court held that Target's privilege log failed to comply with the requirements of Rule 26.

However, many of Target's problems started long before its attorneys began assembling a privilege log. After personally reviewing the purported privileged emails, the Court noted that emails containing attorney-client communications were linked to emails concerning purely business matters. A communication concerning a business discussion which does not request or provide legal advice is not privileged and therefore cannot be withheld from discovery. As such, the business only emails had to be produced. However, the privilege was compromised when the business emails, which were linked to privileged emails, were then forwarded to additional employees who were not sufficiently identified. To fall within the scope of the privilege, there must be a factual basis showing that the recipient was directly concerned with the confidential subject matter or that the recipient's participation in the communication fell within the scope of the employee's duties. Absent such a showing, the Court could not assess whether these additional recipients fell within the scope of the privilege.

Target's problems were further compounded by the fact that many emails were distributed to ten or more people, and in some instances, undisclosed recipient groups. The Court held that "distribution to such large numbers of persons does not suggest confidentiality, and no privilege can be maintained for communications that were shared with a group of unidentified persons." Again, the Court could not assess whether these unidentified recipients fell within the scope of the privilege.

The Court also pointed out that most of the emails lacked a limitation on further dissemination. There were no notations that the information should remain confidential or that the email should not be forwarded. As a result, many email strings which started out privileged, were ultimately



forwarded to persons outside the privilege in the course of a business discussion, thus waiving the privilege. Even when the email contained an explicit notification of attorney-client privilege and a prohibition against further dissemination, a subsequent recipient forwarded the email string to a person outside the privilege. Thus, while Target failed to provide the Court with sufficient factual information to assess the applicability of the privilege, the conduct of its employees in linking business emails to privileged emails and forwarding to persons outside the scope of the privilege served to compromise the attorney-client privilege.

Lessons to be Learned

This case demonstrates the need for corporations to have necessary protocols in place to control dissemination of confidential and privileged email communications. At a minimum, the author of a privileged communication should either mark the email as confidential and/or include in the title or subject matter a notice of confidentiality and a prohibition against further dissemination. However, as the *Target* case demonstrates, this is not foolproof. As such, corporations should explore other available controls to prevent dissemination of privileged communications. For example, advances in information technology allow an automatic notification when someone attempts to forward an email marked confidential.

As for the practitioner, this case presents a hard lesson on compliance with Rule 26. Here, Target's lawyers were given three opportunities to provide the factual basis for the support of its assertions of privilege. For one final opportunity, the Court invited the attorneys to file a response in opposition to the plaintiff's motion. The attorneys declined, opting instead to rest on the assertions contained in the log. However, the log was inadequate. Many emails were not disclosed, while others were not sufficiently described. Recipients were not sufficiently identified. Job titles had little meaning outside of the corporation, and there were no affidavits or other evidence establishing the identity and function of each individual sufficient to demonstrate that the person's participation in the communication did not compromise the privilege. While counsel may not have been able to overcome the compromise of the privilege that had already occurred, counsel is reminded that simply providing the information required by Rule 26 without sufficient factual detail may result in a waiver of the privilege to withhold information in litigation.

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