Professional Perspective

Attorney-Client Privilege & Employee-to-Employee Communications

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Thanks to multiple means of electronic communication that are available these days, employees communicate with each other more quickly and easily—and as a result, more frequently—than ever before. Email and other electronic messaging create efficiencies. They also present unique challenges for attorney-client communications because such means of communication provide non-attorney employees with an opportunity to discuss legal matters with little to no oversight from counsel.

At first blush, such intra-corporate communications would appear to fall outside the protection of the attorney-client privilege because they are not attorney-client communications. But federal courts grappling with this issue have paradoxically extended the attorney-client privilege to employee-to-employee communications in limited circumstances. This article explores those cases and suggests best practices for companies to follow to protect communications between employees regarding legal matters from compelled disclosure.

Attorney-Client Privilege

As the Supreme Court recognized in *Upjohn Company v. United States*, 449 U.S. 383 (1981), the "attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Thus, a "party invoking the attorney-client privilege must show (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." See, e.g., *In re Cty. of Erie*, 473 F.3d 413 (2d Cir. 2007).

Pre-Advice Communications

When it comes to pre-advice communications between non-attorney employees, the question is one of privilege. In *Upjohn*, the court held that communications between a company's attorney and rank-and-file employees who had information the attorney needed to provide legal advice to the company were privileged. Thus, the question for courts faced with a pre-advice intra-corporate communication is whether they can rationally extend *Upjohn*'s holding to the communication at issue.

The facts in *Crabtree v. Experian*, No. 1:16-cv-10706, 2017 BL 377277 (N.D. Ill. Oct. 20, 2017) present a paradigm for when such an extension is proper. In that case, the defendant's in-house counsel initiated an internal investigation to determine how the defendant ought to handle its relationship with a particular customer. At in-house counsel's direction, various non-attorney employees collected information from other non-attorney employees and sent it to in-house counsel to help him provide legal advice to the defendant.

Arguing that the attorney-client privilege applies only to communications that an attorney sends or receives, the plaintiff sought communications between and among non-attorneys that had occurred in the context of the investigation. The court rejected the plaintiff's argument and held that the communications were privileged because the "employees gathered information to assist counsel with rendering legal advice about how to proceed with [the customer]" and that information was "eventually channeled to counsel to aid in the provision of legal services."

While *Crabtree* involved a situation where an attorney instructed non-attorney employees to gather information to assist him in providing legal advice, one court has extended the attorney-client privilege to a situation where an employee collected such information in the absence of a specific directive from an attorney.

In *People's United Bank v. Peoplesbank*, No. 3:08cv01858 (PCD), 2009 BL 71902 (D. Conn. Dec. 28, 2009), the plaintiff's senior vice president spoke with other employees to obtain information that he needed to seek legal advice from in-house counsel on how to prepare for his deposition. The defendant argued that those communications were not privileged because the senior vice president did not engage in them at counsel's direction.

The court found that whether counsel instructed an employee to communicate with others was "not controlling." Rather, the dispositive questions were whether the communication's purpose was "to facilitate legal services" and whether the "information was quickly passed to . . . counsel." Because the senior vice president's communications satisfied both elements, the court held that they were privileged.

Where an employee-to-employee communication fails to satisfy those elements, the attorney-client privilege will not apply. In *Teague v. Omni Hotels Management Corporation*, No. A-19-CV-00940-JRN, 2020 BL 465366 (W.D. Texas Aug. 26, 2020), the court refused to extend the privilege to communications among non-attorney employees merely discussing "an intention to receive legal advice."

Thus, the attorney-client privilege will generally protect pre-advice communications between non-attorney employees if the purpose of the communication was to facilitate the provision of legal advice and the information obtained in response to the communication was promptly provided to counsel.

Post-Advice Communications

Courts dealing with communications about an attorney's advice typically do so through the lens of waiver. Because confidentiality is a necessary element of the attorney-client privilege, "[a]ny disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege." *United States v. Jones*, 696 F.2d 1069 (4th Cir. 1982). So, the critical issue in post-advice communication cases is whether an employee's disclosure of an attorney's advice to another employee undermines the confidentiality of the communication.

If an employee had a business reason for sharing counsel's advice with another employee, courts typically do not find a waiver of the privilege. For example, in *Miller v. Arizona Public Service Corporation*, No. CV-19-03397-PHX-DWL, 2020 BL 382055 (D. Ariz. Oct. 2, 2020), the plaintiff argued that redactions the defendant had applied to certain communications were "categorically improper" because the communications involved "non-attorneys." The court rejected that argument, reasoning that, "since the decision-making power of the corporate client may be diffused among several employees," "employees who shar[e] responsibility for the subject matter underlying [an attorney-client] consultation" may discuss counsel's advice among themselves.

Similarly, in *Uni-Systems, LLC v. United States Tennis Association, Inc.*, No. 17CV147KAMCLP, ECF Doc. No. 394 (E.D.N.Y. Oct. 28, 2019), the defendant's chief operating officer sent the defendant's president and chief financial officer an email summarizing information he had received from the defendant's outside counsel. After finding that the email was privileged, the court held that the chief operating officer's sharing it with other high-ranking executives did not waive the privilege because the email communicated an "attorney['s] thoughts to that attorney's clien[t]."

But widely disseminating legal advice among rank-and-file employees may waive the privilege. On this point, the Western District of Pennsylvania's decision in *Traficante v. Homeq Servicing Corp.*, No. CIV.A. 9-746, 2010 BL 423254 (W.D. Pa. Aug. 10, 2010) is instructive. There, the court found that the defendant had waived the attorney-client privilege applicable to a document because "the document was shared with low level employees having no need for … [the] information [it contained]."

Reading *Miller*, *Uni-Systems*, and *Traficante* together show that communicating legal advice only to employees who have responsibility for the matter on which the company sought legal advice or who have a business need to know about the advice will not waive the privilege, but more widespread disclosures likely will.

Preserving Attorney-Client Privilege in Intra-Corporate Settings

As the cases above show, courts approach privilege issues in the intra-corporate setting practically and focus on the reasons why non-attorney employees discussed legal matters outside the presence of counsel. With this in mind, companies may want to adopt the following practices to receive the full extent of the privilege's protection:

- Instruct employees to consult with counsel when they believe they need to collect information to secure legal advice so that counsel may determine what information, if any, is necessary, who is in the best position to provide it, and how to collect it confidentially.
- Remind employees who collect information to facilitate the provision of legal advice to provide the information to counsel promptly.

- Train employees who communicate with counsel, particularly those who do so frequently or who are key witnesses in pending litigation, on the importance of preserving the attorney-client privilege.
- Require employees to seek counsel's approval before sharing attorney-client communications with others, including other employees.
- Consider sending privileged emails with restrictions in appropriate circumstances prohibiting the recipient from forwarding them or including additional recipients on any response.
- Designate privileged written communications "Attorney-Client Privilege" and "Confidential," but reserve such designations for communications that were made for the purpose of providing or securing legal advice.
- Discuss business matters and legal matters in separate communications to the extent feasible to avoid any confusion among non-attorney employees and the temptation to forward the communication to other employees.
- Limit access to files and storage locations where attorney-client communications are stored to employees who have a business need to know about or access such communications.

