Attorney-Client Privilege Within the Client Organization

The Legal Intelligencer

May 23, 2012

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.