

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

Attorney-Client Privilege

The Sword, The Shield or The Poison Pill in HR Investigations

Charles K. Grant and Brad Bakker
Baker, Donelson, Bearman, Caldwell & Berkowitz
Nashville, Tennessee
615-726-5767
cgrant@bakerdonelson.com

Attorney-Client and Work Product Privileges - Overview

- What is a “Privilege”?
- Preserving Attorney-Client and Work Product Privileges
- Waiver
 - Avoiding unintentional privilege waivers
 - Possible beneficial privilege waivers
- Strategies for Gathering Information and Conducting Internal Investigations

What is a “Privilege”?

- A number of privileges
 - Today focused on two:
 - Attorney-Client Privilege
 - Work Product Privilege



What is a “Privilege”?

- Attorney-Client Privilege

- Designed to protect communications between an attorney and their client
- Two way street – protects communications going from the attorney to the client and from the client to the attorney
- Designed to allow full disclosure and communication between attorneys and their clients
- Controlled by the client – but we are responsible for keeping it safe



Why Are Privileges Important?

- Control of information is vital in litigation
 - If you can choose the what, when, and how of disclosures, you can gain a significant advantage in litigation



What is a "Privilege"?

- Attorney-Client Privilege

- Requirements for the Attorney-Client Privilege to Apply:

- Communication – oral or written
 - Made between privileged persons
 - In Confidence
 - For the purpose of seeking, obtaining, or providing legal assistance to the client



- Work Product Privilege

Attorney-Client Privilege

- Communication
 - Only protects the contents of the communication itself
 - The facts communicated are not protected if those facts can be learned from some other source (can't launder problematic facts through your attorney)
 - Does not protect existence of attorney-client relationship, fee arrangements, or factual circumstances surrounding the communication (date, time, etc.)

I can see your lips are moving,
but all I hear is
blah
blah **blah**

Attorney-Client Privilege

- Privileged Persons

- Includes:

- The client
 - The client's attorney
 - Agents of either the client or the attorney



Attorney-Client Privilege

- Privileged Persons
 - Corporation
 - Tests vary by state – In Tennessee, the law is unsettled, but courts will generally consider the following factors:
 - Is the lawyer giving legal advice or acting in some other capacity?
 - Was the communication made at the direction of the subordinate employee's superior (Supervisor: "I need you to talk to our counsel about what happened...")
 - Was the subject matter of the communication within the scope of the employee's duties?
 - Courts may also consider whether the communication was made within the "control group" of the corporation – more restrictive
 - » Employees in a position to control or take a substantial part in the determination of corporate action in response to legal advice – Examples: CEO, CFO, division managers, etc.

Attorney-Client Privilege

- Privileged Persons
 - Can include employees at all levels depending on the circumstances
 - Very important to control how communications are made to preserve the privilege
 - Have in-house counsel perform investigations



Attorney-Client Privilege

- Privileged Persons
 - Go Through Chain of Command and Supervisors For Lower-Level Employees
 - Relaying information (originally provided by attorneys) between non-attorneys within the organization is acceptable – emphasize confidentiality!



Attorney-Client Privilege

- In-House Counsel
 - Must be careful as to which “hat” you are wearing
 - In-house counsel who also provide business advice and input may not always have privileged communications
 - Attorney Client Privilege only protects communications made for the purpose of seeking legal advice
 - CC’ing counsel does not automatically protect the email
 - The email needs to be intended as confidential
 - Dominant purpose must be to seek legal advice



Attorney-Client Privilege

- Agents of the corporation
 - Courts will sometimes protect transmission to non-employees of a corporation (ex: independent contractors such as data management services) if the outside parties are specifically authorized to coordinate legal issues and the transmission is necessary
 - If multiple corporate entities are closely related, transmission among those entities is also protected
 - It gets dicey with former employees however – you need to be careful here

Preserving Privilege

- Must be Proactive – You can't be lax about privilege issues – If you ignore privilege issues, they will come back to haunt you – note (and label) the necessity of confidentiality at the time of the communication!



Do not be lazy about privilege issues!

What is a “Privilege”?

- Attorney-Client Privilege
 - Requirements for the Attorney-Client Privilege to Apply:
 - Communication – oral or written
 - Made between privileged persons
 - In Confidence
 - For the purpose of seeking, obtaining, or providing legal assistance to the client
- Work Product Privilege



Attorney-Client Privilege

- In Confidence
 - Communication must be made with the intention to maintain confidentiality
 - Can't retroactively make something confidential
 - If a communication is made with the intention to be conveyed to third parties – no privilege



Attorney-Client Privilege

- In Confidence – Third Parties
 - Generally, these will not be privileged
 - Is the Third Party's Presence Necessary for the Rendering of Legal Advice?
 - Consultants
 - Accountants
 - Other outside agents of corporation
 - However, allowing third parties in the room can be fraught with peril – safer practice to limit such communications



Attorney-Client Privilege

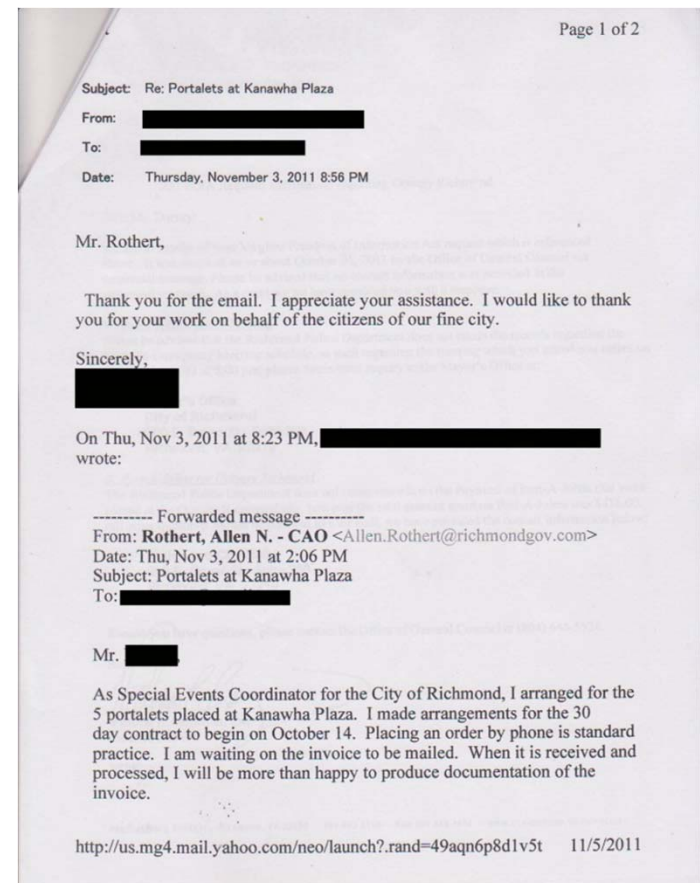
- Third Parties
 - *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999) – Conversations between tax counsel seeking to understand the tax ramifications of a proposed investment and a third party investment banker. The appellate court ruled that this conversation was not privileged. The privilege does not protect “communications that prove important to an attorney’s legal advice to a client.”

Attorney-Client Privilege

- For Purpose of Seeking or Obtaining Legal Assistance
 - Make your requests explicit! – “I need to know the legal ramifications...”
 - Even in-house counsel drafting of arguably “legal” documents (such as by-laws, proxy statements, and security agreements) have sometimes been held as “business” activities rather than legal advice and not privileged

Attorney-Client Privilege

- For Purpose of Seeking or Obtaining Legal Assistance
 - If a discussion of issues in an email concerns both, try and separate your legal communications so that at the very least you can redact some portion of the email after an adverse ruling later.



Work Product Privilege

- Not as strong as attorney-client privilege, but broader in scope
- Limited to preparations for litigation
- 3 Elements Required:
 - Documents and Tangible Things
 - Prepared in Anticipation of Litigation or for Trial
 - By or For A Party or That Party's Representative

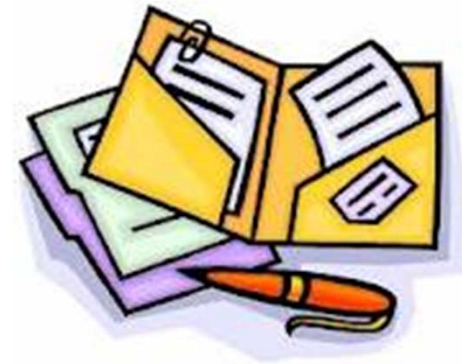
Work Product Privilege

- Prepared in Anticipation of Litigation or for Trial
 - “with an eye toward litigation”
 - Need to show that litigation is being contemplated for privilege to attach
 - important in investigations
 - Must be a tangible risk of litigation – broad general legal exposure doesn’t count
 - Lawsuit does not need to be filed yet
 - Routine investigations don’t qualify (accident reports, other investigations routinely conducted and in the ordinary course of business)



Work Product Privilege

- By or For A Party or That Party's Representative
 - Applies to documents prepared by non-attorney as well – question is the motivation of preparing the document (anticipation of litigation)
 - However, much safer to have documents prepared by counsel – some courts have a presumption against the privilege if counsel did not prepare



Preserving Privilege

- Waiver – Even if you satisfy all the elements, can still lose the privilege later on
- Must be vigilant – Failure to assert the privilege or protect your communications can result in waiver
- Partial disclosures can lead to complete waivers in the eyes of a court
- Stay away from “reply all”!

Preserving Privilege

- Once the cat is out of the bag, it can be very difficult to keep the disclosed information designated as privileged



Preserving Privilege

- Types of Waivers:
 - Purposeful disclosure
 - Partial disclosure
 - Compelled disclosure (subpoena)
 - Failure to object to disclosure (EEOC request)
 - Careless disclosure
 - Inadvertent (this tends to be more curable)
 - Conveyance to third parties



Preserving Privilege

- *Sitterson v. Evergreen Sch. Dist. No. 114*, 196 P.3d 735 (Wash. Ct. App. 2008). The defendant produced 439 pages of documents to the plaintiff; including four privileged documents. At trial, when the plaintiff sought to use the documents, the defendant opposed their use on privilege grounds. Defense counsel stated that he had produced the letters under the mistaken belief that he was obligated to do so and lamented that he “wasn’t thorough enough.” The trial judge allowed the documents into evidence.

Preserving Privilege

- *Sitterson v. Evergreen Sch. Dist. No. 114*, 196 P.3d 735 (Wash. Ct. App. 2008). One of the documents was particularly problematic—defense counsel had opined that his client’s position “would not pass the smell test.” After the plaintiff won at trial, the ensuing appeal focused on whether there had been in fact a waiver of the privileged materials. The appellate court found that under the various factors, a waiver of the privilege had occurred. The verdict was thus affirmed.



Preserving Privilege

- Consider Beneficial Waivers
 - Selective waiver – in many regions of the country, you will waive the whole privilege, so be very careful about deciding to “partially” waive privilege – **You can’t pick and choose!**
- Agreements to Disclose – Parties in a litigation can agree to partial disclosures that do waive the entire privilege
- Use explicit non-waiver agreements when dealing with government agencies – *In re Natural Gas Commodity Litigation*, 232 F.R.D. 208 (S.D.N.Y. June 21, 2005).

Gathering Information and Conducting Investigations

- *Center Partners, Ltd. v. Growth Head GP, LLC*, NO. 04-L-12194, 110381 (Ill. App. Ct. Aug. 30, 2011). Multiple parties created a partnership for the ownership and operation of numerous shopping malls.
- Following a dispute, one party sued the others for breach of fiduciary duty, and sought communications concerning how the parties had agreed to operate and collect revenue from the various shopping malls. The individual defendants acknowledged that they had voluntarily disclosed to the others various attorney-client privileged information they had received from their attorneys regarding the purchase.

Gathering Information and Conducting Investigations

- The trial court ultimately ordered disclosure of *all* privileged communication by and between the defendants concerning the purchase negotiations, including information not previously shared among the defendants. The appellate court upheld the decision, holding that the “subject-matter waiver doctrine” requires a party who discloses some privileged communication to reveal all privileged communications on the same subject matter.
- Tennessee courts have not provided any guidance as to whether this waiver applies in Tennessee

Gathering Information and Conducting Investigations



- Important to have a plan, personnel, and strategies in place in advance
- General investigation policies can be useful
- For serious matters (allegations of widespread discrimination, allegations against senior management, RICO allegations) an outside investigation by counsel may be best in order to protect information with privilege as much as possible

Gathering Information and Conducting Investigations

- Set Goals and Strategy for the Investigation
 - Developing a battle plan before the investigation starts is an effective way to not overlook issues during the investigation
 - Make clear in strategy documents that matters are being prepared in anticipation of possible litigation – Want to attach privileges if possible



Gathering Information and Conducting Investigations



- Consider amount of risk involved in the issue being investigated
 - The bigger the risk or issue, the more you should lean towards an external investigation by independent outside counsel
- Immediate action needed?

Gathering Information and Conducting Investigations

- Maintain Confidentiality
 - Helps avoid retaliation by employees later
 - Keeps control of the information
 - Prevents waiver of privilege by employees



Gathering Information and Conducting Investigations

- Who is Conducting the Investigation?
 - Designate Investigative Team
 - Generally have in-house or outside counsel head the team – allows for their direction of matters and can provide some shield to the investigation



Gathering Information and Conducting Investigations

- Control the Interview Process
 - Do not get sidetracked from the key issues that need to be investigated
 - However, don't overlook new information – you must be thorough so plaintiff's counsel or a jury won't question your investigation later



Gathering Information and Conducting Investigations

- Review Company Policies
- Search Available Records
 - Designate documents generated in the investigation as “work product” (it can’t hurt)
 - Labels are important!
 - Be candid about identifying non-privileged documents and separate them

Gathering Information and Conducting Investigations

- Close the Investigation Properly
- Ensure against retaliation
- Protect privileges going forward – keep documents secured, require employees to speak only with counsel if a related issue comes up in the future

Attorney-Client Privilege

The Sword, The Shield or The Poison Pill in
HR Investigations

Questions?

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

Attorney-Client Privilege

The Sword, The Shield or The Poison Pill in HR Investigations

Charles K. Grant and Brad Bakker
Baker, Donelson, Bearman, Caldwell & Berkowitz
Nashville, Tennessee
615-726-5767
cgrant@bakerdonelson.com