The Trusted Advisor's Dilemma – Maintaining the Attorney-Client Privilege as In-House Counsel

June 9, 2011
Bellevue, Washington

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I. Attorney-Client Privilege

A. What It Does: The privilege protects from disclosure certain communications between lawyer and client.

B. Purpose:

1. The purpose of the attorney-client privilege 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." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

2. "The attorney-client privilege is an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confidential communications between a client and a lawyer." *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) (citing *United States v. Rogers*, 751 F.2d 1074, 1077 (9th Cir. 1985)

C. Its Importance in the Context of Litigation: If all the elements of attorney-client privilege are established, and none of the limited exceptions apply, then the communication is confidential, and a party has a right not to disclose what would otherwise be relevant information.

D. Elements Necessary to Establish the Privilege:

1. The 8-Part Test:

a. where legal advice of any kind is sought

b. from a professional legal adviser in his capacity as such

c. the communications relating to that purpose

d. made in confidence

e. by the client

f. are at his instance permanently protected

g. from disclosure by himself or by the legal adviser

[1] It is with gratitude that we acknowledge Perkins Coie LLP associate Emily Bushaw's invaluable assistance in preparation of these materials.

h. unless the protection be waived.

In re Grand Jury Investigation, 974 F.2d 1068 (9th Cir. 1992).

2. The 5-Part Test: (Corporate officer asserting a personal claim of attorney-client privilege as to communications with corporate counsel)

a. Officer approached counsel for the purpose of seeking legal advice.

b. When corporate officer approached counsel she made it clear that she was seeking legal advice in her individual rather than in her representative capacity.

c. Counsel saw fit to communicate with corporate officer in her individual capacity, knowing that a possible conflict could arise.

d. Corporate officer's conversations with counsel were confidential.

e. The substance of the corporate officer's conversations with [counsel] did not concern matters within the company or the general affairs of the company.

In re Grand Jury Investigation No. 83-30557, 575 F. Supp. 777 (N.D. Ga. 1983).

E. The Difference Between the Attorney-Client Privilege and the Ethical Duty of Confidentiality: As noted in the comments section of Washington Rule of Professional Responsibility (RPC) 1.6(a):

> The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

RPC 1.6 cmt. 3.

RCW 5.60.060(2) provides: "An attorney or counselor shall not, without the consent of his or her client, be *examined* as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." RPC 1.6(a) also preserves a client's confidences and secrets, but makes no mention of *examination*: "A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation except for disclosures that are impliedly authorized in order to carry out representation."[2] *See Dietz v. Doe*, 131 Wash. 2d 835, 844, 935 P.2d 611 (1997). The RPCs define "confidence" as "information protected by the attorney-client privilege under applicable law." See RPC 1.6, cmt. 19. "Thus, a "confidence" is co-extensive with the attorney-client privilege." *Dietz v. Doe*, 131 Wash. 2d 835, 844, 935 P.2d 611 (1997). A "secret," on the other hand, refers to "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." RPC 1.6 cmt. 19. Thus, it may be unethical for a lawyer to reveal a client's secret even where the attorney-client privilege does not protect the information. *Dietz*, 131 Wash. 2d at 844.

F. Application of the Attorney-Client Privilege to In-House Counsel: The role of in-house counsel has increasingly expanded to encompass participation in decisions about business, technical, scientific, public relations and advertising issues, in addition to purely legal issues. This dual role can raise significant complications during discovery. Courts fear that businesses will attempt to

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[2] The prohibition on the disclosure of client confidences and secrets set forth in RPC 1.6(a) is subject to the following exceptions:

> A lawyer to the extent the lawyer reasonably believes necessary:
> (1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;
> (2) may reveal information relating to the representation of a client to prevent the client from committing a crime;
> (3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;
> (5) may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
> (6) may reveal information relating to the representation of a client to comply with a court order; or
> (7) may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver.

RPC 1.6(b).

immunize internal communications from disclosure by placing legal counsel in strategic positions to filter documents through the legal department. Therefore, courts must often distinguish between in-house counsel's legal and business work.

G. Distinguishing Legal Advice vs. Business Advice: For the communication to be privileged, it must have been made primarily for the purpose of giving or obtaining legal advice. A whole body of law has developed that seeks to answer the question of whether a communication between an attorney and a client had the primary purpose of giving or seeking legal advice.

1. The "But For" Test: To determine what communications have the "primary purpose" of giving legal advice, the question should be asked: "would the communication have been made 'but for' the fact that legal advice was sought?" If it would not, it will be privileged. If the communication would have been made in all events, the communication will generally be unprotected.

2. An Implied Request for Legal Advice Is Sufficient: Advice or a legal opinion need not be expressly requested. It is generally sufficient if a request for legal assistance is implicit in the communication. However, because the privilege does not attach to general communications that merely keep the attorney apprised of business matters, in many instances it is simpler to make an explicit request for advice.

a. Comments sent by an attorney to a client about liability in another case were privileged communications because the attorney was implicitly advising the client with respect to the client's own potential liability. *Diaz v. Delchamps, Inc.*, 1997 U.S. Dist. LEXIS 17389 (E.D. La. Oct. 31, 1997).

H. The Various Roles of In-House Counsel:

1. Attorney as a Document Depository: Documents that have been through the hands of an attorney are not automatically privileged merely because the attorney has touched the document. Merely copying an attorney on emails and memoranda will not make the document privileged.

2. Attorney as a Conduit of Information: The fact that an attorney may serve as a conduit of information between various parties does not make the communication between the two parties privileged.

a. The fact that information about sexual abuse of minors was funneled through attorneys did not make it privileged from disclosure. "If that information was routed through counsel, the fact that counsel received the information does not make it privileged." *In re Roman Catholic Archbishop of Portland*, 335 B.R. 815 (D. Or. 2005).

b. "The attorney-client privilege does not protect facts which an attorney obtains from independent sources and then conveys to his client." *Standard Chartered Bank PLC v. Ayala Int'l Holdings, Inc.*, 111 F.R.D. 76, 80 (S.D.N.Y. 1986).

3. Attorney Merely Relaying Legal Information: Monitoring other litigation that merely relates status without conveying any legal strategy does not constitute "giving legal advice" and is not protected. *Cont'l Cas. Co. v. Marsh*, 2004 U.S. Dist. LEXIS 76 (N.D. Ill. Jan, 5, 2004).

4. Attorney as Committee Member: If an entity desires legal advice to be given to a particular committee or as part of the committee's deliberative process, the attorney giving the advice should not serve as a member of the committee, as the lawyer may be deemed to be acting in a business, rather than legal, capacity. *SEC v. Gulf & W. Indus., Inc.*, 518 F. Supp. 675, 683 (D.D.C. 1981).

5. Attorney as a Negotiator: For purposes of determining privilege, the question is whether the negotiation is one dealing primarily with the client's business affairs or one in which legal issues predominate.

a. Former associate counsel to the governor could be called to testify as to her direct involvement in negotiations with an Indian tribe. "Clients of in-house counsel (counsel to the governor is in fact in-house counsel) seek from time to time other types of advice from their attorney. It may be personal, financial, or policy oriented. In this regard, that nonlegal advice is not protected, and when relevant, may be required to be disclosed." *New York v. Oneida Indian Nation of N.Y.*, 2001 U.S. Dist. LEXIS 21616, at *16-17 (N.D.N.Y. Nov. 9, 2001).

6. Attorney as a Business Advisor: Communications made to or from an attorney seeking or giving business advice is not privileged.

a. Memorandum written by attorney to CEO summarizing discussions between company attorneys and research and development persons concerning product research efforts and proposals was not privileged because the document did not relate to the provision of legal advice. "Activities and advice concerning research proposals are of a business nature rather than a legal nature." *Burton v. R.J. Reynolds Tobacco Co.*, 200 F.R.D. 661 (D. Kan. 2001).

b. Documents between attorney and vice president of a cigarette company regarding the VP's belief that cigarettes caused cancer were not protected by attorney-client privilege because they were not legal in nature. Although the communications were between

attorney and client, the communications were of a business nature because there was nothing in the documents "concerning the legal implications" of the VP's beliefs; "rather, the thrust of the documents [was] that it would simply look bad if the head of . . . [the] research and development team believed smoking caused cancer." *Id.*

c. Attorney advice given regarding the disadvantages of purchasing certain securities is unprotected business advice. *Id.*

7. **Attorney as a Business Agent:** When a lawyer acts as a business agent for a client, the lawyer's actions are not protected.

a. In a criminal tax fraud case, the claim of attorney-client privilege was rejected when the testimony of the defendant's attorney was limited to tracing the transfer of funds to and from the defendant and various corporations. The court concluded that there was no indication that the attorney gave legal advice to the defendant or the corporations, or that any confidence that came to the attorney because of the attorney-client relationship was disclosed. "The mere fact that a person is an attorney does not render privileged everything he does for a client. Ministerial or clerical services such as those testified to here are not within the privilege." *United States v. Bartone*, 400 F.2d 459, 461 (6th Cir. 1968).

8. **Attorney as an Investigator:** Having an investigation conducted by an attorney does not automatically protect the report from disclosure. Below are general rules used when determining whether the privilege applies to attorney investigations:

a. If the investigation was of a nature that the business would ordinarily have conducted in all events, then the privilege does not apply.

(i) The privilege did not apply where a law firm was employed by an insurance company "to fulfill its ordinary business function of claims investigation." *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986).

(ii) "Schermer is an attorney who engaged in the practice of employment law. Although her role appeared to be primarily one of investigation with respect to Dr. Simon's complaints, she also acted as a consultant with regard to the veracity of the complaint. Certainly, her legal expertise was a primary factor in the college's decision to hire her. Accordingly, the Court finds that any communications between Ms. Schermer and the college are shielded by the

attorney-client privilege." *Ziner v. Cedar Crest Coll.*, 2006 U.S. Dist. LEXIS 32016 (E.D. Pa. May 30, 2006).

b. For the communications to be privileged, it must be clear that the investigation was conducted to provide legal advice. The information gathered in an investigation will not be protected unless it can be shown that the information gathered is part and parcel of the legal advice given by the lawyer.

(i) Information gathered by an attorney regarding engineering information was not protected. When an attorney forwarded documents to a client conveying unprotected information concerning the status of clean-up efforts, billing by third-party vendors, and other similar information, these were not protected, but documents that conveyed information and also evidenced counsel's advice and analysis were protected. "An attorney's communications to a client reporting facts learned by the attorney from a third party is not within the attorney-client privilege unless the information is included in legal analysis or advice communicated to the client." *ECDC Envtl., L.C. v. New York Marine & Gen. Ins. Co.*, 1998 U.S. Dist. LEXIS 8808, at *26 (S.D.N.Y. June 4, 1998).

c. Information will not be protected if the party seeking the privilege relies on the information gathered as a defense to the action.

(i) A party that relied on in-house counsel to conduct an investigation of claims of sexual harassment and purports to have acted in conformity with the attorney's findings cannot then refuse to disclose the totality of the attorney's investigative file, including an unfinished report, the attorney's notes, and any sections of the report that were deleted or redacted. *Mcgrath v. Nassau Cnty. Health Care Corp.*, 204 F.R.D. 240 (E.D.N.Y. Nov. 30, 2001).

9. **Attorney as a Consultant:** If a lawyer is acting as a consultant in something other than a legal capacity, the communications will not be privileged.

10. **Attorney as a Lobbyist:** If a lawyer acts as a lobbyist, matters conveyed to the attorney for the purpose of having the attorney fulfill the lobbyist role do not become privileged by virtue of the fact that the lobbyist has a law degree.

a. "Although these 'lobbying' efforts seem to have been coordinated by the legal department, the resultant communications do not refer

to legal problems but instead are summaries of various town meetings or reports on the progress of the . . . project. Such communications from counsel to management are not legal advice." *N.C. Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 517 (M.D.N.C. 1986).

b. Communications from in-house counsel to a law firm retained to lobby were not privileged where the content of the communications described the current status of the lobbying effort and responses made to legislators. *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156 (E.D.N.Y. 1994).

11. Attorney as a Political Advisor: Attorney's "advice on political, strategic, or policy issues, valuable as it may have been, would not be shielded from disclosure by the attorney-client privilege." *In re Lindsey*, 148 F.3d 110, 1106 (D.C. Cir.).

I. Examples of Legal Advice Documents:

1. Email and attached draft of company's Form 10-K to be filed with the SEC was protected by the attorney-client privilege. The email (and attached documents) was sent from the CFO to the Head of Investor Relations, the Deputy General Counsel, the Controller, and an employee in the controller division, with instructions to "provide their thoughts on it." The cover memo to the attached Form 10-K was addressed from the CFO to the Chief Executive Officer and the General Counsel. The court held that the email and attachment was a communication that sought legal advice rather than business advice because the "Form 10-K mandates the disclosure of extensive corporate information. The determination of what information should be disclosed for compliance is not merely a business operation, but a legal concern." The court also noted that the confidentiality of the communication was not breached because "in this case, all the non-lawyer individuals who were privy to the . . . email were . . . each . . . directly concerned with the matters of the Form 10-K disclosures." *Roth v. Aon Corp.*, 254 F.R.D. 538 (N.D. Ill. 2009).

2. Drafts of the specifications, claims and other parts of a patent application prepared by the attorney are protected. "A draft necessarily reflects the communications between a client and his attorney as the attorney attempts to put forth the invention in the best light possible to protect a client's legal right." "A patent draft implicitly contains the legal opinion and advice of the attorney regarding the wording of technical specifications, claims, and prior art, and whether an item is included, all of which are necessary to secure a legal claim for the client." *McCook Metal LLC v. Alcoa, Inc.*, 192 F.R.D. 242 (N.D. Ill. 2000).

3. **Completed and returned form letter** sent to inventor from legal department that provided legal advice by reminding inventor of legal requirements of the specifications, claims, declarations, and duty to disclose was protected because it required inventor to fill out form and provide confidential information back to legal department. The **uncompleted form letter** sent to inventor containing legal advice (such as a general summary of the law) is not protected because it does not reveal client confidences. Form letters from attorneys to clients that give general legal advice untied to any particular factual circumstances are not protected. *Id.*; s*ee also Ami/Rec-Pro Inc. v. Illinois Tool Works Inc.*, 1998 WL 70607 (N.D. Ill. Feb. 11, 1998).

4. **Form checklist completed by attorney** is protected because it reflects the attorney's dialogue with the client and showed that the attorney had reviewed legal issues and patent requirements with client. An uncompleted checklist form is not privileged. *McCook Metal LLC v. Alcoa, Inc.*, 192 F.R.D. 242 (N.D. Ill. 2000).

5. **Attorney notes from files memorializing conversations with client** are privileged because the notes summarize the legal advice given and the information received from the client in order to provide the legal advice. *Id.*

6. **Memorandum and letter attachment sent to business and legal personnel** was privileged when the memorandum requested both business and legal advice from non-legal and legal personnel and the letter had handwritten notes from a business person summarizing his discussion with the lawyer as to the wording of the letter. The court determined both were privileged because the letter contained legal advice and the memorandum's purpose was to secure legal advice. *Id.*

7. **Drafts of contracts with attorney's handwritten notes** are privileged because they contain legal advice, but the final executed contract is not privileged. *Id.*

J. Examples of Business Advice Documents:

1. **Position paper written by outside counsel regarding carbon monoxide and cigarette smoking** not protected under attorney client privilege because paper did not render legal advice. Rather, it was written to rebut public criticism of cigarette smoking and was "intended for public relations purposes rather than legal purposes." "It could have been prepared by scientists, tobacco industry non-legal personnel, or others with access to the non-legal literature cited in the paper." *Burton v. R.J. Reynolds Tobacco Co.*, 200 F.R.D. 661 (D. Kan. 2001).

2. **Draft response to anticipated questions stemming from a series of paid editorial statements** issued by the cigarette company in the mid-1980s concerning smoking and health, written by Director of Public Issues and forwarded to in-house attorney for "an opinion about the approach and the content," was not privileged. "There is no suggestion . . . that the author of the response was seeking legal advice as opposed to public relations advice or general business advice." *Id.*

3. **Attorney notes to file regarding technical data and facts** were not protected because party made no showing that the data and facts were 1) communicated to the attorney by the client and 2) communicated by client to obtain legal advice. (The notes could be work product, if party can show that notes were taken in anticipation of litigation.) *Ami/Rec-Pro Inc. v. Illinois Tool Works Inc.*, 1998 WL 70607 (N.D. Ill. Feb. 11, 1998).

4. **Patent portfolio summarizing patents, patent applications and invention reports in the aerospace industry** was not privileged because it did not contain legal analysis or conclusions. *McCook Metal LLC v. Alcoa, Inc.*, 192 F.R.D. 242 (N.D. Ill. 2000).

5. **Interoffice memorandum between attorney and corporate client containing only information about sales, royalty payments, deliveries, purchasing, competitors, shipping, and various other business data** is not protected because memo did not contain legal advice (as opposed to business or technical information) nor any request for legal advice. But interoffice memorandum between attorney and client requesting or giving legal advice is protected in its entirety, including the underlying factual information in the memorandum. *Id.*

6. **Fax cover sheets to and from attorney identifying only the parties to the correspondence, address, and phone numbers** are not privileged as they do not contain legal advice and bear an insufficient relation to the securing of legal advice. *Id.*

7. **Technical drawings, sketches, tables, and test results produced from inventors and sent to legal department** in response to attorney's request for information are not privileged because they contain no request for legal advice, nor is any given. *Id.*

K. Tips to Protect the Attorney-Client Privilege:

1. In sensitive communications, try to separate the legal from the business information. (For example, in discussing your corporation's position on various contract provisions during negotiations, segregate the legal questions from more routine information such as status updates.)

2. Written communications (including electronic mail messages and informal memos) should note that you are seeking advice on a legal question, if

applicable, and should be clearly labeled with a legend such as *"CONFIDENTIAL: PRIVILEGED ATTORNEY-CLIENT COMMUNICATION."*

3. In-house counsel should not be a voting member of a committee and also advise the committee. If the committee seeks legal advice, it should do so from a non-committee member attorney.

4. In-house counsel should inform his or her client that the attorney's direct involvement in a business negotiation on behalf of the client may constitute a waiver of the privilege.

5. If an attorney is to undertake an investigation, the retention letter should explicitly request legal advice based on the results of the investigation.

II. The Attorney Work Product Doctrine

A. What It Does: The work product doctrine protects from discovery materials that are prepared by a party or its counsel in anticipation of possible litigation.

B. Purpose: "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

C. Elements Necessary to Establish Work Product Protection:

1. Prepared by a party, its attorney, or one of their agents (paralegals, consultants, experts, accountants, etc.).

2. Prepared "in anticipation of litigation."

a. any litigation with any party in any court

b. any government investigation in any country

D. Examples of Work Product:

1. Handwritten notes,

2. Annotations on documents,

3. Discussion of strategy, and

4. To-do lists, etc.—even those made by the client.

E. Distinguishing Documents Prepared in "Anticipation of Litigation" vs. Those Prepared in the "Ordinary Course of Business": The work product doctrine does not apply to documents prepared in the ordinary course of business. *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 304 (S.D.N.Y. 1991) ("If a party prepares a

document in the ordinary course of business, it will not be protected even if the party is aware that the document might also be useful in the event of litigation."). *Id.* "[W]ork product protection applies only to material 'that would not have been generated *but for the pendency or imminence of litigation.'" (quoting Kelly v. City of San Jose*, 114 F.R.D. 653, 659 (N.D. Cal. 1987)).

1. Examples of Documents Prepared in "Anticipation of Litigation":

a. Internal audits done at the request of counsel in direct response to an outside agency investigation are work product, even if company normally conducts routine internal audits for business purposes (such as to ensure business is running properly). The audits are not protected by the attorney-client privilege because they are not a "communication" (seeking or giving legal advice). *So. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994).

b. Information about the evolution of an affidavit, such as communications with the counsel relating to the affidavit, prior drafts of the affidavit, and any notes made by counsel while engaging in the process of drafting the affidavit, is protected work product. Protection is not waived by filing final versions of the affidavits to the court. Only if the company ultimately chose to make evidentiary use of a final affidavit that had not been produced to the plaintiffs would the company have waived any work product claim as to that affidavit. *Randelman v. Fidelity Nat'l Title Ins. Co*., 251 F.R.D. 281 (N.D. Ohio 2008).

c. Attorney handwritten notes referencing legal strategies pursuant to litigation are protected work product. *McCook Metal LLC v. Alcoa, Inc.*, 192 F.R.D. 242 (N.D. Ill. 2000); *Natta v. Zletz*, 418 F.2d 633 (7th Cir. 1969).

d. Attorney handwritten notes referencing breach of a license agreement that gave rise to the litigation was considered work product. *McCook Metal LLC v. Alcoa, Inc.*, 192 F.R.D. 242 (N.D. Ill. 2000).

e. Documents related to the settlement of previous litigation between the same parties are considered work product in a subsequent litigation even if the two cases are unrelated, as long as the documents were created by the same parties. *Id.*

f. Validation studies conducted before corporation was sued were considered work product because corporation suspected it would be sued under Title VII and "given the crucial role played by such studies in Title VII disparate impact cases . . . it is wholly

appropriate to characterize preparation of such a study as in anticipation of litigation or for trial." *Rodgers v. U.S. Steel Corp.*, 11 Empl. Prac. Dec. (CCH) 10,666 (W.D. Pa. 1975).

2. Examples of Documents Prepared in the "Ordinary Course of Business"

a. Documents created from work product are not automatically considered work product. In *Southern Bell*, employees gave statements to the company's security personnel at the direction of counsel (in anticipation of litigation). The written statements obtained were work product. But the "panel recommendations" subsequently drafted by managers, from information obtained in the interview statements, were not protected work product as they were drafted for the business purpose of recommending which employees the company should discipline (rather than in anticipation of litigation). *So. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994).

b. Technical information, sketches, drawings, graphs, and test results gathered for patent application are not work product because they would have been created with or without the litigation. *McCook Metal LLC v. Alcoa, Inc.*, 192 F.R.D. 242 (N.D. Ill. 2000).

c. Documents created almost 12 years in advance of litigation were "too distant in time from the present litigation" to be considered work product. *Id.*

d. Personal practice studies done by outside legal firm for corporate client were not protected work product because the studies were done for business purposes, as they were broad studies of employer's personnel practices and not in "anticipation of litigation." *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372 (N.D. Ill. 1982).

e. Meeting minutes and memorandum from corporation's "employee relations committee" was not work product because the committee was initiated for overall business purposes rather than in preparation for litigation. Furthermore, the committee work involved personnel matters of all sorts rather than being "litigation-oriented." *Id.*

APPENDIX A

When the Attorney-Client Privilege Applies

Each of the following elements must be met for the attorney-client privilege to apply:

- **A communication**
- **Between a client and his or her attorney**
- **For the purpose of obtaining legal advice or assistance**
- **Made in confidence**
- **Where the privilege has not been waived; that is, not disclosed to third parties**

Best Practices to Protect the Attorney-Client Privilege

- **Clarify your relationship with counsel.** Communications between a company and its attorneys for the purpose of obtaining legal advice or assistance necessarily require communications between the attorneys and company personnel. Communications between corporate counsel and company personnel are privileged so long as they concern matters within the scope of the employee's corporate duties. Starbucks in-house and external lawyers represent the corporation, not you personally. Not everything that you share with Starbucks counsel will be privileged or even confidential. If you have any questions about your relationship with counsel, please ask.
- **When possible, be clear that you are seeking legal advice.** The attorney-client privilege hinges upon the client's belief that he or she is consulting a lawyer in that capacity and his or her intention to seek professional legal advice. If you are consulting with a lawyer for legal advice, be clear in your communications: "I am seeking your legal advice regarding . . . ." or "Jane, I've copied you so you can provide your legal assessment regarding the attached . . . ." Don't be surprised if a lawyer responds in a similar fashion: "In response to your request for legal advice. . . ."
- **Be clear when you are transmitting legal advice.** Some corporate communications – if their purpose involves obtaining or distributing an attorney's advice – may be privileged even if an attorney is not involved in that particular communication. Consider using language such as the following if transmitting legal advice to another non-lawyer: "Jim, I consulted with our lawyer, [Attorney A], and she advised that we . . . ." (Copying the attorney on the communication may also be appropriate.)
- **If unsure whether the advice you need is business or legal, ask the lawyer to clarify.** The rendering of business advice, even from an attorney, is not subject to privilege. It is particularly difficult, however, to untangle communications that involve both business and legal considerations. In some instances, it may be appropriate to split correspondence into two separate pieces in order to ensure that the legal portion is clearly privileged. In other instances, it may be appropriate to note within the correspondence that the business and legal issues are inseparable. Consider consulting with the lawyer to try to clarify the situation before putting anything in writing.
- **Be thoughtful about recipients.** Privileged exchanges remain so only if the communications are treated as confidential and are not indiscriminately circulated within an organization. Before you hit "send," think through whether each person who will receive a communication has a "need to know." Similar thought should also be given to attendees at meetings and presentations.

Situations to Which the Attorney-Client Privilege *May Not* Apply

- **"Lawyer in the Room."** Sometimes a lawyer is called upon to participate in activities that do not necessarily call for specific legal representation or advice. In those contexts, the privilege does not apply. All conversation in a general meeting, for example, is not protected just because a lawyer is in the room. Rather, only the portion of the meeting where legal advice is solicited and/or given will be protected, while the rest of the meeting content is subject to disclosure. Where a lawyer is called upon to play a role other than as counsel (e.g., investigator), the privilege also may not apply.

- **Correspondence with copies to an attorney.** Correspondence is not automatically privileged just because an attorney is listed among those receiving a carbon or "blind" copy. The test will be whether the content of the correspondence is part of an overall attorney-client communication. If the writer is attempting to convey the content of an attorney's advice to others in the organization with a legitimate need to know, the correspondence may be privileged.

- **Documents provided to an attorney.** Documents do not automatically become privileged simply because they are transmitted to, or reviewed by, an attorney. What is privileged is the fact that a particular document has been provided to the attorney for purposes of soliciting legal advice – not the document itself or the information it contains, unless the document was prepared specifically for the purpose of soliciting the attorney's advice. Correspondence that is forwarded to an attorney for some purpose other than obtaining legal advice is not privileged.

Situations to Which the Attorney-Client Privilege *Does Not* Apply

- **The fact of a consultation.** The privilege does not extend to the fact that a consultation between the attorney and the client occurred, nor to the general subject matter of the consultation. It protects only the *content* of the communications in that consultation.

- **Underlying facts shared with an attorney.** The privilege protects the content of communications between the client and the attorney. It does not extend to underlying factual information that may come out during the course of the communication, unless that information is contained within a privileged communication.

- **Communication in the presence of a third party.** The privilege extends only to communications the client intends to be confidential. Communications made in nonprivate settings or in the presence of third persons unnecessary to accomplish the purpose for which the attorney was consulted are not confidential and therefore are not protected by the privilege.