Update on Attorney-Client Privilege

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Attorneys typically practice with the confidence that their communications with clients will be protected by the attorney-client privilege. The justification behind this doctrine is fundamental to ensuring attorneys can provide the best possible representation to their clients. Through the protection of the attorney-client privilege, clients can candidly and truthfully confide in their counsel, thus equipping counsel with the necessary knowledge for advising their clients on issues relating to compliance with rules, regulations, the law, and, even more critically, litigation.

Every practicing attorney should know, however, that the attorney client privilege is not as steadfast as it appears. While this doctrine is customarily perceived as a steel-enforced shield from the disclosure of sensitive information, recent developments surrounding the treatment of the attorney-client privilege could lead one to think the shield is actually made of paper. For example, the demise of Enron and birth of Sarbanes-Oxley have sparked practices that have begun to wear away at the safe haven that corporations and attorneys alike have become dependent on for keeping confidential information strictly in the boardroom. Until recently, federal policies encouraged prosecutors to grant leniency in charging and sentencing decisions for corporations that waive their attorney-client and work product protections. Although the United States Sentencing Committee recently voted to delete any such policy from its Sentencing Guidelines, the invasion into protected attorney-client territory is creeping into other realms. For example, proposed Federal Rule of Evidence 502, if enacted, would authorize the disclosure of privileged information to government agencies, but not to private parties. Also, taking into account the recent amendments to the Federal Rules of Civil Procedure which provide for discovery in the electronic sphere, attorneys will have to familiarize themselves with what is and is not privileged in the worlds of metadata, e-mail, and the internet.

While some of the new ways that the attorney-client privilege is being manipulated will present new challenges for attorneys, they are not at a complete disadvantage. Last year, the Fifth Circuit decided that a document protected by the attorney-client privilege was admissible as evidence in a case where a former in-house lawyer sued his former employer for violation of federal whistleblower laws. *Willy v. Administrative Review Board,* 423 F.3d 483 (5th Cir. 2005). Under the precedent set by this ruling, attorneys have an opportunity to waive the attorney-client privilege. This is significant considering that waiver of the privilege is typically only available to clients.

While changes in the treatment of the attorney-client privilege are certain to continue, attorneys should remember these tips for client communications that likely will *not* change anytime soon:

- Always address attorney-client privilege issues with a client in the initial phase of your relationship. While corporate representatives these days often have a strong knowledge of the legal system, they may not fully understand the intricacies of the attorney-client privilege and how innocent actions may result in a waiver.
- Remember, in the context of a corporation, the attorney-client privilege can be subject to waiver by *anyone* in management, including officers or directors

- “New” management can waive the privilege of protecting information that was created when the “old” management was in place. *See Commodity Future Trading Comm’n v. Weintraub,* 471 U.S. 343 (1985)
- The attorney-client privilege can extend to non-lawyers whose involvement in a matter facilitates an attorney’s understanding of his or her client’s situation.
- If you obtain an expert for help in a matter, prepare an engagement letter outlining the expert’s expected role. The letter should state that all communications between the expert and the lawyer and client are incidental to providing legal services and intended to be confidential. The expert should also be advised not to communicate with a client without the lawyer’s direction. *See U.S. v. Kovel,* 296 F.2d 918 (2nd Cir. 1961).
- Counsel and clients alike should ensure all records of letters, notes, and conference calls between each other are kept in a secure, marked file and labeled “private” or “confidential attorney-client communication.” Without these simple precautions, a court could find that adequate steps were not taken to preserve the privilege.

By remembering some of these fundamental guidelines for interactions with your clients, you should be equipped to face *any* new change to the attorney-client privilege.