Ethics Challenges for Advising Hospitality Clients in Anti-Trust Matters

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I. SCOPE OF ARTICLE

This article covers some of the key professional and ethical obligations facing attorneys involved in complex transactions or litigation. Antitrust matters, which can involve sophisticated issues, and public and private interests, can give rise to many of the concerns raised here.

II. OVERVIEW OF ATTORNEY-CLIENT PRIVILEGE

Attorney-client privilege is an evidentiary rule that protects the client from compelled disclosure of confidential communications with legal counsel, where such communications occur to obtain legal advice. Similarly, the work product doctrine protects from compelled disclosure materials prepared by counsel in anticipation of litigation or for trial. Issues about the applicability of attorney-client privilege and work-product generally arise in litigation when an adversary seek disclosure of confidential information. The party seeking to safeguard its secrets bears the burden of establishing that the privilege exempts information from involuntary disclosure.

A. Elements of Attorney-Client Privilege

To establish attorney-client privilege there must be five elements: (1) confidential (2) communications (3) between client and counsel (4) to obtain legal advice and (5) the absence of a waiver.

1. Confidentiality

Privilege does not create protection for information or documents that are already in the public domain or that are required to be disclosed under law. Privilege only protects information that is confidential.

2. Communications

The purpose of privilege is to encourage candor with counsel so that clients can elicit sound legal advice and in turn follow the law. Thus, the privilege protects information that is conveyed by a client to counsel. That includes face-to-face and telephone conversations as well as written contact. It also includes information conveyed electronically, such as emails. Privilege does not protect a lawyer's observations of client conduct. If an attorney witnesses a client acting in an unlawful manner, the attorney can be compelled to testify about those observations.

3. Between Client and Counsel

The privilege is intended to enhance an open attorney-client relationship so the presence of third parties who are not necessary to the provision of legal advice destroys the privilege. The privilege does extend to individuals working with the attorney, such as support staff, needed to provide legal advice. It does not include a broad group of employees of the client company who do not need to be involved in the otherwise privileged discussion. For the same reason, broad dissemination of privileged written communications, such as forwarding emails widely, jeopardizes the privilege.

4. Legal Advice

It is often difficult in a business setting to distinguish between legal and business advice. However, the privilege applies to communications with counsel for eliciting legal counsel. Courts often scrutinize the nature of communications with counsel to ascertain whether the attorney was provided the information for legal advice or other reasons that do no give rise to privilege.

5. Waiver

Privilege protection may be waived if the otherwise confidential communications are shared with those who do not have a need to know in connection with the provision of legal advice. Some courts will consider whether the waiver was inadvertent and may give the party seeking protection the benefit of the doubt. Courts also take varying views on the scope of the waiver ranging from limiting it to the specific document or information disclosed to concluding there is a waiver on an entire subject. One area of increasing concern is inadvertent waiver through the transmission of electronic information. Metadata, embedded information that cannot be viewed on the face of the document, may be transmitted inadvertently in electronic communications. That information may reveal counsel communications with client or attorney thought processes. Some jurisdictions consider it unethical to mine for metadata - to attempt to uncover it in a document transmitted electronically. In addition, on the flip side, it may be a breach of professional responsibility to transmit documents without assuring that the metadata is removed. Software programs exist that clean documents before they are transmitted to avoid this inadvertent disclosure.

B. Work Product Doctrine

The work product doctrine protects counsel's thought processes as to materials created in anticipation of litigation.

III. EROSION OF THE ATTORNEY-CLIENT PRIVILEGE WHEN ATTORNEYS ACT AS BUSINESS ADVISORS

A. Erosion of Traditional Privilege

Most clients assume when they confer with counsel that the substance of those communications are subject to the attorney-client privilege and must be kept confidential. In today's legal environment, that is not a safe assumption, particularly for corporate clients. The stable foundation that attorney-client privilege and the work product doctrine historically provided for counsel client relationships has been challenged increasingly over time by courts, prosecutors, auditors and opposing parties. Each of these groups threatens the continued viability of a fundamental aspect of our legal system, and jeopardizes the counsel's ability to uncover information vital to providing sound legal advice.

B. Attorney-Client Privilege in the Corporate Context

With corporate attorney-client confidentiality under threat, it is critical for counsel to appreciate the principles underlying privilege in order to advise corporate clients effectively well before a problem arises. The United States Supreme Court has recognized that privilege protection applies to corporations and that the parameters of privilege in that context must be clear. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The Court reasoned that otherwise attorneys would be hamstrung in their efforts to obtain information from corporate employees essential to providing competent advice. Rejecting the Sixth Circuit Court of Appeals' confinement of corporate privilege to communications with a "control group" responsible to directing a company's conduct based upon legal advice, the Supreme Court acknowledged the need to apply the shield to a broader group. The *Upjohn* Court noted the integral relationship between privilege and law abidance. A "narrow scope…not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's conduct conforms to law." 449 U.S. at 392.

Since *Upjohn*, courts have gradually whittled away at corporate-counsel confidentiality. Judges have scrutinized the corporate invocation of privilege and have identified exceptions. For example, if counsel engages in a broad discussion with clients, courts may carve out the business aspects from the scope of the privilege protection and compel their disclosure. More troubling is the possibility that, when legal and business discussions intertwine, courts will treat the entire discussion as beyond the bounds of privilege.

Particularly when applied to internal corporate communications, courts contour privilege to balance competing objectives. Privilege advocates urge that openness with counsel facilitates effective legal representation, which in turn promotes adherence to the law. Lawyers cannot reasonably expect corporate representatives to be open if they fear their conversations will be shared with others outside the organization, particularly with prosecutors. Without this openness, counsel cannot elicit sufficient information to ferret out potential wrongdoing and to guide clients towards law abidance. The more truthful information counsel acquires from clients, the better equipped the lawyer is to give good advice. "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn*, 449 U.S. at 389.

The principle objection to preserving privilege is society's interest in preventing wrongdoers from hiding relevant information. As corporate scandals dominate the media, public interest in punishing fraud takes precedence. While the legal community fights to preserve the privilege, law enforcement argues that the threat of compelled disclosure of corporate wrongdoing will increase legal compliance. With the crime-fraud exception to privilege already established under *United States v. Zolin*, 491 U.S. 554 (1989), privilege does not embrace communications with counsel in furtherance of future wrongdoing. Thus, the objection to privilege affects communications for furthering good behavior, rather than bad, or correcting prior misconduct. Absent an expectation of privilege, corporate representatives will be reluctant to confide to solicit sound advice towards these good ends. In these uncertain times, counsel faces greater challenges advising clients, and there are no easy answers.

C. Myths About Attorney-Client Privilege in the Corporate Context

Here are four myths about attorney-client privilege that executives need to dispel:

1. Myth: Corporate Counsel Represents the Individual

Company counsel represents the organization, not the individual. Privilege may protect confidential information about company activities individuals communicate to company counsel, but that protection belongs to the company. This can create conflicts of interest when an executive seeks advice from company counsel on actions that may expose the individual and the company to liability.

2. Myth: Attorney-Client Privilege Protects Everything Discussed with Company Counsel

The fact that an individual communicates information to an attorney does not then endow that information with protection if it was not confidential in the first place. Even if it is confidential, privilege does not apply unless the client shares the information to seek legal advice. Further, the privilege does not apply to information shared to get business advice, so if the client and counsel do not distinguish clearly between legal and business advice, they may risk the privilege protection.

3. Myth: Sharing with Colleagues Within the Organization the Substance of Conversations with Counsel Does Not Risk Privilege Protection

If you share privileged communications with too many people in your organization, you may lose protection. Including unnecessary employees in legal discussions can undermine the privilege. Emailing or circulating legal advice memoranda to a broad audience will also cause a waiver. Only those with a valid need to be involved in the dialogue should receive privileged communications.

4. Myth: The Company and its Counsel Will Not Reveal Your Disclosures Without Your Consent

The privilege belongs to the organization. The company decides whether to preserve the confidentiality of your conversations with company counsel or to relinquish it. If the company elects to waive the privilege, the company or its counsel may reveal confidential information that you, as an employee, conveyed. They may do so even if the revelation exposes you personally to civil liability or criminal exposure. Despite the risks to you personally, because you are not the client for company counsel, you cannot block the company from disclosing information to an adversary

IV. REPRESENTING CLIENTS ACROSS BORDERS

There are many issues to consider when handling a transaction for a client overseas or involving parties abroad. One area that transactional counsel may overlook is the extent to which attorney-client privilege and work product doctrine apply to communications during the negotiation and drafting of the deal documents and the extent to which this may create issues if a dispute arises later. To a great degree, these issues will depend on the forum in which the dispute is heard. However, most forums will look to the law of the site where the counsel gives legal advice to ascertain whether the client had a reasonable expectation that privilege or a similar doctrine would protect confidential communications with counsel for obtaining legal advice.

There are at least three privilege situations that can arise in the United States when litigation or a government investigation commences relating to a cross-borders transaction. These include seeking to protect foreign in-house counsel communications with (1) business people in the United States; (2) business people in foreign countries; and (3) their outside foreign counsel.

These three scenarios involve an analysis as to whether the client is domestic or foreign and whether the communication is related to litigation in the U.S. or some other county. We find guidance from cases involving litigation over foreign patents. Those cases stand for the general proposition that "any communications touching base with the United States will be governed by the federal discovery rules while any communications relating to matters solely involving [a foreign country] will be governed by the applicable foreign statute." *Golden Trade et al. v. Lee Apparel Company et al.*, 143 F.R.D. 514, 520 (S.D. N.Y. 1992) (finding that the laws of Norway, Germany and Israel should govern the confidentiality of communications between a non-party Italian company and patent agents in Norway, Germany and Israel, noting that "these counties have the predominant interest in whether those communications should remain confidential").

The Court in *Golden Trade* as a matter of comity looked to the law of those jurisdictions to determine whether the privilege applied. Using a traditional choice of law "contacts" analysis, the court found that the foreign nations had the predominant interest because the communications were with patent agents in those countries who were assisting in the prosecution of patents within their respective countries. *Id*. at 521-22. *See also Astra Aktiebolag et al. v. Andrx Pharmaceuticals, Inc*., 208 F.R.D. 92 (S.D. N.Y.) ("Where, as here, alleged privileged communications took place in a foreign country or involved foreign attorneys or proceedings, this court defers to the law of the country that has the 'predominant' or 'the most direct and compelling interest' in whether those communications should remain confidential, unless that foreign law is contrary to the public policy of this forum.").

The same principles of comity were followed in *Eisai Ltd. v. Dr. Reddy's Laboratories, Inc. et al*., 406 F. Supp. 2d 341 (S.D.N.Y. 2005). There, the court looked to Japanese law to determine whether the U.S. court should recognize a privilege in documents reflecting legal advice provided by Japanese legal professional known as *berishi*. Applying Japanese law as a matter of comity, which accorded the privilege to *benrishi*-client communications, the court found the documents to be protected by the attorney-client privilege.

If the foreign jurisdiction recognizes that an in-house counsel's communications with his or her client for legal purposes are protected, then American courts will also respect that privilege. Therefore, with respect to the three scenarios listed above, if privilege is recognized by a foreign court, in all likelihood the American court will, in the interests of comity, apply the privilege in litigation pending in the U.S. The key remains whether the party seeking legal advice abroad had a reasonable expectation of such protection in the place where the party sought the advice.

V. ETHICAL ISSUES FACING COUNSEL WHEN COMMUNICATING ELECTRONICALLY

A. Federal Rules of Civil Procedure

As the ability to exercise the attorney-client privilege has narrowed, the responsibilities of attorneys, both in-house and outside counsel, for the production of documents in litigation have expanded dramatically. Since the 2006 amendment to the Federal Rules of Civil Procedure adding express rules concerning electronically stored information ("ESI") and discovery, attorneys have been charged with both the preservation and production of vast amounts of ESI. Regardless of what industry you are in, electronic documents have become the standard method of communication and record in the personal and business dealings of individuals and corporations. It is now a given that email is the standard method of communication and documents are drafted and saved on computers. This electronic medium is particularly significant in the event of litigation. As the requirements of this amendment have been tested and evaluated in specific litigations, judges have consistently ruled that attorneys and their clients are jointly responsible for identifying, and potentially collecting and producing relevant materials from a client's computer networks, email servers, back-up tapes, and other electronic means, as well as the traditional hard-copy documents.

B. Increased Responsibility of Attorneys

The responsibility of attorneys, both in-house and outside counsel, has become a significant issue because, in holding attorneys directly responsible for document preservation, collection and production, courts are issuing severe sanctions, including sanctions directed to attorneys, when relevant documents are not properly preserved and produced. From an ethical perspective, it is crucial for in-house attorneys and their outside counsel to ensure that companies establish clear and detailed document retention policies, conduct open and comprehensive document collection and review in the face of litigation, and reasonably exercise the attorney-client privilege in holding back confidential documents. By approaching litigation and document discovery with a comprehensive and transparent document production, all attorneys involved can shield themselves from potential discipline from the court.