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The Watchful Eye

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 of Rosen Seymour Shapss Martin & Company LLP*

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Greetings!

Welcome to *The Watchful Eye* - a publication of the Business Investigative and Insolvency Services Group of Rosen Seymour Shapss Martin & Company.

We welcome your questions or comments about the topics discussed or related ones. Please contact either of us to discuss the facts of your specific situation.

Sincerely,

Robert A. Modansky, CPA, CFF
 Alfred M. Pruskowski, CPA, CVA, CFF

Partners and Co-Champions of the Business Investigative and Insolvency Services Group

RSSM has instituted a program in which guest columnists may submit articles for publication in *The Watchful Eye*. Robert Schragar is the guest columnist for this issue.

The Attorney-Client Privilege

One of the most misunderstood legal concepts is the "Attorney-Client Privilege." Far narrower in application than most people, including many attorneys, believe, the seal of secrecy upon communications between client and attorney does not protect many communications that are often thought to be safe from compelled disclosure.

The attorney-client privilege came into existence long ago for the purpose of letting clients feel free to share all pertinent facts with their counsel. Completely distinct from the attorney-client privilege is the relatively recent work product doctrine which limits, but does not necessarily prevent, the disclosure of materials prepared for, or in anticipation of, litigation. "The work product doctrine encourages careful and

thorough preparation by the attorney, whereas the attorney-client privilege focuses on encouraging the client to fully disclose all information to his or her attorney."[1]
The following discourse will be limited to the attorney-client privilege, leaving the work product doctrine for a later column.

In brief, the attorney-client privilege prevents disclosure of confidential communications made (1) by the client to his attorney and (2) made to the client from his attorney. Also protected are confidential communications among representatives of both the attorney and the client for the purpose of facilitating the legal representation. As stated by the United States Supreme Court, the underlying premise for the attorney-client privilege is that open communications between an attorney and client require that, "if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."[2]

The privilege belongs to the client. The client alone has the right to raise and waive the privilege. Therefore, for example, when a corporation is the client, the corporation is the owner of the privilege. If control of the corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. An officer of the corporation cannot prevent the disclosure of communications he had with the corporation's attorney about corporate matters unless the corporation elects to exercise the privilege.

The elements of the attorney-client privilege are (1) a communication, (2) between privileged persons, (3) in confidence, (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.[3]

A Communication

Under the attorney-client privilege, it is the communication itself, not the underlying facts, that is protected. Simply telling something to the attorney does not impede disclosure of the information. Merely because the communication with the attorney is not discoverable does not prevent discovery of the facts by other means. While the client cannot be compelled to answer, "What did you say to the attorney?" the privilege does not let the client keep secret any relevant facts within his knowledge.

Pursuant to that principle, and much misunderstood, documents sent to an attorney are privileged only if they meet a two-pronged test. First, the documents are sent for the purpose of obtaining legal advice and second, they are subject to another privilege in the hands of the client such as a Fifth Amendment self-incrimination claim. Simply sending non-privileged documents to an attorney does not cloak those documents in a privilege. Therefore, when a taxpayer resisted turning over accountant workpapers which had been sent to the attorney, the U. S. Supreme Court said, "pre-existing documents which could have been obtained by court process from the client when he was in possession may be obtained from the attorney by similar process."[4]

Privileged Persons

The privileged persons are the client, the attorney, and the agents of the attorney for the purposes of the representation and rendering legal advice.

The attorney-client privilege requires that one party to the communication be an attorney. Although that is an obvious statement, issues arise when the attorney is in-house counsel. While communications regarding legal assistance between the corporation's employees and in-house counsel are privileged, this does not mean that every document sent to or received from the attorney is sacrosanct. When the in-house attorney is acting as a manager or working on business matters, no privilege attaches. Nor does copying the attorney on every corporate document provide any protection. In one case, the corporation went so far as to instruct that, "any written correspondence you author, whether by letter, memo, Excel spreadsheet, e-mail, etc., should be directed to [the attorney] at least as one of the recipients) to assure that the attorney-client privilege is retained."[5] It did not take long for the court to reject that attempt.

When the "client" is an institution, an issue exists as to just which individuals in the company are entitled to have privileged communications with the attorney. Generally, one of two tests is applied. One is the whether the individual is a member of the "control group." Does the individual have the authority to control or play a substantial role in the determination of the company's actions? The second test, the "subject matter" test, is the majority rule, applicable in federal courts and most states. The subject matter test requires that the communication be made by a company employee for the purpose of seeking legal advice, be made pursuant to direction of the employee's manager/superior and the subject matter of the communication be within the scope of employment.

However, even under the "subject matter" test, care must be taken to show that a communication from a lower-level employee is pursuant to a specific managerial request for the purpose of the institution obtaining legal advice.

As noted above, the privilege belongs to the client. Therefore, whether the client is the corporation, the individual, or both, controls who may waive the privilege. With a large institution, the presumption is that the attorney is representing the officer in a corporate capacity and it will be difficult, but not impossible, to show the contrary. However, with a closely held corporation it is somewhat easier to say the individual is the client. As one court said, "When an individual, who is also the principal of a corporation, seeks personal legal advice, the attorney-client privilege cannot be waived by corporation merely because corporate matters are also discussed."^[6]

When the attorney deals with other professionals regarding a client, the communications are only protected by the attorney-client privilege if the communication is necessary for the attorney to render legal advice. Where the expert's role is to assist the attorney in understanding facts so as to render legal assistance, the information exchanged is protected.

"Information exchanged with the accountant is protected if it is shown that (1) the accountant was consulted, in confidence, for the purpose of obtaining legal advice from the lawyer, and (2) the communications between the accountant, client, and the lawyer are reasonably related to the purpose of obtaining confidential legal advice from the lawyer."^[7] On the other hand, where the accountants were providing tax and business advice to an in-house attorney (who was also Vice-President for Taxes), no privilege existed even though the communications had some legal aspect.^[8]

[1] *George v. Siemens Indus. Automation, Inc.* 182 F. R.D. 134, 139-40 (D.N.J. 1998).

[2] *Fisher v. United States*, 425 U.S. 391, 403 (1976).

[3] *Restatement, The law Governing Lawyers* § 118 (1988).

[4] *Fisher v. United States*, 425 U.S. 391, 403-404 (1976).

[5] *Bell Microproducts, Inc. v. Relational Funding Corp.*, 2002 WL 31133195 (N.D.Ill., September 25, 2002).

[6] *In re Tippy togs of Maimi, Inc.*, 327 B.R. 236, 239 (Bankr. S.D.Fla. 1999).

[7] *Aull v. Cavalcade Pension Plan*, 185 F.R.D. 618, 628 (D. Colo. 1998).

[8] *Black & Decker Corp. v. United States*, 219 F.R.D. 87 (D.Md. 2003).

About the Author:

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