Protecting Privileged, Attorney-Client Communications: Vigilance Required

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Insurance disputes give rise to unique concerns when it comes to protecting attorney-client communications. That's because attorneys often become involved long before suit is filed – i.e., during the claims process for coverage advice or to assist with investigations. As a result, confidential communications frequently pepper the file. And, after the company is sued, these communications often end up at issue in discovery.

Ordinarily, communications about legal matters between a company and its counsel are protected. Fostering full and frank discussions relating to facts and strategies concerning legal matters and safeguarding them still remains a core, evidentiary principle. Such communications, however, are subject to certain limitations. For example, otherwise routine communications between company officers or employees transacting the company's business do not attain privileged status solely because in-house or outside counsel "gets copied" on correspondence or a memo. *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal.App.4th 110, 119 (1997). In addition, insurance companies cannot shield an unprivileged fact – as opposed to a communication – from discovery merely because it was included in a communication involving an attorney. *Triple A Machine Shop, Inc. v. State of California*, 213 Cal.App.3d 131, 143 (1989). Further, the privilege does not apply when an attorney takes off his "legal hat" and dons his non-legal one – such as business advisor, negotiator, or claims adjuster. *2,022 Ranch, L.L.C. v. Superior Court*, 113 Cal.App.4th 1377, 1397-98 (2003).

Non-lawyer Company Communications Discussing Legal Advice

Courts, of course, must determine the application of the privilege in each case on an issue-by-issue and document-by-document basis. *Zurich American Insurance Co. v. Superior Court*, 155 Cal.App.4th 1485 (2007) sheds some light on how the privilege applies to an insurance company's secondary communications. Secondary communications are ones between corporate employees that are neither to nor from an attorney, but which discuss legal advice. In *Zurich*, the insurer objected to producing documents containing internal litigation plans and strategies. The discovery referee, however, concluded that only documents containing direct communication to or from counsel are privileged – "[t]he fact that many of the disputed items contain [a] discussion of legal matters, strategy, and status of the bad faith litigation cannot be used to cloak them [as privileged]." The trial court adopted the referee's recommendation. *Zurich* at 1491-92.

The "Need to Know" Standard

The Court of Appeal reversed, reasoning that "[i]t is neither practical nor efficient to require that every corporate employee charged with implementing legal advice given by counsel for the corporation must directly meet with counsel or see verbatim excerpts of the legal advice given." *Zurich* at 1498. The appellate court instituted a two-step process to determine whether communications among non-lawyer corporate employees about the

company's legal strategy are privileged: (i) does the document contain a discussion of legal advice or strategy and (ii) if so, was the non-lawyer, employee communication of the advice or strategy "reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer was consulted"? *Id*. at 1503. If the communication was reasonably necessary, the document is privileged. But if not, the privilege is waived.

The *Zurich* court's expansion of the attorney-client privilege to non-lawyer-employee, corporate communication is good news for insurance companies. But, as a practical matter, it requires vigilance. A person's natural desire to share information – especially via an e-mail's "cc" function – must be put in check. Such sharing of legal advice or strategy outside the circle of those employees who really "need to know" will waive the privilege, and the document will lose its protected status.

In addition to training and reminding non-legal employees to ask themselves whether the person with whom they are sharing legal advice really needs to know it, insurance companies should also consider advising their officers and employees of the following:

- Routine communications between company employees concerning the company's business do not attain privileged status simply by "copying" it to in-house or outside counsel;
- Facts – as opposed to communications – are not protected simply by inserting them into a document involving counsel;
- Attorney-client communications are not protected when the lawyer acts in a non-legal capacity – i.e., giving business advice, negotiating, or acting as a claims adjuster or investigator;
- Communications discussing legal advice or strategy should not be passed on to those who do not "need to know"; and
- If the company discovers that legal advice or strategy was inadvertently shared with someone outside the "need to know" circle, it should promptly recover any written communication and record its attempts to retrieve such documents and caution the non-need-to-know employee not to share his or her knowledge of the communication's contents with anyone.

Developing and disseminating guidelines that incorporate these points will help ensure that a company's confidential communications stay that way - confidential.

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