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What's Protected?

Recent Developments Regarding the
Attorney-Client Privilege and Experts



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What's Protected?

Recent Developments
Regarding Expert Reports and
Communications with Experts

Fed. R. Civ. P. 26(a)(2) & 26(b)(4): Experts

Significant changes effective December 1, 2010 regarding:

- What kinds of experts must provide written reports
- Whether draft reports of experts are protected from discovery
- Whether expert-attorney communications are protected from discovery

What's New?

Can expert simply draft report and send to outside counsel (OC) and you (in-house counsel) for thoughts and comments, without worrying that every draft is discoverable?

Draft Reports

Can expert draft report and send to OC and you (in-house counsel) for thoughts and comments, without worrying that every draft is discoverable?

Answer: Yes.

Rule 26(b)(4)(B) says 26(3)(A)&(B) now “protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.”

What's New?

You know it's faster (and cheaper) for your OC to communicate with experts about some things by e-mail v. by phone or in person. Are those e-mails generally protected now?

Attorney-Expert Comm's

You know it's faster (and cheaper) for your OC to communicate with experts about some things by e-mail v. by phone or in person. Are those e-mails generally protected now?

Answer: Generally, yes.

Rule 26(b)(4)(C) says 26(3)(A)&(B) now “protect communications between the party’s attorney and [retained experts], regardless of the form of the communications,” with three exceptions regarding:

1. the expert’s compensation
2. “facts or data” that attorney provides and that expert considers
3. assumptions the attorney provides and that expert relies on

What's New?

In the past, you and your OC have purposefully retained two experts in the same specialty, one to brainstorm freely with you (without fear of discovery) and another to testify. Do you still need to retain two experts in each area expertise, for that reason?

Freedom to Brainstorm

In the past, you and your outside counsel have purposefully retained two experts in the same specialty, one to brainstorm freely with you (without fear of discovery) and another to testify. Do you still need to retain two experts in each area expertise, for that reason?

Answer: No.

That efficiency concern is explicitly discussed in the commentary as a reason for these new Rules.

What's New?

Can you, as in-house counsel, have protected communications with an expert under the newly amended Rule?

In-House: “Party’s Attorney”

Can you, as in-house counsel, have protected communications with an expert under the newly amended Rule?

Answer: Yes, unless an exception applies.

Commentary says “communications with in-house counsel for the party would *often* be regarded as protected even if the in-house attorney is not counsel of record in the action.”

Commentary anticipates a “pragmatic application of the ‘party’s attorney’ concept.”

What's New?

You have a lot of repeat litigation about a particular product, and you use the same expert in lots of those cases, where you may have different law firms representing your company. Are communications between that expert and those various law firms protected?

Repeat Litigation Experts

You have a lot of repeat litigation about a particular product, and you use the same expert in lots of those cases, where you may have different law firms representing your company. Are communications between that expert and those various law firms protected?

Answer: Yes, unless an exception applies.

Commentary specifically lists “repeat expert” scenario as an example.

What's New?

You find that experts' bills are a lot more reasonable when the expert can use assistants to gather facts, draft reports, communicate with counsel, etc. Do the new protections for attorney-expert communications apply only to the expert who testifies, or also to his assistants?

Experts' Assistants

You find that experts' bills are a lot more reasonable when the expert can use assistants to gather facts, draft reports, communicate with counsel, etc. Do the new protections for attorney-expert communications apply only to the expert who testifies, or also to his assistants?

Answer: The latter.

Per the commentary, "Protected 'communications' include those between the party's attorney and assistants of the expert witness."

What's New?

You have a number of cases in federal court that were filed before Dec 1, 2010, in which experts are drafting reports. Any chance that the new protections for expert draft reports and communications could apply to those cases?

Pre-Dec 1, 2010 Cases

You have a number of cases in federal court that were filed before Dec 1, 2010, in which experts are drafting reports. Any chance that the new protections for expert draft reports and communications could apply to those cases?

Yes, if it's "just and practicable."

S. Ct.'s Order says new rules "shall govern all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending."

CIVIX-DDI, LLC v. Metropolitan Regional Info Systems, 273 F.R.D. 651 (E.D. Va. Mar. 8, 2011)

What's New?

Your OC hired Expert A first. Now, you've hired and designated Expert B, who is preparing his report. You'd like to invite Expert B to talk with Expert A, so his report will be more airtight and he'll be better prepared for his deposition. Any chance those communications could be protected?

Expert to Directed Expert

Your OC hired Expert A first. Now, you've hired and designated Expert B, who is preparing his report. You'd like to invite Expert B to talk with Expert A, so his report will be more airtight and he'll be better prepared for his deposition. Any chance those communications could be protected?

Answer: It's possible, but not in the Rule – be cautious.

National Western Life Ins. Co. v. Western Nat'l Life Ins. Co., No. A-09-CA.711 LY, 2011 U.S. Dist. LEXIS 21967(W.D. Tex., Mar. 3, 2011) (motion filed after discovery deadline)

- produced final report & e-mails between experts containing facts or data
- not required to produce draft reports and all e-mail communications between experts

What's New?

If you tell an expert that you'll send her more work if this case is successful, is that communication still discoverable?

Exception 1: Compensation

If you tell an expert in writing that you'll send her more work if this case is successful, is that writing still discoverable?

Answer: Yes.

Rule 26(b)(4)(C)(i) doesn't protect attorney-expert communications that "relate to compensation for the expert's study or testimony."

Commentary says this applies to communications about "additional benefits to the expert, such as further work in the event of a successful result in the present case."

The "objective" of this exception "is to permit full inquiry into such potential sources of bias."

What's New?

You and your OC have a great theory to support your position, and have found some support in the literature to support your theory, but your expert hasn't brought it up on her own. Can you share your ideas and literature without fear that those communications are discoverable?

Exception #2: Facts/Data from Attorney

You and your OC have a great theory to support your position, and have found some support in the literature to support your theory, but your expert hasn't brought it up on her own. Can e-mail that literature without fear that those communications are discoverable?

Answer: No, but there is a fuzzy area here.

Rule 26(b)(4)(C)(ii) says the new protections for attorney-expert communications do not apply to communications that “identify facts or data that the party’s attorney provided and that the expert **considered** in forming the opinions to be expressed.”

What's New?

What if you send the expert an article that you think is on point and then discuss with her whether or not you think that article is relevant to the case?

Relevance of Facts/Data

What if you send the expert an article that you think is on point and then discuss with her whether or not you think that article is relevant to the case?

Answer: Your discussion about whether the article is relevant should be protected, but this is a fine line to walk.

Per the commentary, the second exception “applies only to communications ‘identifying’ the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.”

What's New?

If you send that expert the article that you think is so helpful, and he reviews it but doesn't agree, does he still have to produce that article to the other side?

“All Facts/Data Considered”

If you send that expert the article that you think is so helpful, and he reviews it but doesn't agree, does he still have to produce that article to the other side?

Answer: Probably.

Expert must produce everything she “considers,” not just what she “relies on” in forming opinions.

What's New?

Sometimes it's more efficient – even necessary – to tell an expert in one specialty to “assume” the correctness of another expert's conclusions. If your OC does that, is that still discoverable?

Exception #3: Assumptions Relied On

Sometimes it's more efficient – even necessary – to tell an expert in one specialty to “assume” the correctness of another expert's conclusions. If your OC does that, is that still discoverable?

Answer: Yes, if expert relies on the assumption.

Rule 26(b)(4)(iii) doesn't protect communications that “identify assumptions that the party's attorney provided and that the expert **relied on** in forming the opinions to be expressed.”

But per commentary, you can still have protected discussions with an expert “about hypotheticals, or exploring possibilities based on hypothetical facts,” that “are outside this exception.”

What's New?

Can you share attorney-client privileged materials (or attorney work product, such as an event timeline or chronology, summary of records) with an expert, without waiving the privilege attaching to those materials?

Waiving Privileges/Protections

Can you share attorney-client privileged materials (or attorney work product, such as an event timeline or chronology, summary of records) with an expert, without waiving the privilege attaching to those materials?

Answer: No.

Doing that could still waive the privilege/protections for what you've shared.

What's New?

You often use non-retained testifying experts in your cases, like treating physicians, government accident investigators, and company employees who don't regularly testify as experts. Do you still have to get a detailed written report from such witnesses?

Non-Retained Disclosures

You often use non-retained testifying experts in your cases, like treating physicians, government accident investigators, and company employees who don't regularly testify as experts. Do you still have to get a detailed written report from such witnesses?

Answer: No.

Rule 26(a)(2)(B)&(C): With non-retained experts, you just have to provide summary disclosures of the “subject matter on which” he’s testifying and a “summary of the facts and opinions” he’s expected to testify on.

Counsel can draft, but expert should review & approve.

What's New?

With these non-retained experts, are there any protections for draft reports or attorney-expert communications?

Non-Retained Protections

With these non-retained experts, are there any protections for draft reports or attorney-expert communications?

Answer: Yes and no.

Their draft reports are fully protected, just as retained expert draft reports are. But the amendments to Rule 26 don't protect most attorney communications with these experts.

What's New?

How will these new, protective rules hamstring your OC's ability to vigorously examine opposing experts?

Examining Experts

How will these new, protective rules hamstring your OC's ability to vigorously examine opposing experts?

Answer: They won't. Your lawyers can still fully explore "the opinions to be offered by the expert or the development, foundation, or basis of those opinions," for example:

- testing of materials and notes of testing
- communications expert had with anyone other than party's counsel
- alternative analyses, testing methods, or approaches to the issues and whether the expert considering them in forming opinions

What's New?

Is there any catch-all exception that allows your OC to discover an opposing expert's draft reports or communications with opposing counsel, notwithstanding all these new rules?

Catch-All Exception

Is there any catch-all exception that allows you to discover an opposing expert's draft reports or communications with opposing counsel, notwithstanding all these new rules?

Answer: Of course! But it “will be rare” for a party to make the required showing here.

Rule 26(b)(3)(A)(ii) allows you to discover this info if you have “substantial need for the materials to prepare [your] case and cannot, without undue hardship, obtain their substantial equivalent by other means.”

What's New?

You have a lot of cases in NC state court. Any chance that these new protections for expert-attorney communications (and draft reports) could apply to those cases?

State Court Application?

You have a lot of cases in NC state court. Any chance that these new protections for expert-attorney communications (and draft reports) could apply to those cases?

Answer: Yes, if you can get the parties to agree to it.

Ask the parties and see if the court will permit in the DSO.

What's Protected?

Recent Developments Regarding the Attorney-Client Privilege

Fed. R. Evid. 501: Privilege in General (Effective December 1, 2011)

The common law—as interpreted by the United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Elements of the Attorney-Client Privilege

1. The asserted holder of the privilege is or sought to become a client;
2. The person to whom the communication was made
 - (a) is a member of the bar of a court, or his subordinate and
 - (b) in connection with this communication is acting as a lawyer; and
3. The communication was for the purpose of securing an opinion on law, legal advice, or assistance in a legal proceeding.

A few exceptions to maintaining privilege:

1. The communication was made in the presence of strangers.
2. The communication was for the purpose of committing a crime or tort.
3. The client waives the privilege.

See U.S. v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

Privileged or Not??

Communications to and from an in-house attorney, who is not currently authorized to practice law in any state?

Privileged or Not??

Communications to and from an in-house attorney, who is not currently authorized to practice law in any state?

Answer: It Depends.

See Gucci Am., Inc. v. Guess?, Inc., 09 Civ. 4373 (SAS), 2011 U.S. Dist. LEXIS 15 (S.D. N.Y. Jan. 3, 2011).

Gucci Am., Inc. v. Guess?, Inc., 09 Civ. 4373 (SAS), 2011 U.S. Dist. LEXIS 15 (S.D. N.Y. Jan. 3, 2011).

Discovery dispute over whether communications to Gucci's in-house counsel, Moss, were privileged. Moss was an inactive member of the California Bar at the time of all communications identified on privilege log. Guess? demanded that Gucci produce all of Moss' communications because Moss was not covered by the privilege.

Gucci Am., Inc. v. Guess?, Inc., 09 Civ. 4373, 2011 U.S. Dist. LEXIS 15 (S.D. N.Y. Jan. 3, 2011).

Background of In-House Counsel

- 1993 – Graduated from law school;
- 1993 – Passed California Bar;
- 1994 – Became member of bars of S.D. Cal. and C.D. Cal.;
- 1996 – Voluntarily changed California Bar status to inactive;
- 2002 – Hired by Gucci as in-house counsel (working in N.J.);
- 2008 – Promoted to Vice President, Director of Legal and Real Estate.

Implications

This is a bar specific issue. An attorney who is inactive may not be considered a member of the bar and communications with that attorney may not be protected. To properly assert privilege, make sure in-house attorneys with “inactive” status are considered as members of a court’s bar. Still, however, the reasonable belief standard does provide some protection to corporations.

Privileged or Not??

An email between two non-attorney employees discussing company operations and carbon copying the in-house attorney?

Privileged or Not??

An email between two non-attorney employees discussing company operations and carbon copying the in-house attorney?

Answer: Not.

See Pownell v. Credo Petroleum Corp., Civ. A. No. 09-cv-01540-WYD-KLM, 2011 U.S. Dist. LEXIS 35869 (D. Colo. Mar. 17, 2011).

Pownell v. Credo Petroleum Corp., Civ. A. No. 09-cv-01540-WYD-KLM, 2011 U.S. Dist. LEXIS 35869 (D. Colo. Mar. 17, 2011).

Dispute over whether the attorney-client privilege applied to an email exchange between non-attorneys, where in-house counsel was a carbon copy recipient. Defendants argued that adding counsel was a solicitation of advice or direction with respect to the company's rights and obligations.

Court held that defendants did not carry their burden of establishing that the email exchange was protected by the attorney-client privilege. The email exchange was primarily a business communication between corporate directors and not a solicitation of legal advice.

Iowa Pac. Holdings LLC v. Nat'l R.R. Passenger Corp., Civ. A. No. 09-cv-02977-REB-KLM, 2011 U.S. Dist. LEXIS 45879 (D. Colo. Apr. 21, 2011).

Court addressed whether certain non-attorney emails were privileged. The Court held that “where an attorney was merely carbon copied on an email, and there is no further proof that an attorney was included for the purpose of seeking legal advice, an *in camera* inspection is necessary.”

Henderson Apartment Venture, LLC v. Miller, Case No. 2:09-cv-01849-HDM-PAL, 2011 U.S. Dist. LEXIS 40829 (D. Nev. Mar. 31, 2011).

“In-house counsel is the last person listed on the courtesy copy line of the e-mail. Nothing in the e-mail suggests that legal advice is being solicited from counsel. No question is posed to counsel in the e-mail. No statement is made that any of the statements are the result of legal advice being communicated to a team of in-house personnel. Rather, as the description itself suggests, the e-mail seems to discuss Plaintiff's buy/sell strategy.”

Implications

The withholding party has to demonstrate that the client was seeking legal advice when copying the lawyer, and the court normally will conduct an *in camera* review in making this determination. In-house counsel should train their clients' employees to state in the email why they are sending a carbon copy to the lawyer.

Privileged or Not??

Lawyer's bills?

Privileged or Not??

Lawyer's bills?

Answer: It Depends.

See Hampton Police Ass'n v. Town of Hampton,
No. 2010-323, 2011 N.H. LEXIS 59 (N.H. Apr.
28, 2011).

Hampton Police Ass'n v. Town of Hampton, No. 2010-323, 2011 N.H. LEXIS 59 (N.H. Apr. 28, 2011).

Defendants argued that detailed descriptive billing entries were *per se* privileged from disclosure under attorney-client privilege.

Court noted that billing statements that provide only general descriptions of the nature of the services performed and do not reveal a subject of confidential communications with any specificity are *not* privileged.

The privilege may apply, however, to information in a billing record that reveals “the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law.”

Implications

Corporations should be careful that they do not *impliedly* waive privilege protection for their lawyers' bills by seeking attorney's fees from a third party under a fee-shift statute or contract.

Privileged or Not??

Communications that are disclosed to low level employees who did not need access to the information to carry out their work?

Privileged or Not??

Communications that are disclosed to low level employees who did not need access to the information to carry out their work?

Answer: Not.

See Traficante v. Homeq Serv. Corp., Civ. A. No. 9-746, 2010 U.S. Dist. LEXIS 80387 (W.D. Pa. Aug. 10, 2010).

Traficante v. Homeq Serv. Corp., Civ. A. No. 9-746, 2010 U.S. Dist. LEXIS 80387 (W.D. Pa. Aug. 10, 2010).

Dispute over whether redacted portions of a communication history document were covered by the attorney-client privilege. Plaintiff alleged that defendant waived any protections by allowing low level employees access to the redacted information.

Defendant admitted that low level employees entered notes on the communication history, but claimed that they could not access the entire history for a given loan.

Based on defendant's admission, the court held the defendant waived the attorney-client privilege because 'low level' employees who had no need for said information had access to it via the communication history document.

Implications

Courts do not often find that a company has waived the privilege through intra-corporate disclosure. It is even less likely for a court to decide so on the basis of mere access to information as opposed to actual disclosure.

Privileged or Not??

Documents attached to court pleadings accompanied by a disclaimer stating that the party does not waive the privilege that attaches to the filed documents?

Privileged or Not??

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Answer: Not.

See Curto v. Med. World Commc'n, Inc., No. 03 CV 6327 (DRH) (ETB), 2011 U.S. Dist. LEXIS 53228 (E.D. N.Y. May 11, 2011).

See Curto v. Med. World Commc'n, Inc., No. 03 CV 6327 (DRH) (ETB), 2011 U.S. Dist. LEXIS 53228 (E.D. N.Y. May 11, 2011).

Defendants' computer forensic expert searched plaintiff's company-issued laptop and uncovered two memoranda authored by plaintiff and addressed to the defendant company president. The defendants informed the Court of this discovery and the court found that the memoranda were protected by the attorney client privilege.

Defendants objected to the Magistrate Judge's decision. Plaintiff attached the documents in question to the opposition motion. In the supporting memorandum, plaintiff stated that the documents were included "as exhibits here only for the purposes of assisting in the resolution of Defendants' objections, and plaintiff specifically reserves and does not waive the privilege or immunity from disclosure that attaches to the documents included."

Defendants argued that the act of filing the documents on PACER and serving hard copies on the defendants waived any attorney-client privilege that may have attached to the documents.

See Curto v. Med. World Commc'n, Inc., No. 03 CV 6327 (DRH) (ETB), 2011 U.S. Dist. LEXIS 53228 (E.D. N.Y. May 11, 2011).

“Here, it appears that Plaintiff voluntarily (1) filed the April 2003 Memos on the publicly-accessible electronic docket, without undertaking to file the documents under seal or *in camera*, and (2) served copies of the April 2003 Memos upon Defendants’ counsel directly.

Indeed, Plaintiff has not asserted that the April 2003 Memos were inadvertently or mistakenly filed and served.

Moreover, Plaintiff has presented no case law or other legal authority – and the Court's own research uncovered none – to support the proposition that Plaintiff's disclaimer that she ‘specifically reserves and does not waive’ any applicable privilege would counteract or negate the effect of her voluntarily disclosing the April 2003 Memos to her adversaries.”

Implications

Despite a disclaimer attempting to avoid any adverse effects, disclosing privileged communications to any third party will normally trigger a waiver. Waiver can occur even if the privilege holder does not intend to waive the privilege, or does not appreciate that the disclosure might have that effect.

Questions?

Thank You