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Setting Sail with Attorney-Client Privilege

Keeping Confidentiality Afloat

A Refresher on Attorney-Client Privilege for In-House Counsel

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moderated by Frank Florio

Where are we sailing?

- The Basics of Attorney-Client Privilege and Work Product Protections
- Common Privilege Questions
- Tackling the New Florida Rules of Civil Procedure

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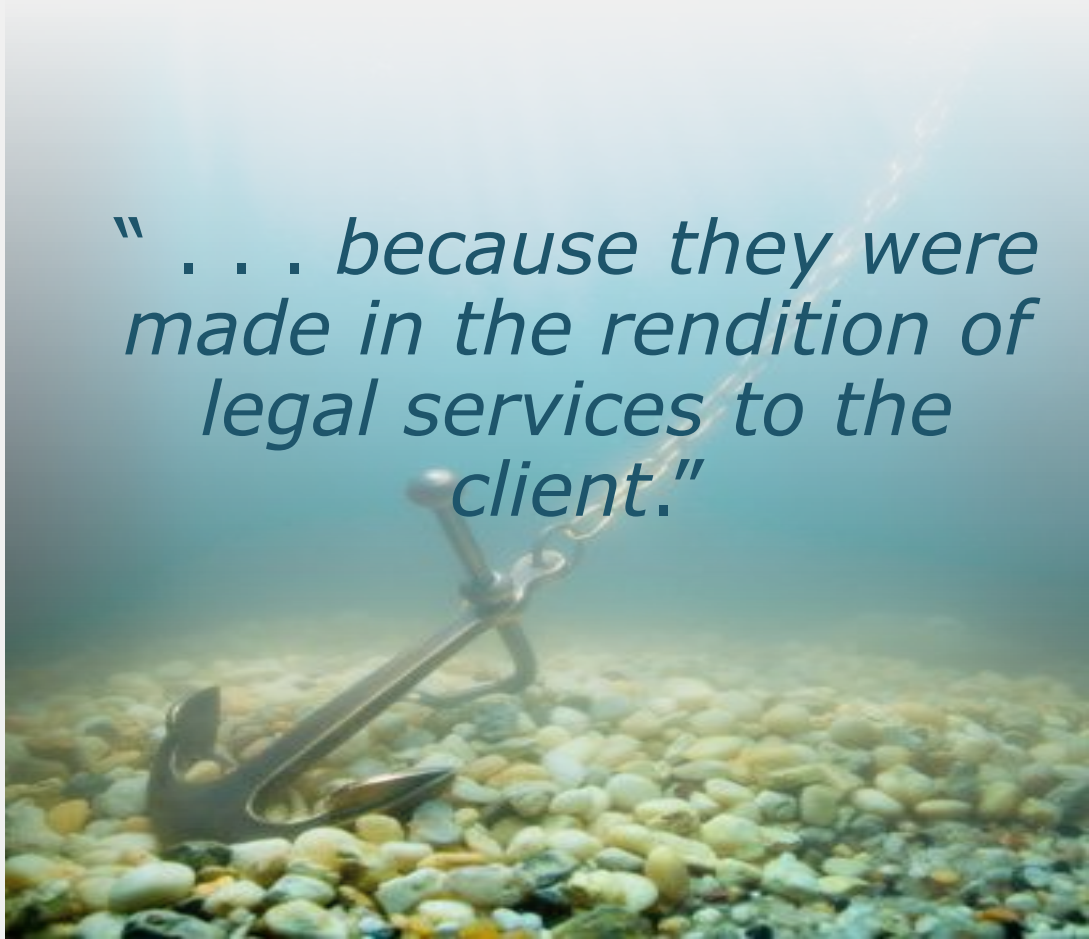
Attorney-Client Privilege

- **Four basic elements necessary to establish a claim of Attorney-Client privilege:**

1. Communication
2. Between a client and an attorney
3. For the purpose of seeking or providing legal advice
4. Made with expectation of confidentiality



Attorney-Client Privilege

- "Attachments which do not, by their content, fall within the realm of the [attorney-client] privilege ***cannot become privileged by merely attaching them*** to a communication with the attorney." *Our Children's Earth Found. V. Nat'l Marine Fisheries Serv*., 85 F. Supp. 3d 1074, 1088 (N.D. Cal. 2015)."

- *Doe v. Intermountain Health Care, Inc.*, 2021 WL 151090 (D. Utah Jan. 16, 2021): Even if the privilege covers the email, "attachments to the email are not privileged ***unless the attached document is privileged*** when the client created it."

- *Warren Hill, LLC v. Neptune Investors, LLC*, Civ. A. No. 20-452, 2020 U.S. Dist. LEXIS 161106, at *3 (E.D. Pa. Sept. 3, 2020), stating that "[a] document does not ***magically metamorphose*** into a document protected by the attorney client privilege simply because a client later sends it to his or her lawyer."

Documents should be reviewed using a "four corners" approach.

Are G.C. → Client Communications Privileged?

The Florida Supreme Court test:

(1) the communication would not have been made but for the contemplation of legal services;

(2) the employee making the communication did so at the direction of his or her corporate superior;

(3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;

(4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;

(5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Southern Bell Telephone & Telegraph Co. v. Deason, 632 So.2d 1377 (Fla.1994)

When is an attorney work product claim defensible?

- It is generally defensible to assert work product protection over documents and communications generated in anticipation of potential litigation.
  - The phrase "in anticipation of litigation" is broad.
  - This includes judicial proceedings, arbitration, mediation, administrative proceedings, government investigations, subpoenas, grand jury investigations, communication threatening litigation, on-going class actions or multiple jurisdiction matters, preparing a complaint, and internal investigations.
  - Legal advice NOT required.

Food for thought: if litigation is reasonably anticipated, has the Company issued a hold notice?

Common Privilege Questions for In-House Counsel

Why Did You Forward My Email?

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No, seriously, why did you forward my email...

- To your entire business unit?
- To our competitor?
- To our vendor?
- To your spouse?
- To your personal email account?

No, seriously, why did you forward my email...

The privilege is codified and protects confidential communications:

(c) A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than:

(1) Those to whom disclosure is in furtherance of the rendition of legal services to the client.

(2) Those reasonably necessary for the transmission of the communication.

Fla. Stat. Sec. 90.502

No, seriously, why did you forward my email…

"Florida courts do not apply a strict rule that counsel's inadvertent production alone waives the attorney-client privilege. Instead, courts consider the following factors in determining whether the privilege has been waived:

(1) **the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production**;

(2) the number of inadvertent disclosures;

(3) **the extent of the disclosure**;

(4) **any delay and measures taken to rectify the disclosures**; and

(5) whether the overriding interests of justice would be served by relieving a party of its error."

Nova Southeastern Univ. v. Jacobson, 25 So. 3d 82 (Fla. 4th DCA 2009)

What About Our Co-Defendants?

Common Interest Privilege

In most cases, a voluntary disclosure to a third party of the privileged material, being inconsistent with the confidential relationship, waives the privilege.

An exception to this general waiver rule, variously called the "common interests," "joint defense," or "pooled information" exception, enables litigants who share unified interests to exchange this privileged information to adequately prepare their cases without losing the protection afforded by the privilege.

Visual Scene v. Pilkington Bros, PLC, 508 So. 2d 437 (Fla. 3rd DCA 1987)

Common Interest Privilege

"**Common interests exception applies where the parties, although nominally aligned on the same side of the case, are antagonistic as to some issues, but united as to others**."

Visual Scene v. Pilkington Bros, PLC, 508 So. 2d 437

(Fla. 3rd DCA 1987)

- Considerations:
  - Formal "common interest agreement?"
  - What happens if one member of the group discloses the information to a non-member?
  - Are you protected if/when unity is lost? And how?

Is It Best to Use Outside Counsel For Sticky Issues?

A Recent Cautionary Tale

United States ex rel. Stan Ellis v. CVS Health Corporation, et al.,
Case No. 16-1582

1. CVS used an outside law firm to hire a consultant;
2. The consultant's ultimate purpose was to provide business advice to the company;
3. The law firm was used an "intermediary" on many, but not all communications between the company and the consultant; and
4. The court concluded that the law firm's role was a "ploy" to shield correspondence between CVS and the consultant from discovery.
5. Court also rejected CVS' work product claims.

What about internal investigations?

Same concept applies!

- Is the investigation for legal advice or business advice?

Challenges for In-House Legal Counsel in Preserving Privilege During Internal Investigations

- The common conundrum: is it legal advice or business advice?
- Involvement of non-legal personnel
- Risk of inadvertent disclosure
- The mechanics of maintaining privilege with employees
- How to preserve privilege for written reports and other documentation

The Rough Seas of the New Florida Rules of Procedure and Electronic Discovery

Don’t Get Thrown Overboard by the New Florida Rules of Civil Procedure

The Florida Rules of Civil Procedure were re-hulled effective January 1, 2025, adopting the Federal standard. The most relevant change for corporate counsel and clients is the new Initial Discovery Disclosure requirements.

Adopting the Federal standard, Rule 1.280(a)(1) now states that “a party must, without awaiting a discovery request, provide to the other parties . . . initial discovery disclosures unless privileged or protected from disclosure[.]”

- **When?** “Within 60 days after the service of the complaint or joinder[.]” (Rule 1.280(a)(3))
- **What?**
  - **Witnesses:** Individuals (and their contact information) the disclosing party would use to support its claims/defenses (and the subjects they are knowledgeable about);
  - **Documents:** Documents (including ESI), or descriptions of them by category and location, that disclosing party would use to support its claims/defenses;
  - **Damages:** Computation for each category of damages claimed by disclosing party and supporting documents/materials;
  - **Insurance policies:** Copy of any policy/agreement that might cover a possible judgment

  (Rule 1.280(a)(1))

Don't Get Thrown Overboard by the New Florida Rules of Civil Procedure

- **How?**
  - A party must make its initial discovery disclosures based on the information then reasonably available to it.
  - A party not excused from making its initial discovery disclosures because (i) it has not fully investigated the case, (ii) it challenges the sufficiency of another party's initial discovery disclosures, or (iii) another party has not made its initial discovery disclosures.
  - A party who formally objects to providing certain information is not excused from making all other initial discovery disclosures required by this rule in a timely manner.
- **Certification.** Initial disclosures must be signed by an attorney certifying "that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry" that the initial disclosure "is complete and correct as of the time it is made." (Rule 1.280(k)).
- **Sanctions.** If a certification violates the new rule without substantial justification, the court, on motion or on its own must impose an appropriate sanction on (i) the signer, (ii) the party on whose behalf the signer was acting, or (iii) both.
- **And after the disclosures?** Rule 1.280(g) requires supplementation of initial disclosures and discovery responses:
  - "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." (Rule 1.280(g)(1)).

How Not to Get Thrown Overboard by the New Florida Rules of Civil Procedure

- Early contact and communication with outside counsel and discovery counsel
- Early assessment of:
  - Key Individuals
  - Electronic Discovery and Documents
  - Damages
- Plaintiff or Defendant?

Prepare, research and document information early to streamline review.

Early Assessment of Key Individuals and Third Parties

- Ask the client for:
  - In-house counsel names and email addresses
    - Any role changes that could affect privilege analysis, e.g., Janice Smith was general counsel for the company from 2015-2020 prior to becoming CEO starting in 2021, etc.
  - List of outside counsel law firms or individuals engaged by the company
  - List of board of directors, their email addresses and years active
    - Email addresses are particularly important for directors from outside the company that may have external domains
  - Background on third parties that may have a special relationship with the company concerning privilege
    - Joint Defense or Common Interest Agreements?
    - Third parties engaged by counsel or for the purpose of litigation?
    - Third party agent or functional equivalent of an employee?

Role Description Defensive Discovery Counsel

Having one firm take on these types of tasks from case to case provides consistency across matters and reduces the cost of duplicative discovery work done by multiple firms (e.g., document review, redactions, and privilege logs), and reduces the burden on clients in researching relevant data sources and discovery histories. Where multiple matters are pending across the docket, having one firm handle discovery has additional benefits:

- Serving as a hub for defensive discovery between all participating merits counsel;
- Developing long-term strategies for document collection, review, and production, with an eye toward efficiency and consistency;
- Coordinating consistency in responding to discovery, including talking points for merits counsel; and
- Developing tracking mechanisms for merits counsel to work with discovery documents as they become exhibits in depositions, briefs, or trial.

The merits counsel relationship with discovery counsel is key to limiting burden on clients.

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