

“Help Me Help You”: What Your Trial Lawyer Wants You to Know About Privilege

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This paper reflects the personal views of the speakers in their individual capacity. It does not necessarily represent the views of McKool Smith, P.C. The information contained herein is intended for informational purposes only and should not be construed as legal advice or a substitute for obtaining legal advice from an attorney. Because of the possible unanticipated changes in applicable federal law, the speakers disclaim all responsibility for the legal effects or consequences for the interpretation of the information provided.

Introduction by “Jerry MaGuire”

What is Privileged?

Basic Elements of Privilege: A Checklist

- Confidential communication
- From client to counsel (or counsel's agent)
 - What about counsel's communication to client?
- To facilitate rendition of legal advice or service
- Not to further crime or tort
- Timely claimed
- Privilege not waived

Choice of Law Analysis is Critical

- Counsel should consider *prior* to communication
- U.S. Privilege Law
 - Federal privilege law
 - Circuits not uniform (e.g., patent related privileges, “common interest” privilege, etc.)
 - State privilege law
 - Which choice of law analysis?
- Foreign Privilege Law
 - Typically only counsel’s testimonial privilege
 - Privilege sometimes not extended to in-house counsel

How Do I Establish Privilege?

Critical Rules for Establishing Privilege

■ Pre-litigation rules

- Properly document privilege at time of communication
- Use privilege “legends” correctly
- Demonstrate selective internal distribution of privileged communications
 - E.g., break email “chains”

■ Post-litigation rules

- Prepare adequate privilege log
- Establish privilege with proof

Who Owns The Privilege [What “The Firm” Teaches]

*“and what if we should desire to terminate
your services at some point?”*

Who Owns the Privilege?

- Privilege belongs to the *company* – not its employees or even counsel
- Only the *company* can claim or waive privilege
- Examples of when this issue is important
 - Internal investigations
 - Former employees
 - Dissolved corporations

What is *Not* Privileged?

Common Mistaken Claims of Privilege

- *Facts* communicated between client and counsel
- Counsel's business advice
 - Bias against corporate counsel
- Draft letters, contracts, public filings and marginalia
 - Intended or actual disclosure to third party
 - Not legal advice or confidential communication
- Notes and memos to file
 - Reflects privileged communication or personal musings?
- Transmittal letters and fax cover sheets

The Boo Hoo Email

From: [REDACTED] (US/COO)
Sent: Tuesday, May 01, 2001 11:06 AM
To: [REDACTED]
Subject: RE: OUT OF BUSINESS

boo hoo

-----Original Message-----

From: [REDACTED]
Sent: Tuesday, May 01, 2001 11:08 AM
To: [REDACTED] (US/COO)
Subject: FW: OUT OF BUSINESS

Mike,

Looks like the Williams family backed-out

Bill



“Red Flags” for Corporate Counsel

- "Red Flags"
 - Counsel not predominantly voicing legal opinion or advice
 - Counsel fails to opine about applicable law or legal effect of corporate actions
 - Counsel fails to identify legal considerations for business alternatives
 - Document not marked properly "privileged and confidential"
 - Document disseminated widely within corporation
- General Rule of Thumb:
 - Privilege not likely if (1) communication would occur even if privilege did not exist or (2) non-legal objective is sufficient to stimulate communication

What is *Not* Privileged?

["Michael Clayton" Pop Quiz]

Memorandum #229

UNITED NORTHFIELD

55 RIVER DRIVE
OMAHA, NEBRASKA 68110
14031 155-8423

June 18, 1991

UNITED NORTHFIELD CALCIATE - INTERNAL RESEARCH MEMORANDUM #229

CONCLUSION: The unanticipated market growth for Calciate by small farms in golden climate demands immediate cost benefit analysis.

In home field studies have indicated that small, short-season farms dependent on well-water for human consumption are at risk for toxic particulate concentrations at levels significant enough to cause serious health/eye damage.

Calciate's great market advantage that it is tasteless, colorless and does not precipitate has the potential to mask and thereby cause potentially lethal exposures.

Chemical modification of the Calciate product - the addition of a detector molecule, such as an indicator or colorant - would require a top-down redesign of the Calciate manufacturing process. These costs, while assumed to be significant, were not enumerated here.

Clearly the release of these internal research documents would compromise the effective marketing of Calciate and must be kept within the protective confines of United Northfield trade secret language.

Andrew Madness
Research and Analysis

John Howard

James Sabojin

Don Hoffman

**Your “Work Product” Is Not
Our “Work Product”**

Distinctions Between Privilege and Work Product Doctrine

- Privilege protects your communications, but work product protects only your *trial* preparation
- Work product = “Prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative”
- Work product protection is not absolute
 - Party may obtain opponent’s non-opinion work product if (i) has “substantial need” and (ii) is “unable without undue hardship to obtain substantial equivalent”
- Work product claim generally belongs to attorney

Waiving Privilege
or
*“Seinfeld
Interpretative Theater”*

The Seven Deadly Sins of Waiver

- Accountants
- Legal fee auditors
- Insurance carriers
- Purchasers or sellers of corporate assets
 - Can I circumvent waiver via contract?
- Government agencies
- Parties with pre-litigation “common interests”
- Offensive use (i.e., “sword versus shield”)

A Final Caution

“Coulda, Woulda, Shoulda...”

- The “email age” changes everything
 - Think still in terms of typewritten letter
- Court will review regardless of whether privileged
- Anticipate opponent may review your “privileged” communications
 - Inadvertent production
 - “Sword versus shield”
 - Preparation for testimony
 - Simply not privileged
- “You’ve got to be kidding me” moments

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