

THE ATTORNEY/CLIENT PRIVILEGE

In the last edition of the Engineering Professional an article appeared on the subject matter of whether the State Bar of Wisconsin will be successful in persuading the Wisconsin Supreme Court to expand the definition of "unauthorized practice of law" to prohibit engineers and other non-lawyer professionals from giving legal advice to clients for compensation.

It is not my intention to take sides on this issue in this article and I expect that engineering professionals will continue to give legal advice to their clients as part of the practice of engineering as they have for decades. I have not read the State Bar's petition to the Wisconsin Supreme Court but I am advised that a supplement to that petition was filed on February 13, 2004. Nonetheless, I want to touch upon a related subject that is associated with the unauthorized practice of law issues, and that is the attorney-client privilege.

As most engineering professionals know, communications between attorney and client are privileged and not reachable under the law even by the subpoena power of the courts. Engineering professionals, as well as other professionals who give legal advice in the course of performing their professional services for clients, i.e., accountants, life insurance sales people, financial services industry representatives, retirement experts and a plethora of other associated professionals or semi-professionals in this complex age in which we live, do not enjoy the confidentiality of the attorney-client privilege. Accordingly, all such communications, oral or written, are susceptible to discovery through the use of the subpoena.

Not only are attorney-client communications strictly privileged from disclosure, the work performed by an attorney for a client constitutes the attorney's work product, and enjoys a qualified privilege. It is unavailable to the inquirer unless in litigation a court determines that the evidence is absolutely essential to a resolution of the issues pending before the court and the evidence is not available from any other source, creating an unacceptable hardship if privileged. Furthermore, the attorney's thought process enjoys an absolute privilege. Once the attorney-client privilege and the attorney's work product privilege is applicable, the client enjoys a most important legal right associated with the sanctity of the attorney-client relationship that permits complete communications between client and attorney without fear of discovery by other parties. That is a protection that will not exist where legal advice is given by non-lawyers.

One of the most frequently found areas where the lack of the privilege is overlooked is in communications between corporate client and consulting engineer. Those communications may relate to very sensitive environmental, financial, or proprietary matters, and while the client may participate in those communications with the erroneous belief that they are privileged, they are not. The consequences can be troublesome. Issues discussed may relate to regulatory matters, environmental and other liability exposure, proprietary secrets, prior knowledge issues, waiver of rights and a myriad of other areas of great concern to clients. Yet the communications are not privileged and what the client told the consulting engineer is discoverable. Sometimes, the client's lawyer will suggest that the engineering professional be hired by and report to the lawyer so that the engineer's work and communication is protected by the lawyer's work product privilege.

Even communications between an owner and an attorney are not always privileged. For example, where communications occur in the corporate environment, the privilege applies to legal communications between in-house counsel and officers, directors and others in the corporation who are in a control position, or have a substantial role in making legal decisions on behalf of the corporation. These people are known as the "control group." Other legal communications between in-house counsel and lower level corporate employees are not privileged unless the communications are made at the direction of members of the control group, or were within the scope of the employee's corporate duties, or the lower level employees were aware that they were being questioned so that the corporation could obtain legal advice, or where the communications were of such a nature as to be considered confidential when made and were kept confidential at all times by the company.

Where communications with in-house counsel are for a business purpose rather than in the rendering of legal advice, the attorney-client privilege does not exist. The United States Supreme Court has said:

“Unlike the situation where a client individually engages a lawyer in a particular matter, staff attorneys may serve as company officers, with mixed business-legal responsibility; whether or not officers, their day-to-day involvement in their employer’s affairs may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client’s consultation about a particular problem but with them, as part of an ongoing permanent relationship with the organization.”

The lawyer’s work product privilege can be lost or waived when it is not used strictly to protect the lawyer’s work product and thought process. For example, a selective disclosure of the attorney’s work product to other parties in the course of negotiating a dispute can result in a waiver of the entire work product. In addition, mixing business matters with legal matters and attempting to extend the privilege to business matters by using the attorney’s work product doctrine can result in a loss of the privilege which protects the attorney’s work product. Furthermore, a document which may otherwise be a product of an attorney’s work efforts cannot be used offensively to support the client in a disputes proceeding without losing the privilege.

Clients often hire consulting engineers to conduct internal investigations of technical matters such as environmental emissions with the laudatory purpose of developing a plan to address those environmental issues. In the course of the internal investigation, damaging evidence may be uncovered which may render the client criminally and civilly liable under the state and federal laws applicable to environmental protection. That evidence and the communications occurring in the course of that internal investigation may be fully discoverable if not otherwise protected by the attorney’s work product privilege.

Documents prepared in anticipation of litigation, whether offensively or defensively, are privileged if they are prepared for the attorney. However, if they are arguably prepared for purely business purposes but have a value for litigation purposes, the privilege may not apply. It must be fairly said that the document was prepared because of the prospect of litigation in order for the attorney’s work product privilege to apply. Yet if the document or work is prepared truly in anticipation of litigation it will be privileged in spite of the fact that it assists the client in the making of a business decision.

It is even doubtful that the client may protect the attorney-client communication privilege or the attorney’s work product privilege by making limited disclosure to regulatory agencies. Most courts have held that any disclosure of privileged information to an agency of the government constitutes a waiver of the privilege. When a client calls in a consulting engineer to conduct an evaluation on the subject of whether certain regulatory violations may have occurred, the entire process is discoverable by the governmental agency. Even if the client hires a lawyer who in turn hires the consulting engineer to make the evaluation, the privilege may be lost if the client selectively provides the governmental agency with evidence clearing the client from any wrongdoing, while at the same time withholding evidence of wrongdoing. Such a selective utilization of the attorney’s work product will waive the entire privilege.

Central to this entire subject matter is the conclusion that only communications between client and attorney and the attorney’s work product in serving the client enjoy the privileges against disclosure. While this subject matter of the attorney-client privilege will not alter the view of the many professions relating to whether they may give legal advice as part of their professional service, it should be a subject matter kept clearly in mind by the engineering professional when discussing legal matters with and preparing documents for a client. Those discussions and documents will be discoverable under subpoena unless the engineering professional is assisting the lawyer in rendering legal assistance.

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