*Email Correspondence Is Not As Privileged As You Might Assume; Attorneys should practice the same caution they advise for their clients; In Practice The Daily Report (Fulton County GA) (Online) August 6, 2013 Tuesday*



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**BODY:**

Email is an innovative tool that has changed business by creating unprecedented productivity and efficiency. As with most innovations, however, email also has a downside. There is no shortage of examples of a poorly written email creating embarrassment or liability for companies. Part of the problem stems from the fact that, while email is technically a form of correspondence, most users treat email with the informality of a conversation. Users routinely write things in an email that they would never write on official company letterhead. This is ironic because the record created by mailing a dozen letters is far less permanent than the record created by sending only one email.

While attorneys regularly counsel their clients to approach email with caution, attorneys often ignore that advice in their own email correspondence. Frequently, this is because attorneys operate under the assumption that their emails are privileged and will never be subject to disclosure. As discussed below, however, that assumption is not always correct. There are numerous scenarios under which any attorney's email (even those rendering legal advice) will not be protected from subsequent disclosure. Therefore, when sending email, attorneys should exercise the same caution that they urge from their clients.

When the client waives privilege

It is well-settled that the privilege belongs to the client, not the attorney. As a result, the client has the power to waive the privilege, even if doing so is inconvenient, embarrassing or harmful to the attorney. This often comes into play in a fee dispute between the attorney and client. In such a dispute, the attorney will likely be required to produce to the client all of the attorney's internal email communications regarding the engagement. To the extent the attorney has made critical and embarrassing comments in those internal emails, they may undermine the attorney's fees claim.

Waiver of the privilege also can occur in connection with an internal investigation. In the context of such investigations, companies often decide to cooperate with regulatory or law

enforcement agencies by voluntarily disclosing privileged emails. Some courts have held that, where a company voluntarily shares its privileged communications with such agencies, the privilege is deemed waived for the purposes of future civil litigation asserted by third-parties.

Bankruptcy or receiverships

Bankruptcy is another context where otherwise privileged attorney-client emails might be disclosed. In Commodity Futures Trading Comm's v. Weintraub, regulators sought to subpoena privileged information from a bankrupt company. The bankruptcy trustee for the company agreed to waive the privilege, but the officers and directors of the company objected. The Supreme Court explained that "the right to assert the attorney-client privilege is an incident of control of the corporation and remains with the corporation." Thus, the Court concluded that the bankruptcy trustee's authority to act for the bankrupt company includes the authority to waive the company's attorney-client privilege, even as to matters that occurred prior to the bankruptcy.

This power to waive the privilege similarly has been applied to receivers. In S.E.C. v. Elfindepan, the Securities and Exchange Commission brought securities fraud claims against a company and its principals. When the receiver who was appointed for the company demanded production of certain privileged materials from the company's former attorney, the attorney objected on the basis of privilege. The court overruled that objection on the grounds that the receiver was entitled to assert (and waive) the privilege for the company. Thus, the attorney was required to provide that information to the receiver.

M&A transactions

Applying the rationale from Weintraub, numerous courts have held that the acquirer of most or all of a corporation's assets also acquires the right to assert the corporation's attorney-client privilege. Thus, where a corporation acquires all or substantially all of the assets of another corporation, the acquirer succeeds to the privilege as it relates to pre-closing legal matters. Some courts even have held that this includes legal advice regarding the acquisition. For example, in Medcom Holding Co. v. Baxter Travenol Labs, Inc., the acquiring company sued the selling company for fraud in connection with the sale of a subsidiary. The acquiring company claimed it was entitled to documents containing privileged communications between the subsidiary and in-house attorneys at the selling company regarding the transaction at issue. The court ordered production of those materials on the grounds that the privilege was transferred to the acquiring company as part of the transaction. The court explained that "parties who negotiate a corporate acquisition should expect that the privileges of the acquired corporation would be incident of the sale."

Conclusion

The foregoing examples are not intended to be exclusive. Rather, they are meant to illustrate that there are a myriad of scenarios under which any attorney's email (even those dispensing legal advice) might not be protected from production in the future. Attorneys should bear this in mind and exercise the same caution they urge from their clients when it comes to sending email.