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Not Every Communication With Your Attorney Is Privileged

The attorney-client privilege is one of the oldest privileges in the law. The privilege started out as a common law right but has since been codified in the Florida Evidence Code. As a general matter, the privilege protects private conversations between attorneys and their clients.

by Allen Levine and Darren Goldman

Courtesy photos

Allen Levine, left, and Darren Goldman, right, of Becker & Poliakoff.

The attorney-client privilege is one of the oldest privileges in the law. The privilege started out as a common law right but has since been codified in the Florida Evidence Code. As a general matter, the privilege protects private conversations between attorneys and their clients. But just because a conversation involves an attorney does not mean the conversation is automatically privileged.

Florida Statute Section 90.502 grants a client the "privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client." To satisfy the privilege, therefore, three requirements must be met: there must be a communication; the communication must have been intended to remain confidential; and the communication must have been made in the context of obtaining legal advice.

This seems relatively simple on its face, but in practice, determining whether the privilege applies is not as clear-cut. Whether something is a "communication" is rarely disputed, but the import of that communication often is. A common attack on the privilege is that a communication was not intended to be confidential. Talking to an attorney in the presence of a third party, for example, could destroy the privilege. Similarly, a communication involving information that no reasonable person would consider confidential could also result in forced disclosure. For instance:

- The facts surrounding when a client first retained an attorney is not confidential, even though the contents of that meeting may be;
- Names of internal reports are not confidential, though their contents may be;

- The fact that a patient received a referral is not confidential, though whether that referral came from an attorney or at an attorney's request would be;
- A lawyer forwarding to a client a non-privileged attachment to an email without any narrative is usually not confidential because no legal advice is given.

A good rule of thumb is that facts known by a client independent of any communication with a lawyer are not confidential, and do not become confidential just because they are discussed between the client and the attorney. The details of the specific conversation may be privileged, but the underlying facts are still subject to disclosure.

The other common attack on the attorney-client privilege is that the communication was not made in the context of obtaining legal advice. Simply having an attorney present during a conversation does not automatically shield the conversation from disclosure. Rather, the attorney must be acting as an attorney and providing legal counsel for the privilege to apply.

While this issue can arise in any context, it most often comes up in the business context, since corporations often rely on attorneys for business advice, and the line between business advice and legal advice can be blurry.

To that end, the Florida Supreme Court has laid out additional requirements for a corporation's communications to be privileged: the communication would not have been made but for the contemplation of legal advice; the employee making the communication did so at the direction of his or her superior, and the superior made the request as part of the corporation's effort to secure legal advice; the content of the communication relates to the services being rendered, and the subject matter is within the employee's duties; and the communication cannot be disseminated beyond those who need to know its contents. See *Southern Bell Telephone and Telegraph v. Deason*, 632 So.2d 1377 (Fla. 1994).

It is important to note that these requirements are *in addition to,* and not in lieu of, the standards set out in Florida Statute Section 90.502. Still, there are two key differences between the attorney-client privilege in the individual and corporation context that a corporation must be aware of.

First, unlike in the personal context where a privileged communication can have multiple purposes, for the privilege to apply in the business context, the communication must specifically have been made for legal purposes and would not have otherwise been made.

Second, whereas the privilege in the individual context applies to the client and those with a common interest, in the business context, the privilege is restricted to those with a "need to know." As a result of these additional requirements, a corporation must essentially rule out other purposes for the communication to justify why each person who became aware of the communication was included. Given these requirements, if a corporation is not careful, it can easily inadvertently waive its privilege.

Finally, it is worth emphasizing that despite the long history and respect for the attorney-client privilege, the burden rests with the party invoking the privilege. If a party intends to assert privilege, the party must be prepared to meet all the requirements of Florida statute Section 90.502—and the added requirements in the case of a corporation.

This is often done by describing the nature of the documents or communications at issue—without revealing the information itself—in such a way that the privilege's applicability can be assessed. In some cases, courts may even want to review the documents in camera out of sight of the party challenging the privilege assertion.

The attorney-client privilege is a shield designed to encourage full and frank communications between attorneys and their clients and promote observance of the law and administration of justice. But the privilege is not limitless, and the failure to fully understand its contours could result in forced disclosure of material information the party meant to keep confidential.

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