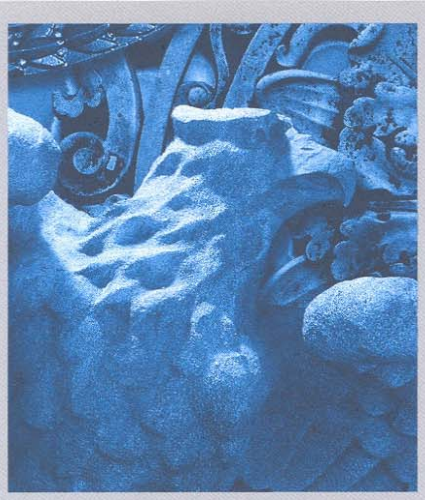

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The Attorney-Client Privilege:

Top Ten Lessons Learned From the Litigation Battlefield

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ACC-Greater New York Chapter

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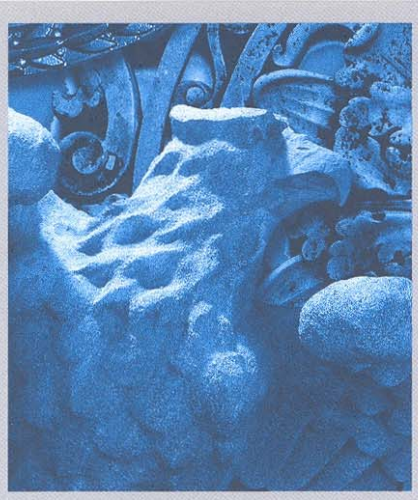

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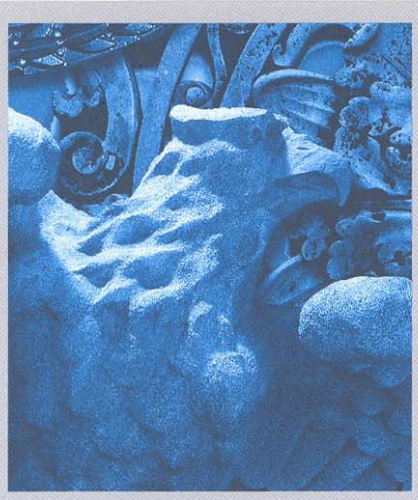
In law school, we spend only a few minutes during our Evidence course discussing the "attorney-client privilege." As law students, we are often left with the impression that the privilege is the lawyer's version of the confession box. Unless you invite a stranger into the room, "what happens in the box, stays in the box."

As practicing litigators, we quickly discover that the privilege is not quite so simple. We learn many lessons about the privilege while on the job – in producing documents, in defending depositions and in trying cases. We sometimes learn the hard way that our Evidence professor did not tell us the full story.

The following is our top ten list of lessons learned about the privilege and legal communications.

1. **Don't Mix Law and Business.**
2. **Leave Lawyering to the Lawyers.**
3. **Don't Put "Privileged and Confidential" on Everything.**
4. **Don't Think "Once Privileged Always Privileged."**
5. **Watch Those E-mail Chains.**
6. **Skip the "Reply to All" Button.**
7. **Be Careful What You Say About Judges.**
8. **Claiming the Privilege Can Cost Your Client "Brownie Points."**
9. **Think Twice When Using the Computer.**
10. **Use the Telephone.**



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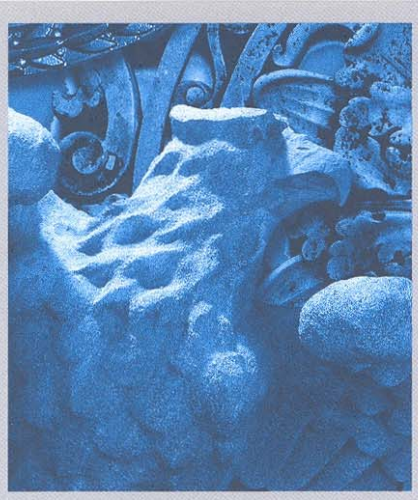
1. Don't Mix Law and Business.

Only certain communications between an attorney and his or her client are covered by the attorney-client privilege. The communication must be confidential and for the purpose of obtaining legal advice. The attorney-client privilege can be limited in its application to in-house counsel. It will only apply where the counsel is performing legal, as opposed to business, duties. *Sackman v. The Liggett Group, Inc.*, 920 F. Supp. 357, 365 (E.D.N.Y. 1996). The privilege may not apply when a lawyer is acting as a political advisor, public relations specialist, corporate officer, expert witness, accountant, tax preparer, investment advisor, or other non-lawyer roles.

In *Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, 1996 WL 29392, at *4 (S.D.N.Y. Jan. 25, 1996), the court refused to apply the attorney-client privilege where the in-house counsel was acting in a capacity as a business negotiator rather than as a legal advisor. Because the business advice, which involved environmental risks, was not accompanied by legal opinions, the privilege did not attach. Courts apply heightened scrutiny to communications between an in- house counsel and the counsel's clients because of the propensity to mix business and legal functions. Because in-house attorneys wear so many metaphorical "hats" during the course of their jobs, determining what function they are performing at any given time may prove difficult.

When confronted with a situation where a lawyer is engaged in a mixed legal-business communication, courts will apply the "primary purpose" test to determine whether the attorney-client privilege should be available. Thomas E. Spahn, *Business Lawyers: Listen Up*, ABA Section of Business Law, Volume 14, Number 5 (May/June 2005), available online at http://www.abanet.org/buslaw/blt/2005-05-06/spahn.shtml.

A good way to measure the primary purpose is to ask



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oneself if the acts performed require a law degree. Explicitly stating on a given communication that a document was prepared as part of the counsel's legal function in the company or in response to a specific request for legal advice is a good safeguard to preserve the privilege. It should be noted, however, that such conclusive statements will not be sufficient evidence to prove the privilege exists in a court of law.

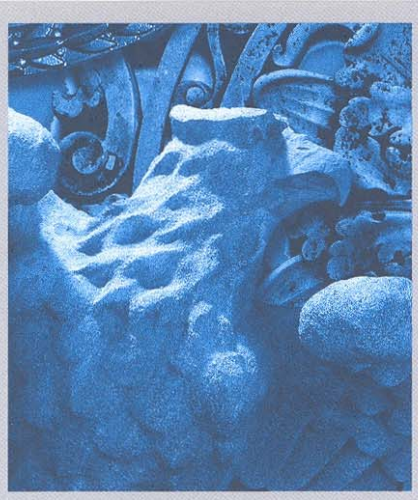
2. Leave Lawyering to the Lawyers.

Just because a non-lawyer talks about a legal issue, a memo or e-mail will not necessarily be deemed privileged. Whether or not the client is communicating with a lawyer, and especially if the client is not communicating with a lawyer, the client should not put on the "lawyer" hat if the client is not a lawyer. Employees should be directed not to use the following phrase in e-mails: "I am no lawyer but…". They should try to avoid expressing an opinion on liability unless they have been asked to do so.

Words such as "dangerous", "defective", and "unsafe" are potent, and should not be tossed around lightly. If an e-mail is going to be sent documenting a problem, the employee would be well advised to note the steps that have been taken to resolve it.

3. Don't Put "Privileged and Confidential" on Everything.

Not every communication between the lawyer and the client should be marked "privileged and confidential." The documents listed on a "privilege log" may be reviewed by the judge *in camera* if the adversary challenges the claim of privilege. If that designation is used when it is not appropriate, and the e-mails are added to the privilege log, the judge may lose confidence in the



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log. An e-mail to the general counsel setting up a golf game is not a good candidate for "Attorney-Client Privilege."

4. Don't Think "Once Privileged Always Privileged."

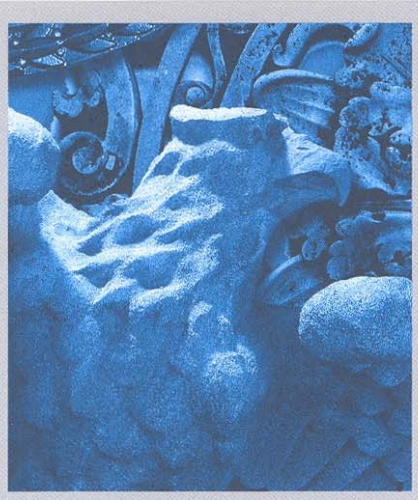
Corporate counsel must always keep in mind that the attorney-client privilege is not universally recognized. For example, there can be limits to the attorney-client privilege in congressional investigations. Jonathan P. Rich, *The Attorney-Client Privilege in Congressional Investigations*, 88 Colum. L. Rev. 145 (1988).

In 1857, Congress enacted a congressional contempt statute which states that anyone subject to a congressional investigation who refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor. 2 U.S.C. §192 (1982). Congress has an implicit right to compel testimony and explicit authority to establish its own rules. This combination "takes precedence over any subconstitutional requirements," and "the courts lack jurisdiction to interpose 'procedural' rules in a nonadversarial setting." Rich, *supra*, at 152.

Attorneys should keep this potential limit of the privilege in mind during their daily corporate activities. If one's corporation is the unfortunate subject of a congressional investigation, there may be no attorney-client privilege upon which to rely. *See In the Matter of Provident Life and Accident Co.*, E.D. Tenn., CIV-1-90-219 (June 13, 1990) (court's earlier ruling on an attorney-client privilege claim was "not of constitutional dimensions, and is certainly not binding on the Congress of the United States").

5. Watch Those E-mail Chains.

Any lawyer who has been involved in producing e-mails during discovery has encountered the nightmare of the e-mail



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chain. A privileged e-mail may be followed by a non-privileged e-mail. A privileged e-mail may have a non-privileged attachment.

While there are many benefits to e-mail chains, they can become a time-consuming (and therefore expensive) burden when it comes to reviewing and producing them to opposing counsel. They will have to be redacted, to the extent they contain privileged e-mails. And, if a privileged e-mail is attached to a non-privileged e-mail, there is a greater likelihood that a privileged e-mail will be inadvertently produced.

Take note when forwarding privileged e-mails. If a privileged e-mail is forwarded to a third-party to whom the privilege does not apply, the entire e-mail chain will lose its privileged nature.

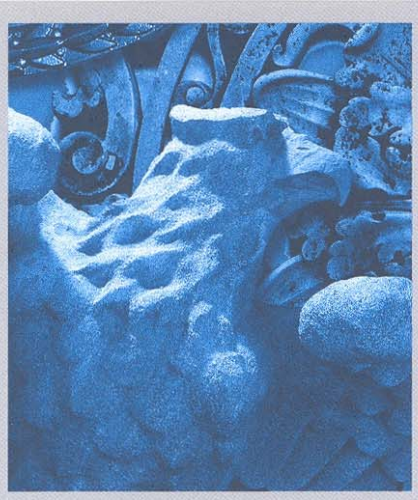
6. Skip the "Reply to All" Button.

In our daily communications, we too often "cc the world." Everyone who receives the e-mail becomes a potential witness. And, if privileged communications are involved, the more people copied the greater the risk that someone who is outside the protected group will receive the e-mail.

7. Be Careful What You Say About Judges.

Never assume that an otherwise privileged e-mail will never see the light of day. Even a privileged e-mail may be read by the court. Outside defense counsel would be well advised to limit negative comments concerning the court, and even their adversaries. It is entirely possible that the judge may some day read those comments.

For example, outside counsel are often asked to provide in-house counsel with "initial case assessments" in which outside



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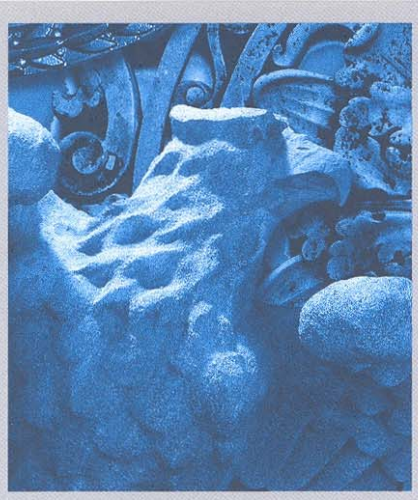
counsel are asked, among other things, to discuss the judge and the venue. The outside counsel might include in the report a statement such as "The Judge is stupid and totally biased against corporations. The Judge is owned by the plaintiff's bar." Down the road that report might appear on the "privilege log." Imagine the problems which will be encountered if the log is challenged by opposing counsel, and that judge asks to review the documents on the log *in camera*.

8. Claiming the Privilege Can Cost Your Client "Brownie Points."

While there is no forced waiver of the privilege, memoranda issued by the United States Department of Justice have urged corporations to waive their attorney-client privilege during prosecutorial investigations. These memoranda have created an impression that the waiver of the attorney-client privilege can be a significant factor in influencing a prosecutor's indictment decisions during corporate investigations.

The 2003 Thompson and the 2006 McNulty Memoranda insinuate that if general counsel want to convince prosecutors that their corporations are cooperative then they are strongly recommended to waive their corporation's attorney-client privilege. Graham, *New Memo Won't Ease Attorney-Client Privilege Concerns*, http://www.law.com/jsp/ihc/PubArticleFriendlyIHC.jsp?id=900005502997, Feb. 11, 2008.

The Thompson and McNulty Memoranda list nine factors prosecutors should consider when determining whether to bring criminal charges against a corporation. *Id.* One point states the corporation's "timely and voluntary disclosure of wrongdoing and



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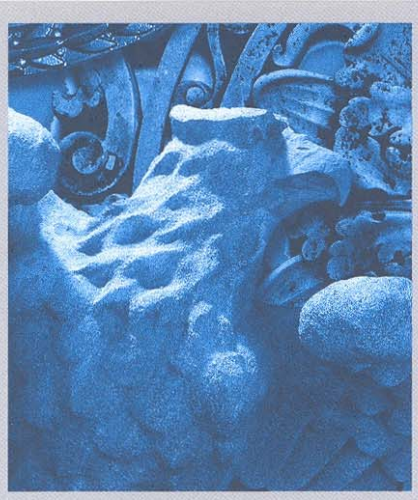
its willingness to cooperate in the investigation of its agents" shall influence the prosecutor's decision. *Id.*

In addition to prosecutors, other government agencies that often "request" waivers of attorney-client privilege include the SEC, antitrust or criminal fraud divisions of the Department of Justice, other federal agencies (e.g. DOL, EPA, HHS, FEC), and state attorneys general offices. "The Decline of the Attorney-Client Privilege in the Corporate Context," available online at http://www.acca.com/Surveys/attyclient2.pdf, at 6.

According to the recent survey by the Association of Corporate Counsel (in conjunction with other associations), almost 75% of both in-house and outside counsel believe that we are now living in a "culture of waiver" where government officials believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive the attorney-client privilege. *Id.*, at 3. In fact, one in-house counsel has gone so far as to say that "whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go. And, thus far, there appears to be no limit." *Id.*, at 5.

9. Think Twice When Using the Computer

Use of the computer itself can result in an inadvertent waiver of the privilege. If a computer system can be accessed by third parties, including the company itself, communications sent via the system may not be privileged. To determine whether the privilege is waived, there must be a subjective expectation that the communication remain confidential and an objective reasonable expectation that the communication remains confidential. *In re Asia Global Crossing Ltd.*, 322 B.R. 247, 257 (S.D.N.Y. 2005) applied a four factor test to determine whether the objective element is satisfied. That case held that in the absence of a computer monitoring program, the employee most likely has a



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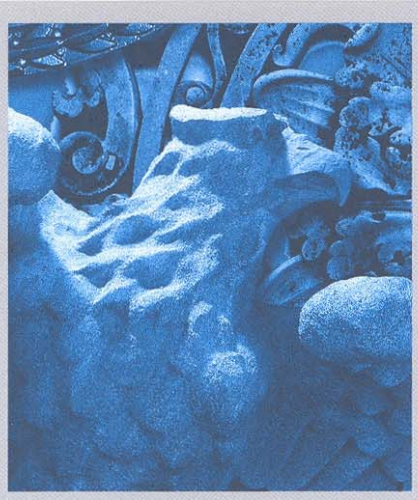
reasonable expectation of privacy. The factors to consider when determining if the objective element is met are:

- Does the company maintain a policy that bans personal or other objectionable use of its e-mail system?
- Does the company monitor the use of the employee's computer or e-mail system?
- Do third parties have a right of access to the computer or e-mails?
- Did the company notify the employee, or was the employee aware, of the use and monitoring policies?

In *Scott v. Beth Israel Med. Ctr. Inc.*, 17 Misc. 3d 934, 847 N.Y.S.2d 436 (N.Y. Co. 2007), the court found that there is no expectation of privacy where there is a "no personal use policy" combined with a policy allowing for monitoring and the employee has notice of the two policies. In that case, a physician sent e-mails to his personal attorney via his employer's computer system. There was a hospital policy in place that limited e-mail use to business purposes only. The physician claimed the attorney-client privilege protected his e-mails because the messages related to continuing litigation between the hospital and him. The court rejected this argument stating that the physician had no reasonable expectation of privacy.

This line of cases suggests that if one intends to send personal, confidential e-mails from a corporate e-mail account, she should inform herself of her company's e-mail and computer policies first. If the company has an e-mail monitoring policy in place, then an employee should not expect any personal e-mails sent from that account to be confidential or privileged.



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10. Use the Telephone.

Our most important lesson learned is that the lawyer and the client should not write anything he or she would not want to see on the front page of the newspaper. Before sending a written message it is always advisable to ask oneself "Should I commit this to writing?"

Many of our clients have learned the hard way that e-mails and instant messages are much more than a simple substitute for the telephone. They can create a permanent record of a flippant conversation which may have seemed to be innocent at the time, but can bury a company in a litigation.

And when speaking on the telephone, be careful. An Association of the Bar of the City of New York Ethics Opinion 1994-11 (1994) states that "A lawyer should exercise caution when engaging in conversations containing or concerning client confidences or secrets by cellular or cordless telephones and other communication devices readily capable of interception, and should consider taking steps sufficient to ensure the security of such conversations." These steps include being aware of the location of privileged conversations as well as who may be listening.