Attorney-Client Privilege and the US Discovery Process

By Steve Seltzer

Why should lawyers who practice law outside the US be interested in or need to know about 'attorney-client privilege' rules in the US? Because of how the privilege is applied and can impact litigation proceedings there. In our increasingly global business world, many lawyers outside the US may find themselves involved in US litigation – either directly or indirectly. In most countries outside the US, generally civil law jurisdictions, communications between attorneys and clients are subject to professional rules of confidentiality or secrecy and the protection of those communications is unlikely to be challenged. Communications covered by the attorney-client privilege in the US, however, are shielded from disclosure under rules of evidence which can be challenged.

One of the most noteworthy aspects of US litigation is the discovery process. This is the exchange of documents and other information between the parties to a case, usually before any trial or hearing. The Federal Rules of Civil Procedure (specifically 26(b)(1)) provide that parties may request from each other (and even from third parties) any relevant information that is 'non privileged.' The privilege is explicitly mentioned in this procedural rule since information covered by the attorney-client privilege is excluded from the universe of admissible evidence under US evidence rules. This exception to disclosure explains why US lawyers are so focused on labelling their written communications with wording such as 'Privileged and Confidential – Subject to Attorney-Client Privilege'. Common law jurisdictions outside the US have similar but less intense disclosure requirements within their litigation processes, and civil law jurisdictions have little or no process for mandatory disclosure of information to the opposing party.

It's no surprise that the majority of written information is now maintained electronically. The US litigation discovery process has evolved into 'e-discovery' – a multimillion dollar industry of third party vendors who specialise in processing emails and other electronic documents only for purposes of litigation discovery. Huge amounts of time and money are spent reviewing electronic information within the context of discovery, with one of the primary goals being to identify and withhold materials covered by attorney-client privilege.

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With that context in mind, it makes sense to outline the principles of US (federal) attorney-client privilege so that non-US lawyers understand which communications may fall within its scope. The privilege applies to (1) a communication between (2) an attorney and (3) a client, made (4) in confidence (5) for the purpose of seeking, obtaining or providing legal advice. The privilege operates much the same in state court systems within the US, though each state's specific laws should be consulted when a dispute is or may be litigated in a state court. All of these factors must be present to invoke attorney-client privilege. This means that not all conversations or writings between an attorney and client are covered by the privilege, rather only those intended to seek or receive legal advice.

A corporation may assert the attorney-client privilege and withhold information during the discovery process just the same as an individual. Generally, if an attorney representing a corporation in the US has a confidential communication with a corporate employee about a subject that is within the scope of employment (meaning his or her general duties and responsibilities on the job), then the communication is privileged. Note that in-house attorneys in the US have the same standing as outside counsel for the purpose of the attorney-client privilege, even though they are employees of the corporation rather than independent advisors.

Because communications covered under the attorney-client privilege are protected from US litigation discovery, corporate employees and their lawyers try to give very wide meaning to the privilege. Outside and internal counsel must be careful to separate legal advice from business advice because corporate employees (including high level executives) may, for example, believe incorrectly that simply adding a lawyer as a 'cc' to an email will make it privileged. Rather, the lawyer's role must involve giving actual legal advice or receiving a request for legal advice.

Corporate employees also must understand that they risk waiving the privilege if they share privileged communications with co-workers. Only employees who have a need to know about or be involved in the matter should be included in the attorney's communication chain. Those employees must be instructed not to share the communication, in writing or verbally, with other employees. When hundreds or thousands of documents, including emails, are being reviewed by legal counsel during the discovery process, the reviewers must determine which communications may fairly be put aside as protected from discovery requests. If an otherwise privileged communication from counsel has been directly forwarded from an employee recipient to a co-worker, that document will most likely lose its privileged status and cannot be withheld.

A final point that deserves to be highlighted is that US discovery can spill outside US borders. Many judges have ordered that documents be collected from outside the US and produced within the discovery process. Those lawyers outside the US, with at least a basic understanding of US litigation discovery and how the attorney-client privilege applies, will have an advantage.

GGI member firm
Moritt Hock & Hamroff LLP
Law Firm Services
Garden City and New York, NY, USA
T: +1 516 873 2000
W: www.moritthock.com
Steve Seltzer
E: sseltzer@moritthock.com