DON'T BE SO FORWARD

A Cautionary Tale for the Digital Age

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February 26, 2011, started as just another day for Timothy Fedele, senior vice president and general counsel of Excela Health, who was investigating the medical necessity of certain cardiology procedures performed by physicians at Excela's hospital in Pennsylvania. To assist in planning for and handling anticipated publicity from the results of that investigation, Excela had retained a public relations firm. On this day, Fedela received an e-mail containing legal advice about the matter from Excela's outside counsel. Consistent with his practice during the investigation, and with it coming to a close, Fedela forwarded counsel's e-mail to the public relations and crisis management consultant. The following week, Excela Health had a press conference during which it acknowledged the results of the investigation and named the doctors it believed may have performed procedures that were not medically necessary. A year later, those physicians filed a complaint seeking damages for defamation and interference with contract. Eight years later, the Pennsylvania Supreme Court held that by forwarding the e-mail to the third-party consultant, Fedela waived the attorney-client privilege for that communication. *BouSamra v. Excel Health*, 653 Pa. 365, 210 A.3d 967 (2019).

Even had the Court upheld the assertion of privilege over the e-mail, the years, time and expense litigating the issue highlight the dangers that accompany the ease of communication facilitated by the digital age. To many e-mail users, the "Reply All" option is the bane of their existence, filling their inboxes with messages copied to everyone possible to "keep them in the know." In terms of protecting privileged communications, however, the "Forward" button gives "Reply All" a run for its money. It's not just e-mail though. Each day brings an onslaught of new electronic communica-

tions that potentially contain privileged information, from texts to instant messages to chats in Zoom and Teams meetings. Often, this technology advances quickly and precedes updating information handling policies to deal with potential record creation.

A separate article could be devoted to exploring all of the ways people communicate electronically and the determination of which of those communications can be considered "documents" for purposes of discovery. This much is clear, however - failing to properly train and remind employees on best practices for electronic and other communications can make yours the next unfortunate name forever memorialized in a reported privilege decision.

UNDERSTANDING THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege has its roots in the common law and serves as the cornerstone to facilitating the free and open exchange of information between attorney and client to ensure effective legal representation. Generally speaking, four elements are required in order to fall under the protection of the privilege: (1) the person who would receive or received the legal advice is or sought to become a client; (2) the person to whom the communication was made was an attorney or a subordinate acting on the attorney's behalf; (3) the communication related to the securing or rendering of legal advice; and (4) the communication was confidential. The specific requirements of falling within the protection of the privilege vary by jurisdiction.

It is clear that certain communications to and/or in the presence of third parties may also be privileged if they were necessary to the attorney being able to provide legal advice to the client. For example, where the opinion of an accountant is required for an attorney to understand a client's tax issues and render advice, the presence of that accountant does not destroy the privilege. *See U.S. v. Kovel*, 296 F.2d 918 (2d. Cir. 1961). And information gathered by an accident reconstruction expert hired by an attorney to assist in preparing for litigation is also privileged. *See Commonwealth v. Noll*, 662 A.2d 1123 (Pa. Super. 1995). When third parties are involved, the focus is on the third-party's specific purpose and actions toward helping the attorney provide legal advice.

Once attached, the attorney-client privilege is absolute unless waived. If challenged, the party claiming privilege has the burden of proving that it was properly invoked. That burden must be carried with knowledge that courts view the assertion of privilege as an obstacle that stands in the way of truth gathering and not an inalienable right not to be questioned.

IN-HOUSE ATTORNEYS WEAR MANY HATS

Corporate counsel perform a variety of roles to serve their internal clients, including business and legal functions. They may also serve as de facto claims adjusters. Simply providing the in-house attorney with information (or, in the digital age, merely labeling e-mails as privileged or copying the attorney on e-mails) does not immediately cloak the communication within the protection of the attorney-client privilege. While specific standards vary by jurisdiction, it is clear that to be protected from disclosure, information must have been provided to the attorney for the primary purpose of seeking or providing legal assistance, or the advice given for predominately legal and not business purposes. And the communication must have been made for the client's need for legal advice or services. When the in-house attorney is involved in investigations, the privilege attaches when the investigation is related to providing legal services but may not where the attorney is simply monitoring claims.

THE *BOUSAMRA* PROBLEM

In forwarding the outside counsel e-mail to the third-party public relations expert, Fedela did not solicit its input, advice, or opinion in forming or facilitating legal advice for dealing with the results of the investigation. He appeared to have forwarded the message for information only. Had Fedela specifically sought the assistance of the consultant in determining how to proceed, the Court would likely have affirmed assertion of the attorney-client privilege.

THE WORK PRODUCT PRIVILEGE

Separately, Excela Health withheld the e-mail asserting the protection afforded by the work product doctrine, which protects documents prepared in anticipation of litigation and prevents disclosure of the mental impressions, conclusions, opinions and/or legal theories of a party's attorney concerning the litigation. In contrast to its decision that disclosure to a third party generally waives the attorney-client privilege, the Pennsylvania Supreme Court in *BouSamra* held that such disclosure did not automatically waive the work product privilege as long as the documents was not shared with an adversary or disclosed in a manner that increased the likelihood that an adversary would obtain it. The Court remanded the case for findings of fact on that issue.

BEST PRACTICES FOR THE DIGITAL AGE

Privileged documents were much easier to control and limit when documents were formal and existed only in hard copy. Technology has brought us copiers, scanners, mobile devices with cameras, and videoconferencing platforms with document sharing features, each of which multiply the ability to copy and transmit documents and information. Experience tells us that less formal communications carry the greatest risk for over dissemination. Internal policies must remind employees that digital communications are not different than, and must adhere to the same formalities of, formally written and printed documents.

What does this mean in practice? Assuming a phone call isn't an option of viable alternative, think before you write. Be purposeful when sending electronic communications, and especially when forwarding or responding to e-mails, considering each recipient and the purpose of including them. When communicating with an attorney or necessary third party about a privileged matter, add a header that the message is being sent subject to the attorney-client and work product privileges, and affirmatively state in the message why you are communicating with the recipient. In the end, privileged electronic communications must be written with the expectation that someone may eventually have to read it, determine its purpose, and conclude that you had intentionally sought or provided legal advice.

In addition, document management and information technology policies must be constantly reviewed and updated to include handling communications created by various platforms, and making those communications subject to your retention policies. Proper planning and execution will ensure that technology makes our lives better and easier, and not more complicated and unpredictable.

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