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TOP PLAINTIFFS BAR: ADDITIONAL INSIGHTS

When is a work email subject to the attorney-client privilege?

By Ivan Puchalt

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Is an email a privileged communication where an employee copies an attorney on the email at work but does not directly seek legal advice? This question arises frequently in litigation, and the answer depends on both the existence of an attorney client relationship as well as the dominant purpose of the communication. In one recent whistleblower retaliation case I handled, the alleged retaliator let his guard down – and arguably evidenced his retaliatory intent against my client – in emails where he likely assumed his communications would never see the light of day simply because he had copied attorneys. But as will be explained, merely copying an attorney, or pronouncing "attorney client privilege" on the subject line of an email, does not guarantee the communication will, in fact, be deemed a privileged communication.

Under Evidence Code section 954, a client has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: (a) the holder of the privilege; (b) a person who is authorized to claim the privilege by the holder of the privilege; or (c) the person who was the lawyer at the time of the confidential communication..." (Evid.Code § 954; *McAdam v. State Nat. Ins. Co.* (S.D. Cal. 2014) 15 F. Supp. 3d 1009, 1014). Such communications include legal opinions formed and advice given in the course of that relationship. (Evid. Code § 952; *Calvert v. State Bar* (1991) 54 Cal. 3d 765, 779.) The party claiming the attorney-client privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal. 4th 725, 733.) Once a prima facie claim of privilege is established, the communication is presumed to have been made in confidence and the opposing party has the burden to establish the communication was not confidential or that the privilege does not apply for other reasons. (*McAdam v. State Nat. Ins. Co.*, supra, at 1014.)

The defense will invariably argue that emails which copy attorneys, or which reference "attorney-client communication" in the subject line, fit squarely within the requirements of Evid. Code § 954. But that is only the beginning of the analysis.

First, the email must meet the definition of a confidential communication. A "'confidential communication between client and lawyer'" is statutorily defined as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Evid. Code, § 952 [emphasis added].) Based on this definition alone, many communications copying attorneys will not qualify for the privilege if there is no legal advice sought or given, and nothing is said to further the attorney-client relationship.

Next, assuming there is a "confidential communication," the focus of the privilege inquiry in California turns to the dominant purpose of the relationship between the parties to the communication. When the party claiming the privilege shows that the dominant purpose of the relationship between the parties to the communication was attorney-

client, the communication is protected by the privilege. (Costco Wholesale Corp. v Superior Court, supra, at 739-740.) To be privileged, the communication must "be made for the purpose of the attorney's professional representation, and not for some unrelated purpose." (*Id.* at 742 (C.J. George concur.opn.).)

It also goes without saying that for attorney-client privilege to apply, there must be an attorney-client relationship. It is not enough that one of the persons involved in the communication is a lawyer if that person is not acting in their professional capacity as a lawyer providing legal services. (*Edwards Wildman Palmer LLP v. Superior Court* (2014) 231 Cal.App.4th 1214, 1226.) No attorney-client relationship arises for purposes of the attorney-client privilege if a person consults an attorney for nonlegal services, such as where the attorney merely acts as a negotiator for the client, gives business advice, or otherwise acts as a business agent. (*Id.; accord League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976; *Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 117; *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1054.)

Further, the privilege "is strictly construed" because it prevents admission of relevant and otherwise admissible evidence. (*Behunin v. Superior Court* (2017) 9 Cal.App.5th 833; *see Uber Technologies, Inc. v. Google LLC* (2018) 27 Cal.App.5th 953, 967.) Transmission to or by an attorney does not create a privilege if none, in fact, exists. (*Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 176.) Sending a carbon copy (or "cc") of an otherwise non-privileged communication to an attorney does not necessarily render the communication privileged. (*See, e.g., In re Google, Inc.* (Fed. Cir. 2012) 462 Fed. Appx 975.)

Applying the above authorities to a real-world scenario, imagine the following. An employee emails the company's Compliance officer, copying in-house counsel, to complain that the plaintiff is not complying with policies. Assume the email also contains several false statements about the plaintiff intended to lead to adverse actions being taken against the plaintiff. If the Compliance officer can respond to the inquiry without using any legal training, and it is a matter of compliance with company guidelines, then this is not likely a communication seeking legal advice. Rather, it is seeking compliance advice, and the attorney-client privilege will not apply, regardless of whether an attorney is copied or the email is labeled "attorney-client privileged communication."

Defense attorneys would do well to counsel their clients not to assume an email is privileged simply because an attorney is copied, and Plaintiffs' attorneys would do well to not accept the assertion of a claimed privilege at face value without delving into the purpose of the communications and the relationships between the parties to the communication.

Ivan Puchalt *is a partner and catastrophic personal injury, insurance bad faith, products liability, wrongful death, and municipal liability attorney at Greene, Broillet & Wheeler LLP.*