ETHICS WATCH

The "Primary Purpose" Test for Application of the Attorney-Client Privilege

By Nathan M. Crystal

The standard elements for the attorney-client privilege are (1) a communication, (2) between privileged persons, (3) in confidence, (4) for the purpose of obtaining or providing legal assistance. See Restatement (Third) of the Law Governing Lawyers §68. In *Harrington v. Freedom of Info. Comm'n.,* 2016 Conn. Lexis 249 (2016), the Connecticut Supreme Court dealt with communications that involve a mixture of business and legal advice. In addition, the opinion considers a number of related issues, including when redaction of privileged material from an otherwise unprivileged communication would be appropriate, the application of the privilege when the communication is to or from a third party but the attorney is copied with the communication, and whether the privilege applies to communications by lawyer/lobbyists.

The opinion involved a state agency, the Connecticut Resources Recovery Authority (CRRA), which assisted public agencies in managing, recycling, and disposing of solid waste. CRRA had retained two lawyers, referred to as R and B, both of whom were registered lobbyists, and their firms. In 2006 CRRA hired R and his firm under several liaison agreements in which R was designated as a "consultant." Under these agreements R provided "outreach" to municipalities and communities that might serve as hosts for CRRA facilities. With one exception, R billed for his services as "General Business Advice"; the one exception was in 2011 when CRRA hired R to provide "legislative monitoring and advice" with regard to two pending bills. R described his role as "formulating strategy and interacting with others to help advance the defendant's business goals"; he did not mention providing legal advice. Id. at **10 n.5. Prior to 2006 CRRA retained R under a legal services agreement, but after 2006 R did not bill for any legal services. At the same time CRRA hired R's firm to provide legal services in the following areas: environmental; real estate/planning and zoning; energy/Department of Public Utility Control; and litigation. CRRA employed B's firm to provide "general counsel as its primary legal service." Id. at **7, n. 3. B also apparently provided lobbying services to CRRA. Both R and B were involved in at least two legal controversies in which CRRA participated. Id. at *12-13.

Plaintiff filed a Freedom of Information Act (FOIA) request seeking email communications between CRRA and R and B. CRRA refused to produce the emails claiming that they were subject to the attorney-client privilege, an exception to the Connecticut FOIA. South Carolina has a similar exception. S.C. Code Ann. §30-4-40(a)(7). The emails involved in the case were of two types: (1) emails between R & B and CRRA and (2) emails between CRRA and nonlawyers on which R and B were copied. Id. at **13-14. Plaintiff then filed a complaint with the Freedom of Information Act Commission, which ruled that the emails were privileged because, even though they involved a mixture of business and legal advice, the business advice was "inextricably linked to the giving of legal advice." Id. at **3. The Connecticut Supreme Court reversed, holding that the Commission had applied an incorrect legal standard; the court went on to provide guidance to the Commission for the remand, particularly as related to the application of the privilege when a lawyer provides lobbying services.

The court began with a discussion of the policies underlying the attorney-client privilege. While the privilege promotes full and frank communication between lawyer and client, it also withholds relevant information from the fact finder. An interesting point in the court's policy discussion is the application of the privilege to governmental entities: because "public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority … their access to candid legal advice directly and significantly serves the public interest …" Id. at **19. South Carolina's FOIA exempts disclosure of agency lawyer communications. S.C. Code Ann. §30-4-40(a)(7) ("Correspondence or work products of legal counsel for a public body …).

In reversing the ruling of the defendant Commission, the court held that when a lawyer provides both legal and nonlegal advice the "primary purpose" of the communication determines whether it is subject to the attor-

ney-client privilege.

The majority of courts and scholars support this approach. However, some courts have adopted a more liberal approach. In *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), the DC Circuit held that the privilege would apply if "one of the significant purposes" of communication was legal advice. South Carolina appellate courts have not ruled on the issue.

Of course, even if the communication is between lawyer and client it will not be privileged if it has no connection to legal advice:

> [S]ome of the e-mails exclusively addressed nonlegal matters, such as eliciting employment opportunities, facilitating business connections or opportunities, and burnishing the defendant's public image, that could not reasonably be found to have been inextricably connected to legal advice. Nor were they all inextricably connected to certain legal controversies or proposed legislation, as the commission's decision suggested.

A communication between lawyer and client designed to inform the attorney of developments – to keep the attorney or the client "up to speed," so to speak – may or may not be privileged. If the communications does not explicitly seek legal advice but gives factual information that may be relevant to legal advice in the future, it will probably not be privileged. However, if the communication is "implicitly" seeking legal advice, it may well be privileged – for example, a report from the client about recent developments that asks the lawyer simply "comments or advice?"

If a communication is not primarily for legal advice, but contains some legal advice, it is possible to redact the legal portion from the communication. Redaction should generally be reserved to those communications in which the legal advice is incidental. However, if the legal and nonlegal components of the communication are inextricably tied together and cannot be separated, the entire communication may nonetheless be privileged even if the primary purpose was not legal advice. Id. at **18.

The Connecticut Supreme Court's discussion of the application of the privilege to lawyer/lobbyists is particularly interesting:

> [I]f a lawyer happens to act as a lobbyist, matters conveyed to the attorney for the purpose of having the attorney fulfill the lobbyist role do not become privileged by virtue of the fact that the lobbyist has a law degree or may under other circumstances give legal advice to the client, including advice on matters that may also be the subject of the lobbying efforts … Summaries of legislative meetings, progress reports, and general updates on lobbying activities do not constitute legal advice and, therefore, are not protected by the work-product immunity … If a lawyer who is also a lobbyist gives advice that requires legal analysis of legislation, such as interpretation or application of the legislation to fact scenarios, that is certainly the type of communication that the privilege is meant to protect … If advice is characterized as merely political, rather than legal, it is also not protected … And a communication telling a lobbyist what to disclose to a legislator in the course of lobbying efforts has been held to be unprotected because it contemplates disclosure to a third party …

In an interesting side point, the court noted that it was unclear whether the attorney-client privilege applied to communications relating to proposed legislation: "It is not apparent how the attorney-client privilege's policy of effectuating greater compliance with the

law through the encouragement of more open communications to the attorney is furthered in the legislative context." Id. at **35.

The court discussed the implications for the attorney-client privilege of the inclusion of third parties in the communication. Communications in the presence of a third party are usually not subject to the privilege because they do not have an expectation of confidentiality. However, if the communication is with an agent or employee of the attorney or client who is necessary to the consultation, then the privilege may apply. The court noted that in the case before it, some of the communications were with a director of the Government Law & Strategies Group of R's firm. There was no evidence in the case that he was acting as an agent of R for the purpose of rendering legal services. If communications include or are distributed to nonlawyers who are not agents or employees of the attorney or client necessary for rendering legal advice, the privilege is probably waived. Id. at **38.

A number of practice pointers flow from the case: First, lawyers and clients need to be careful about including or copying nonlawyers on communications because of possible waiver of the privilege. The inclusion of even nonlawyer agents or employees may jeopardize the privilege if they are not necessary for rendering legal advice. For example, communications with paralegals should be protected, but communications that include public relations personnel are questionable. Second, if a communication is not primarily for legal advice, it may be possible to redact the legal portion when producing the document. However, it is good practice to try to separate legal advice from other type of communications. See Nathan Crystal & Francesca Giannoni-Crystal, *Preserving the Attorney-Client Privilege and Protecting Work Product as In-House Counsel*, South Carolina Lawyer 12 (January 2016) (discussing good practice for in-house counsel but containing considerations on preserving the privilege that could possibly have a broader reach). Third, lawyer/lobbyists need to recognize that many of their client communications may not be privileged. Communications about legislative developments and political advice are probably not protected. Blanket labels of privilege on all communications are unlikely to cure the lack of legal advice. In fact, a general use of the label "privileged" could end up weakening valid claims of privilege. When a lawyer/lobbyist is providing legal advice, it would be useful to emphasize in the communication the legal nature of the advice at the beginning of the communication– for example, "You have asked us to provide you legal advice on the following issue" or "Senate Bill 432 has significant legal implications for your company as set forth below." ⚖