For Our Eyes Only

Attorney-Client Privilege and Its Application to Banks
The attorney-client privilege is a rule of evidence that prevents the adverse party in a lawsuit from obtaining access to certain communications. If properly understood and well managed, this privilege offers a useful tool for protecting the bank in litigation while maintaining effective relationships with regulators. On the other hand, a lack of appropriate knowledge of the privilege could have serious adverse consequences if litigation should arise.

A non-lawyer banker reading this article may be thinking that the attorney-client privilege is something only lawyers need to know about. In addition, some bank attorneys may mistakenly believe that simply labeling all of their communications as “attorney-client privileged” represents a fail-safe option. Unfortunately, an adequate understanding of the privilege on the part of the persons who might have invoked it, or prevented its subsequent waiver, is often arrived at too late. This article reviews certain well-established rules that courts apply in interpreting the privilege. In light of the privilege’s importance, all employees should have at least a basic understanding of how their actions or inactions may affect its availability.

The attorney-client privilege is intended to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law.”1 It is one of the oldest privileges for confidential communications recognized under the law. The privilege covers both natural and non-natural corporate persons, and it extends to communications between a firm’s legal counsel and persons employed at any level of the organization. In this regard, the U.S. Supreme Court recognized in *Upjohn Co. v. United States*2 that:

Middle level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.3
The attorney-client privilege is an exception to the strong presumption under U.S. law that the facts underlying any legal dispute are fully discoverable. In this regard, the Second Circuit Court of Appeals has opined that because the attorney-client privilege “stands in derogation of the public’s ‘right to every man’s evidence, . . . it ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.” Awareness of this tension between the attorney-client privilege and public policy favoring open discovery is important because if there is any reason for doubt regarding the privilege’s applicability, a court is likely to err on the side of inapplicability. Hence, the need for all employees to know how the privilege comes into being and how their personal actions may cause it to be forfeited.

The attorney-client privilege shields against discovery: “(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice.” In this regard, it is important to note that “the protection of the privilege extends only to communications and not to facts.” Thus, “[t]he client cannot be compelled to answer the question [in the course of litigation], ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication with to his attorney.”

In order to be covered by the attorney-client privilege, the communication must have been made between a client and their legal counsel. Therefore, giving an attorney after-the-fact notice of sensitive discussions (e.g., by copying them on the meeting minutes) will not trigger application of the privilege. Moreover, merely including an attorney in the discussions likewise will not suffice. Rather, in establishing the privilege, the necessary first step is to create an attorney-client relationship by requesting legal advice. In this regard, “a party cannot create the [attorney-client] relationship based on his or her own beliefs or actions.” As soon as a given matter is perceived to present legal sensitivity, an explicit, documented request for advice from counsel should be made.

The attorney-client privilege “protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice.” To this end, communications made by and to laypersons acting as agents for attorneys in internal investigations are likely to be protected by the attorney-client privilege. In addition, so long as one of the primary purposes of an internal investigation was to obtain or provide legal advice, the privilege will attach “regardless of whether [the] internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy.” On the other hand, the mere fact that an attorney finds certain information helpful in providing legal advice does not render that information privileged.

As noted above, the attorney-client privilege covers communications between an inhouse attorney and the firm’s employees. However, demonstrating that the communication in question involved a request for legal advice may be challenging. This is because in-house attorneys routinely provide both legal advice and business advice, and it may be impossible to separate the two. The U.S. District Court for the District of Columbia recently addressed this issue in FTC v. Boehringer Ingelheim Pharsms., Inc. as follows:

[[h-house counsel may have certain responsibilities outside the lawyer’s sphere, and, as a result, the corporation can shelter the attorney’s advice only upon a clear showing that the attorney gave it in a professional legal capacity. In re Sealed Case, 737 F.2d at 99; see also Neuder v. Battelle Pacific NW. Nat’l Lab., 194 F.R.D. 289, 292 (D.D.C. 2000) (finding that communications are not privileged where in-house counsel is acting solely in his capacity as a business advisor and the legal advice, if any, is merely incidental to business advice].

One way of avoiding the above issue is to engage outside counsel, which may make sense for reasons besides the attorney-client privilege; among other things, having in-house counsel oversee an “independent” review to be performed by the compliance department or an outside consulting firm involving activities that the attorney supports on a day-to-day basis necessarily undermines the exercise by introducing bias. Another option is to require that in-house counsel specify when they are giving business advice versus legal advice. In actual practice, however, advice is often not amenable to clear-cut categorization. In addition, if stressed too strongly, this approach can interfere with the closeness to the business that is a hallmark of effective inhouse legal support.

In the absence of direction provided by an attorney, a risk assessment performed by an outside consulting firm will not be recognized as attorney-privileged, and, contrary to commonly-held belief, the fact that the consultants in question were retained through a law firm may not change that result. For example, in evaluating whether communications from an accounting firm were protected by attorney-client privilege in Schlicksup v. Caterpillar, Inc., the U.S. District Court for the Central District of Illinois noted that:

[What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant’s rather than the lawyer’s, no privilege exists.]

In addition, because the communication to the attorney must be made in confidence, it is important to limit the persons with knowledge of those communications to those with a bona fide “need to know.” Furthermore, the privilege may be waived if the resulting legal advice is distributed to “employees of the corporation who are not in a position to act or rely on [it].” Thus, a written report summarizing the findings of an attorney-client privileged investigation or risk assessment should always be delivered first to the General Counsel, who will then decide whether and to what extent broader distribution is warranted.

Subject to narrow exceptions, including the limited statutory exception for financial institutions discussed below, voluntary
disclosure of an attorney-client privileged communication waives the privilege. Moreover, the disclosure of any part of a communication waives the privilege for all communications related to the same subject matter. Thus, the careless inclusion of attorney-client privileged information in an internal communication (e.g. in an email message) could have far-ranging adverse consequences.

Another, closely-related rule of evidence is the “work product” privilege. This privilege covers documents that were prepared in anticipation of litigation to provide assistance to counsel. In this regard, it is essential to the application of the work product privilege that the materials were prepared at least in part because of the prospect of impending litigation, and not just in the ordinary course of business. This privilege may apply even if the attorney-client privilege does not. For example, in Szulik v. State Street Bank & Trust Co., after first concluding that a series of email messages between bank employees who were conducting a review of client accounts was not protected by the attorney-client privilege because they did not concern a request for, or the receipt of, legal advice, the U.S. District Court for the District of Massachusetts held that the work product privilege did apply because the underlying review had been requested by bank counsel in anticipation of litigation.

Lastly, as noted above, the law treats financial institutions differently than other firms with respect to the waiver of privileged information. Namely, in general, the voluntary sharing of such information with a state or federal banking regulator, or with the Consumer Financial Protection Bureau (“CFPB”), waives the privilege only with respect to the regulator to whom the information was given. Specifically, the applicable federal law provides that:

The submission by any person of any information to the Bureau of Consumer Financial Protection, any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such Bureau, agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such Bureau, agency, supervisor, or authority.

Please note that interpretations of the above statutory language establishing what is known in the law as “selective waiver” should only be made by legal counsel, including with respect to whether a contemplated disclosure would occur “in the course of any supervisory or regulatory process.”

The ability of a financial institution to choose to share privileged information with their regulators promotes ongoing transparency and becomes extremely important if agency enforcement action is threatened. However, this ability also presents some serious potential pitfalls. For example, the above statutory language does not extend the selective waiver to state attorneys general or other state agencies that do not constitute a “State banking supervisor.”

Yet, the CFPB has been unwilling to provide assurances that it will not share information with such non-banking state parties. If the CFPB were to do so, the subject financial institution would lose the protections of privilege with respect to all parties (i.e. not just government bodies) for both the information that was shared and all related communications. Therefore, the critical importance of discussing in advance with legal counsel all contemplated voluntary disclosures of information—whether to the CFPB or to any government agency—cannot be overstated.

In sum, if properly understood and applied, the attorney-client privilege represents a useful tool that encourages clients to seek legal advice by shielding both their communications to counsel, and the resulting advice, against discovery in litigation. In this regard, banks enjoy a special ability to share information on a voluntary basis with their regulators without forfeiting applicable privileges with respect to other parties. Extreme care should be taken in attempting to navigate the attorney-client privilege, and that care should always include seeking the assistance of competent legal counsel.

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Notes:
3- Id. at 391.
4- 482 F.2d 72, 81 (2d Cir.), cert. denied, 414 U.S. 867, 38 L. Ed. 2d 86, 94 S. Ct. 64 (1973) (quoting 8 Wigmore, Evidence § 2291 (McNaughton rev. 1961)).
6- In Re City of Erie, 473 F.3d 413, 419 (2d Cir. 2007).
7- Upjohn, 449 U.S. at 395.
8- Id. at 396.
9- See, Wultz v. Bank of China Ltd., 304 F.R.D. 384, 391 (S.D.N.Y. 2015): “[W]e are unaware of any case law suggesting that a person’s collection of information is protected merely because the person harbors a plan to provide the information later to an attorney — particularly where there is no proof that the attorney sought to have the individual collect the information at issue;” See, also, Neuder v. Battelle Pac. Northwest Nat’l Lab., 194 F.R.D. 289, 295 (D.D.C. 2000): “[D]ocuments prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged since they are not communications made primarily for legal advice.”


11- In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 22 (1st Cir. 2003).


13- Id. at 760.

14- Wultz, 304 F.R.D. at 391.


16- Id. at 16-17 (quotation marks omitted).

17- “[N]othing in the policy of the privilege suggests that attorneys, simply by placing accountants, scientists or investigators on their payrolls and maintaining them in their offices, should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the latter are operating under their own steam.” United States v. Pipkins, 528 F.2d 559, 563 (5th Cir. 1976) (quoting, United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961)).


19- Id. at *9.

20- See, e.g., Graff v. Havenhill North Coke Co., 2012 U.S. Dist. LEXIS 162013, * 36 (S.D. Ohio 2012) (in finding certain contested documents privileged, the court noted that the documents in question were explicitly marked as access restricted to persons with “a direct need to know”). One major downside to labeling all communications to and from counsel as attorney-client privileged is that it unnecessarily restricts the free flow of information within the firm.


22- “[S]ubsequent disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of the privilege.” In re Horowitz, 482 F.2d 72, 81 (2d Cir. 1973).

23- “[W]hen a party discloses part of an otherwise privileged communication, he must in fairness disclose the entire communication, or at least so much of it as will make the disclosure complete and not misleadingly onesided.” Von Bulow v. Von Bulow, 114 F.R.D. 71, 79-80 (S.D.N.Y. 1987).


26- Id. at * 13.


28- See, CFPB Bulletin 2013-06 (Responsible Business Conduct: Self Policing, Self Reporting, Remediation, and Cooperation), which describes certain “responsible conduct,” including the voluntary disclosure of relevant information, that “may favorably affect the ultimate resolution of a Bureau enforcement investigation.”

29- For additional information regarding the CFPB’s position on disclosing privileged information to other entities, see CFPB Compliance Bulletin 2015-01 (Treatment of Confidential Supervisory Information) and 12 CFR §1070, et seq.