

The Best Defense Is a Good Defense,
or,
What to Do About Possible Claims if There May Be No Internal Privilege
and Related Issues

By Peter R. Jarvis*

I. Introduction.

Two recent U.S. District Court decisions and one slightly older decision have held that a law firm whose lawyers communicate with the firm's in-house counsel about possible claims by a current firm client against the firm cannot use attorney-client privilege to prevent the client from discovering those communications or the advice given by the firm's counsel.¹ Granted that three district court cases do not make a landslide, there is still cause for concern when lawyers seek advice from their in-house colleagues about current-client matters.

This paper does not assess the holdings reached in these cases but instead suggests approaches to help minimize the adverse consequences of these holdings. Much of this paper constitutes old wine in somewhat newer bottles. Common sense and good risk management practices are just as important today as they were before these cases were decided. Now, as before, the adoption of sound in-house practices should help firms avoid potentially damaging and embarrassing problems.

II. Follow the Advice You Would Give to a Client.

Like the theoretical cobbler's children with no shoes, lawyers often fail to heed the advice they would give to clients in similar circumstances.

A. Prevention Is Better than Cure.

A firm should encourage its lawyers to do the work necessary to avoid or minimize the risk of mistakes in the first place. This includes encouraging lawyers to seek assistance from others when it may be needed and not to proceed by themselves and in a vacuum.

Similarly, the establishment and maintenance of good calendaring systems and of work habits that do not leave things to the last minute will also reduce a firm's exposure.

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¹ *Koen Book Distribs. v. Powell, Trachtman, Logan*, 212 F.R.D. 283 (E.D. Pa. 2002); *Bank Brussels Lambert v. Credit Lyonnais*, 220 F. Supp. 2d 283 (S.D.N.Y. 2002); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560 (E.D. Pa. 1989).

B. E-Mail (and Even Old-Fashioned File Memoranda and Conversations) Can Be Hazardous to Your Health: Watch What You Work.

If it is true in wartime that loose lips sink ships, it certainly is true in litigation that parties can come to regret what they or their employees have written down. Thus an attorney who is going to write what is ostensibly a factual summary of a situation should be sure that he or she has the actual facts in hand. Similarly, language that reflects attempted humor at the client's expense or that unnecessarily characterizes circumstances or individuals should be avoided.

Finally, lawyers must tell each other, just as they tell their clients, that e-mail documents can do just as much harm as snail mail and that hitting the delete button does not mean that an adverse party will not be able to retrieve an e-mail at a later time.

C. Avoid Cover-Ups.

When a lawyer concludes he or she has made a mistake that is likely to materially injure his or her client, he or she will generally have a duty to make full disclosure to the client and to seek client consent before continuing with the representation. *See, e.g.*, RPC 1.1, 1.4, 1.7(b). In other words, lawyers should not try to bury a mistake. Everybody hates a cover-up and no lawyer should want to turn a potential negligence/malpractice action into a breach of fiduciary duty/nondisclosure action.

There is also a further potential benefit to disclosure of apparent problems, both within and outside a firm. The involvement of individuals who did not themselves make the mistake may lead to solutions that either mitigate or avoid potential harm.

D. Don't Bill Consultation or "Fix" Time to the Client.

A lawyer who has made a mistake should see to it that any time or expenses incurred in attempting to assess or fix the mistake are not billed to the client. If nothing else, juries are unlikely to look favorably upon counsel who want a client to pay to fix the mistake that counsel made.

III. Maximize the Chance that Privilege May Be Found to Exist.

The three cases cited above do not hold that a law firm can never obtain privileged advice. The following points are therefore prudent.

A. Inform the Client of the Problem and of the Fact that the Firm May Seek Its Own Advice at Its Own Expense.

This option is available to firms that do not attempt to cover up or bury their mistakes. A client who is told that the firm is seeking its own advice should not be in a position to assert that it reasonably expected access to the firm's defensive work product.

B. When Appropriate, Retain Outside Counsel.

Even if privilege is lost for in-house communications within the firm, it will probably not be lost when a firm communicates with its own outside counsel. Once the decision to consult outside counsel is made, what would otherwise be internal documents can be directed to outside counsel.

IV. Write as if Privilege Does Not Exist or Your Firm May Wish to Waive It.

Even if privilege otherwise might be available, there may be times when a firm wishes to waive it. This would be true if, for example, a lawyer subject to discipline at a firm wishes to assert by way of mitigation or defense that he or she consulted ethics counsel before acting. In addition, there may be times when the in-house counsel's records provide the best contemporaneous documentation of events. Given, then, the combined possibilities that a court may hold privilege inapplicable or that a firm may wish to waive privilege, it is particularly important that lawyers write in a manner that is more likely to be helpful than harmful.

A. Form, Style and Judgment Are Key.

As has been noted above, someone ostensibly summarizing "the facts" should make sure that he or she knows the facts and should not speculate or guess on important issues. Similarly, nouns and verbs are frequently better than adjectives and adverbs.

B. The Good, as Well as the Bad and the Ugly, Can Be Documented.

Memorandum writers sometimes forget that it is appropriate to make a record of helpful, as well as harmful, facts. If, for example, a required written conflicts waiver was never obtained but a lawyer well remembers a discussion in which an oral waiver was obtained, the lawyer would be well advised to document the details of that discussion.

V. Conclusion.

In this post-Enron, post-Arthur Andersen world, attorneys must pay more attention to protecting themselves, as well as their clients, than ever before. Fortunately, the circumstances in which the goals of self-protection and client protection seriously diverge are likely to be few. One can be a zealous advocate while also looking after one's own interest, whether attorney-client privilege applies or not.