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What Forms the Basis of Attorney-Client Privilege?

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When is a lawyer not a lawyer? The answer to that riddle can be complex and depends on the nature and scope of the task the lawyer performed and why and when he or she performed it.

Confidentiality is the bedrock of our profession. CPLR 4503(a)(1) states the rule in unequivocal terms:

> Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client *in the course of professional employment*, shall not disclose, or be allowed to disclose such communication (emphasis added).

Given this plain and clear language, many attorneys assume, without giving it a great deal of thought, that privilege applies broadly to everything they do. They make this assumption because they overlook the emphasized language of CPLR 4503(a)(1)—"in the course of professional employment." This language can be a barrier to the invocation of attorney-client privilege. Simply put, not everything an attorney says or does is protected by privilege—the attorney must be acting in his or her professional capacity for the privilege to attach.

Two other provisions also come into play when considering the nature and scope of the privilege—CPLR 3101(c), which provides that "the work product of an attorney shall not be obtainable" and CPLR 3101(d)(2), which provides qualified protection for materials "prepared in anticipation of litigation or trial."

Professional Capacity Rule

Understanding when material is privileged because it was performed in an attorney's professional capacity (CPLR 3101(c)) and when it is material prepared for litigation (CPLR 3101(d)(2)) is critical. The former is absolutely privileged, the latter is subject to discovery "only upon a showing that the party seeking discovery has substantial need of the materials…and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[1]

As the Court of Appeals explained in *People v. Kozlowski*,[2] there is a built-in tension in CPLR 3101's treatment of attorney work product, which is absolutely privileged, and trial preparation material, which is subject only to a qualified privilege which can be defeated upon a showing of substantial need and undue hardship in obtaining similar material. Faced with a discovery demand, the attorney's first concern should be whether the material is absolutely privileged pursuant to CPLR 3101(c) or whether it is conditionally privileged pursuant to CPLR 3101(d)(2). This article focuses on the CPLR 3101(c) privilege, leaving CPLR 3101(d)(2) issues for another day and another article.

Before turning to the scope and coverage of CPLR 3101(c), two key issues must be addressed. First, as the Appellate Division held in *Brooklyn Union Gas Co. v. American Home Assurance Co.*,[3] the burden of establishing privilege rests upon the party invoking it. Second, whether the privilege applies is entrusted to the sound discretion of the trial court whose findings will not be vacated absent a showing of abuse of that discretion.[4] Thus, the privilege battle, in almost all cases, must be fought and won at the trial-court level.

The rule as to what forms the basis of the attorney-client privilege was succinctly stated by the Court of Appeals in *Matter of Priest v. Hennessy,*[5] in which the issue was whether a grand jury could obtain information as to who had retained counsel to represent certain prostitutes. The Court of Appeals stated a three-pronged test for determining whether the information sought is privileged:

> First, it is beyond dispute that no attorney-client privilege arises unless an attorney-client relationship has been established. Such a relationship arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services. [Citations omitted]. Second, not all communications to an attorney are privileged. In order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a "confidential communication" made to the attorney for the purpose of obtaining legal advice or services. [Citations omitted]. Third, the burden of proving each element of the privilege rests upon the party asserting it.[6]

Notwithstanding this broad view of attorney-client privilege, the fact that an attorney prepared a document or conducted an investigation or interview is no guarantee that the courts will recognize the material as privileged. In *Salzer v. Farm Family Life Insurance,* the Appellate Division held that the attorney work product privilege is narrowly construed to apply only to material "prepared by an attorney, acting as an attorney, which contains his analysis and trial strategy."[7] The Appellate Division explained that "[m]aterials or documents that could have been prepared by a layperson do not fall within the attorney work product exception," but are, instead, treated as CPLR 3101(d)(2) "material prepared in anticipation of litigation" and subject to the qualified privilege.[8]

The Professional Skills Rule

That an attorney investigated issues and prepared a letter or memorandum is not, standing alone, sufficient to support a claim of privilege. The Appellate Division has consistently held that the attorney-client privilege "applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy."[9] Therefore, "[d]ocuments prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage and to evaluate the extent of a claimant's loss are not privileged … such documents do not become privileged 'merely because an investigation was conducted by an attorney.'"[10]

Likewise, a letter written by an expert analyzing a plaintiff's rights under an insurance policy was deemed not privileged even though the letter was written one week before plaintiff retained counsel. The Appellate Division explained that the "exemption for attorney work product does not apply because the letter was not prepared by counsel acting as such and does not otherwise uniquely reflect a lawyer's learning and professional skills."[11]

Similarly, an investigator's report was deemed to be neither attorney work product nor material prepared for litigation because "[s]uch reports of insurance investigators or adjusters prepared during the processing of a claim are discoverable in the regular course of the insurance company's business."[12]

However, documents that contain an attorney's legal analysis, or documents prepared by an expert at the behest of an attorney are deemed to be attorney work product that is protected by CPLR 3101(c). Thus a memorandum prepared by an insurer's in-house counsel discussing the possibility of a lawsuit based upon the rejection of claims was deemed to be privileged because it "contains the attorney's legal analysis and conclusions."[13] This analysis also applies to "documents generated by consultants retained by counsel 'to assist in analyzing or preparing'" for anticipated litigation.[14]

That insurance company files contain reports that serve "mixed/ multi-purpose" goals—i.e., they discuss both claims issues and potential litigation issues—is not sufficient to shield them as privileged.[15] In determining whether an attorney's work is privileged or not, the courts will look to the date a "firm decision" was made to disclaim coverage, rather than the date the insurer had reason to investigate the propriety of the claim.[16]

In *Lamite v. Emerson Electric Co.-White Rodgers Division,*[17] the Appellate Division held that a report prepared by an investigator retained by plaintiff's counsel was deemed not to be attorney work product but, rather, was material prepared for litigation and thus was shielded only by the qualified privilege that attaches to such information. The Appellate Division explained that "[t]he work product of an attorney is a concept which has been very narrowly construed" and applies only to material and information "prepared or conducted by the attorney."[18]

The critical issue is whether the document sought contained the thoughts, ideas, impressions and the creative work of an attorney. Thus, minutes of a meeting,[19] an index of documents,[20] and a list of prior liability claims[21] were deemed not to be privileged attorney work product. For the same reason an audio recording of a witness interview conducted by an attorney was found to be not privileged because it did not contain "elements of opinion, analysis, theory, or strategy."[22]

In many cases whether a document is absolutely privileged under CPLR 3101(c) or qualifiedly privileged under CPLR 3101(d)(2) requires an in camera review which, as the Appellate Division noted, may result in a finding that some of the material is absolutely privileged, some is qualifiedly privileged and some is not privileged at all.[23]

Conclusion

There are two lessons that every attorney should bear in mind. First, not every litigation-related task an attorney undertakes is going to be protected by either the absolute privilege accorded by CPLR 3101(c) or the qualified privilege accorded by CPLR 3101(d)(2). Second, an attorney seeking discovery from an adversary may be entitled to more discovery than most think and this discovery may very well include documents opposing counsel had a hand in creating.

Endnotes:

1. CPLR 3101(d)(2).

2. 11 N.Y.3d 223, 244, 869 N.Y.S.2d 848, 861 (2008). See also *Gama Aviation v. Sandton Capital Partners,* 99 A.D.3d 423, 424, 951 N.Y.S.2d 519, 521 (1st Dept. 2012) (attorney work product is subject to absolute privilege unlike trial preparation material).

3. 23 A.D.3d 190, 191, 803 N.Y.S.2d 532, 534 (2d Dept. 2005).

4. *148 Magnolia v. Merrimack Mutual Fire Insurance,* 62 A.D.3d 486, 487, 878 N.Y.S.2d 727, 728 (1st Dept. 2009).

5. 51 N.Y.2d 62, 431 N.Y.S.2d 511 (1980).

6. Id. at 68-69, 431 N.Y.S.2d at 514. The Court of Appeals concluded that information as to who retained the lawyers to defend the prostitutes was not privileged since there was no attorney-client relationship between the attorneys and those who retained them (id. at 69, 431 N.Y.S.2d at 514-15).

7. 280 A.D.2d 844, 846, 721 N.Y.S.2d 409, 411 (3d Dept. 2001).

8. Id., 721 N.Y.S.2d at 411. After concluding that CPLR 3101(d)(2) applied to the witness statements at issue, the Appellate Division concluded that defendants failed to show that they could not obtain substantially similar material without undue hardship.

9. *Brooklyn Union Gas*, 23 A.D.3d at 190-91, 803 N.Y.S.2d at 534. See also *Lalka v. ACA Insurance*, 128 A.D.3d 1508, 1509, 9 N.Y.S.3d 504, 505 (4th Dept. 2015) (report as to whether to pay or reject claim, even if made by attorney, is not privileged); *National Union Fire Insurance of Pittsburgh, Pa. v. TransCanada Energy USA*, 119 A.D.3d 492, 493, 990 N.Y.S.2d 510, 511 (1st Dept. 2014) ("the record shows that counsel were primarily engaged in claims handling—an ordinary business activity for an insurance company"). But see *McClier v. United States Rebar*, 66 A.D.3d 416, 885 N.Y.S.2d 599 (1st Dept. 2009) ("Documents in an insurer's claim file that were prepared for litigation against its insured are immune from disclosure").

10. *Brooklyn Union Gas*, 23 A.D.3d at 191, 803 N.Y.S.2d at 534, quoting *Spectrum Systems International Corp. v. Chemical Bank*, 78 N.Y.2d 371, 379, 575 N.Y.S.2d 809, 815 (1991).

11. *Plimpton v. Massachusetts Mutual Life Insurance*, 50 A.D.3d 532, 533, 855 N.Y.S.2d 544, 545-46 (1st Dept. 2008).

12. *148 Magnolia*, 62 A.D.3d at 487, 878 N.Y.S.2d at 728.

13. *Rossi v. Blue Cross & Blue Shield of Greater New York*, 140 A.D.2d 198, 200, 528 N.Y.S.2d 51, 53 (1st Dept. 1988).

14. *MBIA Insurance Corp. v. Countrywide Home Loans*, 93 A.D.3d 574, 574, 941 N.Y.S.2d 56, 58 (1st Dept. 2012), quoting *Hudson Insurance v. Oppenheim*, 72 A.D.3d 489, 489-90, 899 N.Y.S.2d 29, 29 (1st Dept. 2010); *Beach v. Touradji Capital Management*, 99 A.D.3d 167, 170, 949 N.Y.S.2d 666, 669 (1st Dept. 2012).

15. *Melworm v. Encompass Indemnity Co.*, 112 A.D.3d 794, 795, 977 N.Y.S.2d 321, 323 (2d Dept. 2013).

16. *Donohue v. Fokas*, 112 A.D.3d 665, 667, 976 N.Y.S.2d 559, 561 (2d Dept. 2013).

17. 208 A.D.2d 1081, 1083, 617 N.Y.S.2d 924, 925-26 (3d Dept. 1994).

18. Id., 617 N.Y.S.2d at 925-26, quoting *Central Buffalo Project Corp. v. Rainbow Salads*, 140 A.D.2d 943, 944, 530 N.Y.S.2d 346, 347-48 (4th Dept. 1988).

19. *Aetna Casualty & Surety v. Certain Underwriters at Lloyd's*, 263 A.D.2d 367, 368, 692 N.Y.S.2d 384, 385 (1st Dept. 1999).

20. *Bloss v. Ford Motor,* 126 A.D.2d 804, 805, 510 N.Y.S.2d 304, 305 (3d Dept. 1987)("No opinions, strategy or legal conclusions are sought").

21. *Soper v. Wilkinson Match (USA),* 176 A.D.2d 1025, 1025-26, 575 N.Y.S.2d 180, 181 (3d Dept. 1991) ("Only work product 'which necessarily involved professional [legal] skills…can be afforded the privilege'").

22. *Geffner v. Mercy Medical Center,* 125 A.D.3d 802, 802, 4 N.Y.S.3d 283, 284 (2d Dept. 2015).

23. *Beach,* 99 A.D.3d at 171, 949 N.Y.S.2d at 669-70.

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