Privilege Issues in Franchise Systems

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Be Proactive About Privilege

- Maximizes protection of privileged communications
- Prevents waiver
- Once the matter has escalated to litigation, it’s too late!
Why is This Evidence so Valuable?

• Sutton’s Law

Q: “Why do you rob banks?”
A: “Because that’s where the money is.”

Internal corporate communications can be a goldmine of relevant evidence
Attorney-Client Privilege

Party asserting privilege must show that the communication was
1. Made or received by a “client“
2. Made or received by an attorney or subordinate-ACTING IN THAT CAPACITY
3. Made for the purposes of securing or providing legal advice
4. The privilege must be asserted and not waived by the client
Radiant Burners Case

Judge Campbell denied the existence of attorney-corporate client privilege because

1. “Zone of silence” would be vast and unworkable
2. Defining the “client” would be challenging
3. Corporations could “insulate their activities by discussing them with legal advisors”
Was the Communication Between Privileged Persons?

Beyond clients they can be:
- Prospective clients
- Agents of the client
- The attorney
- Agents of the attorney
Upjohn v. United States

Expanded the definition of privileged persons in a corporate context.
Upjohn Factors

• Was the information necessary to supply the basis for legal advice to the corporation or was it ordered to be communicated by superior officers?
• Was the information available from the “control group” management?
• Did the communication concern information within the scope of the employee’s duties?
• Was the employee aware that they were being questioned in order to secure legal advice for the corporation?
• Were the communications considered confidential when made and kept confidential?
Was the Communication made in Confidence?

Was communication shared only with those who “need to know?”

• Assesses and implements the legal advice
• Benefits from or could be personally liable
• Responsible for acting on subject matter of the communication
Fe uses email address provided by Fo to communicate with her attorney. Fo searches servers in anticipation of litigation and finds the emails.

Can the Fe successfully assert that the emails are protected by the Atty-Client Privilege?
Word of **Caution** Before Searching for Fe Emails

It is a violation of the **Stored Communications Act** to:

“intentionally access[] **without authorization** a facility through which an electronic communication service is provided” or to “**intentionally exceed[]** an authorization to access that facility” “and thereby obtain[] . . . access to a wire or electronic communication while it is in electronic storage in such system.”
Word of **Caution** Before Searching for Fe Emails

**Exemptions to SCA:**

- A “provider” of the email account may search the system – but some courts define provider to be the entity that stores the emails and administers the system, which is often not the Fo.

- Better practice is to comply with the **authorized access exception:**
  - condition use of Fo-provided email on Fe consenting to Fo having right to access all info
  - Obtain signed acknowledgement if possible
  - **Do not overstep authorization**
Franchisor Counsel Best Practices

1. Develop unambiguous written policy stating:
   - email is provided for franchised business use only.
   - **Fe reserves right** to monitor, access, collect, and use any information sent, received, or stored on Fo email system.
   - Fe **has no expectation of privacy** in use of email system

2. Obtain and Preserve written confirmation from Fe
Franchisee Counsel Best Practices

1. Ask about email at the beginning of your representation of the Fe.
2. Advice Fe not to use a Fo-provided email to communicate regarding legal dispute for any reason.
3. If you receive an email from Fe, which you assume or know was provided by Fo:
   • Assume Fo has a policy allowing it access, and that Fe is on notice of it.
   • Do not respond to the email. Pick up the phone.
   • Same as #2 above.
Was the Communication made for the Purpose of Obtaining or Giving Legal Advice?
Heightened Scrutiny for In-House Counsel

1. **Predominant Purpose Standard**: Was the primary purpose of the communication to render or solicit legal advice?

2. **But-For Standard**: Factoring in the totality of the circumstances, was the communication prepared because of the need to give or obtain legal advice?

3. **To Facilitate the Rendition of Legal Advice**: Does not have to be the primary purpose, just one of the purposes.
Hypo Lightening Round: Is it Privileged?
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In-house counsel participates in a senior leadership meeting during which business discussions are made, but during the meeting in-house counsel also provides updates regarding ongoing litigation.
Hypo Lightening Round: Is it Privileged?

In-house counsel provides Fo’s Standards Department with hypotheticals to assist in determining what constitutes an illegal financial performance representation, the type of conduct that violates the franchise agreement, and the kind of documentation to collect.

What about communications with Fo in-house counsel regarding a standards review for a specific Fe?
Hypo Lightening Round: Is it Privileged?

CFO emails draft of an FDD to several executives including in-house counsel. Text of the email states: “please review and let me know what you think.” All the executives respond to the email, cc’ing in-house counsel.
Hypo Lightening Round: Is it Privileged?

In-house counsel receives and responds to emails from a Fo employee in which the Fo employee:

• Describes a phone call from a Fe reporting that a neighboring Fe is cutting costs by using meat from a non-approved vendor under investigation for an E. coli outbreak (i.e, grounds for immediate termination if true).
• Asks what to tell the Fe that called.
• Asks what to do about the alleged violating Fe.
Hypo Lightening Round: Is it Privileged?

Fo Regional Operations Manager emails Fo Vice President of Operations about a troubled Fe. After exchanging several emails, the VP send an email, with in-house counsel cc’d. The email ends with the following: “I’m cc’ing Jane for her thoughts as well.”
The Work Product Doctrine

Attorney Client Privilege
• Applies to communications between attorney and client (and their agents)
• Complete protection unless waived

Work Product Protection
• Applies to a broader range of things
• Protection is not absolute
Elements of the Work Product Doctrine

To establish work production protection, the invoking party must show that the material at issue:

(1) is a document or tangible thing,
(2) prepared in anticipation of litigation, and
(3) prepared by or for a party, or by or for his representative.
Hypo Lightening Round – Work Product?

• Internal memo discussing effect of new POS system on franchisees
• Pictures from inspection of troubled franchisee’s stores
• Salesperson’s notes and recommendation of franchise prospect
• Incident report as required by operations manual
Ordinary v. Opinion Work Product

Opinion work product
• Encompasses “opinions, judgements, and thought processes of counsel.”
• Very rarely produced

Ordinary work product
• All other things that do not include mental impressions, conclusions or opinions of the attorney
• Can be produced upon showing of substantial need
Substantial Need

- Relative importance of the document
- Party’s ability to obtain that information by other means
Hypo Lightening Round-Substantial Need?

- Witness statements from an internal investigation—witnesses are still employees and live in same city
- Witnesses are no longer employees and live in 8 different states
- Investigation was 10 years ago and witnesses claim “poor memory”
- Witnesses are co-defendants and have destroyed key documents
Waiver – Proactive Best Practice for Forwarding Emails

• Only forward legal emails to those that “need to know”
• Label as A/C and W/P (including attachment if applicable)
• State legal purpose within the body of the communication
• Conspicuously state in communication to not distribute to anyone or discuss with anyone without counsel’s authorization.
Waiver – Use of Online File Sharing Databases

• *Harleysville Ins. Co. v. Holding Funeral Home* – waived A/C and W/P

• Harleysville’s actions “were the cyber world equivalent of leaving its claims file on a bench in the public square and telling its counsel where they could find it.”

• Best Practices: (1) **NEVER** use unprotected online file sharing database; and (2) If client send hyperlink that you can access without a password, **immediately** investigate and inform client to disable and/or protect the database.
Exception to Waiver - Inadvertent Disclosure

Fed. R. Evid. 502(b):

(1) The disclosure is inadvertent;
(2) The holder of the privilege took reasonable steps to prevent disclosure; and
(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B)
Hypo Lightening – Inadvertent Disclosure?

• Disclosing party confused a privileged doc with a non-privileged doc, and produced the privileged doc.

• Disclosing party used search terms to locate privileged ESI, but privileged ESI later found in production.

• Disclosing party discovers inadvertent disclosure and issues a Fed. R. Civ. P. 26(b)(5)(B) demand.
Clawback Agreements and Orders

• Avoid uncertainty of Rule 502(b) reasonableness analysis
• Avoid excess costs of pre-production review for A/C and W/P
• Minimize discovery battles
Best Practices for Clawback Orders

• Label it a “Clawback Order”

• Define the term “inadvertent” broadly - **better yet, avoid the term “inadvertent” altogether**

• State that the order’s provisions supersede and replace Rule 502(b).

• If in a jurisdiction that allows parties to forego all pre-production review, explicitly state this in the order

• If you are in a jurisdiction that requires some degree of pre-production review to avoid waiver, describe in detail the methodology agreed to by the parties
Best Practices for Clawback Orders – Cont’d

• Specify that if a receiving party suspects that a privileged document was produced, the receiving party must notify the disclosing party and must not use the document without producing party’s approval or judicial resolution.

• Specify that a producing party who learns that it has produced privileged documents must notify the recipient to comply with the obligations of Fed. R. Civ. P. 26(b)(5)(B).
Privilege in Franchise Litigation
What Should Receiving Party do if it Discovers Potential Inadvertent Production?

ABA Model Rule 4.4(b) – if a lawyer receives material and the lawyer either knows or reasonably should know that the material was inadvertently sent, then the lawyer must promptly notify the sender:

• Does not address what, if anything, the receiving lawyer should do with material
• Does not define “inadvertently sent”
• Not all states have adopted; and those that have are not uniform
What Should Receiving Party do if it Discovers Potential Inadvertent Production?

*Stengart v. Loving Care Agency*, New Jersey Supreme Court (2010)

- NJ Rule 4.4(b): “[a] lawyer who receives a document and has **reasonable cause to believe that the document was inadvertently sent** shall not read the document or, if he or she has begun to do so, shall stop reading the document, **promptly notify the sender**, and **return the document** to the sender.”

- Employer *found* former employee’s emails to her attorney when it searched the hard drive of a company-owned computer. Employer’s counsel used the emails in litigation.
What Should Receiving Party do if it Discovers Potential Inadvertent Production?

*Stengart v. Loving Care Agency*, New Jersey Supreme Court (2010)

- Held: didn’t matter that the emails weren’t “inadvertently sent” because review and use of the emails “fell within the ambit” of the New Jersey Rule.
- Remanded the case for a hearing to determine whether a sanction was appropriate.
What Should Receiving Party do if it Discovers Potential Inadvertent Production?


- Defense counsel used hyperlink to unprotected online sharing database, which was in an email produced through discovery, to access documents Plaintiff later claimed were covered by the A/C and W/P.

- No state rule; court looked to related ethics opinions
What Should Receiving Party do if it Discovers Potential Inadvertent Production?


- Held: defense attorneys should have known that the documents “might” be privileged and, therefore, were *ethically obligated* to notify Plaintiff’s counsel.
- Held: even if defense attorneys believed privilege had been waived, they should have brought issue to court before using the documents.
- Defense counsel ordered to pay parties’ costs as a *sanction.*
Best Practices

Ask for permission not forgiveness!

• Notify opposing counsel before using or sharing the materials

• If parties disagree on privilege or waiver, bring a motion and do not use materials until after you receive the court’s blessing
A Privilege Log Should:

1. Identify what documents or things are being withheld
2. Establish the elements of the privilege
   • Made between privileged persons
   • In confidence
   • For the purpose of securing legal advice—Be specific
Privilege Log Quick Tips

• Courts have wide discretion regarding how privilege logs should be organized
• Address concerns early
• Provide specific facts
Privilege Disputes Can Result in Sanctions

• Courts will impose sanctions up to and including waiver of the privilege.
• Courts will look at:
  • The broadness of the requests
  • The responsiveness of the party
  • Delays in production
  • Amount of information at issue
  • Presence of bad faith
Review the Privilege Log

• Look for recipients and descriptions
• Compare to the discovery plan
  • What do you know?
  • What additional information do you need?
• How important is the document?
Questions?