Understanding Privilege in an Electronic World
BY JEFFREY E. DUBIN AND SAM A. BENSON, JAVITCH, BLOCK & RATHBONE, LLC

Have you ever sent an email that you wish you could recall? Have you ever sent an email to the wrong recipient or mistakenly included the wrong attachment? These are common hazards in the electronic world that we live in today.

For subrogation professionals, this fast paced “click and send” environment permits an efficient and convenient method to exchange information. However, due to the ease and speed of electronic communication, the subrogation professional can easily send information electronically that should remain protected from disclosure in a subrogation case. The ability to protect privilege in today’s technologically advanced world begins with the subrogation professional and requires a thoughtful approach to avoid spoiling a claim to privilege later in litigation. This article analyzes the types of privileges applicable to subrogation, how to protect privilege when communicating through email, and the requirements to assert privilege under the federal rules.

Privileges Important to Subrogation
The two most important privileges in the context of subrogation are the attorney-client privilege and the work product doctrine. The attorney-client privilege bars the disclosure of communications between the attorney and client. The privilege applies in both directions: communications from the client to the attorney and communications from the attorney to the client.1 But, in order for the privilege to exist, the communications must have been made in confidence and for the purpose of providing or securing legal services.2 The privilege does not apply where legal advice is merely incidental to business advice.3 The mere fact that emails are sent to an attorney does not guarantee privilege, nor does information become privileged simply because it came from an attorney.

The work product doctrine applies to materials prepared in anticipation of litigation or trial by a party or a party’s counsel.4 Work product includes any materials prepared by the attorney which reflect the attorney’s impressions, opinions, or legal theories regarding the specific litigation at issue. While the work product doctrine is often applied to the work of an attorney, the concept of work product is not confined to information or materials gathered or assembled by the attorney.5 The work product rule also protects materials compiled by investigators and other agents for the attorney as part of trial preparation.6 Materials prepared by someone other than the attorney are protected under the work product doctrine as long as those materials were prepared for counsel with an eye toward the realistic possibility of impending litigation. Discovery of materials prepared in anticipation of litigation may be obtained only upon a showing that the adverse party has a substantial need for the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.7

Spoiling Privilege by Forwarding Emails
The ability to forward emails to multiple parties with the click of a button has changed the landscape of the attorney-client privilege and the way that courts evaluate the privilege. An “email chain” is a series of related emails that have been replied to or forwarded by multiple recipients over a period of time and include the text of each prior email. Email chains add complexity to the attorney-client privilege, since some emails within the chain may contain
factual information that is not protected by the privilege while other emails in the same chain may contain or request legal advice.

Courts are divided as to whether an entire email chain sent to counsel is privileged. A minority view is that an email chain is equivalent to a continuing conversation among multiple participants that is shared with an attorney and thus should be afforded the same privilege as a conversation held in person. However, a significant number of courts over the years have rejected this view and concluded that each email within the chain is a separate communication for which a separate privilege must be asserted. Depending on the jurisdiction, subrogation professionals must recognize that email chains forwarded to counsel are not necessarily privileged and each email within the chain may be scrutinized as to whether privilege applies.

While there is division among the courts as to whether privilege applies when forwarding email chains to counsel, forwarding single emails received from counsel to third parties will certainly spoil a claim to privilege. As a general rule, an email disclosing the attorney’s legal advice to an unnecessary third party will waive the attorney-client privilege. Thus, a subrogation professional must use caution before forwarding an email to third parties without first consulting counsel. For example, an email sent from the attorney to the subrogation professional and then forwarded to an expert will be discoverable because the sender waived the attorney-client privilege. An email such as this can be quite damaging if it is placed in the hands of the adverse party. Not only will the adverse party have access to the attorney’s mental impressions or legal opinions, but the identity of the expert will also be disclosed. In the event that the expert is only consulted and not retained to testify at trial (since the expert’s opinion may not be favorable to the subrogating party), the adverse party will now have access to the expert and his opinion. Subrogation professionals must be cognizant of the content of emails sent and received in the course of business.

Furthermore, subrogation professionals should not blind copy the attorney on emails if they are seeking legal advice. This will create difficulty later in document production, since there will be no record that the email was ever sent to the attorney. Blind copying an attorney may also bring into question whether the sender intended to seek legal advice in the first place. It is important to remember that, for a communication to be privileged, it must be clear that the sender intended to seek legal advice.

Protecting Privilege Through the Use of Labels and Disclaimers
Subrogation professionals have an affirmative duty to prevent the disclosure of confidential communications to third parties, since communications disclosed outside of the attorney-client relationship will not be protected. It is good practice for subrogation professionals to label emails to protect the privileged nature of the work. Labels such as “Confidential Attorney-Client Communication” or “Privileged and Confidential” should alert readers and display the party’s intent to protect the confidentiality of the communication. Labels will also provide a reminder that confidential communications should only be copied and distributed to those individuals who need to be involved in the communication. There is no specific location where the label must be placed within an email; however, a short privilege warning in the subject line of the email will clearly warn unintended recipients as to the nature of the communication.

Privilege can be further protected by identifying the purpose of the communication at the beginning of the email. For example, an email to counsel which states “I am writing to seek a legal opinion as to…” lays the foundation for a claim of attorney-client privilege, while “I am writing to provide the information you requested regarding the subrogation claim against….”
will lay the foundation for a work product claim. Subrogation professionals must remember that business and legal questions should not be mixed in emails to counsel, since communications which do not seek legal advice are not protected under the attorney-client privilege. Stating the purpose of the email at the outset will provide clarification to the attorney as to the nature of the communication (business or legal) and will support a claim of privilege later in litigation.

An email disclaimer is another technique that can be utilized by subrogation professionals to protect privileged information. An email disclaimer is a block of text appended to the bottom of an email that alerts the recipient as to the confidential nature of the message. The primary reason to utilize an email disclaimer is to avoid waiving privilege in the event that the email is sent to the wrong recipient. When an email containing confidential information is mistakenly sent to a third party, the court will look at the facts surrounding the inadvertent disclosure before determining whether privilege has been waived. Waiver of privilege for inadvertently disclosed information generally occurs only if the producing party failed to take reasonable steps to maintain confidentiality. An email disclaimer will help to establish that the sender took reasonable steps to maintain confidentiality.

Although a disclaimer may indicate that the transmitted communication is confidential, it is by no means an end all solution to protecting privilege. Nevertheless, subrogation professionals should always include a disclaimer when sending emails that contain privileged information, since the disclaimer will evidence subjective intent to maintain the confidentiality of the communication. The following is a general disclaimer recommended for subrogation professionals:

“NOTICE: The information in this email and in any attachments is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and delete all copies of the original message.”

Labels and disclaimers clearly play an important role in protecting privilege; however, subrogation professionals should be aware of the significance of overusing labels and disclaimers. Routinely placing labels and disclaimers on all communications may give the adverse party an opportunity to claim that the warning is meaningless. Furthermore, communications sent to third parties outside of the attorney-client relationship do not need a label or disclaimer, since the adverse party can attack the confidentiality of a communication that has widespread distribution. As a result, subrogation professionals should limit the use of labels and disclaimers to only those situations involving confidential and privileged communications.

**The Duty to Create a Privilege Log**

A claim to privilege can always be challenged by the adverse party if the basis for that privilege is not adequately supported. Thus, it is essential for the subrogation professional to understand how the privilege is asserted and the consequences that could result if the privilege is successfully challenged.

The burden to establish the privilege falls on the party objecting to the production. When a party withholds otherwise discoverable information by claiming that it is privileged or subject to protection under the work product doctrine, the party must make the claim expressly and must describe the nature of the documents or communications not disclosed in a manner that will enable the adverse party to assess the applicability of the privilege or protection.

As a means to provide information to evaluate the applicability of the privilege asserted,
a party is required under Fed.R.Civ.P. 26(b)(5) to compile a list which provides a factual
description of the documents withheld from production and the basis of privilege. This list is
commonly referred to as a “privilege log.”

A privilege log will set forth an itemized listing of each document which contains the following information:
1. The date of the document;
2. The identity and capacity of the author(s) and recipient(s) of the document;
3. A description of the subject matter addressed in the document; and
4. An explanation as to the privilege asserted.

A party’s failure to submit a privilege log or provide sufficient detail within the privilege log may have severe consequences, such as a motion to compel by the adverse party challenging the assertion of privilege or a court order ruling that privilege has been waived.

A court order compelling production of withheld documents may also lead to sanctions if the party continues to refuse to provide the requested documents.

There are procedural mechanisms by which the party claiming privilege can protect its interests if a motion to compel is anticipated. The party may move the court for a protective order if there is a legitimate need to limit discovery of the subject information.

A party may also request an in camera inspection of the materials. During an in camera inspection, the court will privately review the documents at issue to evaluate the privilege asserted. An in camera hearing is not a matter of right and whether to hold such a hearing is ultimately left to the trial court’s discretion.

Conclusion

Subrogation professionals should have a basic understanding of how communications made in the ordinary course of business are protected under the attorney-client privilege and work product doctrine. It is important to recognize that not all communications within an email chain are privileged merely because they were forwarded to counsel. Emails from counsel should never be forwarded to third parties unless the attorney is first consulted. Labels and disclaimers are a valuable way to maintain the confidentiality of a communication; however, the use of a label or disclaimer is by no means an assurance of privilege. The manner in which subrogation professionals communicate through email can have a drastic effect on whether those communications are entitled to protection. Subrogation professionals must take the necessary measures to protect confidential information in emails to avoid spoiling the privilege later in litigation.

Endnotes:

2 United States v. Evans, 113 F.3d 1457, 1461 (7th Cir.1997).
5 Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir.1978).
(holding that each email of the chain must be considered as a separate, unique document and therefore must be separately itemized within the privilege log in order to claim privilege);
Thompson v. Chertoff, No. 3:06-CV-004 RLM, 2007 WL 4125770, at *2 (N.D.Ind. Nov. 15,
(holding that each individual email in a string must be analyzed separately); In re Univ. Serv. Fund Tel. Billing Practices Litig., 232 F.R.D. 669, 673 (D.Kan.2005) (holding that each email is a separate communication for purposes of privilege, since portions of the chain may contain non-privileged content).


10 Id.

11 Fed.R.Evid. 502(b).


14 Similar to the Federal Rules, many states have also mandated the use of privilege logs in discovery.

