PRIVILEGE UPDATE: ATTORNEY BILLS/INTERNET TRANSMISSION BY: DONALD PATRICK ECKLER, ESQ. AND ALICE M. SHERREN ESQ.

As described in our previous article, *Tribe's Trump Tweet*: A-C Client Privilege and Confidentiality," PLDF Quarterly, Vol. 8, Issue 3, not all confidential information is protected by the attorney-client privilege. Two recent decisions analyze how the protections of the attorney-client privilege may inadvertently be compromised or lost, even when the information itself is confidential. This article explores how attorneys can safeguard their clients' confidential information as the law of privilege and technology rapidly evolves.

Attorneys' Bills Not Categorically Protected

Opposing counsel wants to obtain billing records in an ongoing case. Can a lawyer be compelled to disclose these records and potentially reveal strategies to the other side?

In *Los Angeles County Board of Supervisors v. The Superior Court of Los Angeles County*, 2 Cal. 5th 282 (2016), the Supreme Court of California addressed whether lawyers may be compelled to produce billing invoices. In that case, the ACLU submitted a public records request to the county seeking "invoices" specifying the amounts the county had been billed by any law firm in connection with nine lawsuits alleging excessive force against jail inmates. The court noted that since the billing records in question had been transmitted in a secure fashion, those records remained confidential. However, in coming to its determination that billing invoices are not "categorically" protected by the attorney-client privilege, the court pointed to the business nature of attorney bills and the well settled principle that business advice is not protected by the attorney-client privilege.

Despite this ruling, the court noted that information contained within certain invoices may still be within the scope of the privilege. The court stated: "To the extent that billing information is conveyed 'for purpose of legal representation' – perhaps to inform the client of the nature or amount of work occurring in connection with a pending legal issue – such information lies in the heartland of the attorney-client privilege."

The court went on to hold that when a legal matter remains pending and active, the privilege encompasses *everything* in an invoice, including the amount of aggregate fees, because an uptick in spending might reveal investigative efforts and trial strategy, or concern about a particular event. The court did note, however, that the privilege may not protect invoices in concluded matters: "But there may come a point when this very same information no longer communicates anything privileged, because it no longer provides any insight into litigation strategy or legal consultation."

So what does this mean in the context of professional liability defense? The *Board of Supervisors* case was decided in the context of the California Public Records Act (PRA), which is modeled after the federal Freedom of Information Act (FOIA). Its holding may be distinguishable in cases that do not implicate either Act, but is certainly illustrative of how courts may view information contained in billing records. It appears that billing records (or at least portions of those records) may enjoy attorney-client privilege protection from disclosure in ongoing cases, but that billing records in concluded cases could be subject to compelled disclosure.

Oops – Did We Just Waive the Privilege?

A client wants to share surveillance video with its lawyer to determine strategy in ongoing litigation. Does it matter how that video is shared?

One of the hallmarks of the attorney-client privilege is protection by the client of the secret nature of the communication. In *Harleysville Insurance Company v. Holding Funeral Home, Inc.*, 2017 U.S. Dist. LEXIS 18714, 15 CV 57 (W.D. Va, February 9, 2017), the court held that materials which were transmitted in an unsecured fashion were not protected from disclosure even though the materials would have otherwise enjoyed such protection.

The use of technology makes the transmission of information much easier and more efficient, especially for large volumes of data. However, transmission through unsecure means can lead to a waiver of the attorney-client privilege or work product protection. In *Harleysville*, an insurer wished to share video surveillance footage of a fire loss scene with its counsel, and chose to utilize an internet-based electronic file sharing service. The client sent a hyperlink to its lawyers – which could be accessed by anyone who clicked the link or typed in the url – and did not password protect the information shared. The hyperlink was transmitted via an email which contained a standard confidentiality notice. Later, additional information, including the insurer's entire claim file, was added to the site.

In discovery, the other side was provided electronic copies of all documents, including the email which contained the hyperlink. Despite the confidentiality notice, counsel used the hyperlink to gain access to the video and the entire claims file without ever notifying the insurer or its counsel that they had accessed and reviewed potentially privileged information.

The *Harleysville* court determined that the attorney-client privilege had been waived because the client insurer had failed to transmit the information in a secure way, and had failed to redact privileged information. The court stated "[t]he information uploaded

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PLDF Amicus Program

Please let us know of appeals in your jurisdictions implicating important professional liability issues that might have national significance.

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to this site was available for viewing by everyone, anywhere who was connected to the internet and happened upon the site by use of the hyperlink or otherwise. In essence, Harleysville has conceded that its actions were the cyber world equivalent of leaving its claims file on a bench in the public square and telling its counsel where it could find it."

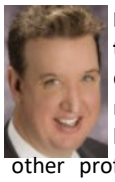
The attorney-client privilege is possessed by the client, not the attorney. The *Harleysville* court observed that the technology involved in information sharing is rapidly evolving, and whether a client chooses to use a new technology is a decision within that client's control. The court placed the burden of understanding whether the technology chosen by a client allows unwanted access by others to confidential information squarely on the client.

So what can attorneys do to aid their clients in avoiding inadvertent waiver of the privilege? To the extent it is within an attorney's knowledge, an attorney can counsel clients on the appropriate manner to secure their electronic data. Even if a client missteps and provides information in an unsecure matter, there are ways to minimize the damage done, including removing the information from the unsecured source.

It should be acknowledged that while the *Harleysville* court found that the insurer client had waived the privilege by using unsecured transmissions, the court was not pleased with the counsel who accessed the potentially protected information either. The court issued sanctions, finding that counsel should have asked the court to decide the issue before making any use of the potentially protected information: "The court should demand better, and the ruling here is not intended to merely tolerate the bare minimum ethically compliant behavior, but, instead, to encourage the highest professional standards from those attorneys who practice before the court."

Conclusion

As these cases illustrate, potential threats to the attorney-client privilege may come from within the attorney-client relationship. As defenders of a client's confidences, attorneys should be vigilant in maintaining the secure transmission of client information, whether it is their bills, the client's claims files, or other information.



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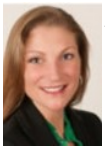

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