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DISCOVERY

INSIGHT: Practical Tips For "Anticipation of Litigation" Discovery

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In-house lawyers and clients who anticipate litigation discovery should understand how common missteps can destroy or waive privilege protections, particularly in today's digital age. As experienced lawyers know, cases can be won or lost depending on whether documents are withheld as privileged. However, many lawyers wrongly believe that the work-product doctrine, which may be invoked by both lawyers and clients, can be used as a catch-all protection to prevent discovery of documents. In reality, the doctrine has a more limited scope and only protects those documents prepared for or by an adverse party in "anticipation of litigation."

If you, your company, or client misunderstands the privilege, there may be long-term and drastic consequences, particularly in "bet-the-company" lawsuits. If company employees believe that the documents they author are privileged, they may be less careful in their writing, assuming that the document will never be seen by anyone outside the organization. If the privilege for one document is waived, it is possible that the privilege may be waived for other documents covering the same subject matter as well. Failing to properly preserve privilege can open up company secrets that would otherwise be protected from disclosure.

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The Work-Product Doctrine

The work-product doctrine is a common law doctrine that was created by judges to allow lawyers to prepare and develop legal strategies and theories free from needless interference by adversaries. The doctrine is now codified by Federal Rule of Civil Procedure 26(b)(3), and analogous state rules of civil procedure, and expands beyond merely the thought processes of lawyers. Unlike the attorney-client privilege, which protects communications between lawyers and their clients, the work-product doctrine encompasses "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its

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representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).'' Fed. R. Civ. P. 26(b)(3).

Many clients and lawyers wrongfully assume that using the label ''work product'' or ''attorney work product'' protects documents from later discovery. This is incorrect. The work product doctrine only protects from discovery by an adverse party those materials prepared for or by a party, including in-house counsel, in ''anticipation of litigation.''

What does this mean, in practical terms? Although the court's interpretation of ''anticipation of litigation'' varies by jurisdiction, it generally means that the document must have been created before or during litigation and with an eye towards litigation. If the primary purpose for the document's creation is not related to litigation, work-product protection will generally be denied by the court. The pertinent question for a party intending to claim a work product privilege is whether it can be shown that the document was prepared because of the threat of litigation, rather than a bona fide business purpose. Although application of the work-product doctrine depends on the facts and circumstances surrounding the preparation of the requested documents, counsel can properly claim the privilege for documents prepared for expected litigation.

The work-product doctrine, however, is not absolute. Unlike the attorney-client privilege, which can only be waived by the client, the work-product doctrine may be overcome if an opposing party can show that it has a substantial need for the documents to prepare its case for trial and cannot, without undue hardship, obtain their substantial equivalent by other means. In addition, the party claiming the privilege bears the burden of proof, and must demonstrate to the court that the documents were in fact prepared in anticipation of litigation and that the work-product doctrine applies.

Special Considerations in an Electronic Age

Successfully asserting the work-product doctrine has become challenging for companies and businesses in an age where electronic communications across all mediums of exchange are routine. Litigation conflicts often arise in the context of discovery of electronically stored information (''ESI'') due to the proliferation of e-mail, text messages, and social media, and the potential greater accessibility of the information. The use of electronic communication has resulted in the generation of more documents by more people, with a far broader distribution than ever before. It is a fact of modern life that an enormous volume of information is electronically created, exchanged, and stored. ESI is commonplace in our personal lives and in the operation of businesses, public entities, and private organizations. In addition to discovery of documents in hard copy format, an adversary most likely will seek discovery of electronic data relating to the same subject areas. What was once rare—discovery involving ESI—has now become commonplace.

The widespread use of electronic communications, which can be distributed globally within seconds, has increased the legal risks to companies and introduced new issues in litigation discovery. Electronic materials have provided opposing counsel in litigation with a fertile source of unanticipated and damaging information. Most litigators and their clients can recount horror stories of ''smoking gun'' e-mails, text messages, Bloomberg chat messages, or social media posts, that so damage their case beyond repair that settlement discussions are initiated. Based on modern discovery practices and techniques, lawyers and their clients must assume that problematic electronic communications may be discoverable and used in litigation to their adversary's advantage. However, these risks can be avoided by being informed and diligent about preserving privilege before litigation begins.

Key Tips

In-house counsel should follow these basic rules in order to prevent potentially disastrous results in later litigation.

1. Assume that any communications will be read by a court or an adversary

Electronic communications are instantaneous. Before the advent of e-mail, lawyers and clients might proofread a letter multiple times before sending it. E-mails should not be treated with less diligence. Just because you can communicate faster does not mean that you should devote less time to making sure the e-mail says exactly what you want it to say.

Do not put anything in an e-mail, text message, social media post, or other form of electronic communication that you would not be willing to show to a jury or a judge. Some industry insiders refer to this as the ''Wall Street Journal'' test (never say something that you would be unhappy to see on the front page of the newspaper). Although this advice will almost certainly not be strictly adhered to in today's digital age, it should at least be an aspirational goal to minimize exposure in litigation. In-house counsel should make sure that employees are advised of this objective and are made aware that their e-mails or text messages could potentially end up being read in a courtroom or in a newspaper. When reasonable precautions are taken to reduce the writing of ill-considered and damaging e-mails or text messages, a company will prevent disclosure of damaging or confidential company information and minimize its vulnerability during later litigation discovery.

2. Limit distribution of e-mails

As anyone who has ever sent or received a mass e-mail knows, it is easy to send a message to all the employees of a company with the availability of e-mail distribution groups. It is even easier to select ''Reply All'' when responding to an e-mail. As lawyers who have reviewed e-mail communications during discovery know, this option is frequently used.

When writing and sending an e-mail, you should carefully consider whether each recipient must be included on the e-mail distribution. For each additional recipient you include on your e-mail, there will be an additional source for the communication, which may be separately discoverable. This can be especially problematic if the e-mail contains potentially incriminating or embarrassing content because opposing counsel may be more likely to notice it due to the number of copies circulated. Also, the more people who receive an e-mail, the more opportunities there are for that person to in turn forward the e-mail to others, both internally and externally. E-mails can easily be forwarded, and can easily be sent to people outside of the company.

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Other issues can arise with the popularity of e-mail communications. For example, for every employee who receives an e-mail, that person may be deposed about the e-mail at a later date. In addition, if an e-mail contains an attachment, that attachment is subject to the same discovery issues discussed above. Attachments may raise a host of other issues in discovery because there may be multiple versions of the same document, each of which may be independently discoverable. Because earlier versions of electronic documents may be discoverable, carefully consider whether those versions should be circulated before they are finalized.

3. Avoid inappropriate language in communications

Lawyers who have reviewed electronic communications in discovery know that inappropriate language in e-mails, texts, or other forms of electronic communication can quickly pique their interest amidst otherwise mundane business communications. Even insignificant foul language can have a prejudicial effect if later shown to a judge or a jury, potentially tainting their perception of the author.

Refrain from making negative comments about someone in electronic communications. If you have something negative to say about someone, say it in person or on the phone. The use of negative statements in electronic communications can create a predicament in later litigation if the credibility of the subject or the author is on the line before a jury or judge. Remember, these communications may be used to attack the integrity of a key witness for your company.

Humor and sarcasm should similarly be avoided because funny or snarky comments may be misinterpreted or misunderstood when later presented to a judge or jury. Because humor is context-based, it often loses its impact and can be misconstrued when removed from its original context and revisited in later litigation. In the context of a deposition or a trial, a deponent or witness's explanation of ''I was just kidding'' could be interpreted as derogatory or flippant when taken out of context. If you feel the need to use humor, sarcasm, or profanity, save it for telephone or in-person communications.

4. Clearly label privileged communications

To avoid questions of privilege in later litigation, label potentially privileged e mails ''Privileged and Confidential.'' Even if the e-mail is not truly privileged, the label will be a red flag during litigation that it might be potentially privileged (and therefore not discoverable) in the context of document production. Determining whether a communication is privileged can be difficult years after a communication is sent in the midst of contentious litigation. Adding that legend at the top of the communication can assist those who are reviewing documents during the process of document production.

Clearly labeling privileged communications is also important because it avoids the potential waiver of privilege. If an in-house lawyer writes an e-mail advising an internal client, the recipient could potentially waive the privilege if the client decides to forward the e-mail to others. Including the ''privileged'' legend on e-mails warns the recipient to be cautious with the e-mail and not to forward the e-mail without consideration.

However, exercise caution in labeling privileged communications as ''work product.'' Labeling documents as ''work product'' privileged may have negative implications for later litigation. For example, labeling a document as ''work product'' could be construed as an admission that you are anticipating litigation when you are not. This is important because it may require litigation holds on company records. As a precaution, consult with a lawyer before labeling documents as ''work product'' to ensure that the label is appropriate.

5. Use oral communications

Many of the problems that arise in litigation discovery can be avoided by simply picking up the phone to communicate rather than creating a paper or electronic trail of information. Although e-mail has replaced telephone communications as the preferred medium of communicating, telephone or face-to-face communications should be encouraged when transmitting certain information to prevent problems for counsel later in litigation. This should be emphasized especially when addressing sensitive or incriminating subjects. If you cannot reach colleagues by telephone or meet them in person, simply send them an e-mail saying, ''Please call me.''

Conclusion

By following these five tips for dealing with business communications, in-house counsel can prevent or minimize problems in later litigation. Although these tips might not be suitable for each company, in-house counsel should implement them in a way that meets the realities of their organizations. Informing employees about these precautions through training or department meetings will ensure that employees are vigilant about their use of electronic communications.

The reality and dangers of electronic communications require companies to think carefully and proactively about their role in potential litigation. Companies can benefit from the work-product doctrine and avoid pitfalls that may arise in later discovery by staying informed about privilege issues and following these tips. Taking a proactive approach to privilege issues in the context of electronic communications well in advance of any dispute or lawsuit arising is prudent and will help companies avoid unexpected damaging disclosures.