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Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of Privilege and Discovery

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Assistant General Counsel for Finance & Litigation

A Lawyer's View of Privilege and the Discovery Process

by Lisa J. Obayashi

This article is written in response to remarks made by a beleaguered procurement office faced with the task of assisting the Contract Law Division in that litigation phase known as discovery. The purpose of this article is to provide procurement personnel with some guidance on when to seek protection under the available doctrines of privilege from those pesky contractor attorneys who demand to see every single piece of paper ever produced by the procurement office. In particular, I am referring to those instances when the contracting officer believes that certain documents and answers, whether in the form of answers to interrogatories or depositions, should not be provided to personnel outside the Government. That instinct is what privilege is grounded on—confidentiality. When the Contract Law Division informed you that the Government's case was shaky because ... - the answer was obviously sought in confidence. This article will focus on the role of privilege and its application in the discovery process.

Privilege & Discove

There are basically three recognized privileges which allow a party, in this case, the Government, to withhold certain documents and answers in response to discovery requests. Discovery being that stage of the litigation where each side gets to go on a fishing expedition—to discover the relevant evidence in a case. Don't worry, the Government gets to fish as well. The General Services Board of Contract Appeals and the General Accounting Office, our two most frequented tribunals, follow the federal practice of requiring parties to produce those materials that might reasonably lead to the discovery of relevant evidence. This very broad standard, however, means that opposing counsel will seek any document that has the possibility of leading to matters having a probative quality. Privilege is one of the means by which a party can thwart the discovery request which seeks everything you have ever seen, written about, or heard about a particular contract.

Attorney-Client Privilege

The attorney-client privilege is the oldest of the common law privileges for confidential communications. It has been recognized from the times of early Elizabethan England where an attorney refused to turn informer against his client. The purpose of the privilege is to encourage frank and full communications between attorneys and their clients thereby promoting broader public interests in the observance of law and administration of justice. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The privilege applies if "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D. Mass. 1950).

The GSBCA limits application of the attorney-client privilege to those communications made with the intent that they remain confidential and with the reasonable expectation of protection of that confidentiality. *Amdahl Corporation*, 85-2 BCA ¶18,054 (1985). This means that if the communication took place in public, it will be difficult to assert the privilege at a later time.

Further, the GSBCA follows the rule that communications from the attorney to the client are privileged only to the extent that they would reveal a confidential communication from the client or when such communications are inextricably intertwined with the legal advice. *In Re Sealed Case*, 737 F.2d 94, 99 (D.C.Cir.1984); *B.D. Click*, 83-1 BCA at 81,174 (citing, *In Re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 389 (D.D.C.1978)).

So for instance, if you, as the contracting officer, are asked in a deposition: What did you say or write to your attorney? The answer contains obvi-

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ously contains confidential communications. Similarly, if you are asked: What advice were you given? The advice is inextricably intertwined with legal advice and is therefore privileged.

The privilege is asserted in all contexts of discovery. The contracting officer faced with the task of going through his or her voluminous contract files finds a document addressed to legal counsel seeking advice on whether a particular contract claim warrants a denial. The document obviously fits the description outlined above and can be withheld on the basis of the attorney-client privilege. The same would apply to telephone notes in which you have documented your attorney's advice.

Another context in which the privilege is raised is during depositions. Opposing counsel asks what you did after receiving his client's claim. You can answer that you consulted with your attorney. The line of questioning regarding your actions should usually stop there. What you asked, what you were told, etc. are all privileged under the guidelines set forth above.

Privilege & Discove

There is a major exception to the attorney-client privilege—when the substance of those communications is put in issue, the privilege usually falls. *B.G.W. Limited Partnership v. General Services Administration*, GSBCA, 10501(6/23/92). The situation often arises in the context of a contract interpretation case under the Contract Dispute Act. As the GSBCA explained in *Tera Advanced Services Corp.* , 84-1 BCA ¶16,936 (1983), it is unfair to allow an appellant to advance a contract interpretation—sponsored and developed by in-house counsel—while resisting inquiry into that view because of the sensitive nature of attorney-client communications:

Having raised the issue of its officers' understanding of what they were signing when they executed the lease agreement, having indeed built its entire case upon its course of dealing with the Government in consultation with, and with the participation of, its attorney, appellant now invokes the attorney-client privilege to prevent the Government from inquiring into one of the principal elements to that understanding. What we have here, then, is a clash between the values protected by the attorney-client privilege and the need to get the right result in this case. In such a situation, the privilege must yield.

Id. at 84,250.

Attorney Work Product Privilege

The work product privilege is a broader privilege and designed "to promote the adversary system by safeguarding the fruits of counsel's trial preparation from the discovery requests of opposing parties." *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371 (D.C. Cir. 1984). It grew out of the need to provide an attorney with a "certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). The key to this privilege is a showing that the information sought was prepared or obtained because of the prospect of litigation. Fed. R.Civ. P. 26(b)(3) (Advisory committee note, 1970). It is intended to aid the lawyer in trial preparation. Common examples are the lawyer's research, analysis and mental impressions all performed because of the prospect of litigation.

In *Harrington Associates, Inc.*, 85-2 BCA ¶18,109 (1985), appellant based its claims for damages on the review of corporate files made by its project manager. Appellant sought to shield the project manager's notes and analysis-- some of which detailed events that occurred during contract performance--from discovery, on the basis that the material was attorney work product developed in anticipation of litigation. The GSBCA disagreed. Ordering production of the project manager's notes and analyses, the board held that the submission of claims "is a part of the normal day-to-day routine of performing a government contract. . . . " such that these records, "prepared in the regular course of business" did not qualify as attorney work product. Only documents that implicate counsel's labors and preparation for litigation will be shielded from full disclosure under the attorney work product rule.

Deliberative Process or Executive Privilege

The deliberative process privilege, aka the executive privilege, protects secret and other highly sensitive communications within the government from disclosure. The deliberative process privilege is the privilege recognized by the courts to "prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). "[t]he purpose of the privilege for predecisional deliberations is to ensure that a decision maker will receive the unimpeded advice of his associates." *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 359-360. The privilege is founded on the public policy that, in order for

government to function effectively, government decision makers must be able to obtain frank opinions and recommendations from their subordinates. If those opinions of the subordinates were to be spread upon the public record, decision makers would find it more difficult to obtain the necessary input to their decision making. There are two requirements to this privilege: that it be predecisional (i.e. does not express a policy already adopted by the agency) and it must be deliberative, i.e. (opinion and not fact). A direct part of the deliberative process is that it makes recommendations or expresses opinions on legal or policy matters.

Before you get carried away in thinking that a majority of the documents found in your files are predecisional and deliberative, keep in mind that this privilege is rarely invoked. This is because of the procedural hurdles and the showing which the Government must make to prove that a document is truly deliberative. First "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). Second, the claim must be accompanied by an affidavit in support of the privilege executed by the head of the agency which has control over the matter, after personal consideration of the documents at issue. The Boards of Contract Appeals allow this authority to be delegated by the head of the agency, but only to a subordinate with high authority. *Automar IV Corporation*, 88-2 ¶20,821 (1988). Third, the agency must provide 'precise and certain' reasons for preserving the confidentiality of the requested information." *Mobil Oil Corp. v. Department of Energy*, 520 F.Supp. 414, 416 (N.D. N.Y. 1981).

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Examples of documents which are often the subject of the deliberative process privilege are recommendations, drafts, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. *Coastal States Gas Corp. v. Dept, of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

Purely factual information, albeit in a deliberative intragovernmental memorandum, is not protected by the privilege, to the extent that it can be separated from expressions of opinion or recommendations without compromising that privileged material in those documents. *In re Franklin National Bank Securities Litigation*, 478 F.Supp. 577 (E.D. N.Y. 1979).

The burden of proving that a particular document is exempt from discovery based on this particular privilege is on the government. Also, that burden once met, may be overturned by an appellant making a compelling showing that the need for the documents outweighs the public interest in preserving the privilege. The court will usually hold an *in camera* review of the documents in question to determine whether the privilege applies.

Assisting Agency Counsel

Here are a few tips which can assist agency counsel and your own office get through the discovery process while still withholding privileged documents: First, seek out all files, not just your own contract files, *i.e.* program office files. Second, err on the side of producing the document or answering the interrogatory. Point out documents which you believe are privileged and let the attorney assigned to the case make the call. This way, both your attorney and opposing counsel will not end up in discovery squabbles at a later date, *i.e.*. during depositions when opposing counsel finds out about a document which had not yet been produced or objected to on the grounds of privilege. Third, ask your attorney whether there may be other grounds for withholding the information. Although a document may not be privileged, it may also be irrelevant or objectionable on some other ground.

Editor's Postscript

Don't let the possibility of your files being "discovered" serve as a reason or an excuse for not documenting your actions, decisions, phone calls and other matters. All other things being equal, the party with the best set of records has the definite advantage if a matter goes to litigation.