WHAT IS REALLY COVERED BY THE ATTORNEY-CLIENT PRIVILEGE?

by Mark A. Lienhoop

All lawyers know that there is an attorney-client privilege. But when it comes to responding to discovery, some seem to think it covers a lot more than it really does. Maybe this is because they confuse privileged communications with attorney confidences. Actually, these are two very different rules. Only the privilege can prevent disclosure of what would otherwise be discoverable.

Confidentiality is required by Professional Conduct Rule 1.6. (This arguably controls over a similar statutory provision which used to be at Ind. Code 34-1-60-4, recodified as I.C. 33-21-1-3.) The professional obligation of confidentiality is broader than the attorney-client privilege. According to the "Comment" to Rule 1.6, it "applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." In addition, it always applies, in court and out.

On the other hand, the attorney-client privilege applies to communications only. Various definitions of the attorney-client privilege have been given over the years. Some often quoted definitions include one by Wigmore found at 8 J. Wigmore, *Evidence* Sec. 2292, at 554 (McNaughton rev. ed. 1961). Another is from Judge Wyzanski in *United States v. United Shoe Mach. Corp.*, 89 F.Supp. 357, 358 (D. Mass. 1950).

In federal courts, the attorney-client privilege is a question of federal common law when jurisdiction is based on a federal question. However, state privilege law applies in federal court when the claim is based on state law. See, Federal Rules of Evidence, 501.

Because the privilege was originally developed through the common law, its specifics can vary from jurisdiction to jurisdiction. Regardless, it is generally recognized to require a confidential communication, between those covered, regarding legal advice. See Restatement, *The Law Governing Lawyers* Sec. 118 (Tentative Draft No. 1, 1988).

Indiana's attorney-client privilege has been recognized since 1840. *Brown v. State,* 448 N.E.2d 10, 13 (Ind. 1983). It is now codified at IC 34-46-3-1 (formerly IC 34-1-14-5). The current statute provides that attorneys are not required to testify regarding confidential communications made to them, and as to advice given, in the course of their professional business. This seems to be a pretty standard definition and in keeping with the ones discussed above.

A fairly recent case which illustrates application of Indiana's attorney-client privilege is *Owens v. Best Beers, Inc.,* 648 N.E.2d 699 (Ind. Ct. App. 1995). Owens was general manager of Best Beers and Haak was its president. Best Beers successfully brought suit against Miller Brewing in response to Miller's termination of its distributorship agreement.

Later, Owens brought suit against Best Beers claiming that Haak had promised him additional compensation in return for being in charge of the litigation against Miller Brewing. Owens sought to prove this through testimony of the attorney Best Beers had used in its litigation against Miller. At the deposition of that attorney, other counsel for Best Beers

objected to any questions regarding the alleged compensation agreement based on the attorney-client privilege. The trial court denied Owens' motion to compel.

The Court of Appeals reversed and remanded. Owens was adverse to Best Beers in regards to the agreement. Anything communicated, or intended to be communicated, to Owens regarding the agreement was not confidential and, therefore, not privileged. In addition, the privilege covered only communications and not actions, such as, for example, the preparation of documents.

The Court in *Owens* also noted that communications between attorney and client which do not concern the subject matter of the attorney-client relationship are not privileged. *Owens*, at 702. On the other hand, the Court of Appeals held that confidential communications between Haak and the Best Beers attorney regarding the alleged compensation agreement with Owens, made outside the presence of Owens, were privileged. *Owens* confirms that Indiana's attorney-client privilege applies only to confidential communications regarding legal advice.

Application of the attorney-client privilege is determined question by question. *Owens*, at 702. Therefore, the Court of Appeals remanded the case to the trial court to determine whether the privilege applied to any question not specifically addressed in the opinion.

Of course, even if the attorney-client privilege applies, it can be waived. One way in which it might be waived as to testimony in court is if the communication was revealed in response to discovery. *See, Taylor v. Taylor*, 643 N.E.2d 893 (Ind. 1994).

Perhaps it is fear of waiver, along with uncertainty about what the privilege really covers, that causes its overuse in discovery responses. Perhaps it is confusion of the privilege with the

work product doctrine. Actually, these are two very different rules, but that is for another article. If you want to review the difference yourself, a good resource is published by the Section of Litigation of the American Bar Association. It is called *The Attorney-Client Privilege and the Work Product Doctrine*, 3rd Ed., by Edna Selan Epstein (1997).

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