DISCOVERY ABOUT DISCOVERY: DOES THE ATTORNEY-CLIENT PRIVILEGE PROTECT ALL ATTORNEY-CLIENT COMMUNICATIONS RELATING TO THE PRESERVATION OF POTENTIALLY RELEVANT MATERIAL?

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ABSTRACT:

This article will examine when some attorney-client communications may be considered in connection with a spoliation claim based on an alleged breach of the duty to preserve information. The steps taken by a client to the fulfill the duty to preserve

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information, even if taken in response to privileged communications, have been held to be discoverable, although related attorney communications have not been routinely discoverable. Where there is a preliminary showing of a breach of the duty to preserve information, at least some attorney-client implementation communications have not been treated as protected by courts faced with the issue.

The courts' decisions may be supported by a number of different theories, including: the communications are in furtherance of a common-law duty, and not for the purpose of seeking legal advice; under the crime, fraud, or tort exception to the privilege; under the theory that the communications are fact work product and disclosable pursuant to established work product rules; because they are put in issue by an "advice of counsel" defense; or under the attorney "self-defense" doctrine. In short, there are two alternative paradigms. Under one, the communications are not privileged. Under the other, they are considered pursuant to exceptions to the privilege.

Under the first rationale, because some preservation communications are made pursuant to a duty imposed by law, they are not privileged communications seeking legal advice; however, absent a preliminary showing of breach of the duty to preserve, the attorney-client communications are wholly irrelevant to the claims, defenses, and subject-matter of the action, and therefore not discoverable. Alternatively, under the second theory, attorney-client preservation communications are privileged or work product; however, at least portions of them may become discoverable under either an exception to, or waiver of, those protections, when there is a preliminary showing of a failure to preserve information that should have been preserved. Regardless of the rationale, it appears settled that, upon such a preliminary showing, some attorney-client communications become discoverable.

The outer boundary of a reviewing court's inquiry into attorney-client preservation communications and analysis, however, remains to be determined. Courts may distinguish between legal advice related to preservation, on the one hand, and implementation communications, on the other, with the former remaining protected by the privilege in all but the most egregious circumstances and the latter open to discovery upon a preliminary showing of breach of duty. Specifically, it is not yet clear whether legal analysis and advice concerning preservation decisions, and clients' specific requests for advice, will be discoverable in some instances. In today's practice, counsel and their clients are well advised to think early and often about the potential for discovery on discovery. Especially in the highly complex world of e-discovery, even with good faith efforts, it is very easy to fail to preserve or lose relevant information by inadvertence. However, even the inadvertent loss of relevant data may lead to probing questions into the conduct of counsel and client before a court resolves a sanctions motion.

For this reason, counsel and client should be aware, when drafting preservation documents, and engaging in implementation discussions, that those documents and discussions may voluntarily or involuntarily be presented to a court for review in connection with a spoliation motion. Prudence suggests, for example, that litigation hold letters should not contain surplus tactical and strategic discussions, and should be no more expansive than necessary to effectively accomplish the preservation task. It may be advisable to circumscribe preservation discussions and segregate notes regarding the implementation of preservation efforts from substantive communications involving the

merits of the dispute. Additionally, all participants in the adversary process need to consider the probability that, even absent a preliminary showing of breach of the duty to preserve, the steps taken by a client to preserve information are likely discoverable, and that discovery may indirectly disclose some information regarding attorney-client communications.

The preserving party may desire to disclose information about its preservation efforts, without disclosing strategic information, in order to attempt to dissuade or defeat a spoliation motion. The opponent may seek such information to support a spoliation argument.

As a tactical or strategic matter, attorney and client may intentionally draft some or all preservation documents in a manner that would create the option of disclosing them without waiving any privilege. If implementation discussions are viewed as communications that are unprivileged because they are compelled by a legal duty, nothing would prohibit voluntary disclosure and such disclosure could be made without concerns relating to waiver of privileges. Careful drafting may make it easier to respond to a spoliation motion.

Certain facts—such as what steps a litigant took, or failed to take, to preserve material—should be deemed routinely discoverable. Other facts, such as the contents of a litigation hold letter, and attorney-client implementation discussions, should require a greater showing to support disclosure. Actual legal advice, if disclosable at all, should be discoverable only upon a more compelling showing and, perhaps, after in camera review. Although, where there is evidence of a breach of the duty to preserve, there are multiple bases for seeking discovery of some attorney-client preservation communications, the least problematic approach is to assert that implementation communications are unprivileged, compelled exchanges that are only conditionally relevant.