Big Money

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COPY CATASTROPHE

Smoking gun letter discoverable if not addressed or copied to counsel

By Robert K. Olsen and Timothy A. Lambirth

In September 2005, the California Court of Appeal issued a ruling that emphasizes the criticality of addressing communications directly to legal counsel when the sender expects the attorney-client privilege to apply. The Court held that a letter written to a non-attorney was considered non-privileged despite the uncontroverted fact that the recipient was acting as a member of a crisis management team which itself included an attorney. An after-the-fact declaration by the sender that she expected that the communication would be passed on to the attorney was unpersuasive to the Court. *Doe 2 v. Superior Court (Calkins)*, 132 Cal. App. 4th 1504, 34 Cal. Rptr. 3d 458 (2nd Dist. September 29, 2005).

The case arose out of an alleged clergy sex abuse case, and much of the Court's opinion focused on claims of the clergy-penitent privilege which is not discussed in this article. An entirely separate claim of privilege was made, however, based on the attorney-client privilege as to a letter sent by one clergyperson to another. (The letter was not even claimed to be protected under the clergy-penitent privilege so the Court's discussion of the attorney-client privilege was not mere dicta.)

The letter at issue, dated July 22, 2002, was sent by a Pastor Fernandez to a Reverend Stewart. Stewart (the recipient) was described as Fernandez's supervisor and a "member of a crisis management team" of the California Nevada Annual Conference, the regional governing body of the United Methodist Church. The opinion stated that the crisis management committee included an attorney.

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> *- Robert K. Olsen and Timothy A.. Lambirth*

The plaintiffs sought production of the July 22 letter. In opposition to a motion to compel production, Fernandez (the sender) gave a declaration stating "that it was her 'expectation, intention and belief that this July 22 correspondence would be passed onto the Bishop of the Annual Conference and to Attorney Jay Rosenlieb as the attorney for the Annual Conference and with whom the declarant and the Bishop's office had been jointly communicating concerning the [subject of the litigation].'" 34 Cal. Rptr. 3d at 464.

The trial court concluded that the July 22 letter was not protected by the attorney-client privilege because it was not sent or even copied to an attorney. The appeals court upheld the ruling. The appeals court acknowledged the provisions of the Evidence Code that allow privileged communications to be made to the attorney and "*those who are present to further the interest of the client in the consultation.*" 34 Cal. Rptr. 3d at 470, quoting California Evidence Code Section 954 (emphasis in original). Nonetheless, the Court seemed more persuaded by the fact that Fernandez, the sender, "did not transmit the letter to any attorney. Indeed, she did not even copy the letter to an attorney. Rather, the letter was sent to Reverend Stewart." *Id.* The appeals court further noted that Fernandez did not explain in her declaration why she did not transmit the letter to the attorney directly. The Court concluded with the axiom that a communication which was not privileged to begin with may not be made so by subsequent delivery to an attorney. *Id.*

The *Calkins* case seems to stand for the proposition that addressing correspondence to a senior member of a committee, even one which includes legal counsel, will be insufficient to assure that the letter will be treated as attorney-client privileged. (The opinion did not discuss the attorney work product doctrine.)

The decision in *Calkins* may not surprise practicing attorneys, many of whom feel that they spend half their careers reminding clients that sensitive communications really are best addressed to legal counsel, not the client's management. Nonetheless the Court's decision might be surprising to non-specialists. The average client, if asked to whom employees should send sensitive communications, might well say that everything should go through the chain of command, that is, from junior worker to supervisor to manager, and so on. Hence internal memos, e-mails and other communications containing potentially devastating information are routinely stripped *ab initio* of protections that might well have been available under the attorney-client privilege.

The practice tip in light of *Calkins* is to educate clients about the necessity of addressing sensitive communications directly to legal counsel, either in-house or outside. The company manager who asks a subordinate to write up his or her findings or recollections about a sensitive matter without directing that the correspondence be expressly addressed to legal counsel does the company a disservice. And this oversight could cost the company Big Money!

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