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Miyuka Nishi/William & Mary Law School, LL.M.

Protection of Corporate Intranet Communication from Discovery - Comparison with Japanese Practice

1. Introduction

Generally, a corporation involved in Japanese civil action has no duty to disclose its internal document, such as correspondence between a headquarters and a branch office. Japanese courts emphasize that if a corporate internal document is subject to discovery, people of the corporation can not candidly exchange their opinions in its internal discussion and thus the company can not freely formulate its will. Under the current laws and court precedents in Japan, any communication internally exchanged by email, fax or the like is free from discovery unless special circumstances exist.[FN1] On the contrary, once a corporation is involved in litigation in the U.S., it generally must disclose any correspondence relevant to the subject matter of the litigation unless it is privileged or protected by the court order.[FN2] Especially, a corporate defendant must produce not only saved email but also deleted one as long as it can be retrieved from back-up systems.[FN3] Due to the rapid development of information technology and spread of computers, many corporate officers and employees use intra-email as a substitute for oral communication assuming that they can discard it by one-click deletion. Corporate officers might discuss their business strategy or production plan though intranet as if they talk in face-to-face meeting. Also employees might chat with their colleges by intra-email, complaining of their boss, customers, or trading partners, as if they whisper each other. Nevertheless, under American practice, such hardly erased intranet communication tends to be discoverable evidence. This article first reviews a Japanese court precedent rejecting the discovery of corporate internal documents and then analyzes American practice relating to discoverability of corporate intranet

communication in terms of two points: (1) interpretation of "documents" set forth in Fed. R. Civ. P. 34 and (2) application of "self-critical analysis qualified privilege." [FN 4]

2. Japanese Civil Procedure - No obligation to disclose internal communication

The Code of Civil Procedure of Japan does not adopt an American style discovery to seek information and evidence from the opponent party. Thus the Code has no required disclosure, interrogatories nor deposition, but does have production of documents by a specific court order.[FN5] The Code provides, however, several exceptions and "a document which is solely for the use of the possessor" is exempt from the discovery. [FN6] In 1999, the Supreme Court of Japan established certain criteria as to the exemption of "a document which is solely for the use of the possessor." [FN7] In Maeda v. Fuji Bank, 1695 Hanrei-Jiho 49 (Supreme Court, Nov. 12, 1999), a bank loaned its customer 650 million yen (about $5.5 million) by which the customer invested in stocks through a securities company. The bank's branch manager extended excessive loans to the customer, despite being well aware that the customer could not repay the loan other than by paying from the proceeds of the stock transactions. Although the customer incurred heavy loss from the investment, he was still liable for the loan not only the principal but also interests thereto. The customer argued that the bank breached its duty of care for the safety of the customer and claimed damages. In the course of the litigation, the customer filed a motion to the court that the bank should disclose its documents circulated internally for the headquarters' approval of the loan. The Court held:

When a document was prepared solely for internal use and did not presuppose disclosure to outsiders, and by disclosure, is likely to cause disadvantage such as the violation of privacy, or inhibition of free

formulation of will by individuals or organizations, such document should be exempted from discovery....

[A] bank document for internal approval of a loan usually includes the internal discussion such as profitability for the bank, assessment of the borrower and the opinions of persons in charge.... [T]he internal document is not made under the requirement of law, but is made to form the bank's opinion in a smooth and appropriate way. Also, the document is made for examining the availability of a loan and thus expected to contain a frank assessment and views. Therefore, the document is prepared solely for the internal use of the bank and is not intended to be disclosed externally. Such disclosure may affect the free exchange of views and inhibit free formulation of opinions within the bank. Accordingly, the internal document should be exempted from discovery, unless special circumstances exist....

Because Fuji Bank denied generally the corporation's duty to disclose its internal document and did not make sure under what circumstances such document is subject to discovery, there have been two kinds of criticism against the Fuji Bank decision. First, given the fact that Japanese civil procedure has no deposition system and that the production of document is a sole measure to seek information and evidence possessed by the opponent party, it is almost impossible for an individual plaintiff such as a consumer, customer, patient etc. to obtain necessary information or evidence from a corporate defendant such as a large company, financial institute, hospital etc. Second, for fair fact-revelation, the Court, at least, should have performed in-camera review of the internal document to determine whether it should be exempt from discovery [FN8], rather than denied the discovery entirely at the outset. Nonetheless, since Fuji Bank, Japanese courts follow its decision. As Fuji Bank made it clear,

the courts protect not only a corporation's substantive interest such as trade secret but also its decision making process itself, namely free internal discussion and exchange of opinions. For example, if a corporate engineer were aware that any internal communication should be discovered in future litigation, he might abstain from opining his insight on a new product in traceable way. No corporate officer can formally express his negative opinion on the corporate strategy if every internal communication were subject to discovery. It can be said that Fuji Bank deliberately balanced the above policy consideration against fact-revealing function of discovery.

3. Is deleted email discoverable as long as it can be retrieved and restored?

Under Federal Rules of Civil Procedure, corporate intranet communication is discoverable if: (1) it is obtainable with the use of detection devices; (2) it is in the possession or control of the requested party; and (3) it is not protected by privilege or court orders. [FN9] Thus, to the extent it is retrievable, the deleted email is generally thought to be discoverable under the same rules that pertain to written materials. [FN10] Such email, however, can be classified into two groups. One is deleted email which is copied and kept in the backup tapes intentionally by a corporation for record purpose. The other is deleted email which is restored in computer hardware, server, or system automatically regardless of intention of a corporation. The former ("Backup Email") can be compared with a written document kept by a corporation in its storage. But the latter ("Computer-Stored Email") seems more like papers in a shredder, which happen to remain uncut. Supposing that such computerized restoration is available much longer than the record-keeping-period of the corporation, it is disputable whether the Computer-Stored Email can be regarded as "in the possession or control of the requested party" and "obtainable with the use of detection

devices" under Fed. R. Civ. P. 34. Although discovery of Backup Email can be recognized as "one of the risks taken on by companies which have made the decision to avail themselves of the computer technology now available to the business world" [FN11], discovery of Computer-Stored Email is beyond the corporation's foreseeability and thus it might retrain the corporation's candid internal discussion by using advanced technology. In relation to this point, Eugene J. Strasser, M.D., P.A. v. Bose Yalamanchi, M.D., P.A., 669 So. 2d 1142 (Fla. App. 1996) has given certain direction. In breach of contract suit, plaintiff requested inspection of defendant's computer system to search for financial information, which was purged but allegedly retrievable from the defendant's computer system. The trial court granted plaintiff's motion without any limitation. The appellate court, however, quashed the trial court's order and remanded. It held that, for discovery of a deleted electronic file, the requesting party must prove the likelihood of retrieving certain information from the files and must show that there is no less intrusive manner to obtain the information. In so ordering, the court especially mentioned "[P]laintiff seeks permission to enter defendant's computer system to search for financial information that defendant claims has been purged from his computer and therefore no longer in defendant's possession. The scope of our discovery rules is broad enough to encompass this request, but the circumstance of allowing entry into a party's computer system to attempt to access information no longer in the party's possession may not have been fully envisioned by the drafters of the rules...." (emphasis added). [FN12] Thus Bose Yalamanchi seems to have balanced the protection of business information of the requested party against the fact-revealing demand, by appropriately allocating burden of proof, based on careful interpretation on the meaning of discoverable information which must be "obtainable with the use of detection

devices" and "in the possession or control of the requested party."[FN13]

4. Can corporate intranet communication be privileged?

(1) Self-critical analysis privilege

Although corporate intranet communication is generally discoverable under Fed. R. Civ. P. 34, there is possibility that it is protected by the self-critical analysis privilege. [FN14] The self-critical analysis privilege was first recognized under the common law in Doctors Hosp., Inc., 50 F.R.D. at 250-251. [FN15] Since then, "[A] number of federal courts have recognized that self-critical analyses are generally privileged and not subject to discovery." [FN16] "The self-critical analysis privilege has been extended to numerous areas besides medical care: to a defense contractor's confidential assessment of its equal employment opportunity practices; to accounting records; to securities law; to academic peer reviews; to railroad accident investigations; to product safety assessments; and to products liability."[FN17] The purpose of the self-critical analysis privilege is to protect records of candid and potentially damaging self-criticism from discovery, in light of public interest in socially useful investigations and evaluations or compliance with the law or professional standards. [FN18] Thus courts balance the public interest in protecting candid corporate self-assessments against the private interest of the litigant in obtaining relevant documents through discovery. [FN19] The balancing test determining whether the self-critical analysis privilege applies (to any case other than employment discrimination cases) is whether the party asserting the privilege has established that: (i) the information sought resulted from a critical self-analysis undertaken by the party seeking protection; (ii) the public has a strong interest in preserving the free flow of the

type of information sought; (iii) the information is of the type whose flow would be curtailed if discovery were allowed; and (iv) the document was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential. [FN20] The self-critical analysis privilege is a qualified privilege and thus it is overcome when the other party shows exceptional necessity or extraordinary circumstances, which are similar to those required by Fed. R. Civ. P. 26 (b) (3) to overcome the work product protection. [FN21] Also, the privilege only protects subjective opinions contained in a self-critical analysis and thus objective facts or statistics therein are discoverable. [FN22]

(2) Application of the self-critical analysis privilege to corporate intranet communication

Accordingly, if corporate intranet communication includes (i) subjective impressions, opinions, evaluations, recommendations or theories; (ii) which are parts of self-critical discussion; (iii) the free flow of which serves the public strong interest; (iv) the free flow of which would be curtailed if discovery were allowed; and (v) which are expected to be kept confidential, the corporation can protect records of such intranet communication by the self-critical analysis privilege thorough the procedure parallel with work product protection set forth in Fed. R. Civ. P. 26 (b) (3). When a corporation specifically makes minutes or other written documents, self-critical opinions can be distinguished from fact descriptions. In the context of intranet communication, however, it is almost impossible for a corporation to scrutinize every email and draw blight line between "facts" and "opinions" commingled therein. Given the current function of intra-email as a substitute for oral communication, it seems that the self-critical discussion itself should be protected regardless of subjective-or-objective distinction. Also, although documents

must be kept confidential for the self-critical analysis privilege, a sender of email can not control a "forward" function in a recipient's computer. Further, by computer virus, email might be forwarded somewhere else unexpectedly. Thus it is argumentative what constitutes "confidential" as to the intranet information. Moreover, because intranet communication sometimes functions the same as confidential face-to-face meeting, it can be argued that the self-critical analysis privilege should apply to intra-communication more broadly. For example, when staffs of a financial institute critique their daily investments through intranet, such critique might be privileged in litigation on its fiduciary duty toward customers. Also, intranet discussion on corporate business strategy might be protected by the privilege if such discussion includes critique about previous achievement and intends to improve its service toward consumers.

5. Conclusion

Although Japanese style blanket privilege can not be expected, discoverability of corporate intranet communication should be limited to the certain extent as discussed above. Such limitation might be established in future litigation by narrowing the discoverable information and by enlarging application of the self-critical analysis privilege.

[FN1]. Code Civ. P., Law No.109, art. 220, para. 4 (Japan). Maeda v. Fuji Bank, 1695 Hanrei-Jiho 49 (Supreme Court, Nov. 12, 1999).

[FN2]. Fed. R. Civ. P. 26(b), 34.

[FN3]. See GTFM, Inc. v. Wal-Mart Stores, Inc., 2000 WL 335558, at *1 (S.D.N.Y. Mar 30, 2000) (ordering defendant to make available the individual who is most familiar with defendant's computer records and facilities, and in particular the recording, maintaining, back-up, purging and retrieval of computer data, to meet with plaintiffs' expert to explain defendant's computer facilities and to provide reasonable assistance to plaintiffs' expert in his/her efforts to retrieve data), Linnen v. A.H. Robins Co., Inc., 1999 WL 462015, at *6 (Mass. Super. June 16, 1999) (granting motion to compel production of the back-up tapes), In re Brand Name

Prescription Drugs Antitrust Litigation, 1995 WL 360526, at *3 (N.D. Ill. June 15, 1995) (granting motion to compel production of e-mail, which is intra-corporate correspondence generated and stored within computer system).

[FN4]. See Bredice v. Doctors Hosp. , Inc., 50 F.R.D. 249, 250-251 (D.D.C.1970), aff'd, 479 F. 2d. 920 (D.C. Cir. 1973) (holding that the records of medical staff meeting are entitled to a qualified privilege and thus not discoverable without showing of exceptional necessity or extraordinary circumstances).

[FN5]. Code Civ. P., art. 219 (Japan).

[FN6]. Code Civ. P., art. 220, para. 4, no. 3 (Japan).

[FN7]. Fuji Bank, 1695 Hanrei-Jiho 49.

[FN8]. Code Civ. P., art. 223, para. 6 (Japan).

[FN9]. Fed. R. Civ. P. 26 (b), (c), 34, Fed. R. Civ. P. 34 advisory committee's note.

[FN10]. See In re Brand Name Prescription Drugs Antitrust Litigation, 1995 WL 360526, at 1 ("Rules 26(b) and 34 of the Federal Rules of Civil Procedure instruct that computer-stored information is discoverable under the same rules that pertain to tangible, written materials.").

[FN11]. Linnen v. A.H. Robins Co., Inc., 1999 WL 462015, at *6 (citing In re Brand Name Prescription Drugs Antitrust Litigation 1995 WL 360526, at *2).

[FN12]. Eugene J. Strasser, M.D., P.A. v. Bose Yalamanchi, M.D., P.A., 669 So. 2d 1142, 1144 (Fla. App. 1996).

[FN13]. Fed. R. Civ. P. 34, Fed. R. Civ. P. 34 advisory committee's note.

[FN14]. See Thomas R. Mulroy & Eric J. Muñoz, The Internal Corporate Investigation, 1 DePaul Bus. & Com. L.J. 49, 60 (Fall, 2002) ("[B]ecause some courts have invoked its protections, the self-evaluation privilege may serve an important alternative argument in support of non-disclosure of sensitive intra-corporate files.").

[FN15]. Doctors Hosp., Inc., 50 F.R.D. at 250-251 (holding that the records of medical staff meeting, which reviews and analyzes the clinical work done in the hospital, are entitled to a qualified privilege and thus not discoverable without showing of exceptional necessity or extraordinary circumstances, on the basis of the overwhelming public interest in having those staff meeting held on a confidential basis so that the flow of ideas and advice can continue unimpeded).

[FN16]. Tice v. American Airlines, Inc., 192 F.R.D. 270, 272 (N.D.Ill.2000).

[FN17]. Reichhold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522, 525 (N.D.Fla.,1994).

[FN18]. See Donald P. Vandegrift, Jr. The Privilege of Self-Critical Analysis: A Survey of the Law, 60 ALB.L.REV. 171, 175-76 (1996).

[FN19]. Id. at 176.

[FN20]. Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992).

[FN21]. See Doctors Hosp., Inc., 50 F.R.D. at 250-251, Bradley v. Melroe Co., 141 F.R.D. 1, 3 ("In order to warrant disclosure of portions of documents evidencing mental impressions, opinions, theories and recommendations, a moving party must demonstrate substantial need for the materials similar to that required by Fed. R. Civ. P. 26 (b) (3) to overcome the qualified immunity from discovery of work product materials.").

[FN22]. Donald P. Vandegrift, Jr., supra, at 177. See also Bradley, 141 F.R.D. at 3.