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Protecting Intracompany Privilege

The more widely it is disseminated, the more likely it is that legal advice reaches employees outside of privilege

By Andrew W. Schwartz / Sills Cummis & Gross P.C.

We have been taught since law school that the attorney-client privilege is precious and must be zealously guarded. The logic is undeniable. The attorney-client privilege allows for frank discussions between attorneys and clients on the full range of legal issues.

This is equally true of intracompany communications between corporate counsel and company employees. However, this particular subset of attorney communications presents two challenges not as prevalent in communications between a company and its outside counsel. First, corporate counsel frequently act in dual roles: as lawyer and as businessperson. The commingling of these roles may impact the scope of the privilege when legal and business advice are present in a single communication. Second, it is often difficult to limit the dissemination of privileged information among company employees, especially in larger companies. The more widely legal advice is disseminated, the greater likelihood it will reach employees who are not within the scope of the privilege, leading to a waiver of the privilege. This article offers suggestions for protecting the privilege in intracompany communications.

Legal Versus Business Advice

When in-house counsel sends a communication, the first question is whether it is privileged. In *UpJohn v. United States*, 449 U.S. 383 (1981), the Supreme Court made clear that the attorney-client privilege includes the communication of legal advice between corporate counsel and any company employees who are integral to the rendering of the legal advice to the company. This includes not only the recipient of the legal advice but also those employees with knowledge required by counsel in order to formulate such advice. But the attorney-client privilege does not extend to communications in which counsel is fulfilling the role of businessperson, and not lawyer.

> *Intertwining legal and business issues in a single communication confronts the hazard of not being privileged.*

Since legal and business issues are often intertwined, it may be difficult to distinguish and separate legal advice from business advice within a single communication. Courts focus on the "primary purpose" of the communication in determining whether the privilege applies to mixed business and legal communications. In assessing these communications, most jurisdictions look for the single predominant purpose of the correspondence: whether it primarily concerns a business issue or the giving of legal advice. In a few recent cases, however, courts have started to recognize that a communication with counsel may have more than one primary purpose. These cases recognize the complexity of the dual role of in-house counsel and the importance of both the legal and business advice they render. As the D.C. Circuit Court stated *in re: Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), "[s]ensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication." *Id.*, at 760.

While this development is worth monitoring, for now counsel should not assume that communications that contain both legal and business advice will be deemed privileged in litigation. Rather, there remains a significant hazard that a court will find such mixed communications are *not* privileged.

Who Is in the Circle of Privilege?

The second consideration is the identity of the recipients of the communication. In *UpJohn*, the Supreme Court identified five elements to be considered by federal courts to assess whether particular employees are within the scope of the privilege. Boiled down to its essentials, *UpJohn* finds that communications with nonexecutive employees are privileged if they have particular knowledge of the issue at hand that is not known to executives within the company or the information is necessary for their job duties.

While many states of have adopted the *UpJohn* standard, some states, such as Illinois, still employ the "control group" test rejected by the Supreme Court in *UpJohn*. Under the control group test, communications are privileged only if they are between counsel and those employees who "control" the decision-making process with regard to the particular issue. While this group may include some lower-level employees, this test typically disfavors the inclusion of lower-level employees on privileged communications, even if their input is required for the rendering of the advice.

The disparity in these tests makes it difficult (if not impossible) to determine whether privileged information may be imparted to lower-level employees without fear of waiver. This is particularly true of companies whose business spans across multiple jurisdictions applying different standards. Caution should be taken when the need arises to involve lower-level employees in discussions of legal advice.

Protect the Privilege

Even with variations in the law, there are certain steps corporate counsel may take to best position a company to successfully assert

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the attorney-client privilege in litigation for its communications between counsel and company employees.

Specifically identify communications as containing legal advice. Counsel should expressly identify those communications — letters, memos, emails, texts and PowerPoints, for example — intended to provide legal advice. Communications containing or relating to legal advice should be labeled "Attorney-Client Privileged" either in the subject line or at the top of the body of the communication. During oral communications, counsel should state that the purpose of the discussion is to provide legal advice for the company. While such statements may not be determinative, they will bolster the argument that a particular communication is privileged. Care should be taken, however, not to haphazardly apply the "attorney-client privileged" label, especially to uniquely business discussions. Abuse of the privilege label may open the door for opposing counsel to convince a court to apply greater scrutiny to all of the privilege designations on counsel's communications, with potentially unfavorable results.

Do not mix legal and business advice in a single communication. Corporate counsel should avoid including both legal and business advice in a single communication whenever reasonably possible. As noted above, it is often difficult to keep the two separate. Under the primary purpose test, a finding that a document is primarily for business advice, and not legal advice, will result in it not being privileged. While some courts have started to accept that the privilege should apply to communications containing both business and legal advice, movement in this direction may be slow. The better practice is to take the decision out of the hands of the courts by not including both legal and business advice in a single communication.

In situations where this is not possible, any legal advice contained in "mixed" communications should be clearly labeled and separated from the business portion of the discussion. This will allow for redaction of the legal advice prior to production of the business portion of the correspondence in discovery, which may protect the privilege.

Limit the number of recipients of privileged information. The circle of recipients of privileged information should be strictly limited to those who need to know it. The larger the circle of recipients of privileged information, the more likely it is that a court will find that one or more of the recipients is outside the scope of the privilege, resulting in a waiver of the privilege. This is particularly important for companies doing business across multiple jurisdictions that may, like Illinois, still apply the stricter "control group" test to determine the application of the attorney-client privilege.

Avoid lengthy email strings. It is not unusual for a single email string to include 10, 15 or even more emails. As an email string grows in length, it becomes more difficult to control both the subject matter and the recipients. As new issues or parties are added to an email string, the risk increases that a court will find that the privilege has been waived. The addition of a single employee who is outside the scope of the privilege to an email string that contains legal advice at the beginning of it may be sufficient to waive the privilege.

Warn employees of the limits of the attorney-client privilege. The average employee may not appreciate the limited nature of the attorney-client privilege and the strict measures necessary to prevent a waiver of the privilege. An employee who is ignorant of the privilege may unwittingly disclose privileged communications to persons who are not covered by the privilege, resulting in a waiver. Employees should be warned not to share privileged information except as absolutely necessary and always with the prior knowledge of counsel.

Corporate employees should also be dissuaded of the myth that communications are privileged merely because a lawyer is copied. The ease of copying an attorney on an email may be viewed as a simple mechanism to protect and maintain the confidentiality of information being discussed among businesspeople. Given the perceived protection of the privilege, employees may mistakenly believe that they are free to discuss sensitive nonlegal issues without fear of disclosure in litigation.

While these few suggestions do not guarantee that a court will support an assertion of the attorney-client privilege, they will strengthen the company's argument that its communications are privileged.

The views and opinions expressed in this article are those of the author and do not necessarily reflect those of Sills Cummis & Gross P.C.