

WESTON HURD CLIENT ADVISORY
April 2014

Challenges Faced by In-House Counsel Concerning Privilege

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In-house counsel face ethics questions that are significantly different from outside counsel or criminal defense attorneys. For example, application of the attorney-client privilege in the corporate context can be complicated, leading to confusion as to who the client of the corporate counsel is and when communications are or are not privileged. This is especially tricky because more and more in-house counsel are being asked to provide both legal and business advice.

Legal vs. Business

A communication that mixes business and legal advice does not automatically lose its privilege. Instead, courts will look at a number of different factors:



- **The substance of the communication.** Courts will not protect communications where a substantial portion of the communication involved the rendering of business advice by the in-house counsel. However, the inverse is not necessarily true—even where legal aspects predominate, courts may separate the two spheres as much as possible and only protect those parts that are identifiable as legal.
- **The purpose of the communication or meeting.** Courts will look to whether the communication or meeting was designed to address problems which can be characterized as predominantly legal. One case, *GeorgiaPacific Corp. v. GAF Roofing Mfg. Corp.*, No. 93 Civ. 5125 (RPP), 1996 WL 29392, at *4 (S.D.N.Y. Jan. 25, 1996), held that the negotiation of a contract by in-house counsel is a business and not a legal task. However, most courts focus on whether changes to contracts were legal in nature or business-related (e.g., prices of goods or services).
- **The title of the in-house counsel.** Titles that mix business with legal roles (i.e., Vice President of Development and Assistant General Counsel) weigh against the privilege. As part of this inquiry, courts sometimes look at the counsel's position on the corporate organizational chart.

- **Who the in-house counsel communicated with.** Simply including the in-house counsel as one of several recipients to a communication or one of several participants at a meeting is not sufficient to establish privilege. Further, if an otherwise protected communication includes improper recipients, this could destroy the necessary "confidentiality" element, rendering the communication discoverable.

How to Protect the Privilege

Steps that in-house counsel can take to increase the likelihood that their communications will be protected by the attorney-client privilege include:

- Educate non-legal employees about the attorney-client privilege, when it applies, and how it can be waived by sloppy business practices. In-house counsel should remind non-legal employees that routine business communications are not privileged simply because they are sent to in-house counsel.
- Clearly label all written communications seeking or providing legal advice as "confidential" and subject to the "attorney-client privilege." These labels should only be used when applicable; overuse of these labels could result in a court finding that such communications do not warrant protection by the attorney-client privilege.
- Avoid funneling all documents through in-house counsel, as a court may interpret this as a bad-faith attempt to withhold discoverable evidence.
- Request that non-legal employees write, at the top of their written communications with in-house counsel that the communication constitutes a "request for legal advice."
- Similarly, when requesting information from non-legal employees, in-house counsel should write, at the top of any written communication, that "this information is being requested for the purpose of rendering legal advice."
- Communications regarding "compliance advice" are not privileged because "compliance advice" is not the same as "legal advice."
- To be privileged the "primary purpose" of a communication must be to seek or provide legal advice. Emails to or from in-house counsel that seek both legal and business advice may not satisfy that requirement.
- Where possible, legal and business topics should not be discussed in the same communication.
- When producing documents and creating a privilege log during litigation, in-house counsel should not withhold an entire document as privileged when portions of the document deal only with business information. Rather, in-house counsel should redact and log privileged portions of documents, and then produce the redacted document.
- If there is a fear that litigation may arise with regard to a particular transaction, for example, and in-house counsel have been asked to investigate the facts surrounding that transaction, all the in-house counsel's documents relating to that investigation should specifically state that they were created "in anticipation of litigation."
- Each email within a string must be separately analyzed and independently come within the privilege (or not).



- To minimize the possibility of a court finding that the attorney-client privilege has been waived because the communication was distributed too widely, in-house counsel should be careful to distribute the communication to only those non-lawyers who truly have a "need to know."
- In situations where the attorney-client privilege may be particularly important, consider retaining outside counsel. Communications with outside counsel are presumed to be privileged because outside counsel does not generally provide business advice in the same way that in-house counsel does. Once outside counsel is involved, the burden shifts to the opposing party, including the government, to prove that a communication is not privileged.

Before You Push Send: Checklist Before Sending an Email

Recipients

- Do they need to know?
- Who is cc'd?

Content

- Are you giving legal or business advice?
 - *If both, consider sending in separate emails*
- Privileged or confidential documents?



Label

- Confidential
- In anticipation of litigation (i.e., work product)

Conclusion

There are important differences in the nature of the work performed by in-house counsel and outside counsel. Specifically, unlike outside counsel, in-house counsel have only one client, the corporation. As an employee of the organization, in-house counsel have thorough knowledge of the corporation's affairs and are often expected to give both legal and business advice. By implementing the safeguards addressed herein, in-house counsel will likely be able to prevent the loss of the protection offered by the attorney-client privilege.

Any questions regarding this topic should be directed to your Weston Hurd attorney.



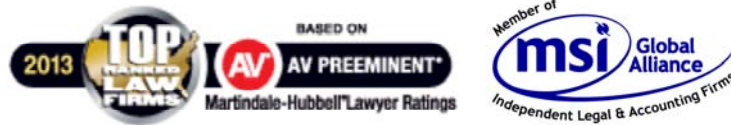
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