

Federal Court Sets Guidelines for Denying Attorney-Client Privilege on Communications

by Julia E. Judish and Stephen S. Asay

Hiring a lawyer for a general counsel role – either in-house or by retaining outside counsel to perform that role – can benefit organizations in countless ways. Unlike outside attorneys who are consulted on a piecemeal basis, corporate or general counsel are very familiar with the organization’s operations, leadership, and goals. Because they are often privy to and included in discussions of key business decisions and developments, they can ground their legal advice on a thorough understanding of the organization and its history. That intimate connection to the organization’s business life, however, operates as a double-edged sword. As some court decisions illustrate, the regular inclusion of general counsel in business communications can strip communications with corporate counsel of the presumption that they are protected by attorney-client privilege.

The U.S. Supreme Court has long upheld the importance of attorney-client privilege, because the privilege “encourage[s] full and frank communication between attorneys and their clients.” *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Both “the giving of professional advice to those who can act on it” and “the giving of information to the lawyer to enable him to give sound and informed advice” are protected. The privilege applies both to individual and to corporate clients. Nonetheless, claims of privilege in the modern corporate context have faced challenges because counsel have become widely involved in business operations, “render[ing] decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues.” *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007).

It has been long established that the mere fact that an attorney is involved in a communication does not make that communication privileged. *Anaya v. CBS Broad., Inc.*, 251 F.R.D. 645 (D.N.M. 2007). Rather, communications between a client and a corporate attorney about business matters or business advice are not privileged unless they “solicit or predominantly deliver legal advice.” In *United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center*, 2012 U.S. Dist. LEXIS 158944 (M.D. Fla. Nov. 6, 2012), a federal

magistrate judge in Florida applied that rule to hold that hundreds of documents and communications involving Halifax Hospital's inside counsel were not privileged. In reaching his ruling, the judge focused on the intent and purpose of the communications and developed a number of bright-line rules.

The judge refused to grant a presumption of privilege to documents or communications simply because the document was labeled "Confidential – Attorney Client Privilege." With respect to emails, if the "To" line was addressed to both in-house counsel and a non-lawyer, the judge ruled that the email *could not* have a primary purpose of seeking legal advice, making it not privileged and therefore discoverable. The judge also ruled that numerous emails were not privileged because no attorney was included in the "To" or "From" lines, even if an attorney was included in the "cc:" line. If, on the other hand, a communication was emailed to the in-house counsel and copied to non-lawyers, the judge ruled that it *might* have a primary purpose of seeking legal advice; the judge then examined the substance of the communication to determine whether privilege applied. If the communication did not include a request for legal assistance or convey information that was reasonably related to the requested legal assistance, the judge held that it was not privileged.

By contrast, the judge stated that communications between Halifax Hospital and its outside counsel were "cloaked with a presumption of privilege," more readily finding that such communications were for the purposes of seeking legal advice and granting them privileged status.

Other courts have adopted somewhat more flexible approaches in analyzing whether communications with an organization's general counsel qualify for attorney-client privilege. See *Stopka v. Am. Family Mut. Ins. Co.*, 816 F. Supp. 2d 516 (N.D. Ill. 2011) (argument that privilege cannot apply to emails without attorney as direct participant "unpersuasive as an absolute rule"); *Vioxx* (organizations "*usually* cannot claim that the primary purpose" of emails directly addressed to both attorneys and non-attorneys is for legal advice or assistance). Nonetheless, all of these cases serve as important cautions to organizations that assume the inclusion of general counsel in discussions automatically confers privilege on such discussions. To lessen the risk of losing a privilege claim, organizations should adopt a set of best practices for communications with their general counsel.

Best Practices

1. **Do** address communications seeking legal advice directly to your attorney, listing only the attorney(s) in the "To" line. Non-attorneys may be copied but should not be primary recipients.
2. **Do** make a specific determination about the people who should be included on each communication, paying heed to whether they need to be included in the legal discussions to carry out their corporate responsibilities.
3. **Do** expressly state that you are seeking legal advice from your attorney if the email does not relate primarily to business issues. Including a statement such as "I'd like to get your legal advice on the following issue" in communications with your attorney will make it clear that the purpose of the communication is to obtain legal advice. The use of standard language or "code words" for such requests will streamline the identification of privileged documents during electronic discovery.
4. **Do** copy your general counsel on significant business discussions and decisions. It is important that your general counsel understands the business issues you face, and your attorney may spot

a legal issue no one else notices. If so, the attorney's subsequent legal advice on the issue will be privileged, even if the initial business-related communication is not.

5. **Do not** address communications in the same manner regardless of whether you are seeking business or legal advice. Your attorney should not be included as a primary recipient of business communications.
6. **Do not** use large contact groups for legal communications. While group emails may be convenient, they may also jeopardize privilege if they include non-lawyers who would not ordinarily be included in a legal consultation.
7. **Do not** leave it unclear whether you are seeking legal advice. **Do not** request a combination of both legal and business advice in the same communication unless you clearly demarcate the separation of the issues.
8. **Do not** forward legal advice to non-attorneys who do not need the information, and **do not** forward legal advice to third parties. These actions will waive privilege by disclosing attorney-client communications to those outside the attorney-client relationship.
9. **Do not** tell third parties: "My attorney tells me that" This will waive privilege by disclosing the content of your communications with your attorney. Instead, you can convey your position to the other party without framing it as sharing legal advice you received.

If navigating these guidelines leaves you with questions, your counsel can advise you on the parameters of attorney-client privilege. A discussion of that sort clearly entails legal advice and thus will itself be protected by attorney-client privilege.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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