

Patterson Belknap Webb & Tyler LLP

Privilege and Ethical Issues for In-House Counsel 2011 Ethics Continuing Legal Education Presentation

Peter W. Tomlinson
Tomer J. Inbar

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Areas to be Discussed

- I. Attorney-Client Privilege and Work Product Doctrine: Issues for In-House Counsel
- II. Special Issues Related to Investigations

I. Attorney-Client Privilege and Work Product Doctrine:

Issues for In-House Counsel

Purpose of the Privilege

- *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981):
 - “[T]o encourage full and frank communication between attorneys and their clients and
 - thereby promote broader public interests in the observance of law and administration of justice.
 - The privilege recognizes that sound legal advice or advocacy serves public ends and that
 - such advice or advocacy depends upon the lawyer[] being fully informed by the client.”

Elements of the Attorney-Client Privilege

- The attorney-client privilege is a rule of law that protects from compelled disclosure:
 - a communication
 - made in confidence
 - between an attorney
 - and a client
 - for the purpose of seeking or obtaining legal advice
- Burden on party asserting privilege to establish each element

“A communication”

- Oral, written, or gesture
- Protects electronic communications
- Typically protects communications both from client to attorney and attorney to client
- Protects communication, not underlying facts

“made in confidence”

- During the communication, client must reasonably believe no one else will learn of the contents of the privileged communication
- Communications generally not protected if made in presence of third party
- Communications generally not protected if made with intent to convey to third party

“between an attorney”

- Individual duly licensed to render legal advice
- Includes in-house and outside counsel of organization
- Includes agents working under the control of the attorney (e.g., secretaries, clerks, stenographers, paralegals, investigators, messengers, translators, jury consultants, or retained experts)
- Client must “reasonably believe” that the person to whom communications are made is an attorney.

“and a client”

- The intended beneficiary of legal services
- Organization can be a client for purposes of invoking privilege
 - Program and administrative staff
- Privilege not destroyed when organization distributes legal advice received from counsel to corporate personnel
- Information gathered by corporate employees for transmission to corporate counsel for legal advice is privileged

“for the purpose of seeking or obtaining legal advice”

- Not every communication with an attorney is privileged
- Includes consultations with prospective clients, even if attorney is never retained

Exceptions to the Attorney-Client Privilege

- Crime-fraud exception
- Self-defense exception

Special Privilege Issues: In-House Counsel with Business and Legal Responsibilities

- Many in-house counsel serve multiple roles.
- Courts often skeptical of assertions of privilege by counsel with legal and business responsibilities.
- Communication that mixes business and legal advice does not automatically lose privileged status.
- "We are mindful, however, that C was a Company vice president, and had certain responsibilities outside the lawyer's sphere. The Company can shelter C's advice only upon a clear showing that C gave it in a professional legal capacity." *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984).

Special Privilege Issues: In-House Counsel with Business and Legal Responsibilities (cont'd)

- Factors used by courts to determine whether communication should be protected include:
 - Substance of communication
 - Purpose of communication/meeting
 - Title of in-house counsel
 - Who in-house counsel communicated with and where.
- Including in-house counsel as one of several recipients to a communication is not sufficient to establish privilege.

Work-Product Doctrine

- Protects materials prepared in anticipation of litigation
- Purpose of doctrine: protect the adversarial process
- Oral as well as written
- Can be prepared by client, attorney, agents, or anyone else
- Other Scenarios
 - AG Investigation
 - IRS Audit
 - Internal Investigations
- Retention of Experts

Work-Product Doctrine (cont'd)

- Two levels of work product:
 - Work which recites factual matters
 - Work reflecting counsel's opinions, conclusions, mental impressions or legal theories
- Protects actual work product but not underlying facts

Waiver

- Depends on nature of disclosure
- Scope of waiver
- Attorney-Client v. Work Product waiver

Waiver

- Types of disclosure include:
 - Deliberate disclosure to third party
 - Advice of counsel defense (sword/shield)
 - Inadvertent disclosure

Sources of Authority for Waiver Issues

- Federal, State, or Local Rules of Procedure (FRE 502)
- New York's new Rules for Professional Conduct and New York's old Disciplinary Rules (DRs).
- ABA Model Rules and NYS Bar Association Ethics Opinions
- Court Decisions

New Ethics Rules in New York

- New York adopted new Rules of Professional Conduct that went into effect on April 1, 2009
- These rules are similar but not identical to the Model Rules of Professional Conduct and can be found at:
http://www.nycourts.gov/rules/jointappellate/NY%20Rules%20of%20Prof%20Conduct_09.pdf

Inadvertent Disclosure under the new New York Rules

- New York's new Rule 4.4:
 - A lawyer should “promptly notify the sender” upon receipt of a document that the lawyer “knows or reasonably knows” was inadvertently sent.
- ABA Op. # 06-440, addressing Model Rule 4.4:
 - The Model Rule 4.4 includes the same provision above, but the ABA Opinion interpreting it states that the receiving lawyer need not refrain from reviewing the materials, and that the lawyer does not need to abide by follow-up instructions from the sender.

"Oops, I Hit the Send Button"

It is not clear whether the courts' approaches to this issue will be the same following the recent changes in rules.

- Previously in New York:
 - Notify opposing counsel and destroy/return as instructed.
 - Material only can be reviewed to the extent needed to determine whether privilege applies.
 - **Burden on recipient** to obtain court order allowing use.
- Current practice in many other jurisdictions:
 - Notify opposing counsel, **but** can review all material.
 - **Burden on sender** to obtain court order restricting use.

Who Controls the Attorney-Client Privilege?

- Privilege belongs to the client.
- Privilege belongs to the organization's management.
- "The power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors."
 - *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 n.5 (1985).

Recommendations for In-House Counsel to Protect Privileged Communications

- Make clear statements of privilege on notes and memos.
- In corporate transactions, identify at the outset whether the attorney will have a business or legal role (or both).
- Try to separate business from legal advice.
- Consider the pros and cons of written versus oral communication.
- Keep minutes of meetings that include specific statements regarding confidentiality and subject matter.

II. Special Issues

Related to Investigations

Interviewing Employees – *Upjohn* Warnings

- Interviewing an employee during an investigation has ethical and legal implications relating to privilege.
- *Upjohn v. United States*, 449 U.S. 383 (1981)
 - Supreme Court held that communication between corporation's employees and general counsel in the course of an internal investigation were protected by the attorney-client privilege.
- "*Upjohn* warnings":
 - Ensures that communications between investigating counsel and employees remain privileged and protects the company's control of that privilege.

Upjohn Warnings

- Before beginning an interview, counsel should inform employees:
 - Counsel represents the organization.
 - Counsel does not represent the employee.
 - Interview is privileged.
 - The privilege belongs to the organization.
 - Employee can not disclose substance of communication.
 - The organization may choose to waive the privilege and disclose the substance of the interview to anyone, including the government.
- Recommend memorializing these warnings in interview memos.

Failure to Provide *Upjohn* Warnings

- Significant consequences associated with failing to provide *Upjohn* warnings and creating an attorney-client relationship with a company employee (e.g. waiver, disqualification).
- *In re Grand Jury Subpoena Under Seal*, 415 F.3d 333 (4th Cir. 2005)
 - Court denied AOL Time Warner employees' motion to quash grand jury subpoena for memos reflecting interviews between employees and counsel.
 - Held that *Upjohn* warnings defeated employees' claim of attorney-client privilege.
 - Court noted that failing to provide *Upjohn* warnings would have resulted in disqualification.

The Confessing Employee Hypothetical

Requests by Employees for Counsel

- In the course of an investigation, an unrepresented employee may ask corporate counsel whether he or she should hire separate counsel.
 - Prudent response is to reiterate that counsel represents the organization and cannot advise the employee.
- You can alert the employee that based on what counsel presently knows, you may be able to represent the employee in the future.
 - Imperative to re-emphasize that you do not currently represent the employee.

Payment of Legal Fees by Organization

- Employee may have the right to have his or her legal fees paid for by the organization.
- Indemnification involves the organization's obligation to make one of its directors, officers or employees whole for losses (e.g. damage awards and attorney fees) incurred in a proceeding because of actions taken in the scope of employment.
- Advancement of fees involves the right to payment of ongoing legal expenses incurred in defending such a proceeding.

Authority for Payment of Expenses

- The right to indemnification/advancement of expenses may come from:
 - Corporate law
 - Certificate of incorporation
 - Bylaws
 - Employment contracts
 - Past practices

Who is a "Threatened" Party?

- Right to advancement and indemnification typically arises when an officer/director/employee is "threatened" to be made a party to an action.
- An officer/director/employee is "threatened" when he or she is notified by a government agency or by a potential litigant that he or she may be held *personally* liable or exposed to some sanction for his or her conduct.

Contacts

For further information, please contact:

Peter W. Tomlinson

212.336.2977

pwtomlinson@pbwt.com

Tomer J. Inbar

212.336.2310

tinbar@pbwt.com

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