

PROTECTIONS AND PITFALLS OF THE ATTORNEY-CLIENT PRIVILEGE

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All in-house counsel possess general knowledge of the meaning and application of the attorney-client privilege. But often a deeper understanding only becomes necessary when it is too late. Perhaps an opposing party in litigation demands disclosure of a high-level conversation that may not be protected. Maybe the best intentions of counsel in seeking assistance from a third-party have inadvertently waived the privilege. Or perhaps a new theory in litigation cannot be pursued without losing the safeguards shielding harmful communications. Realizing the scope and limitations of the attorney-client privilege at the outset, rather than facing surprising advice from outside counsel later, can protect a company and allow it to benefit from the full protections offered by the law.

Overview of Applicable Law.

The attorney-client privilege serves an important function for both clients and counsel in seeking and providing legal advice. As the Supreme Court has explained, “[i]ts purpose is to 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’s being fully informed by the client.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As the Supreme Court has noted, however, “[a]dmittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual.” *Id.* at 389-90.

Although the attorney-client privilege presents unique issues in the corporate context, its existence and scope are well-established under both federal and Arizona law. In *Upjohn*, the Supreme Court explained its contours, holding that the privilege protects communications that were (i) between the corporation's employees and counsel, (ii) for the purpose of securing legal advice for the corporation, (iii) concerning matters within the scope of the employees' duties, and (iv) made in confidence with an intent that they remain confidential. *See id.* at 394-95. As the Court also clarified, the privilege only protects substantive communications, not facts that happen to be exchanged between counsel and company representatives. *See id.* at 395.

While similar to the privilege under federal law, Arizona's attorney-client privilege has some distinctions. An Arizona statute defines its scope:

[A]ny communication is privileged between an attorney for a corporation . . . partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:

1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.
2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.

A.R.S. § 12-2234(B). Under Arizona law, the privilege protects communications between a corporation's employees and counsel, whether for the purpose of providing advice to the company or its employees or for the purpose of obtaining information necessary to provide such advice. By covering business entities other than corporations and including agents and members, the Arizona statute is broader in scope than *Upjohn*'s articulation of the federal privilege.

Corporate counsel represents the company itself, not its individual officers or other representatives. In-house attorneys must keep that principle in mind, as well as the related

ethical standards that govern their obligations in communicating with a corporation's employees and representatives. For example, Arizona's ethics rules confirm that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." *See* Ariz. R. Sup. Ct. 42, Ethical Rule 1.13(a); *see also* Model Rules of Professional Conduct, Rule 1.13(a). A company's in-house attorney also must be conscious of potential conflicts that arise between the company and its representatives. The ethical rules explain that "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." *See* Ariz. R. Sup. Ct. 42, Ethical Rule 1.13(f); *see also* Model Rules of Professional Conduct, Rule 1.13(f).

Creating Protected Communications.

Understanding how the privilege has been defined and applied can ensure that communications with counsel are properly protected. Among the key factors are the purpose of the communication, the circumstances in which it arose, and those involved in its exchange. By recognizing these factors, in-house counsel can take steps that increase the likelihood of a later finding of privilege and insulation of communications from disclosure.

Most significant to remember is that the privilege covers only those communications made for the purpose of providing legal advice. While that may seem like a common-sense principle for outside counsel, in-house lawyers often serve multiple roles within an organization, providing both legal and business advice. Frequently their formal titles reinforce the dual nature of their work, such as when they serve as both a vice president or other officer and general

counsel. To the extent that those roles are blurred in discussions and dealings with other company representatives, the privileged nature of the communications becomes less certain.

Corporate counsel, however, can follow simple practices to lessen the risk that communications may later be deemed unprotected. First, in-house counsel can segregate those communications intended to offer purely legal advice from those that arguably address business or management issues. Where written discussions necessarily touch on various legal and non-legal matters – such as board-meeting minutes or strategic updates – the portions addressing legal issues should be kept discrete and redactable.

Additionally, in-house counsel and those engaged in legal discussions can document their understanding that they are exchanging information for purposes of securing legal advice. Such intent can be included within the substantive text; for example, counsel can explain expressly that they are writing to provide legal advice on the matter at issue, and other participants can note explicitly that they are seeking legal advice.

Another way to reinforce the intent of written communications is through a notation or designation on an email or other document. A common practice is to note that a writing is confidential, state that it constitutes protected discussion with counsel, or describe the entire document as covered by the attorney-client privilege. A different option, where in-house counsel has more than one formal role, is to add a signature block or email address that highlights the non-business capacity in which counsel is operating.

Yet a simple comment or note is not sufficient unless the communication in fact reflects legal advice. Counsel also should anticipate that, in a future discovery dispute, a court may conduct an *in camera* review and examine many of the corporation's communications to understand fully their context and the practices used by the counsel and employees in connection

with related discussions. For that reason, indiscriminately designating communications as privileged not only fails to satisfy the applicable standard, but risks undermining an eventual argument asserting the privilege.

Another measure that corporate counsel can take is to limit the participants involved in legal communications to those necessary to seek and offer legal advice. Ideally it should be clear from the communications that those participating in the discussions are acting within their assigned roles in providing information, requesting assistance for a legal need, or implementing a course of action as advised by counsel. The greater the involvement of individuals with no logical role in the confidential discussions, the less likely the communications will be deemed privileged and protected.

The nature of counsel's role in the communications also is critical. The mere fact that an attorney is copied on correspondence or was forwarded information does not render it privileged. Rather, counsel should be instrumental in the legal advice sought or provided. For the same reason, simply sharing information from a discussion with counsel cannot immunize any statements made from disclosure.

None of these steps can guarantee a future finding of privilege, but each can enhance the likelihood that communications deserving of the privilege will be protected.

Preserving the Privilege.

Even where communications are properly protected by the attorney-client privilege, they can lose that protection through waivers of the privilege. Some of the most common factors leading to waiver are inadvertent disclosures, failure to maintain confidentiality, and reliance on attorney-client communications to support an asserted claim.

Under both the Federal Rules of Evidence and their Arizona counterpart, inadvertent disclosures of information can waive the attorney-client privilege if a party did not take reasonable steps to prevent disclosure or prompt steps to rectify the mistake. *See* Fed. R. Civ. P. 502(b); Ariz. R. Civ. P. 502(b). A failure to ensure that a given communication remains confidential also supports a finding that the privilege, even if previously valid, no longer applies. Corporations and their in-house counsel, however, can implement measures to safeguard privileged and confidential communications and decrease the chances of compelled disclosure.

First, in-house counsel should make certain that participants in privileged communications understand the need to preserve their confidence. Just as those involved in the initial communications should be limited to the individuals necessary to seek, provide, and implement legal advice, future circulation of the discussions should be similarly restricted. To maximize protection and ensure that information is treated uniformly, a company can impose measures similar to those applicable to proprietary business data, including consistent document retention and destruction policies. In addition, counsel and company representatives should not discuss legal issues and strategy in business meetings or other settings with a broader audience.

The use of third-party service providers also may result in an unwanted waiver of the attorney-client privilege. For example, if in-house counsel relies on an outside accountant to analyze data or an outside vendor to review and process information, such use could waive the privilege. Some courts have held that where a third-party's involvement was not necessary to facilitate communication between an attorney and a client, even if it served a valid business purpose, confidence was not maintained and the privilege was lost. As a result, in-house counsel should ensure that actions taken internally or by outside counsel do not create such a risk of waiver.

Finally, when litigation arises, in-house counsel also must take care that the company's actions do not result in a choice between a beneficial strategy and preservation of the privilege. In Arizona and elsewhere, courts generally do not allow any selective waiver of the privilege. In practice, that principle holds that, as a matter of fairness, a party to litigation cannot make disclosure only of those privileged communications that favor it, while withholding others. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 61 ¶ 23, 13 P.3d 1169, 1178 (2000) (“[A] waiver can be implied when a party injects a matter that, in the context of the case, creates such a need for the opponent to obtain the information allegedly protected by the privilege that it would be unfair to allow that party to assert the privilege.”); *Ulibarri v. Super. Ct. in & for Cnty. of Coconino*, 184 Ariz. 382, 385, 909 P.2d 449, 452 (App. 1995) (“The privilege may not be used as both a sword and a shield.”).

In the corporate context, because legal and business communications often are intertwined, there is a greater risk of disclosing documents that may implicate the privilege. Beyond complying with discovery obligations, a corporation also may wish to rely on certain communications in which in-house counsel participated. Even if the discussion focused primarily on a non-legal matter, its affirmative use may necessitate the production of potentially privileged materials. Under well-established principles, as a matter of fairness, a court then may order the production of other, related communications to avoid allowing a selective waiver. In such instances, if the corporation was not diligent in creating, segregating, and preserving privileged communications, the resulting waiver could be far broader and more harmful than necessary.

Conclusion.

Unfortunately for both in-house counsel and outside attorneys, clear and unequivocal guidance on the scope and application of the attorney-client privilege is not possible. Any dispute ultimately will turn on the particular circumstances of the case, the governing law, and the analysis of a court. Nevertheless, by understanding well-established principles and anticipating the issues that may arise, counsel can take steps to safeguard a corporation's communications and allow it the full benefit and protections of the attorney-client privilege.