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W. Legal Ethics: Attorney-Client Privilege for In-House and Outside Corporate Counsel

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Legal Ethics: Attorney–Client Privilege for In-House and Outside Corporate Counsel[1]

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It's simple—the attorney–client privilege protects from discovery communications between a client and her lawyer. It's challenging—the privilege applies to communications between (some) corporate representatives and outside counsel, depending whether federal or state privilege law applies; and if state law, which state. It's convoluted—the privilege protects communications between (some) corporate representatives and in-house counsel, but only if U.S. law applies, the issue arises in an advantageous jurisdiction, and in-house counsel satisfy a heightened burden, prove the communication arose in a legal (rather than business) capacity, and the company employee did not waive the privilege by inappropriately disseminating the communication.

American law acknowledges the protections of an in-house attorney–client privilege, but "what is unclear is exactly how far this protection extends regarding the corporation's employees and agents." *E.I. DuPont de Nemours & Co. v. Forma-Pack, Inc.*, 718 A.2d 1129, 1141 (Md. Ct. App. 1998). Courts recognize that "[d]efining the scope of the privilege for in-house counsel is complicated," *U.S. Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994), and in-house lawyers and their in-house clients should too. The greatest source of confusion concerns whether the employee communicated with the in-house lawyer so that she could render legal advice to the company. Courts effectively correlate in-house lawyers with Janus, the two-faced Roman God of Transition, with one face symbolizing counsel's lawyer role and the other personifying her business role.

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Other concerns exist. The privilege does not protect all employee–in-house lawyer communications. Non-lawyer employees may not simply copy an in-house lawyer on an email and expect the privilege to preclude its disclosure. Privilege notices at the end of corporate emails, without more, are likely insufficient to invoke the privilege. In-house lawyers have several questions about their privilege, and the list below answers some of the more frequent ones.

1. When are employee–in-house communications privileged?

It depends. Whether the attorney–client privilege protects from compelled discovery an employee's communication with an in-house attorney depends on (1) whether the communication meets certain universal, threshold privilege requirements and (2) the jurisdiction in which the privilege challenge arises.

The threshold privilege requirements are threefold. The in-house lawyer must first establish that the document over which she seeks protection is a communication—the privilege only protects communications, not fact-related documents. For example, the privilege likely does not protect minutes from a corporate committee meeting, but likely protects an employee's communications to in-house counsel about those minutes. *See Neuder v. Battelle Pacific Nw. Nat'l Lab.*, 194 F.R.D. 289 (D.D.C. 2000).

Second, in-house counsel must prove that the communication was confidential at the time of its creation, but also that the parties intended for the communication to remain confidential. The intent-to-remain-confidential prong is crucial; the in-house lawyer should implement measures to ensure that a confidential communication remains so by, for example, monitoring its filing location and instructing recipients not to disseminate communication. *See Se. Pa. Transp. Auth. v. Caremarkpcs Health, L.P.*, 254 F.R.D. 253 (E.D. Pa. 2008).

The third threshold privilege requirement requires evidence that the employee communicated with in-house counsel for the purpose of the lawyer rendering legal advice to the company. The dual business and legal roles concern courts, and most courts presume employee–in-house lawyer communications concern business issues and impose a "heightened scrutiny" when considering the "rendering legal advice" element. *Kincaid v. Wells Fargo Sec., LLC*, 2012 WL 712111 (N.D. Okla. Mar. 1, 2012).

Even if the in-house lawyer meets these three threshold requirements, obtaining privilege cover for employee communications still depends on the jurisdiction deciding the privilege issue. Some states follow the so-called "control group" test, which holds that the privilege does not apply to all employees' communications with in-house lawyers, but rather only to communications of those employees within the company's control group. The control group consists of top management persons who have the responsibility of making final decisions, and employees whose advisory role to top management in a particular area is such that management would not make a decision without their advice or opinion. *Sullivan v. Alcatel-Lucent USA, Inc.*, 2013 WL 2637936 (N.D. Ill. June 12, 2013).

Federal common-law and the majority of states follow the subject-matter test, which provides that "[a]n employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491–92 (7th Cir. 1970); *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994). The

privilege in these jurisdictions applies to all employees so long as they communicate with the in-house lawyer about matters within the scope of his employment.

2. Will a boilerplate contractual choice-of-law provision ensure the company receives its preferred privilege law?

This question has no consensus answer. The answer to the first question reveals that whether the attorney–client privilege protects an employee–in-house lawyer communication turns on the law applied to the communication. In-house lawyers would gain some comfort if they could ensure that favorable privilege law—for example, the law of a subject-matter state rather than a control-group state—applied in contract litigation. Parties in contract negotiations often agree upon and insert a choice-of-law provision. But the question is whether this boilerplate provision is sufficient to apply the chosen state's privilege law. Not necessarily.

Although few courts have addressed this issue, one court ruled that a contract's choice-of-law provision did not require application of the chosen state's privilege law. *Hercules, Inc. v. Martin Marietta Corp.*, 143 F.R.D. 266 (D. Colo. 1992). The *Hercules* court applied Utah's privilege law even though the contract governing the dispute called for application of Colorado law. The court reasoned that the choice-of-law provision pertained to the contract interpretation, and that "[n]othing in the express terms of the contract applie[d] to the law of privileged communications." *Id.* at 268. The take-away is that courts may not construe boilerplate choice-of-law provisions broadly enough to cover privilege disputes. The in-house lawyer, therefore, should consider broadening her contractual choice-of-law provisions to expressly include the chosen state's privilege law.

3. Will the privilege cover in-house counsel's communications with employees of corporate owners, subsidiaries, or affiliates?

Yes, in certain circumstances. Answering this question requires a case-by-case, fact-intensive analysis. The privilege generally covers a company's in-house counsel communications with employees of a sufficiently related company. For example, the Restatement comments that, "when a parent corporation owns a controlling interest in a corporate subsidiary, the parent corporation's agents who are responsible for legal matters of the subsidiary are considered agents of the subsidiary." RESTATEMENT (THIRD) LAW GOVERNING LAWYERS, §73 cmt. d. And courts consider the corporate client to include not only the company that employs the in-house lawyer, but also the parent, subsidiary, and affiliate corporations, *U.S. v. Am. Tel. & Tel. Co.*, 86 F.R.D. 603 (D.C. Cir. 1979), but only if there is sufficient controlling interest. *Moore v. Medeva Pharm., Inc*., 2003 WL 1856422 (D.N.H. Apr. 9, 2003).

So, what degree of relationship does the privilege require? In-house lawyers should look to the joint-client doctrine and the common-interest doctrine for assistance, and the court's decision in *SCR–Tech LLC v. Evonik Energy Servs., LLC*, 2013 WL 4134602 (N.C.Super. Ct. Aug. 13, 2013), provides guidance. Ebinger, a corporation, owned 37% of SCR–Tech GmbH which, in turn, owned 100% of SCR–Tech LLC. Ebinger, SCR–Tech LLC, and legal counsel engaged in several communications pertaining to negotiations that ultimately led to the sale of SCR–Tech LLC to an unrelated third entity. In subsequent litigation, the defendant moved to compel these communications, claiming that Ebinger was not SCR–Tech LLC's parent for purposes of extending the attorney–client privilege. The court disagreed and invoked concepts of "joint client" and the common interest doctrine to support its decision.

The court noted that many lawyers and courts improperly interchange the "joint client" doctrine and the common interest doctrine (or joint defense doctrine). These concepts are distinct and contain "analytical differences." The joint client doctrine focuses on client identity and the

relationship between two entities. The common interest doctrine, however, focuses on the common legal interests between two entities regardless of their relationship.

Rather than drawing a bright-line rule that a corporation must own a certain percentage of an affiliated corporate entity before the joint client doctrine applies, the court looked at the totality of circumstances to determine whether the entities "are sufficiently united such they may properly be considered joint clients." If the degree of common ownership is sufficient to evidence control of the subject matter of the putatively privileged communications, then the court will apply the joint client doctrine and consider both entities as one client for privilege purposes. If the circumstances reveal that the relationship does not rise to that level, then the court will look more at the common legal interest between the two entities to determine whether the common interest doctrine protects the sharing of privileged information.

4. Are employees' communications with a foreign-based in-house lawyer privileged?

This FAQ is of increasing importance given the number of corporations with operations and lawyers divided between the United States and multiple foreign countries. And answering this FAQ requires discussion of two concepts: whether the foreign country recognizes an evidentiary privilege for in-house lawyers; and conflicts-of-law rules governing privileges between the United States and the foreign country at issue.

A country-by-country in-house privilege review is beyond the scope of the FAQs, but several foreign countries do not recognize an evidentiary privilege governing communications between a company's non-lawyer employees and its in-house lawyers. The European Union, for example, rejected an in-house counsel privilege in *Akzo Nobel Chem. Ltd. v. European Commission*, 2010 EUR-Lex CELEX LEXIS 62007J0550, P44 (Sept. 14, 2010).

But when does American or foreign law apply? The Second Circuit provides the most developed law on the subject and applies the "touch base" approach. This analysis requires a determination as to which country has the most compelling or predominant interest in whether the communication should remain confidential. *Astra Aktiebolag v. Andrx Pharm., Inc*., 208 F.R.D. 92 (S.D.N.Y. 2002). As applied, communications relating to U.S. legal proceedings or advice on American law "touch base" with the United States and, therefore, American privilege law applies. But communications regarding a foreign legal proceeding or foreign law requires application of foreign privilege law. *Gucci Am., Inc. v. Guess?, Inc*., 271 F.R.D. 58 (S.D.N.Y. 2010); *Anwar v. Fairfield Greenwich Ltd.*, 2013 WL 6043928 (S.D.N.Y. Nov. 8, 2013).

In sum, there is no privilege for communications between a U.S. based employee and a foreign-based attorney if the communication concerns foreign law and that law rejects an in-house counsel privilege. But the privilege covers a foreign employee's communication with a U.S. based in-house counsel about American law issues.

5. Does the privilege apply if the in-house lawyer is not licensed in the state where she works?

Yes, so long as she is licensed in another jurisdiction. In the United States, the attorney–client privilege applies only to communications with attorneys licensed to practice law. *Anwar v. Fairfield Greenwich, Ltd.*, 2013 WL 6043928 (S.D.N.Y. Nov. 8, 2013); *Wultz v. Bank of China, Ltd.*, 2013 WL 5797114 (S.D.N.Y. Oct. 25, 2013). Courts recognize that in-house lawyers often maintain multijurisdictional practices and move nationally and internationally with their corporate employer. Consequently, the privilege applies to in-house lawyers even if they are not licensed in the state where they work so long as they are licensed in some jurisdiction. *See Florida Marlins Baseball Club, LLC v. Certain Underwriters at Lloyd's London*, 900 So. 2d 720

(Fla. Dist. Ct. App. 2005). This includes licensure in a foreign jurisdiction. *Renfield Corp. v. E. Remy Martin & Co., S.A.*, 98 F.R.D. 442 (D. Del. 1982).

The privilege is inapplicable, however, if the in-house attorney is not licensed in any jurisdiction, *Fin. Tech. Int'l, Inc. v. Smith*, 2000 WL 1855131 (S.D.N.Y. Dec. 19, 2000), or if the in-house lawyer allows his licensure to lapse. *Gucci America, Inc. v. Guess?, Inc.*, 2010 WL 2720079 (S.D.N.Y. 2010). Courts recognize a "reasonable belief" exception, which holds that the privilege applies if the in-house lawyer is not licensed where the client "reasonably believes that the person to whom the communications were made was in fact an attorney." *Anwar*, 2013 WL 6043928, at *3. The exception applies to a mistake of fact—where the client mistakenly believed in the in-house lawyer's licensed status—not a mistake of law, such as where the client believed that privilege law would protect the communication regardless of the license status. *Id.* at *8. Under the reasonable belief exception, courts are more likely to apply the exception where the in-house lawyer previously held a license but allowed it to lapse or go inactive, and less likely to apply the exception where the attorney never obtained a license.

6. Who in the company has authority to waive the privilege?

Not all employees may waive the corporation's attorney–client privilege; rather, only employees who manage or control the company's activities may waive the privilege. The court's decision in *Hedden v. Kean Univ.*, 2013 WL 5745994 (N.J. Super. Ct. Oct. 24, 2013), illustrates this point. *Hedden* concerned whether the privilege covered a head basketball coach's email to university in-house counsel and whether the coach's distribution of that email to the NCAA constituted privilege waiver. Applying the subject-matter test, the court ruled that the privilege protected "communications made by mid or low-level employees within the scope of their employment to the corporation's attorney for purposes of aiding counsel in providing legal

advice." The coach and her email fell into this privileged-employee category. But as to the waiver issue, the court held that the reverse is not true—not all employees may waive the corporation's privilege, only officers, directors, or "those who manage or control its activities." The coach did not fall into this category, and her disclosure of the email to the NCAA was not privilege waiver.

States applying the control group test, discussed in FAQ No. 1 above, consider privileged only those communications involving a certain level of employees. The subject-matter test, followed by federal courts and the majority of states, holds that all employees may have privileged communications with the in-house lawyer so long as the communication's subject falls within the scope of the employees' duties. Courts such as *Hedden* hold that only employees who manage or control the company's activities may waive the privilege.

7. Does the privilege protect communications to the company's lawyer–lobbyist?

Yes, if the communication concerns legal advice rather than purely lobbying efforts. Many companies employ government-relations lawyers who primarily lobby local, state, or federal governments on the corporation's behalf. The attorney–client privilege protects communications with a lawyer–lobbyist so long as she is "acting as a lawyer." In re *Grand Jury Subpoenas Dated Mar. 9, 2001*, 179 F. Supp. 2d 270, 285 (S.D.N.Y. 2001). The privilege does not protect communications and information conveyed to the lawyer–lobbyist for the purpose of fulfilling her lobbyist role. *Id.*

The privilege's application in the lawyer–lobbyist context is highly fact specific. On the one hand, the privilege likely does not protect communications from lawyer–lobbyists that simply summarize legislative meetings, update legislative activity, or update the progress of certain legislation because these types of communications do not fall within the legal-advice

sphere. On the other hand, the privilege likely protects communications from the lawyer–lobbyist that includes a legal analysis of certain legislation. *A&R Body Specialty & Collision Works, Inc. v. Progressive Cas. Ins. Co.*, 2013 WL 6044342 (D. Conn. Nov. 14, 2013).

8. Does the privilege cover conversations between two non-lawyer employees?

Yes, in certain circumstances. Although the privilege applies to communications between company's employee and its in-house lawyer, courts recognize that "[m]anagement should be able to discuss amongst themselves the legal advice given to them as agents of the corporation with an expectation of privilege." *McCook Metals, LLC v. Alcoa Inc.*, 192 F.R.D. 242, 254 (N.D. Ill. 2000). The privilege therefore attaches to communications between non-lawyer employees where the employees discuss or transmit legal advice given by counsel or where an employee discusses her intent to seek legal advice about an issue. *Datel Holdings Ltd. v. Microsoft Corp.*, 2011 WL 866993 (N.D. Cal. Mar. 11, 2011). The key issue is whether the employee–employee communications occurred for purposes of seeking a legal opinion, rendering legal services, or providing assistance in some proceeding. *Johnson v. Sea–Land Serv., Inc.*, 2001 WL 897185 (S.D.N.Y. Aug. 9, 2001).

9. May in-house lawyers communicate with outside consultants under the privilege umbrella?

It depends. In control group states, the privilege likely will not apply to consultants because they generally do not fall within top management persons who have the responsibility of making final decisions, nor do they serve an advisory role to top management in a particular area such that management would not make a decision without their advice or opinion. In subject-matter jurisdictions, the privilege likely applies if the outside consultant qualifies as the functional equivalent of an employee.

The court in *In re High–Tech Employee Antitrust Litig.*, 2013 WL 772668 (N.D. Cal. Feb. 28, 2013), encountered an interesting privilege situation involving Bill Campbell, the Board Chairman for Intuit, Inc. who simultaneously served in several roles with Google, Apple, and other technology-based companies. Prior to 2007, Campbell served, while Intuit chairman and without a Google contract, as an advisor to Google's management team and Board of Directors. In 2007, Campbell entered an agreement with Google that made him a part-time Google employee.

The *High-Tech* court had to determine whether the attorney–client privilege protected Campbell's email communications with Google employees—most often sent through his Intuit email address. Questions regarding Campbell's role prior to 2007, when he had no formal agreement with Google, complicated the analysis. The Court followed the leading functional-equivalent-employee cases of *U.S. v. Graf*, 610 F.3d 1148 (9th Cir. 2011) and *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994), which held that there is no legitimate reason to distinguish between a company's employee and its consultant for attorney–client privilege purposes, and that the privilege extends to consultants who are "in all relevant respects the functional equivalent of an employee." The Court must examine the consultant's role and determine whether he was the primary agent who communicated with counsel, whether he acted as a corporate agent in a significant capacity, whether he managed employees, or had substantial input into the development of the litigation-related issues.

In *High–Tech*, the Court found that Campbell was the functional equivalent of a Google employee even while he served as Intuit's Board Chairman. The Court found that Campbell advised Google's management and Board of Directors on business strategy, organizational development, and internal business processes. The Court also found significant Campbell's

important advisory role, noting that he emailed with Google executives regarding "confidential and highly sensitive matters related to Google's compensation practices, policies, and strategies." But because of Campbell's roles with Apple, Intuit, and other companies, the Court stopped short of issuing a blanket privilege protection for all of Campbell's email communications. Google still had to prove that the communications otherwise fell within the corporate attorney–client privilege, meaning it had to further prove the email communications were to Google in-house or outside counsel, were intended to be, and actually were, confidential, and were for purposes of Google's counsel rendering legal advice.

10. Is an email discussing business *and* legal issues privileged?

Yes, the privilege covers these "dual-purpose" emails, but only if the in-house lawyer establishes that the emails were sufficiently legal-based under one of two tests, depending on the jurisdiction. Courts apply two standards to determine whether these dual–purpose emails receive privilege protection: the "because of" standard and the "primary purpose" standard.

The so-called "because of" standard requires in-house lawyers to prove that, under the totality of the circumstances, including the nature of the document and the factual situation, the employee prepared the document because of litigation or a legal purpose. Courts borrow this standard from the work–product doctrine, but apply it where mixed communications involve both business and legal advice. *See In re CV Therapeutics, Inc. Sec. Litig*., 2006 WL 1699536 (N.D. Cal. June 16, 2006). Under the primary purpose standard, the privilege protects in-house lawyers' communications involving business and legal advice if the primary purpose of the communication is to obtain or give legal advice. *See U.S. v. Chevron Corp*., 1996 WL 444597 (N.D. Cal. May 30, 1996).

The "because-of" standard requires a lesser burden of proof, demanding that in-house lawyers simply show that the employee prepared the putatively privileged communication because of legal issues. The primary purpose standard requires a higher burden of proof, focusing on whether each communication was for the primary purpose of rendering legal advice.

In a thorough opinion, the USDC for the District of Nevada recently evaluated both standards and applied the primary purpose standard to in-house counsel email communications. Although noting that the "because of" standard had supplanted the "primary purpose" standard in some jurisdictions, the court found that the Ninth Circuit had not done so. And noting that "merely copying or 'cc-ing' legal counsel, in and of itself, is not enough to trigger the attorney–client privilege," the court reviewed each challenged email to determine whether the primary purpose of its creation was legal-advice related. *See Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615 (D. Nev. 2013).

About the Author

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