

AVOID THE SMOKING GUN: HOW TO PRESERVE A CORPORATION'S ATTORNEY-CLIENT PRIVILEGE

Although the U.S. Supreme Court recently reversed the conviction of now-defunct Arthur Andersen, it was too late to save the company. A “smoking gun” privileged email from in-house counsel reminding executives of the firm’s “document retention” policy appears to have played a significant role in jury deliberations leading to Andersen’s conviction and subsequent demise. One wonders what the result of the trial would have been if that e-mail was never written, or if Arthur Andersen had not waived its right to prevent disclosure of the email under the attorney-client privilege.

The attorney-client privilege belongs to the client and is centuries old, yet few non-lawyer officers and board members fully understand what it protects or how the privilege can be lost. This client alert sets forth the general principles and rules of law pertaining to the attorney-client privilege, and suggests practice pointers for corporations to employ in order to retain the protection of the privilege.

The Attorney-Client Privilege Generally. The attorney-client privilege protects certain communications between an attorney and client from compelled disclosure, thereby fostering open dialogue between the attorney and the client without fear that what is said to the lawyer will be relayed to a potential adversary. The privilege applies to individuals as well as to corporations.

The privilege shields communications between attorneys and their clients from discovery, and it therefore provides the basis for objection to demands for discovery of materials or communications that otherwise might be discoverable. The basic elements needed to establish privilege are: (i) a communication (ii) made in confidence (iii) between an attorney (iv) and a client (v) for the purpose of seeking or obtaining legal advice.

A client can expressly waive the privilege or can be deemed to constructively waive it through: (i) disclosure of any part of the communication to a third party, including certain company employees, outside auditors, underwriters, etc.; (ii) production of privileged documents; (iii) deposition testimony; or (iv) when the legal advice is combined with or otherwise provided for a specific business purpose. In addition to waivers of the privilege, communications otherwise privileged will not be protected if they relate to communications in furtherance of contemplated or ongoing criminal or fraudulent conduct pursuant to the “crime/fraud exception” to the privilege.



The Attorney-Client Privilege In The Corporate Setting. In the corporate setting, the attorney-client privilege attaches to the entity and not the individual employees who communicate with counsel. Similarly, the decision whether to waive the privilege belongs to the corporation, and not to its employees.

This raises two issues: (i) who are the employees who actively represent the corporation for purposes of invoking the privilege; and (ii) what are the ways in which a corporation can best preserve confidentiality?

The competing tests for attorney-client privilege in the corporate setting are:

- Control group test. The control group test holds that the privilege may be invoked only by those employees who communicate with counsel and who are in a position to control, or take a substantial role in the determination of, the course of action a corporation may take based on the legal advice received.
- Subject matter test. The subject matter test holds that the privilege attaches only when (i) the communication is made for the purpose of giving or receiving legal advice; (ii) the employee who is communicating with the attorney is doing so at the direction of a superior; (iii) the direction is given by the superior to obtain legal advice for the corporation; (iv) the subject matter of the communication is within the scope of the employee's duties; and (v) the communication is not disseminated beyond those persons who need to know.
- "Upjohn" test. The "Upjohn test" comes from the U.S. Supreme Court decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the authoritative case on the scope of the attorney-client privilege in the corporate setting. In *Upjohn*, the Supreme Court:
 - Rejected the control group theory, stating that it frustrates the purpose of the attorney-client privilege by "discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client"; and
 - Adopted a version of the subject matter test – i.e., the Court ruled that the communications at issue in *Upjohn* were protected because (i) they were made to in-house counsel at the direction of corporate superiors, (ii) concerned matters within the scope of the employees' in-house duties, (iii) the information was not available from upper-level management; and (iv) the employees were aware that they were being questioned in order for the corporation to receive legal advice.



Thus, under this subject matter/*Upjohn* test, counsel may gather facts from employees of any rank and any employee may seek legal advice from counsel, so long as the foregoing criteria are satisfied.

Upjohn is the leading case on the scope of the attorney-client privilege in the corporate context, but the control group test is still followed in some states, while others have codified their test. In Massachusetts, the *Upjohn* test is followed.

The Unique Role Of In-House Counsel In Today's Business World. In today's legal environment, in-house counsel to corporations serve as business advisors and strategists as well as legal counselors. Therein lies the potential obstacle to asserting the attorney-client privilege in this context, because one of the requirements for the privilege to apply is that the client must have sought legal advice as opposed to merely business advice. Consequently, understanding the dual nature of the role of in-house counsel and the implications that role may have on the attorney-client privilege is of utmost importance to both counsel and the client – i.e., the company.

Particularly in a post-Enron, post-Arthur Andersen, Sarbanes-Oxley climate, where in-house counsel may undertake investigations into past business and accounting practices in addition to formulating new policies for the future, it becomes particularly important to remain cognizant of the scope of the privilege, and the possibilities of waiver.

Practice Pointers. While there can be no *guarantee* that the privilege will protect a given communication, the following are some practical steps that can be taken to facilitate retention of the attorney-client privilege.

- Wherever possible, in light of the inconsistencies among various jurisdictions, try to meet the standards of both the control group and subject matter tests. In order to satisfy the more stringent control group test, the in-house representative should be top-level management or someone whose responsibilities clearly include making substantial decisions within the corporation – i.e., do not communicate with counsel if you are unable to act on the legal advice received without consulting other employees.



- Restrict circulation of any communications with counsel only to those on a “need to know” basis, and when communicating, clearly express that the communication is intended to evoke legal, not business, advice.
- Consider carefully the pros and cons of written communication vis-à-vis oral communication before choosing one form over the other. Oral communication can often be more efficient than written communication, but creating a written record allows for the opportunity to physically mark, or note, that the communication is intended to be legal advice and is strictly confidential. When favoring written communication, however, do not be overly broad in using restrictive markings or the system will lose its persuasive force. Be particularly careful of using email for privileged communications, given the risks of inadvertent waiver by forwarding to someone outside the zone of privilege.
- If business advice is sought along with legal advice, separately address each issue. Although in theory the privilege will be maintained if the legal aspect of the advice is the “predominant” part of the communication, it is best to eliminate any uncertainty and not leave it to chance in court.
- During meetings with counsel and employees in which legal advice is sought or discussed, keep a record of the meeting (minutes) noting the date, the persons present, and the subject matter of the meeting, which must be a legal issue to be protected. The records themselves should contain a definite statement of the intent for confidentiality. Having an attorney present at a meeting does not necessarily make the communications in that meeting subject to the privilege.
- Corporations should avoid using counsel as a *conduit for information*, because a court may perceive this as an attempt to create a zone of silence, and may therefore become suspicious of any subsequent attempts to invoke the protections of the privilege.
- Before the communication takes place, consider the topics that will be discussed at the meeting and whether such communication will be protected by the privilege.
- Company employees should be reminded periodically of their responsibility to the corporation and the limited scope of the privilege with a statement setting forth company policy on legal communications, which should contain prescriptive advice on how to retain the privilege. Employees should also be told that the privilege belongs to the corporation and may be waived only by the corporation, even if to do so might expose the employees to liability.



- Corporations should hire outside counsel to conduct internal investigations. By doing so, the corporation can avoid the bias that is often shown by courts toward investigations conducted by in-house counsel – a bias that may result in loss of the privilege, which would otherwise attach to the documents prepared by outside counsel as part of the investigation. As added protection, the company should execute a written agreement with the law firm conducting the investigation expressly noting the confidential and legal nature of the services that the investigator will provide and, if possible, insure that outside counsel reports back to in-house counsel, not company business groups, during the course of the investigation.
- If a corporation is served with a grand jury subpoena or receives correspondence from the Securities and Exchange Commission (or any other investigatory arm of the government) signaling an investigation into the company's practices, hire outside counsel immediately – even before preliminary attempts to contact prosecutors or investigators and discuss the basis for the investigation. A voluntary presentation to the government, even if intended to avoid the filing of any charges, can waive the privilege.

Conclusion. The attorney-client privilege is an important legal protection but its scope is frequently misunderstood. Unintended waiver of the privilege can have far-reaching consequences.

Take note of the guidelines and pointers listed above, and when in doubt, contact David S. Godkin (godkin@birnbaumgodkin.com; 617-307-6110).

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