

A question of Privilege

With attorney-client privilege increasingly under attack, inside counsel must educate upper management.

Often referred to as the foundation of the legal system, attorney-client privilege has protected the flow of confidential information between attorneys and clients by removing the fear that the communications will be revealed to others.

The issues surrounding attorney-client privilege on the corporate level are

Who is covered?

A challenge for corporate counsel is explaining who may seek privileged legal advice, and what information is privileged.

Determining who can seek privileged legal advice has long been debated, according to Timothy J. Dacey, a director at Goulston & Storrs. There are two approaches: the control

"If the subject is how to structure a transaction, the advice can easily stray into business advice," said panelist Lena G. Goldberg, executive vice president and general counsel with financial services provider FMR Corp. "Whether you're discussing a specific corporate entity, or the tax consequences of a transaction, you have to stay within the legal confines. Make it clear to your clients if and when you begin to move into the business realm."

Is three a crowd?

The same rules apply when privileged information is relayed in the presence of a third party, such as a public relations specialist, or an accountant assisting in a corporate tax issue. PR specialists, for instance, are increasingly sought to help with high-profile criminal investigations.

"In some cases, the litigation has such a high profile that it could negatively influence public opinion," Dacey says. "So it's important for a lawyer to be able to work with a PR professional when advising clients."

But the move incurs risk. Some courts have held that employing a PR specialist undermines the communication's confidentiality and therefore constitutes a privilege waiver. "To me, it's a hard sell," says the Hon.

Allan van Gestel, who sits on Mass. Superior Court's Business Litigation Session. "I can be comfortable with an accountant or a medical professional. And there might be cases, such as tobacco litigation, where a PR professional fits. But generally, I would be skeptical."

Corporate executives/employees also should know that the right to waive the attorney-client privilege resides not with them, but with the corporation, and that the privilege can be waived only at the corporation's discretion.

"Inside counsel only has one client, and that's the corporation," Dacey says. "If an officer talks to a corporate attorney, the corporation owns the privilege and can waive it."



L to R: Tim Dacey, Goulston & Storrs; Hon. Allan van Gestel, Mass. Superior Court; Lena G. Goldberg, FMR Corp; Richard Zielinski, Goulston & Storrs

complicated. Indeed, with the Department of Justice and Securities and Exchange Commission encouraging companies to waive the privilege during an investigation, many within the legal community believe the attorney-client bond is at risk.

Counsel must better educate corporate management on the importance of not only understanding, but also protecting the attorney-client privilege. That was the common thread running through "Confidential: Subject to Attorney-Client Privilege...But is it?," a seminar sponsored by Goulston & Storrs and *InsideCounsel*, in Boston, Mass., in late March.

group test (*City of Philadelphia v. Westinghouse Electric Corp.*), and the subject matter test (*Upjohn Co. v. United States*).

"These are the two arguments you can make in court. Under the control group test, only senior management of the corporation is within the scope of privilege," Dacey explains. "But we also have the subject matter test, which states that any employee can have privileged communication with in-house counsel, as long as it's within the scope of his or her duties to the organization."

Another potential pothole involves the often-difficult task of distinguishing legal advice, which is privileged, from business advice, which is not.



Tom Sartory
Goulston & Storrs



Lena G. Goldberg
FMR Corp.



Hon. Allan van Gestel
Mass. Superior Court

"I was involved in a case in which a CEO had talked to inside counsel about a number of matters," adds van Gestel, "Later, the company was sold, and the buying company waived the privilege."

Does technology help or hurt?

Email and other communications technologies represent another potential threat to attorney-client privilege. A common problem involves inadvertent disclosure of electronic documents during pre-trial document production.

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Granted, mistakes occur, especially when discovery involves sifting through millions of electronic records. Inside counsel must explain any production burdens up front and ensure the best effort is made to identify and sequester privileged documents.

"In the early e-discovery cases, inadvertent production simply waived the privilege," said panelist Richard Zielinski, director at Goulston & Storrs. "But, increasingly, courts are opting for the middle-of-the-road approach.

They will ask, 'How reasonable were the company's precautions? How many of the documents were privileged? And how quickly did the company move to get the documents back?' If a lot got through, the company obviously wasn't very careful."

"The proposed amendments to the Federal Rules of Civil Procedure address this," adds Thomas J. Sartory, director, Goulston & Storrs. "Rule 16 and Rule 26 recommend that both sides negotiate how privileged documents will be handled in advance of production." Further, under Rule 26, if a document is produced in error, the producing attorney must notify opposing counsel and claim privilege. It's opposing counsel's obligation to return or destroy the document, or submit it to the court for a ruling.

"I've seen this problem," van Gestel says. "If there's a burden to the production, we need you to explain it, along with how you intend to identify what's privileged and what isn't. That way, if you've got thousands of documents and you inadvertently produce privileged documents, we can and will be sympathetic."

Can email be stopped?

Measures must also be taken to rein in the speed and ease with which privileged electronic documents can be distributed. A corporate email system such as Lotus Notes allows the sender to lock down email and prevent the recipient from forwarding it. "Extra care must be taken, because what was once a paper document can easily bounce around an organization electronically and travel well beyond the intended audience," Dacey says.

"If you receive an email seeking legal advice and it's an open-ended question, determine the legal issue and address it," Goldberg advises. "But don't forward it to the world, because then the privilege is lost."

It's inside counsel's role to identify how attorney-client privilege can be forfeited within a corporation, and continually champion measures to protect it. Taking steps to keep everyone within the organization apprised of corporate privilege requirements makes good business sense, Goldberg concludes.

"We talk to our client groups about the difference between legal advice and business advice, and how to keep something privileged," she says. "We conduct senior-level training to educate both lawyers and executives on what is and is not protected. With nearly 40,000 employees, we have to remain vigilant to limit distribution of privileged communications."

For more information about the Professional Liability Group at Goulston & Storrs, please visit www.goulstonstorr.com.

Training Counts

Now more than ever, inside counsel must work closely with board members and upper management to champion their company's attorney-client privilege rights. Sponsoring ongoing internal legal seminars is an efficient way to reaffirm:

- > Why attorney client privilege is so important;
- > Who should/should not seek privileged legal advice;
- > Why such rights belong to the corporation, not the individual;
- > The difference between legal and business advice;
- > The need to maintain the privilege when third-party advisors are present;
- > How to protect against inadvertent waiver when privileged electronic documents are routed internally; and
- > How to identify and sequester privileged electronic documents if/when e-discovery production ensues.