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In-House Counsel's Privilege Dilemma

by Keith A. Call

In-house lawyers wear many hats. They are, of course, legal counsel for the employer. They are also called upon to be business people, often helping to establish policies and operations that promote profitability and other business goals of the organization.

The roles of “lawyer” and “business person” are often blurred. Along with the in-house lawyer’s multi-faceted roles comes the difficult issues of identifying what is privileged legal advice, what is a non-privileged business communication, and how to protect the former. This article provides a brief overview of the law and some practice pointers.

Some Basics

The attorney-client privilege protects confidential communications between the attorney and client made for the purpose of facilitating the rendition of professional legal services to the client. *See* Utah R. Evid. 504(b); Utah Code Ann. § 78B-1-137(2); 1 Restatement (Third) of the Law Governing Lawyers §§ 68-72 (2000). The privilege applies to in-house counsel just as it would any other attorney. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1974); Restatement § 72, cmt. c. The privilege extends to a corporate client’s representatives. Utah R. Evid. 504(b)(2).

Not every communication between a lawyer and client is privileged. *Gold Standard, Inc. v. Am. Barrick Res. Corp.*, 801 P.2d 909, 911 (Utah 1990). The privilege protects only those disclosures “necessary to obtain informed legal advice.” *Id.*

The Primary Purpose and Significant Purpose Tests

For in-house counsel, many communications with the client are a mixed bag of both legal and business advice. So how do you know if your communications, written or oral, are protected?

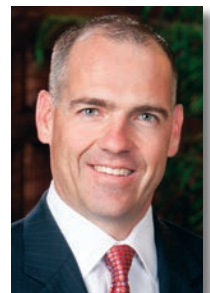
Many courts have adopted and applied a “primary purpose” test, holding that the in-house lawyer’s communications are privileged only if the “primary purpose” of the communication

is to gain or provide legal assistance. For example, in *RCHFU, LLC v. Marriott Vacations Worldwide Corp.*, No. 16cv01301-PAB-GPG, 2018 WL 3055774 (D. Colo. Dec. 31, 2018), the plaintiff sought to compel disclosure of an unredacted copy of a strategic plan memorandum addressed to Marriott’s Corporate Growth Committee. Various lawyers within Marriott’s law department participated in preparing the memorandum over a period of six months. It contained “mostly . . . business advice but provides some smaller measure of legal advice.” *Id.* *3. Applying the “primary purpose” test, the court found the primary purpose of the memorandum was to develop successful business strategies. The court further found that the legal advice was so intertwined with the business advice that redaction was impractical. The court ordered production of the entire unredacted memorandum. *Id.* **3-4.

Many other courts have adopted the “primary purpose” test. *See, e.g., Harrington v. Freedom of Info. Comm’n*, 144 A.3d 405 (Conn. 2016). Such cases have held that the legal advice must “predominate” or “outweigh” any business purpose. *See id.* at 416–18 (and cases cited therein).

But is the “primary purpose” standard softening? Two D.C. Circuit cases authored by now-Supreme Court Justice Brett Kavanaugh suggest that it may be. In *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), the D.C. Circuit stated, “[T]he primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the

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other.” *Id.* at 759. The court noted that trying to identify a “primary purpose” among overlapping purposes can be impossible, and proceeded to evaluate whether legal advice was one of the “significant purposes” of the communication. *Id.* at 759–60. The court held that documents related to a company’s internal fraud investigation, conducted pursuant to the company’s Code of Business Conduct and overseen by the company’s law department, were privileged. While the court did not expressly reject the “primary purpose test,” it seems quite clear it applied a relaxed “significant purpose” standard.

The D.C. Circuit issued a similar opinion, also authored by Judge Kavanaugh, in *Federal Trade Comm’n v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 892 F.3d 1264 (D.C. Cir. 2018). At least one commentator has astutely questioned whether the strategic plan memorandum addressed in the *RCHFU* case would be protected under the *Kellogg* and *Boehringer* standard. See Todd Presnell, *No Room in the Inn: Marriott’s Legal Dep’t Loses Privilege over Strategic Plan Memo*, PRESNELL ON PRIVILEGES (Dec. 18, 2018), available at <https://presnellonprivileges.com/2018/12/18/no-room-in-the-inn-marriotts-legal-dept-loses-privilege-over-strategic-plan-memo/>.

Practice Pointers

The court’s reasoning in *RCHFU* suggests some ideas to help in-house counsel retain privilege for mixed business and legal communications. See also Karen Rubin, *In-House Counsel and Privilege: Opinion Offers Some Take-Home Lessons*, THE LAW FOR LAWYERS TODAY (Jan. 3, 2019), available at https://www.thelawforlawyerstoday.com/2019/01/in-house-counsel-and-privilege-opinion-offers-some-take-home-lessons/?utm_source=Thompson+Hine+LLP+-+The+Law+for+Lawyers+Today&utm_campaign=a0505e6519-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_a5e44ca7ad-a0505e6519-72878029.

Ideas include:

- Identify privileged communications as such, by including headers or footers identifying the communication as privileged.
- Do your best to keep privileged legal advice separate from business communications.
- While lawyer involvement is not always determinative, make

sure to note and include lawyer involvement in all privileged legal communications.

- Educate your client, including managerial and other employees, on the importance of protecting privilege and avoiding waiver.
- The holder of the privilege has the burden to prove the privilege exists. Know that courts will expect any company with a legal department to be sophisticated enough to protect privileged information.

Conclusion

In-house counsel have tough jobs. Your legal guidance may be integral to your company’s success. By understanding the applicable legal standards, you should be better equipped to protect privileged information in your business.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.