

The Attorney-Client Privilege

Overview and Update on Issues Facing In-House Counsel

Charlie Parker
713-632-8000

Cam Barker
512-533-0150

The Privilege Generally

The attorney-client privilege applies to

1. a communication
2. made between client and lawyer
3. in confidence
4. for the purpose of obtaining or providing legal assistance.

Who Personifies the Client?

- This question determines who may invoke the privilege and who is beyond its scope
- Not all corporate employees personify the corporate client
- In a special investigation, even directors may not personify the client
- Counsel should carefully manage the distribution of legal advice and supporting materials

Waiver: Forwarded E-mail

To: Uninvolved Accounting Staffer
From: HR Director
Subj.: FWD: Advice on FMLA Investigation

It looks like next week will be busy.

----- Original Message -----

To: HR Director
From: Alan Attorney
Subj.: Advice on FMLA Investigation

As we discussed in last week's call, I think our investigation of Employee's FMLA complaint raises these concerns....

Waiver: Transaction Partners

To: Alan Attorney; Transaction Team; Potential Transaction Partner
From: Transactional Team Member

Alan – As we discussed, I'm concerned that the negotiating position on the points below might violate our contract with XYZ Co....

or...

To: Transactional Team; Potential Transaction Partner
From: Alan Attorney

Attached is the most recent draft of the agreement

Waiver: Outside Auditors

To: Alan Attorney; Transaction Team

From: Transactional Team Member

Cc: Outside Audit Team Member

As we discussed during our conference call last week, Alan is helping us analyze several issues we need to consider in the next round of negotiations. In particular, he is analyzing whether XYZ Co. might later argue that our position on one issue would breach our contract with XYZ...

Legal v. Business Advice

- Attorney communication giving business advice does not qualify for the privilege
- Corporate in-house counsel provides legal advice but often has business duties – a clean distinction can be difficult
- In-house counsel's advice is protected, but often scrutinized more closely by courts

Legal v. Business Advice

- Officers, directors, and employees rely on in-house counsel to understand distinction between legal advice and business advice
- Copying in-house counsel on emails does not make the communications privileged

Business Advice

To: Customer Training Manager

From: Alan Attorney

Cc: CEO

I agree.

----- Original Message -----

To: Customer Training Team

From: CEO

Cc: Alan Attorney

Next month we will implement the attached new procedure for customer training. Please review and let me know if you have questions.

Alan – If you agree with this procedure, confirm with our Customer Training Manager.

Legal Advice

To: CEO

From: Alan Attorney

I believe laws governing our Texas and Louisiana training facilities require us to use instructors with a minimum number of years' experience. There may also be a requirement in Louisiana that some amount of that experience comes from field work. These issues are being researched – I will get back to you.

----- Original Message -----

To: Alan Attorney

From: CEO

Next month we will implement the attached new procedure for customer training. Please review and let me know if you see any legal issues. For example, are there requirements on the type of instructors we use?

Tips on Legal v. Business Advice

- When possible, document business advice separately
- Explain privilege limits to your business client – e.g., at the beginning of a transaction – to avoid interjecting business into legal email chains
- Explain waiver to your business client early and often
- Maintain privileged documents in lawyer files only where possible
- Identify, analyze, and document privilege issues in transactions

Internal Investigations

- Original pressure to waive privileges to earn cooperation credit
 - 1999 Holder Memo
 - 2001 SEC Seaboard Report
 - 2003 Thomson Memo
 - 2004 Sentencing Guidelines Amendment

Culture of Waiver

- 2006 survey of corporate counsel:
75% agreed that culture of waiver exists
- Criticism: Routine waiver requests, with no real ability to resist, chills the attorney-client relationship and thus corporate compliance initiatives
- Partial retreat:
 - 2006 McNulty Memo
 - 2006 Sentencing Guidelines Amendment

Filip Memo

- 2008 Filip Memo [USAM § 9-28]
- Cooperation credit now expressly focuses, not on waiver of privilege, but on the disclosure of facts known to the corporation about conduct under review
- Directs prosecutors not to seek disclosure of core (nonfactual) attorney-client communications, although a company may choose to do so.

Focus on Fact Disclosure

- Corporations need not disclose – and prosecutors may not request – notes or memos generated by lawyers' interviews
- Only underlying facts need be disclosed (including facts acquired in interviews)
- Exceptions to DOJ bar on requesting core attorney-client-privileged documents:
 - Advice-of-counsel defense
 - Crime-fraud

SEC Enforcement Manual

- Publicly released in 2008; revised in 2010
- 2008 Manual - Suggests less intrusion on privilege: directs SEC staff not to ask for waiver of the privilege and focuses on facts, not attorney notes and memos
- 2010 Manual – Still bars a penalty for not waiving privilege, but expressly allows staff to request waiver or privilege with approval by senior officials

Waiver Pressure Remains

- **SEC Enforcement Manual – Recidivism into culture of waiver**
- **Filip Memo – Applies only to DOJ; encourages companies to comply with disclosure programs of other agencies**
- **Case study: 2009 Bank of America investigation**

Consequences of Waiver

- No selective waiver – Substantial risk that third-party litigants will be able to discover privileged information voluntarily disclosed to the government; nonetheless, consider seeking a confidentiality agreement
- Federal Rule of Evidence 502 limits the scope of waiver when documents are intentionally disclosed to the government: undisclosed documents must be disclosed only if they concern “the same subject matter” and “ought in fairness to be considered together”

YetterColeman LLP
TRIALS | APPEALS

909 Fannin Street, Suite 3600
Houston, Texas 77010
phone 713.632.8026
fax 713.632.8002

221 West 6th Street, Suite 750
Austin, Texas 78701
phone 512.533.0150
fax 512.533.0120

info@yettercoleman.com
www.yettercoleman.com