

# TEXAS LAWYER

## Preserving Privilege When In-House Counsel Wear Multiple Hats

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In-house counsel wear a variety of corporate hats: lawyer, business advisor, corporate officer and dealmaker, to name just a few. Without a doubt, this diversity of experience increases in-house counsel's value as a team member. It also promotes greater synergies between legal and business departments.

But a single player filling multiple roles presents risks. That's particularly true when executives and workers expect that all communications with in-house counsel, regardless of whether legal or business in nature, are privileged and thus exempt from discovery in subsequent litigation.

It's a dilemma well-known to in-house counsel who regularly provide transactional advice. When attempting to shield attorney communications from discovery, the work-product privilege applies only when litigation is reasonably anticipated.

This means that the work-product privilege almost always does not apply when the in-house attorney is giving advice during contract negotiations when the parties are still on a friendly footing. As a result, should those warm, fuzzy feelings eventually evaporate and people begin to anticipate litigation, the attorney-client privilege may be the best means to prevent disclosure of communications between in-house lawyers and the business team they counsel.

As codified in Texas and elsewhere, the attorney-client privilege grants the client a privilege to prevent disclosure of confidential communications "made for the purpose of facilitating the rendition of professional legal services to the client."

The attorney-client privilege applies in a corporate setting, but the mere involvement of a lawyer in a business transaction does not create a right to withhold communications on the basis of privilege. Instead, courts look to the "primary" or "predominant" purpose of the communication. In other words, did the attorney function more as a business adviser or as a legal adviser?

In practice, applying this standard can prove slippery, particularly where communications with in-house counsel implicate both legal and business concerns. For that reason, courts often look to what the U.S. Court of Appeals for the Fifth Circuit described in a May 2013 decision in *Exxon Mobil Corp. v. Hill* as the "context" of the advice, as well as the content of the advice itself.

According to the Fifth Circuit's opinion in *Exxon Mobil*, during negotiations for a contract to clean and store oilfield equipment, a businessperson asked in-house counsel whether he should provide certain test results to the other contracting party. In response, in-house counsel advised that the businessperson should provide only one of the results and only after the removal of captions indicating the existence of other results. In-house counsel also prepared a draft response to the other

contracting party disclaiming any liability or warranty for the test results and affirming Exxon's property interests in the results.

The district court found the advice was not privileged. Applying the "primary purpose" test, the district court found that its primary motivation was to help secure more favorable contract terms, not to protect the company from legal liability. The district court observed that the communications did not refer to any legal reasoning and did not cite any legal concerns that prompted its solicitation.

The Fifth Circuit reversed. Noting that context was key, the court found that disclosure issues are a universal concern under contract law and that other legal counsel were involved in the negotiations. According to the court, the communications' purpose was to deal with issues of potential legal liability stemming from the under-disclosure of data or implied warranties, both of which were "obvious reasons" to seek legal advice.

## **Manage Risk**

Risks abound when in-house counsel communications are disclosed in litigation. Once a court finds that an in-house counsel is operating in a predominately business capacity, then clearly privileged communications may get swept up with generic business advice and produced in mass.

How can in-house counsel preserve the confidentiality of legal advice without sacrificing their role in making business decisions? Here are seven ways to prevent surprises in future litigation:

1. State the purpose. Make clear that the communication's primary purpose is to gain or seek legal assistance. Emphasize the legal aspects of the advice provided.
2. Know the audience. Direct legal advice to those empowered to make legal decisions. As a lawyer, be discriminating about disseminating advice.
3. Talk the talk. Where possible, incorporate legal reasoning or cite legal principles. In *Exxon Mobil*, express references to warranty liability and property rights were critical to sustaining the privilege. In other words, it helps to talk like a lawyer.
4. Identify the position. In-house counsel should reflect their legal position in any written communication intended as legal advice. Use a privilege legend, but beware doing on a blanket basis. Merely stating that something is privileged doesn't make it so.
5. Mix apples and oranges with care. Think carefully before combining legal and business advice in the same communication. Don't give business advice on issues unrelated to the legal questions under consideration.
6. Know the law. Be mindful of which law applies to privilege issues, whether through contractual choice-of-law provisions or otherwise. There are important nuances to the attorney-client privilege depending on the state or federal jurisdiction.

Since counsel may be involved in the heat of negotiations when these privilege issues arise, it's smart for lawyers to develop a cheat sheet in advance that provides the rules of relevant jurisdictions.

7. Consult the clients. Make sure management understands the differing confidentiality standards attaching to legal versus business advice. Clarify the lawyers' roles as advisers.

As both legal and business adviser, in-house counsel working in transactional settings must be ever alert to privilege issues. It's a nuanced task, dependent on facts varying by transaction. But by documenting the nature of the advice and clearly delineating the role, in-house counsel can play a critical role in protecting both the legal and business interests of their clients.

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