



Thomas Paschos

The Preservation of the Attorney-Client Privilege by Corporate Counsel

Introduction

In 1981, the United States Supreme Court extended the attorney-client privilege to in-house counsel. *Upjohn Co. v United States*, 101 S.Ct. 677, 449 U.S. 383, 66 L.Ed. 584 (1981). The issue in *Upjohn* was whether in the corporate context, the attorney-client privilege included communication between the attorney and low level employees of the corporation. The Supreme Court held that any information obtained by a corporate defendant's attorney that is sought for purposes of legal advice is protected by the attorney-client privilege. The client is not just the ranking officers of the corporation, but includes any employee from whom information is sought.

Significant is the fact that corporate counsel does not have the same capacity as outside counsel to have privileged communications with clients. The problem is that courts do not treat a communication as privileged simply because

it was made by or to a person who is an attorney. A communication is privileged only if the primary purpose of the communication is to further the objectives of the attorney-client privilege. In other words, the communication must be made for the purpose of seeking, obtaining or providing legal assistance. Specifically, the attorney-client privilege protects communications between a lawyer and a client when the communications are 1) made for the purpose of seeking or providing legal advice, as opposed to business advice; 2) confidential when made; and 3) kept confidential by the client.

Who is the Client?

The scope of the attorney-client privilege is unique when an attorney represents a corporation. It is generally recognized that not all corporate employees are the "client." Courts have employed two theories to decide which corporate employees in-house counsel may communicate with in a privileged context.

One theory is the "control group test" under which only those conversations between in-house counsel and the corporation's controlling executives and managers are eligible for protection. Often, a company's "control group" is made up of a very limited number of corporate employees.

In *Upjohn, supra*, the Supreme Court expanded the control group test to include an inquiry into the subject matter of the communication. Under this theory, employees with relevant information regarding the subject matter are considered the "client" regardless of their position in the company. Therefore, it is possible for any corporate employee to have a privileged conversation with corporate counsel. However, the conversations are not always privileged. Issues arise because often many corporate employees are under the impression that they can discuss any corporate legal matter with a corporate attorney and it will be privileged. Not every corporate employee is entitled to a privileged communication on every legal matter. Unless the communication is within the scope of the employee's responsibility, it is not privileged. Further, some employees may be outside the scope of the privilege as to any legal matters. Issues arise when

Thomas Paschos is a partner of the law firm of Thomas Paschos & Associates, PC. He practices in the fields of professional liability, employment litigation, insurance coverage, products liability, and complex commercial litigation. He represents amongst others, corporate officers, physicians, dentists, nursing homes, lawyers, accountants, product manufacturers, insurance agents and brokers, architects and engineers, contractors, and insurance companies. He is the current Chair of Primerus' Professional Liability Group and also serves on the Executive Committee of Primerus' Labor & Employment Group.

Thomas Paschos & Associates, PC
30 North Haddon Avenue, Suite 200
Haddonfield, New Jersey 08033
856.354.1900 Phone
856.354.6040 Fax
tpaschos@paschoslaw.com
www.paschoslaw.com

these employees attend meetings where corporate counsel gives legal advice.

Not all jurisdictions use the expanded test in *Upjohn*, some continue to employ the control group test.

Legal Advice vs. Business Advice

Most in-house attorneys have dual legal and business roles and some hold corporate titles such as Vice President or Secretary, in addition to the title of General Counsel. Often corporate legal advice involves at least some element of business advice, as a result in-house counsel face more scrutiny when it comes to applying the attorney-client privilege. Generally, communications made by and to an in-house counsel with respect to business matters or business advice are not protected by the attorney-client privilege.

To invoke the attorney-client privilege, the communication must be primarily for the purpose of rendering legal advice. It is inevitable that legal advice is often intertwined with business advice. Some courts have approved redaction or exclusion of privileged portions of documents containing legal advice mixed with business issues.

Courts have held that there is a need for this heightened scrutiny when it comes to applying the attorney-client privilege to corporate counsel because of the chance that an attorney may participate simply to be able to assert the privilege and keep the documents off limits in discovery. Therefore, courts must often distinguish between a lawyer's legal and business work.

Further, the fact that counsel is carbon-copied on a document or attends a meeting, does not invoke the privilege. Typically, the privilege does not apply under these circumstances unless it can be demonstrated that the communication would not have been made but for the client's need for legal advice. If the

purpose of the communication is not for the primary purpose of obtaining legal advice, it does not become privileged by adding counsel as recipients. Additionally, counsel's recommendation of, or involvement in, a business transaction does not necessarily place the transaction under the cloak of privilege.

Preserving the Attorney-Client Privilege

Communications subject to the attorney-client privilege remain protected unless the client affirmatively waives the privilege or it is indirectly released by the client's actions. The privilege which applies to information shared in representation of the corporation cannot be waived by an individual officer, director or employee without the proper authority.

While in-house counsel may communicate with any employee or agent of the corporation about their work as necessary to render legal services for the corporation, the following points should be kept in mind to ensure the attorney-client privilege is preserved.

- Distribute privileged information only on a confidential, need-to-know basis.
- Avoid disseminating privileged legal documents to outside third parties.
- Try to separate the legal information from the business information in sensitive communications.
- When acting in the capacity of General Counsel, do not use any non-legal titles (Vice President, Secretary, etc.)
- If possible, document the basis for distributing communications to numerous recipients. The writing should make clear why each recipient is receiving the memorandum.
- When applicable, written communications, including electronic mail and informal memos, should note that you are seeking legal advice. Writing "counsel is addressing the following legal issues" or "privileged

attorney-client communication" at the beginning of communications expected to be privileged can be an added safeguard.

- Do not discuss privileged matters in business meetings attended by employees who do not have a direct interest in the matter.
- Consider retaining outside counsel to handle particularly sensitive matters. Confidential communications with outside counsel face less scrutiny when being characterized as legal advice.
- Corporate employees must be aware of the boundaries of the privilege. Corporate counsel should advise the corporate employees that not all communications are subject to the privilege.
- Counsel should refrain from sending e-mails and attachments to both lawyers and non-lawyers if the sender hopes to maintain privilege over the communication. If counsel receives an e-mail sent to both lawyers and non-lawyers, counsel should create a new document before commenting or making changes in order to reassert privilege over the new edits and communication.

Conclusion

By knowing the ground rules regarding the type of communication protected by the attorney-client privilege, the scope of the attorney-client privilege in a corporate setting, as well as considering the above points, corporate counsel should be able to ensure that the attorney-client privilege is preserved. **D**