Today's in-house counsel serve as business advisors as well as legal counselors. This hybrid role risks waiver of the attorney-client privilege. Here are steps company lawyers can take to preserve that protection.

By Joseph J. Siprut

An In-House Counsel's Guide to Preserving Attorney-Client Privilege

In July 2004, the U.S. Court of Appeals, Fifth Circuit, upheld the June 2002 criminal conviction of the accounting firm Arthur Andersen for obstruction of justice related to its client Enron.[1] In October 2002, the federal district court judge had sentenced Andersen to the maximum $500,000 fine and five years' probation. Even before that, however, the charges dealt the company a death blow as clients fled and the firm was forced to lay off thousands of employees.

More than two years later, few have forgotten the "smoking gun" e-mail authored by in-house counsel for Andersen reminding executives of the firm's "document retention" policy.[2] Indeed, after Andersen's conviction at that trial, several jurors said that the memo, which was sent to the head of Andersen's Enron audit team, convinced them that the accounting firm was guilty of obstructing justice.

One wonders how the trial would have turned out if that e-mail had never been written or if Andersen had not waived its right to prevent disclosure of counsel's electronic communication under the attorney-client privilege. In the wake of the fifth circuit's decision in this case, therefore, it is appropriate for in-house counsel to focus on the attorney-client privilege, the protection it affords, and – perhaps most importantly – how to preserve it.

1. *USA v Arthur Andersen*, 374 F.3d 281 (5th Cir 2004).
2. Tom Fowler, *Andersen guilty verdict seen as fatal blow to firm*, Houston Chronicle (July 19, 2002), online at <http://www.chron.com/cs/CDA/ssistory.mpl/topstory2/1456537>.

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In-house Counsel's Unique Role in Today's Business World

In today's legal environment, in-house counsel to corporations serve as business advisors and strategists as well as legal counselors. And therein lies the potential obstacle to asserting the attorney-client privilege in this context, because one of the requirements for the privilege to apply is that the client must have sought legal advice, not merely business advice. Consequently, understanding the dual nature of the role of in-house counsel and the implications that role may have on the attorney-client privilege is of utmost importance to both counsel and the client – that is, the company.

The Attorney-Client Privilege Generally

The attorney-client privilege protects certain communications between an attorney and client from compelled disclosure, thereby fostering open dialogue between the attorney and the client without fear that what is said to the lawyer will be relayed to a potential adversary. The privilege applies to clients who are individuals as well as to corporate clients – the corporation itself.

The privilege shields communications between attorneys and their clients from discovery, and it therefore provides the basis for objection to demands for discovery of materials or communications that otherwise might be discoverable. The basic elements needed to establish privilege are (i) a communication (ii) made in confidence (iii) between an attorney (iv) and a client (v) for the purpose of seeking or obtaining legal advice.[3]

A client can expressly waive the privilege or can be deemed to constructively waive it through (i) disclosure of any part of the communication to a third party, including certain company employees, outside auditors, underwriters, etc.; (ii) production of privileged documents; (iii) deposition testimony; or (iv) legal advice that is combined with or otherwise provided for a specific business purpose. In addition to waivers of the privilege, communications otherwise privileged will not be protected if they are in furtherance of contemplated or ongoing criminal or fraudulent conduct pursuant to the "crime/fraud exception" to the privilege.[4]

The Attorney-Client Privilege in the Corporate Setting

In the corporate setting, the attorney-client privilege is unique in that it is the corporate entity to whom the privilege attaches, not the individual employees who communicate with the attorney.[5] Similarly, the decision whether to waive the privilege belongs to the corporation, not its employees.

This raises two issues: (i) who are the employees who actively represent the corporation for purposes of invoking the privilege; and (ii) what are the ways in which a corporation can best preserve the privilege? The competing tests for attorney-client privilege in the corporate setting are described below.

To preserve the privilege, avoid communicating with someone who is not high-level enough to act on your legal advice without consulting other employees.

Control-group test. The control-group test holds that the privilege may be invoked only by employees who communicate with counsel and are in a position to control, or take a substantial role in determining, the course of action a corporation may take based on the legal advice received.

Subject-matter test. The subject-matter test holds that the privilege attaches only when (i) the communication is made for the purpose of giving or receiving legal advice; (ii) the employee who communicates with the attorney does so at the direction of a superior; (iii) the direction is given by the superior to obtain legal advice for the corporation; (iv) the subject matter of the communication is within the scope of the employee's duties; and (v) the communication is not disseminated beyond those persons who "need to know" the communication's contents.

***Upjohn* test.** The aptly named "*Upjohn* test" comes from the U.S. Supreme Court decision in *Upjohn Co v United States*,[6] the authoritative federal case on the scope of the attorney-client privilege in the corporate setting. In *Upjohn*, the Supreme Court:

- rejected the control-group theory, stating that it frustrates the purpose of the attorney-client privilege by "discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client"; and
- adopted a version of the subject-matter test – that is, the Court ruled that the communications at issue in *Upjohn* were protected for the following reasons: (i) they were made to in-house counsel at the direction of corporate superiors; (ii) they concerned matters within the scope of the employees' in-house duties; (iii) the information was not available from upper-level management; and (iv) the employees were aware that they were being questioned so the corporation could receive legal advice.

Thus, under this subject-matter/*Upjohn* test, in-house counsel may gather facts from employees of any rank and any employee may seek legal advice from counsel as long as the foregoing criteria are satisfied.

Upjohn is the leading case on the scope of the attorney-client privilege in the corporate context, but because it was decided as a matter of federal common law, it is not binding on the states. Indeed, some states have rejected the *Upjohn* approach, including Illinois. Illinois courts follow the control-group test instead.[7]

Practice Pointers for In-House Counsel

While there can be no guarantee that the privilege will protect a given communication, here are some practical steps you as in-house counsel can take to help retain the attorney-client privilege when discussing legal matters.

- Wherever possible, in light of the inconsistencies among various jurisdictions, try to meet the standards of both the control-group and subject-matter tests. To satisfy the more stringent con-

3. For a thorough discussion of the privilege in the corporate context, see Daniel J. Polatsek, *Attorney-Client Privilege, Corporate Clients and the Control-Group Test*, 91 Ill Bar J 80 (February 2003).
4. See, e.g., *Illinois Education Association v Illinois State Board of Education*, 204 Ill 2d 456, 467 (2003).
5. See generally *Proof of Waiver of Attorney-Client Privilege*, 32 Am Jur Proof of Facts 3d 189 (2004).
6. 449 US 383 (1981).

trol-group test, the in-house representative should be top-level management or someone whose responsibilities clearly include making substantial decisions within the corporation. In other words, do not communicate with someone who is unable to act on your legal advice without consulting other employees.

• Communicate on a "need to know" basis only, and clearly express that your communication is legal, not business, advice.

• Consider carefully the pros and cons of written versus oral communication before choosing one form over the other. Oral communication can often be more efficient than written communication, but when you communicate in writing you can physically note that the communication is legal advice and is strictly confidential. Do not be overly broad in labeling communications as legal advice, however, or the system will lose its persuasive force.

• If business advice is sought along with legal advice, separately address each issue. Although in theory the privilege will be maintained if the legal aspect of the advice is the "predominant" part of the communication, it is best to eliminate any uncertainty and not leave it to chance in court.

• During meetings with in-house counsel and employees in which legal advice is sought or discussed, keep a record of the meeting (minutes) noting the date, the persons present, and the subject matter of the meeting, which must be a legal issue to be protected. The records themselves should contain a definite statement of the intent for confidentiality. Having an attorney present at a meeting does not necessarily make the communications in that meeting subject to the privilege.

• Corporations should avoid using in-house counsel as a conduit for information, because a court may perceive this as an attempt to create a zone of silence and cast a suspicious eye on attempts to invoke the privilege.

• Before the communication takes place, talk with the business person about what topics will be discussed at the meeting and whether that discussion will be protected by the privilege.

• Periodically remind company employees of their responsibility to the corporation and the limited scope of the privilege with a statement setting forth company policy on legal communications, which should contain advice on how to retain the privilege. Consider reminding employees that the privilege belongs to the corporation and may be waived by – and only by – the corporation, even if doing so might expose individual employees to liability.

• Corporations should hire outside counsel to conduct internal investigations. Courts tend to disfavor investigations conducted by in-house counsel. That means that the privilege could be lost in cases where documents prepared by outside counsel as part of the investigation would remain privileged.

As added protection, in-house counsel should execute a written agreement with the firm conducting the investigation expressly noting the confidential and legal nature of the services that the investigator will provide and insure that outside counsel reports back to in-house counsel, not company business groups, during the course of the investigation.

• If a corporation is served with a grand jury subpoena or receives correspondence from the Securities and Exchange Commission (or any other investigatory arm of the government) signaling an investigation into the company's practices, hire outside counsel immediately – even before preliminary attempts to contact prosecutors or investigators and discuss the basis for the investigation. A voluntary presentation to the government, even if intended to avoid the filing of any charges, can waive the privilege.

Conclusion

The role of in-house counsel in today's times is often a hybrid version of both attorney and business advisor. When these two roles begin to merge and in-house counsel dons both "businessperson hat" and "lawyer hat," protective actions should be taken to distinguish between the two roles wherever possible for purposes of retaining the attorney-client privilege. ■

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7. See, e.g., *Consolidation Coal Co v Bucyrus-Erie Co*, 89 Ill 2d 103, 106, 432 NE2d 250 (1982). The Court noted:

> [T]he only communications that are ordinarily held privileged under [the control group] test are those made by top management who have the ability to make a final decision rather than those made by employees whose positions are merely advisory. We believe that an employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority, is properly within the control group. However, the individuals upon whom he may rely for supplying information are not members of the control group. Thus, if an employee of the status described is consulted for the purpose of determining what legal action the corporation will pursue, his communication is protected from disclosure. This approach, we think, better accommodates modern corporate realities and recognizes that decision-making within a corporation is a process rather than a final act. (Cites omitted).

Id at 120, 432 NE2d at 258. See also *Midwesco-Paschen Joint Venture for Viking Projects v IMO Industries, Inc*, 265 Ill App 3d 654, 657-58, 638 NE2d 322, 325 (1st D 1994) (affirming the control group test).

Reprinted from the Illinois Bar Journal
Vol. 92 #11, November 2004.

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