

Are Organizational Attorney Communications Privileged? Depends on Who (and Where) You're Asking

When litigating at a law firm, it is *easy* and *generally* safe to assume that your communications with your clients are privileged. That is, lawyers at law firms communicating with their corporate clients (through the corporations' in-house counsel) about ongoing litigation are generally doing so for the purpose of rendering legal advice. For lawyers who move from law firms to in-house legal roles, though, that is no longer a safe assumption. And the implications of privilege in corporate settings are broader than considering whether to produce certain custodial emails where a company employee may be communicating with corporate counsel. Indeed, courts have struggled with questions of privilege in the context of requests to depose company attorneys with varying outcomes. *See, e.g.,* Dkt. 2257, *Wolverine World Wide, Inc. v. American Ins. Co.*, 1:19CV00010 (W.D. Mich., Dec. 1, 2023) (granting motion to compel deposition of an in-house attorney after finding the attorney was primarily “engaged in the ordinary business of claims handling” and not providing legal advice).

As a primer for attorneys who have recently moved into a corporate counsel role, this paper outlines the factors courts consider when analyzing challenges to claims of privilege over communications between a corporation's employees and a corporation's counsel.

Whose Communications Are Privileged?

“Attorney-client privilege” protects certain communications between attorneys and clients from disclosure. The privilege's purpose “is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Indeed, “[t]he lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.” *Id.*

What about clients that are corporations; would communications between counsel and *any* employee of the corporation be privileged? Not necessarily. A corporation can only speak or act through its officers, directors or employees, but whether those individuals can be considered “the client” for purposes of attorney-client privilege rests largely upon the jurisdiction where the court analyzing a challenge to an asserted challenge sits.

Upjohn: The most prevalent test, by far, is *Upjohn*. Federal courts and most states employ the Subject Matter (or “*Upjohn*”) test, which applies the privilege most broadly. Under *Upjohn*, the privilege will extend to communications with *any* corporate employee, regardless of status, provided three criteria are met: (1) the communications concern matters within the scope of the employee’s corporate duties; (2) the employee is aware that they are being questioned so the corporation can obtain legal advice; and (3) the communications are considered confidential when made and are kept confidential by the company. *Upjohn*, 449 U.S. at 390.

Chadbourne: California state courts analyzing a privilege challenge in this context use a more complex test stemming from *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 736–38 (Cal. 1964). Under the *Chadbourne* test, courts consider: (1) whether the employee may be potentially liable for the incident; (2) whether the employee understands the communication is confidential; (3) whether the statement is within the scope of the employee’s responsibility; (4) whether the company directed the employee to make the statement; and (5) whether the “dominant purpose” of the communication was for legal advice.¹

¹ Though not the subject of this primer, there is also a divergence between federal law and California law concerning communications between parent and subsidiaries. Under federal law, the privilege extends to communications with employees of subsidiary when: (1) employee possesses information critical to the representation of the parent; and (2) the communications concern matters within the scope of employment. *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1493 n.6 (9th Cir. 1989). In California, privilege extends to communications with employees of parent/subsidiary only when: (1) parent and subsidiary have common interest in securing legal

Control Group: The privilege is generally seen as most curtailed under the Control Group test, which has been adopted by a handful states (Illinois, Maine, New Hampshire, South Dakota, Oklahoma, Alaska, Hawaii). There, the privilege only extends to two groups: (1) top management—*i.e.*, employees or officers who have authority to make decisions based on legal advice; or (2) necessary advisors to top management on whom management actually relies in reaching its decision. *See, e.g., Consolidation Coal Co. v. Bueyrus-Erie Co.*, 89 Ill. 2d 103 (1982).

When Are Corporate Counsel “Providing Legal Advice”?

Even if the employee would satisfy the *Upjohn*, *Chadbourne*, or Control Group Test, that does not necessarily mean that communications between that employee and in-house counsel will withstand a privilege challenge. As corporate counsel are increasingly called upon to render both legal and business advice within an organization, courts have dug deeper than an attorney’s title to determine whether communications between an employee and in-house counsel are privileged.

The divergence in privilege claims stems from who qualifies as a client. At a firm, your client is the individual or company that retained you for your legal services. But the client of an in-house attorney is the company, not individuals working for the company. *See, e.g.*, ABA Model Rule 1.13(a) (“A lawyer employed or retained by an organization ***represents the organization*** acting through its duly authorized constituents.”) (emphasis added). As a result, communications between an organizational attorney and employees of that organization are generally only privileged if certain criteria are met. The attorney-client privilege only protects (1)

advice relating to same matter; (2) the communications were made to advance shared interest in securing legal advice on common matter; and (3) the communications would otherwise be protected from disclosure by a claim of privilege. *Oxy Resources Cal. LLC v. Superior Court*, 115 Cal. App. 4th 874, 888-91 (2004).

communications made between an attorney and a client or related persons, (2) in confidence, (3) for the purpose of seeking, obtaining or providing legal advice.

The first two elements are relatively straightforward. The communication must generally involve an attorney and there must be a “reasonable expectation” that the communication will remain confidential² for the privilege to attach. But courts vary in their analysis of communications that are not as cut-and-dry as standard “questions from counsel” scenarios contemplated by any of the tests outlined above. Courts struggle most with analyzing communications made to or by organization counsel that could have both a business impact and a need for legal advice.

Some courts find that for the privilege to attach, “a corporate lawyer must not only be functioning as a lawyer, but the advice given must be *predominately legal*, as opposed to business, in nature.” *Breneisen v. Motorola, Inc.*, 2003 WL 21530440, at *3 (N.D. Ill. July 3, 2003) (emphasis added); *see also Boca Investering Partnership v. United States*, 31 F.Supp.2d 9, 12 (D.D.C.1998) (finding documents prepared by a corporate attorney who worked on business side of office were nevertheless entitled to protection because advice was “predominately legal” as opposed to business). Other courts ask whether “the communication’s *primary purpose* is to gain or provide legal assistance.” *Faloney v. Wachovia Bank, N.A.*, 254 F.R.D. 204, 209 (E.D. Pa. 2008). A third subset of courts are even more demanding, requiring the privilege asserter to “demonstrate that the communication would not have been made *but for* the client’s need for legal

² If the communication tends to show it was intended to be made in confidence, the privilege may attach despite later *waiver* through dissemination to third parties. Note that waiver is a separate consideration, and the distribution of legal advice received from its counsel *within a corporation* should not, by itself, waive the privilege. *See Scholtisek v. Eldre Corp.*, 441 F. Supp. 2d 459, 464 (W.D.N.Y. 2006) (“[W]hether the dissemination of privileged communications to corporate employees vitiates the privilege is decided by applying a ‘need to know’ standard: did the recipient need to know the content of the communication in order to perform her job effectively or to make informed decisions concerning, or affected by, the subject matter of the communication?”)

advice or services.” *In re Bristol-Myers Squibb Sec. Litig.*, 2003 WL 25962198, at *5 (D.N.J. June 25, 2003).

None of these tests lend themselves to cut-and-dry analysis when applied to most modern communications between employees and in-house counsel. Nor do they provide clear guidance to attorneys considering whether to withhold a communication from production on the basis of privilege asserted with in-house counsel. But some courts have offered additional guidance based on their own analysis of privilege logs and through in-camera review. For example, the Special Master considering privilege challenges in the Vioxx litigation offered nine substantive guidelines for counsel to consider when producing documents that may have a colorable claim to privilege. These categories ranged from memoranda addressed to an attorney with limited distribution (privileged) to emails addressed to both lawyers and non-lawyers for review and approval (often privileged) to long email chains where counsel was only carbon copied later in the chain and did not substantively comment (rarely privileged). *See generally In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 809–13 (E.D. La. 2007).

Conclusion

There are myriad reasons that courts have taken different approaches to analyzing which corporate employees can have privileged communications with outside counsel, just as there are numerous, case-specific factors that lead to courts applying different standards to analyze whether an organizational counsel’s communications are protected by the privilege. But the simplest reason is that claims of privilege are often litigated, so many courts have had the opportunity to weigh in. The time to consider these issues is before that motion practice, which can cost both resources and credibility with the court. So long as counsel are aware of the limitations on privilege protections, they can take care to ensure that confidential communications that warrant protection have it.