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Challenges and Strategies for Preserving Privilege When In-House Counsel Serves a Dual Role

Nicole M. Brunson, Esq.

How do in house counsel effectively protect the privilege of their communications when asked to advise on business, technical, ethical, and even financial matters? We will explore the scope, the challenges, and some strategies to help preserve the privilege in the duality of in-house counsel.

Although each jurisdiction has its own privilege definitions and rules, generally, the attorney-client privilege protects confidential communications between an attorney and client, including a client representative, made for the purpose of rendering professional legal services. Whether privilege protects an in-house attorney's communications depends on the predominant purpose of the communication. If the objective is legal advice, then the communication is privileged, so long as it is confidential and between attorney and client. Alternatively, if the attorney is acting as a business negotiator or advisor, then the communication probably is not privileged. (M. Kaylan Dunn, 2020)

Attorney-client privilege applies to all attorneys admitted to the bar and anyone working on their behalf (paralegals, secretaries, translators, experts, etc.). As stated in *Upjohn Co. v. United States*, U.S. Supreme Court (1981), "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. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." That being said, communications made for the purpose of rendering business advice, e.g., drafts of documents prepared by business, meetings for the purpose of making business decisions. (Gottlieb, 2021) Many courts apply heightened scrutiny to distinguish in-house counsel's legal advice from business advice. Communications that mix both legal and business advice are generally considered privileged if the legal issues are predominant. *See, e.g., In re County of Erie*, 473 F.3d 413, 422 (2d Cir. 2007); *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984).

With these principles and concepts at play, it is quite easy to see how quickly the protection and use of attorney-client privilege for in-house counsel can be far more complicated than for outside counsel. Protecting privileged communications and documents is an important responsibility that comes with the

in-house counsel job. The starting point is to cultivate a defensive mindset and to be always circumspect and thoughtful. (Geib, 2019) Here are few practical pointers will help you protect the in-house attorney-client privilege:

1. Training and practicing with employees about legal purpose versus business purpose as well as confidentiality.
2. Be an example of keeping privileged communications separate when engaging in writing with employees.
3. Initiate calls and move away from emails, texts and other forms of social communications when using and preserving privilege.
4. Create and maintain department practices that work to protect and preserve privilege within and outside the legal team.