

Communication Quicksand: Email and the Attorney-Client Privilege

There is a problem at Wally's Widgets...a big problem. A high level sales employee, Calvin Creep, is accused of serious sexual harassment by a fairly new employee, Valerie Victim. Human Resources initiates an investigation, talking with several employees and preparing detailed notes. As the investigation unfolds, H.R. decides that Larry Lawyer, the company's in-house attorney, should be clued-in on the happenings.

An H.R. Specialist, Irene Inspector, prepares a detailed email summary of the investigation (that includes some very damaging information) and sends it to her boss, Connie Compliance, the Director of Human Resources. She also copies Larry Lawyer and Sally Sales, the Sales Department Director. The subject of the email states "FYI: Investigation Summary." The body of the email says things like "my plan is to follow up with Valerie" and "I think we should suspend Calvin immediately. His behavior was inappropriate." At no point in the email does Irene ask for anyone's advice or input.

Connie Compliance replies to all with "I agree with your plan. Good work, Irene." Sally Sales, by contrast, replies to all with "Hold on. Calvin is one of my biggest producers. Let's not be so quick to suspend him because he has a huge sales call in a month. We HAVE to have him there!" An exchange unfolds during which Connie and Sally debate whether Calvin should remain an active employee, or be suspended. Larry Lawyer remains copied on the exchange, but never chimes in. (NOTE: Unbeknownst to everyone, Larry is out of town for a three week jury trial involving an allegedly defective product produced by the company).

Ultimately, Sally Sales wins out and Calvin remains actively employed. Irene is told to "table" her investigation until after Calvin's big sales call. In the interim, Calvin terminates Valerie Victim's employment, claiming that she "is not a team player" and "not committed to what we are trying to accomplish." Of course, Valerie files a Charge of Discrimination with the EEOC and, ultimately, a lawsuit.

When the outside lawyers for Wally's Widgets send a copy of the lawsuit to Larry Lawyer (in-house counsel), they also include the Plaintiff's First Request for Production of Documents and a brief summary of the information sought. Included in that summary is a request for "Any and all documents related to any investigation of Plaintiff's complaints about Calvin Creep." As Larry works with H.R. to collect the requested documentation, he stumbles across the exchange on which he was copied, but to which he never responded. "Whew," he says, "I'm glad this entire exchange is protected by the attorney-client privilege!" Larry facilitates the production of thousands of documents and moves on with his life. Months later, during Irene Inspector's deposition, she testifies that she sent an email summarizing her investigation to Connie, copying Sally Sales and Larry Lawyer, and casually mentions that Larry Lawyer never responded. Valerie's attorneys identify the exchange on Wally's Widgets' privilege log and request a conference with the Court. During the conference, the Judge asks to see copies of the exchange, which Larry happily provides. "As you can see, your honor" Larry says "this entire exchange is privileged because I was copied throughout." Is he right?

The Attorney-Client Privilege: Generally

The attorney-client privilege protects certain communications between an attorney and client from compelled disclosure (such as in response to a Request for Production of Documents), thereby allowing for open dialogue between the attorney and the client without fear that what is said or written by or to the lawyer will be relayed to a potential adversary. The privilege applies to individuals as well as to corporations.

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.

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) when the legal advice is combined with or otherwise provided for a specific business purpose.

Whose Conversations are Privileged?

In determining whether an employee's conversations with counsel are privileged, the majority rule is the "subject-matter" or *Upjohn* test. Under this test, communications regarding the subject matter of a legal representation are protected as long as they were made by employees to in-house counsel at the direction of corporate superiors and the employees were aware that they were being questioned so the corporation could receive legal advice. This approach allows in-house counsel to gather facts from employees of non-executive rank in appropriate cases.

As to former employees, Courts have recognized the need for corporate counsel to obtain knowledge from former employees in order to advise the corporation. As a result, the attorney-client privilege may extend to communications between corporate counsel and a former employee if these communications (1) concern knowledge obtained or conduct which occurred during the course of the former employee's employment with the corporation; or (2) relate to communications which themselves were privileged and which occurred during the employment relationship. This does not mean that former employees are insulated from contact by an adversary's attorney; the opposing counsel need only advise the former employee of his representation and interest in the litigation and direct the former employee to avoid disclosing privileged or confidential information.

What Conversations are Privileged?

In today's legal environment, in-house counsel can serve as business advisors and strategists as well as legal counselors. As such, 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 company. Moreover, as indicated above, simply copying an attorney on a message does not make it privileged, per se. Rather, a communication is privileged only if (1) the person who sought or received the legal advice is (or sought to become) a client of the attorney; (2) the person to whom the communication was made is a qualified attorney (*e.g.*, a member of

the bar) or is an attorney's subordinate acting on the attorney's behalf (e.g., a paralegal); (3) the communication at issue relates to the securing or rendering of legal advice; and (4) the communication was confidential.

Practical Tips

While there can be no *guarantee* that the privilege will protect a given communication, the following suggestions will increase the likelihood of the privilege attaching.

- Be extraordinarily careful who is copied on emails during internal investigations. With that in mind, restrict circulation of any communications with counsel only to those on a "need to know" basis, and when communicating, clearly express that the communication is intended to evoke legal advice.
- Consider carefully the pros and cons of written communication versus oral communication. Oral communication can often be more efficient than written communication, but creating a written record allows for the opportunity to physically mark, or note, that the communication is intended to be legal advice and is strictly confidential. Obviously, one should be particularly careful of using email for privileged communications, given the risks of inadvertent waiver by forwarding to someone outside the zone of privilege.
- During meetings with 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, so the document should mention, for example, that "Larry advised us that ____."
- Company employees should be reminded periodically 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 prescriptive advice on how to retain the privilege. Employees should also be told that the privilege belongs to the corporation and may be waived only by the corporation, even if to do so might expose the employees to liability.
- Written corporate policies that govern internal investigations should include a specific statement that all investigations are to be conducted for the purpose of obtaining legal advice and at the direction of company counsel (whether in-house or external lawyers).
- Company counsel (whether in-house attorneys or external lawyers) should initiate internal investigations. In practice, however, a company's lawyers are often not the first to learn of potential misconduct. For example, companies with standing compliance policies and personnel who are responsible for investigations may learn of misconduct through a hotline call or a non-attorney investigator. Thus, involving company counsel from the very moment the company learns of the need for an internal investigation may be difficult. In those situations, once apprised of misconduct, company counsel should formally initiate the

investigation — even if non-attorneys have already gathered some facts — and document the investigation’s legal purpose. Company counsel should also take care to oversee each stage of the investigation, especially when non-attorneys are involved. For reasons of cost and efficiency, it may make sense for many corporate compliance programs to allow non-lawyers to conduct investigative work. Non attorneys may conduct investigations without jeopardizing the attorney-client privilege if they are acting as agents of attorneys. From an organizational standpoint, non-attorney personnel (e.g., Internal Audit) should report to the company’s Legal department for the purposes of the internal investigation.

- At the outset of an internal investigation, and in a contemporaneous writing, companies should document that the investigation is being conducted for the purpose of obtaining legal advice and at the direction of internal or outside counsel. This writing should include a statement, set forth as succinctly and as narrowly as possible, describing the specific issue(s) on which the company is seeking legal advice in that investigation. To the extent the precise issues may expand or otherwise shift over time, the company should update this document to reflect such changes. Companies should also take certain formal precautions to ensure the attorney-client privilege, which attached at the beginning of the investigation, continues to attach to every stage going forward by communicating the investigation’s legal purpose. Non-attorneys who are involved in conducting the internal investigation should be appraised of the investigation’s legal nature and general purpose.
- Avoid funneling all documents through in-house counsel, as a court may interpret that as a bad-faith attempt to withhold discoverable documents.
- As indicated earlier, non-legal employees should write, at the top of any written communication, that “I am requesting this information for the purpose of rendering legal advice.”