

The Changing Burden on Preserving Privilege

Presented by Winstead PC

Melissa Ruman Stewart
and John P. Kincade

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The Basics of the Privilege

- A communication between the client and an attorney
- Communication is made for purpose of obtaining legal advice or legal services
- Communication is intended to be confidential and made confidentially (outside presence of strangers)
- Client has not waived the privilege, *i.e.*, communication remains confidential
 - Tex. R. Evid. 503; *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981); *SEC v. Brady*, 238 F.R.D. 429 (N.D. Tex. 2006)

The Company is the Client... But Who is the “Company”?

- **“Control Group”**

Communications from those employees who have control of or substantially participate in decision-making process

- *Upjohn*, 449 U.S. at 390; *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993)

- **“Subject Matter”**

Communications with corporate counsel at direction of employee's corporate superiors to secure legal advice about matter within scope of employee's duties

- *In re E.I. DuPont De Nemours & Co.*, 136 S.W.3d 218 (Tex. 2004)

But Who is the “Company”? (cont.)

- Texas law and federal common law usually apply “hybrid” analysis
- “Case by case” approach to privilege

Corporate Outsiders and Independent Contractors

- Communications with outsiders who are “functional equivalent” of employees may fall within attorney-client privilege
- Attorney may confer confidentially with non-employees who have significant relationship with company and possess “very sort of information that the privilege envisions flowing most freely”

Employee's Personal Privilege

- Employee may assert *personal* attorney-client privilege over communications with corporate counsel
- Separate from Company's privilege
- Applicable when, for instance, corporation has waived its privilege and counsel called to testify against employee

Employee's Personal Privilege (cont.)

1. Was communication made for purpose of seeking legal advice
2. Did employee make clear legal advice being sought in her individual capacity
3. Did counsel agree to communicate with employee in her individual capacity
4. Was communication confidential
5. Did communication concern general affairs of company

- *In re Bevill*, 805 F.2d 120 (3rd Cir. 1986)

Colliding Roles of Legal and Business Advisor

- **Modern Reality:**
 - In-house counsel involved in many facets of corporation's business
 - Counsel are valued for judgment and business acumen; brought in sooner on company issue
 - Counsel are by nature “issue-spotters” and “problem solvers”
 - Counsel are concise, brief, articulate, organized, and well written

Colliding Roles. . . (cont.)

- **Stress points:**

- In-house counsel often serve dual roles as attorneys and business advisors
- Corporate legal departments may be decentralized with attorneys spread throughout the organization
- Emails are readily sent, cc'd, and bcc'd to in-house counsel; counsel asked to join-in conference calls

Colliding Roles. . . (cont.)

- **Stress points (cont.):**
 - Court’s increasingly look askanse at corporate counsel communications (post-*Enron* and *Worldcom*)
 - Government requests for privilege waivers
 - Outside auditors request for privilege waiver or access to files
 - Sarbanes Oxley reporting requirements

- **All create “opportunities” for erosion and waiver of privilege**

Colliding Roles . . . (cont.)

Framework for classifying communications

- **Scope of Communication**
 - In what role was counsel acting?

- **Confidential**
 - Tex. R. Evid. 503(a)(5): Communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

Scope of Communication – Various Tests

- **Primary purpose:**

- was in-house “counsel participating in the communications primarily for purpose of rendering legal advice or assistance.”

- *In re Vioxx Prods Liability Litig*, 501 F.Supp. 2d 789 (E.D. La. 2007)

Scope of Communication – Various Tests

- **Activity typically legal in nature:**
 - was corporate counsel engaged in activity typically performed by an attorney

Scope of Communication – Various Tests

- **Organizational Placement:**

- does counsel work within discrete legal department or within GC's office vs. working for company business group or management.
- *Boca Invest. P'ship v. U.S.* 31 F.Supp. 2d 9 (D.D.C. 1998)

Communication Primarily for Legal Purpose

- **Vioxx:**
 - Merck & Co. V.P. and Ass't GC
 - Regulatory and product responsibility. Primary regulatory counsel.
 - Screens publications, print advertisements and television commercials, marketing materials, public relations and media responses, and technical and scientific articles for compliance with FDA regulations and Merck policies
 - Proposes legal, scientific, technical, editorial, and grammatical revisions and comments

Communication Primarily for Legal Purpose (cont.)

- Primary purpose test queries whether counsel was acting in professional legal capacity
- Seeks to segregate “legal” from “business” communications
- Including some business advice with legal advice may, but does not necessarily, defeat primarily for legal purpose
- Non-legal services “inextricably intertwined” with legal communication may be privileged
- But legal advice simply incidental to business communication usually not sufficient for legal purpose

Communication Primarily for Legal Purpose (cont.)

- The number of lawyers or non-lawyers to whom communication was sent is not dispositive – one non-attorney for non-legal purpose
- Communication sent to attorneys and non-attorneys raises question whether prepared primarily for legal advice
- But evidence that non-attorneys received communication to notify them of legal advice sought or given may suffice for privilege
 - *Southeastern Pennsylvania Transp. Auth. v. CaremarkPCS Health, L.P.*, 254 F.R.D. 253 (E.D. Pa. 2008)

Communication Primarily for Legal Purpose (cont.)

- **Pervasive Regulation Theory:**
 - Because industry is so extensively regulated, counsel is heavily involved in management and every communication concerns potential legal problems; therefore, all communications are privileged
 - Rejected by *In re Vioxx*

- **Reverse Engineering Theory:**
 - Communications about non-privileged studies, articles, marketing materials, etc. should be privileged because opposing counsel can indirectly discern legal advice by reviewing drafts and comparing them to final versions
 - Rejected by *In re Vioxx*

Confidentiality: Use of an Unsecured Wireless Network

- Raises questions about confidentiality
- Lack of security features in many public wireless-access locations

Confidentiality: Use of an Unsecured Wireless Network (cont.)

Consider:

- Level of security and reasonable precautions
- Ramifications of interception and use of information by third party
- Degree of sensitivity of information and effect on client from a disclosure
- Urgency of situation
- Client instructions and access to client's devices and communications

State Bar of California Standing Committee on Professional Responsibility Formal Opinion No. 2010-179

Confidentiality: Inadvertent Disclosure

- Privileged communication inadvertently disclosed
- Courts require “reasonable steps” to preserve confidentiality of communication

Confidentiality: Inadvertent Disclosure (cont.)

- **Apply litigation related “inadvertent disclosure” principles to non-litigation situations**
 - Immediately ask competitor, unintended third-party recipient, opposing counsel, etc. to delete or return communication
 - Demand, in writing, return or deletion of communication
 - Bring to attention of court, if in litigation, or file lawsuit/TRO
 - Establish procedure requiring employees immediately to inform General Counsel’s office
 - Plan ahead and develop step-by-step plan of action before crisis arises

Confidentiality: Privileged Communication in Government Investigation

- **Holder Memo – 1999**

- Whether to charge corporation with criminal conduct
- prosecutors should consider “...corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges.”

Confidentiality: Privileged Communication in Government Investigation

- **Thompson Memo – 2003**
 - Similar to Holder: Voluntary waiver of attorney-client privilege is factor in decision whether to prosecute company and in sentencing
 - Did corporation impede the investigation by instructing employees or their counsel not to cooperate openly and fully with government's investigation?

Confidentiality: Privileged Communication in Government Investigation (cont.)

- **McNulty Memo – 2006**
 - Prosecutors must first analyze actual need for privileged communication and obtain authorization to request privilege waiver
 - “legitimate need” test
 - “seek the least intrusive waiver” possible

. . . Government Investigation (cont.)

- **Amendment Federal Rule of Evid. 502 (2007-2008)**
 - Advisory Committee recommended Rule 502 allow “limited waivers of privilege”
 - Not included in final version of new Rule 502

. . . Government Investigation (cont.)

- **Filip Memo – September 2008**
 - Waiver of attorney-client privilege no longer considered as part of company’s “cooperation” with government
 - Prosecutors explicitly prohibited from requesting waivers

Confidentiality: In-House Counsel Serving as Rule 30(b)(6) Representative/Deponent?

- Designation of in-house counsel as 30(b)(6) representative is not an automatic waiver of privilege
- Privilege not waived when attorney testifies only to factual matters, not advice

Confidentiality: In-House Counsel Serving as 30(b)(6) Representative (cont.)

- **But waiver *is* possible when in-house counsel:**
 - Testifies concerning portions of attorney-client communication
 - Places attorney-client relationship directly in issue
 - Asserts reliance on attorney advice as an element of the defense

Confidentiality: In-House Counsel Serving as 30(b)(6) Representative (cont.)

- **Best Practices:**
 - Avoid placing legal advice at issue during deposition, such as asserting reasonableness of actions or relying on advice of counsel
 - Be aware of potentially privileged subject-matter and avoid it (e.g., relevant communications that contain business and legal advice)
 - Plan ahead; Conduct practice deposition

Employees' Communications to Personal Counsel

- Is employee's email to personal attorney privileged?
- Courts may consider 3 factors:
 1. Nature and scope of company's internet use policy
 2. Was policy effectively conveyed to employee
 3. Was employee's expectation of confidentiality reasonable

LEGAL PROFESSIONAL PRIVILEGE IN THE EUROPEAN UNION: After the AKZO Decision

Introduction

- Attorney-Client Privilege in the United States is the ***legal professional privilege***, on a global scale
- It is important to understand the differences in treatment of the privilege in all jurisdictions
 - It can adversely affect your company in those jurisdictions
 - It may be able to be used to give you an advantage over companies in other jurisdictions

Introduction (cont.)

- Long-anticipated judgment regarding LPP in the EU issued on September 14, 2010: *Akzo Nobel Chemicals Ltd. & Akcros Chemicals, Ltd. v. Commission*
 - Confirmed the long-standing rule that LPP does not cover communications between company management and in-house counsel in EU
 - Follows the law as set forth in the 1982 ruling in *AM&S Europe v. Commission*

The *Akzo* Decision: Background

- EU competition law surprise investigation by the European Commission (EC)
- UK office of Dutch-based company
- Emails seized between in-house counsel and management
- In-house counsel was a member of Dutch Bar and signed an independence agreement with the company
- The EC and subsequently the ECJ found that LPP did not exist between the in-house counsel and company management

The *Akzo* Decision: Key Findings of the ECJ

- LPP is subject to two cumulative conditions:
 - Communications must relate to ***client's right of defense*** ***and***
 - Communications must come from ***independent counsel*** who are members of a bar of an EU member state
- In-house counsel and outside counsel are not equally independent
 - Independence means the absence of an employment relationship between the counsel and the client

Limitations of the *Akzo* Decision

- Very narrow scope
- Applies only to competition/competitive law investigations conducted by the EC
- No application outside the field of EU competition law

Scope of the LLP Within the EU

Privileged or not privileged?

- Communications between company and in-house counsel who is not a member of a bar –
 - ✓ NOT privileged
- Communications between company and in-house counsel who is a member of a Bar (EU member state bar or non-EU member state bar) –
 - ✓ NOT privileged

Scope of the LPP Within the EU (cont.)

Privileged or not privileged?

- Communications between company and outside counsel who is not a member of any bar –
✓ NOT privileged
- Communications between company and outside counsel who is a member of a bar of an EU member state –
✓ ARE privileged

Scope of the LPP Within the EU (cont.)

Privileged or not privileged?

- Communication between company and outside counsel who is not a member of a bar of an EU member state –
 - ✓ PROBABLY NOT privileged
- The ECJ did not directly address this issue but prior decisions have held that such communications are not privileged

Implications of the *Akzo* Decision

- **Confirms Existing Law**
 - Debate on LPP has remained strong since 1982 *AM&S* case
 - Case provided opportunity to expand scope of LPP
 - Case highlighted relevance of privilege issue to in-house counsel

Implications of the *Akzo* Decision (cont.)

- **Symbolic Consequences**
 - May signal preference against applying disparate rules of privilege in EU member states
 - May signal global preference against in-house counsel LPP

Implications of the *Akzo* Decision (cont.)

- **Competitive Disadvantages**
 - Companies with offices in EU member states will be disadvantaged compared to companies who do not have offices in EU member states
 - Negative impact on principal of equality

Implications of the *Akzo* Decision (cont.)

- **Waiver of privilege**
 - The privilege as to documents taken during dawn raids or other EC investigations is waived going forward – the documents will then be accessible even to opponents in non-EU member states

Akzo Summary

- ECJ in *Akzo* has decisively ruled that communications with in-house counsel are not privileged in the context of EU competition law
- *Akzo* has sparked renewed interest in LPP
- Pay careful attention to implications for in-house counsel
- Use recommendations in this presentation and practices implemented by other in-house legal departments as starting points for creating policies that will maximize privilege protection

Practices for Preserving Privilege

- **Employees:**
 - Begin communication with clear statement of legal advice sought
 - “I need your legal advice about ...”
 - “Written on advise of counsel ...”
 - Send only to essential recipients
 - “I have copied A and B because each [subject matter/control group] ...”
 - Obtain permission from legal department or in-house counsel before distributing communication, e.g., email
 - “Please advise me to whom I may distribute or forward your response...”

Practices for Preserving Privilege (cont.)

- Judiciously label communications as privileged and confidential
 - serves to create expectation of confidentiality
- Double check recipients
 - avoid “bbc’s”
- Create an environment where employees are comfortable asking counsel questions about these topics, *i.e.*, maintaining privilege

Practices for Preserving Privilege (cont.)

- **Counsel:**

- Create form emails:

- For employees to seek legal advice – “Please provide a legal opinion on...”
 - For responding to a request for legal advice – “This communication responds to your request for legal advice about...”

- Explain why additional recipients are included

Practices for Preserving Privilege (cont.)

- **Counsel:**

- Ensure memorandum, email or document includes title as in-house counsel for company and sufficient notations
- Consider segregating legal advice emails into separate folder labeled “Confidential” and “Attorney-Client Privileged”
- Consider explicitly incorporating client’s confidences in communications with management
- Consider offering general reason within communication for having included business discussion

Practices for Preserving Privilege (cont.)

▪ **Emails:**

- Same rules of privilege apply
 - Maintaining confidentiality is a paramount consideration
 - Waiver of privilege may occur when non-legal recipient forwards email for non-legal purpose
 - Beware of email Chains
 - File in confidential manner – separate folder with appropriate label

Practices for Preserving Privilege (cont.)

- **Attachments:**

- May be privileged if part of confidential communication sent primarily for legal assistance
- Attorney edits to non-privileged email or attachment do not make email or attachment itself privileged
- attorney edits may be redacted so that privilege preserved

EU

Recommendations/Best Practices

- Identify relevant jurisdictions and become familiar with their rules of privilege

EU

Recommendations/Best Practices (cont.)

- Create and implement a clear policy for each of those jurisdictions

EU

Recommendations/Best Practices (cont.)

- **Strategically manage communications – in general**
 - Be very careful about what you put in writing
 - Clearly identify and label privileged and confidential
 - Identify, label, ***and separate*** documents from ***outside counsel***
 - Limit distribution lists for privileged documents
 - *Avoid editing/commenting on documents from outside counsel*
 - *Instruct non-legal experts through outside counsel and make sure their reports are transmitted through outside counsel*

EU

Recommendations/Best Practices (cont.)

- **Strategically manage communications – EU wide communications**
 - Bring in outside counsel from an EU bar when company may be subject to exposure under competition rules
 - Separate privileged documents based on jurisdiction
 - Steer sensitive information through outside counsel

EU

Recommendations/Best Practices (cont.)

- **Use IT Infrastructure**
 - Identify the location of the servers where your information is stored
 - Use IT department to segregate files for privileged and confidential information
 - Store privileged information in servers located in jurisdictions that will recognize their privilege

EU

Recommendations/Best Practices (cont.)

- **Be Selective in Hiring Outside Counsel**
 - Choose counsel from jurisdictions that will protect privilege
 - If EU competition issues are involved – choose counsel from EU member states
 - Use relationships with law firms for particularly sensitive communications with outside consultants

EU

Recommendations/Best Practices (cont.)

- **If applicable, create an EU Investigation procedure to follow**
 - In the event of an unexpected investigation, request that disputed information be segregated and sealed
 - Consider sending all employees home once enforcement officials arrive

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