

ATTORNEY-CLIENT PRIVILEGE IN THE GLOBAL CONTEXT

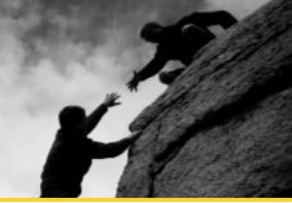
Practical Guidance For In-House Counsel





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Introduction

As an in-house counsel, you can implement precautionary measures to ensure that privileged client communications and documents remain protected from disclosure. To assist you in this regard, Ally Law, a premier global network of over 60 law firms, has summarized attorney-client privilege in select global jurisdictions to alert you to certain of basic and unique aspects of this law in your area. For the complete list, visit www.ally-law.com.

Best practices to keep in mind as you review the compendium include the following:

- Keep communications relating to legal advice separate from business orientated communications
- Communicate legal and business advice in separate e-mails or separate documents
- Label confidential and privileged legal communications with company employees as “privileged and confidential” or “attorney/client communication”
- Limit the dissemination of confidential communications and confidential documents
- Carefully choose who will attend company meetings
- Avoid handling matters that are normally the responsibility of the business executive
- Warn the client that business advice is not protected by the privilege and that routinely copying in-house counsel on internal non-legal communications will not protect the business communication as privileged
- Hire outside legal counsel to conduct internal investigations for the purpose of providing legal advice.



Overview

This compendium is focused on the attorney-client privilege in the context of in-house counsel's internal communications and with third-parties. ***It is not intended to be legal advice but to convey general information about the privilege commonly encountered by in-house counsel. Consult your Ally Law member firm for more information.***

The basic law of attorney-client privilege is as follows, although specifics may vary by jurisdiction:

The attorney-client privilege protects confidential communications between a client and an attorney (both in-house and outside legal counsel). The privilege applies both to communications by the client to the attorney and to communications by the attorney to the client, if made in confidence and for the purpose of seeking or rendering legal advice. All communications between the client and legal counsel, so long as they are made confidentially and for the purpose of obtaining legal advice, enjoy a "seal of secrecy" and are shielded from the view of third parties no matter how probative, damaging or embarrassing the privileged communication may be. The party asserting the protection of the attorney-client privilege bears the burden of proving that the privilege applies. This requires proof not only of the existence of the attorney-client relationship but also that the communication was made in confidence, for the purpose of obtaining or providing legal advice, and that the privilege has not been waived. The privilege extends only to the confidential communication itself, not to the underlying facts.



Attorney-Client Privilege Summaries

For the summaries in select jurisdictions to follow, we address basic questions and unique aspects of the attorney-client privilege specific to any particular jurisdiction.

AUSTRALIA: VICTORIA AND AUSTRALIAN CAPITAL TERRITORY: Russell Kennedy



General Comments Under Australian Law

Legal professional privilege in Victoria evolved from a common law concept. Sections 118 and 119 of the Evidence Act 2008 (Victoria), and their Federal equivalents, codified the right to rely on the privilege against production of certain documents or evidence in Court proceedings. The parties to, and the purpose of, communications will affect whether the privilege applies to particular communications. This is specifically relevant to in-house counsel who are also known as Corporate Counsel or General Counsel.

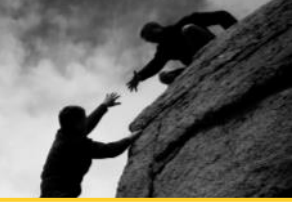
Who constitutes the client?

The employer of in-house counsel is typically also the client. In-house counsel often also fulfils other roles, such as company secretary. Accordingly, when dealing with in-house counsel, it is critical that all parties to the communication understand its purpose. Clear guidelines as to who is authorised to provide in-house counsel with instructions, and reciprocally, to whom in-house counsel owe their duties, should be documented and followed.

In a company, the Board of Directors or Chief Executive Officer commonly have the requisite authority, as well as officers who are given delegated authority in the context of a specific event or issue.

What communications are privileged?

Legal professional privilege will attach to professional advice given by in-house counsel, beyond formal advice as to the law, including advice as to what a party should do in a legal context. However, it does not cover commercial and practical advice. The High Court of Australia has confirmed that the privilege protects the confidentiality of communications and documents passing between lawyers and clients, if made for the dominant purpose of:



- giving or obtaining legal advice, or
- assisting in the conduct of reasonably foreseeable litigation.

An objective test is applied to ascertain the dominant purpose of a communication or document. The prevailing or most influential purpose of the communication is considered starting with the intended use of, and the reason for, the communication being brought into existence.

The lawyer's independence from the opinions of, and their loyalty to, their employer, must be considered before a claim of legal professional privilege can be maintained. The Federal Court of Australia has commented that where in-house counsel gives advice in that capacity, that independence can be assumed.

Caution should be exercised where in-house counsel are discussing legal advice given to their employer by an external lawyer. A discussion of the advice will remain covered by the privilege. However, a discussion about what to do as a result of the advice received may not be similarly covered if it evolves into a discussion about commercial, strategic or practical options available to the employer client.

The capacity in which in-house counsel is acting, for the purpose of the communication, must always be considered. This is particularly so where the in-house counsel fulfils more than one role in the organisation. Only communications sent or received in the capacity as a legal advisor can attract privilege.

Acting inconsistently with a claim of privilege can cause it to be waived. Privileged material should only be circulated on a "need to know" basis.

Application of Privilege to Internal Investigations

The privilege will attach if the dominant purpose test is satisfied. Organisations should carefully consider and document the purpose of an internal investigation. Where the investigation is for multiple purposes, contemporaneously documenting the dominant purpose can be particularly important.

Simply having in-house counsel commission or oversee the investigation will not be sufficient if it is later found that the dominant purpose of the investigation was for normal business purposes. Normal business purposes may include ensuring regulatory compliance, informing the development of internal policies and procedures and reviewing maintenance programs.



Risk Management Suggestions

- The terms of in-house counsel's contract of employment should clarify from whom they are to take instructions and to whom they report.
- In-house counsel should maintain a current practising certificate. In some cases, privilege has been found to attach to communications involving in-house counsel, without a local practising certificate, who is entitled to practice elsewhere. Similarly, lack of a current practising certificate can be a relevant, but not a determinative, factor in considering privilege.
- Where possible, avoid using in-house counsel to fulfil multiple roles in the organisation. Where in-house counsel does hold multiple roles, communications made in each different capacity should be separate.
- Document the dominant purpose of the communication and label all privileged communications "Subject to Legal Professional Privilege". These steps will not always be determinative, but they may assist if there is a subsequent dispute as to the dominant purpose.
- Limit publication of legal advice to those who "need to know" in the organisation. Do not disclose the substance or conclusion of legal advice in external or widely circulated communications.
- Avoid references to the substance of legal advice in Board minutes or papers. Instead, note only that an issue the subject of legal professional privilege was discussed. Records of any such discussion should be in a separate document or at least a separate section that can later be redacted if the document is required to be produced (for example, under subpoena).

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AUSTRALIA : WESTERN STATES

Civic Legal



In-House Counsel and Legal Professional Privilege in Western Australia

The Legal Framework in Western Australia

Evidence law in Western Australia relies heavily on the common law and is supplemented by the *Evidence Act 1906 (WA)*. This legislative scheme applies in Western Australian courts. Other states and territories in Australia - New South Wales, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory - have evidence legislation based on the Model Uniform Evidence Bill prepared by the Parliamentary Counsel's Committee and endorsed by the Standing Committee of Attorneys-General on 26 July 2007. These states and territories have applied the Model to pass their own legislation on evidence. However, Western Australian legislation is not modelled after the Model Uniform Evidence Bill and is therefore still largely based on the common law.

Legal professional privilege in Western Australian law applies to protect confidential communications passing between a client and a legal adviser from being disclosed. It applies where communications are for the dominant purpose of providing legal advice or preparing for litigation.

Who is the client?

Identifying the client is vital to determining what communications are protected by legal professional privilege. This is because the protection attaches to communications passing between a client and a legal adviser, including documents prepared by third parties. The client protected from having to disclose documents by legal professional privilege is the person in a relationship of trust with a legal adviser. Such a person is one who is entitled to expect the legal adviser to promote and protect their rights and interests. A retainer is not necessary to create the legal adviser-client relationship required to protect communications by legal professional privilege.

Where a lawyer is not in private practice, but is employed by an organisation as in-house counsel, the employer is the client. Communication with the client's agents is considered to be the same as communication with the client organisation where they are given confidential information for the dominant purpose of enabling them to obtain legal advice or in the course of actual or contemplated litigation.



Where an in-house counsel works for a corporation, it is a question of fact as to which group of directors and employees constitute the agents of the client for the purpose of determining the existence of legal professional privilege. An entire corporation can be seen as the client rather than individual officers of that corporation. Those with the authority in a corporation to instruct the in-house counsel may be characterised as representing the client for the purpose of determining whether and which communications give rise to the protection of legal professional privilege.

What communications are protected?

Communications between clients and legal advisers are generally protected by Legal professional privilege under Western Australian Law where the **dominant purpose** for their creation or communication is legal advice or the preparation for actual or impending litigation. Communications between in-house counsel and their employers are protected by legal professional privilege where the in-house counsel is acting independently in their capacity as a lawyer.

Documents created for the **dominant purpose** of legal advice or for use in legal proceedings are entitled to immunity from production. The term “dominant” suggests the purpose should be the ruling, prevailing or most influential purpose. This is determined by an appreciation of competing purposes. A dominant purpose is not the same as a primary or substantial purpose, as the purpose must dominate the decision to make the relevant communication.

Acting Independently

It may be difficult for in-house counsel to distinguish between their role as legal counsel for their employer and their role as an employee. In-house counsel must act with a sufficient degree of independence from their employer to be considered to be acting in their capacity as legal counsel rather than as an employee. Communications between the in-house counsel and their employers can only be protected by legal professional privilege if the in-house counsel is acting with the requisite independence in their capacity as a lawyer, rather than as an employee. Independence in this context means the in-house counsel’s loyalties or interests to the employer should not influence the legal advice provided, nor the fairness in their conduct of litigation on behalf of the client.

Capacity as a Lawyer

Legal professional privilege cannot attach to communications between a lawyer and their client just by virtue of that relationship alone. The privilege applies where an in-house counsel



can demonstrate affirmatively that they are acting as a lawyer and not just as an employee possessing specialist skills. The court may consider that if the advice had been sought from an external lawyer, privilege can attach, and that just because advice was actually sought from an in-house counsel should not disturb privilege attaching.

Intra-Company Investigations

If an in-house counsel acting independently in their capacity as a lawyer requests that their employer perform an investigation in order to determine their employer's legal rights, then that investigation and the reports created during it may be protected by legal professional privilege. However, where an in-house lawyer prepares or commissions an investigation and report into an incident, if the report has multiple purposes and the dominant purpose for that report is not for providing legal advice or for the preparation of litigation, legal professional privilege does not attach to the investigation and report. If legal professional privilege is disputed over an intra-company investigation and subsequent report, the client asserting the privilege must be prepared to lead evidence demonstrating that the dominant purpose of the investigation was to seek legal advice or the preparation of litigation. Such evidence may include internal procedures demonstrating the legal necessity of the investigation, and statements from the CEO confirming the legal necessity of the investigation.

Unique Considerations in Western Australian Law

In Western Australia, legal professional privilege can attach to copies of documents where legal professional privilege does not in fact attach to the original document itself. In *Commissioner, Australian Federal Police v Propend Finances Pty Ltd*, the investigation of alleged taxation offences led to the Australian Federal Police seeking access to documents in the possession of Propend's solicitors. Propend's solicitors claimed legal professional privilege over these documents, including copies of documents the originals of which were not privileged. The High Court determined that the test of whether privilege attaches to copies of non-privileged documents is a sole purpose test. If the reason that the copies were produced was to obtain legal advice, then the copies would be protected by legal professional privilege.

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CHINA: R&P China Lawyers



A general concept of Attorney-Client Privilege does not exist under PRC laws.

A general rule on Attorney-Client Privilege, which gives an attorney the right to refuse disclosure of communication with its clients, does not exist in the People's Republic of China (PRC): PRC laws do not contain any provisions that exempt lawyers or other legal professionals from being forced to disclose information they have received, irrespective of whether this is from a client or from a third party.

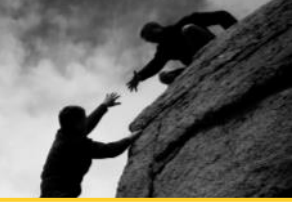
More generally, the *PRC Civil Procedure Law* establishes that “Any unit or individual that knows something of a case has the obligation to testify in court.” Lawyers are not exempt from this obligation, even though the law does not establish any consequences for refusal.

The *PRC Criminal Procedure Law* contains a similar obligation. However an important exception is made establishing that a criminal defense lawyer is entitled to keep confidential the information about her client that comes into knowledge during her practice, unless such information relates to a crime being or to be committed that endangers the State security or public security, or a crime that seriously threatens another person's personal safety. To support this right, the *PRC Lawyer's Law* establishes a lawyer's right to meet a suspect/defendant and their meeting shall not be monitored.

PRC laws establish confidentiality obligations on lawyers.

PRC laws do contain specific obligations on lawyers to not disclose information. While this does not translate into an absolute right to refuse disclosure, it does at least establish a clear intent of the law to allow lawyers more room to maneuver. Under the *PRC Lawyer's Law*:

- A lawyer shall keep confidential the secrets of the State and commercial secrets that he comes to know during his legal practice, and shall not divulge the private affairs of the parties concerned.



- A lawyer shall keep confidential the information and situations that come to his/her knowledge during practicing activities and that the clients or others do not want to divulge, unless the information and situations are about the facts that the clients or other persons prepare to commit or are currently committing crimes that endanger national security or public safety, or seriously jeopardize the personal safety of others.

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CHINA: HONG KONG: Boase Cohen & Collins



General Position of an in-house counsel in Hong Kong

The position of an in-house counsel acting in the course of his employment as a solicitor for his employer is in the same position as a solicitor acting for a client. A solicitor who works for a non-solicitor employer must comply with the Solicitor's Practice Rules, Practice Directions and the rules and principles of professional conduct. An employed solicitor shall have regard to the applicability of legal professional privilege when advising his non-solicitor employer.

The principle of legal professional privilege (**LPP**) is enshrined in Article 35 of the Basic Law. Hong Kong residents shall have the right to confidential legal advice. There are two types of LPP: (1) legal advice privilege relates to communications between a client and his/her lawyer for the purpose of preparing a legal advice, and (2) litigation privilege relates to communications between a litigant, his/her lawyer and third parties.

Who constitutes the client?

In accordance with the landmark Hong Kong Court of Appeal decision in *Citic Pacific Ltd v Secretary for Justice and Commissioner of Police* "the client" is simply the corporation. The employees who are authorised to act for the corporation in the process of obtaining legal advice will be protected by the legal advice privilege.

There is no restriction as to the **levels of employees**. It is permissible for employees from any levels of the structure to be involved in the process of obtaining legal advice as long as they have authorisation, including the directors. The Court of Appeal in *Citic* appreciated the possible situation that the necessary information for the purpose of getting legal advice may have to be acquired by the management from employees in different departments or at various levels of the corporate structure.

It is unclear from the decision whether the **former employees** of the corporation would be protected under privilege. The concern lies in whether the corporation could give authorisation to the former employees to act for it in obtaining legal advice, which we view it is not likely. The former employee is rather treated as a genuine third party. Whether the Court will in due course extend the ambit of legal advice privilege to cover communications between lawyers and genuine third parties, as opposed to employees, for the purpose of providing legal advice is left open.



What communications are protected?

The dividing line between protected and non-protected communications is determined under the dominant purpose test. To fall within the protection of the legal advice privilege, the communications or document must have come into existence for the dominant purpose of obtaining legal advice.

Given the dual nature of the role as an employee and as an in-house counsel, it is difficult as a practical matter to distinguish between non-protected business communications and protected attorney-client communications. The prudent practice of an in-house counsel in the context is to minimise circulation groups, to keep written communications to a minimum and to provide legal advice separately from other issues to satisfy the dominant purpose test.

Intra-company investigations

Whether intra-company investigations conducted by in-house counsel are privileged depends on the dominant purpose of the investigations. If the investigations are primarily for collating information from various levels of employees to obtain legal advice, the internal communications and documents which were produced and brought into existence would be privileged. However, the role of the in-house counsel would be ambiguous when he or she substantially participates in conducting the intra-company investigations and makes non-legal discussions with the employees. It is more likely for the in-house counsel to be acting in the capacity as a legal employee, instead of a solicitor in giving legal advice.

We view that the prudent way would be to separate the in-house counsel from the investigation process and allow them to opine on the information that is collated by other departments or levels of employees in the capacity of a solicitor.

Waiver issues

Hong Kong law recognises the concept of limited waiver, similar to English law. To allow the Department of Justice to assist the court in LPP claims, the claimant should seriously consider giving a limited waiver for specified personnel or independent counsel appointed by the law enforcement agent and /or the Department of Justice to inspect the disputed materials. The latter would only be engaged in the task of handling LPP claims on the strict understanding that they would not use the knowledge acquired in such process for other purposes.

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CANADA: ALBERTA

Bryan & Company



With only a few exceptions, the rules with respect to in-house counsel and solicitor-client privilege are standard across Canada.

Who constitutes the client benefiting from the solicitor-client privilege?

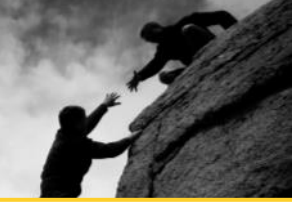
The Law Society of Alberta's *Code of Conduct* sets out that the corporation, organization or entity itself is the client, rather than its directors or the board. It is also possible for in-house counsel to provide advice to individual members of the organization or corporation, provided that counsel complies with conflict of interest rules surrounding joint retainers. Unlike in the United States, communications between in-house counsel and any employee of a corporation will be shielded with privilege, so long as legal advice is sought in the course of the employee's normal duties. Solicitor-client privilege belongs to the client, and can only be waived by that client.

Protected solicitor-client communications versus non-protected business communications

Communications from in-house counsel are only covered by solicitor-client privilege if the lawyer is performing the function of a solicitor. According to the Supreme Court of Canada, privilege attaches only to communications:

- between solicitor and client;
- which entail the seeking or giving of legal advice; and
- which are intended to be confidential by the parties.

As such, communications where no legal advice is sought or given, or which are not intended to be confidential, will not be protected. Lawyers acting in management roles should be cautious, as courts will draw a distinction between management activities and communications for the purposes of giving or seeking legal advice. Where in-house counsel is consulted with respect to policy or business decisions, privilege will likely not apply. However, legal advice can extend to more than simply telling the client the law, but also to what should "prudently and sensibly be done in the relevant legal context".



Having a lawyer present in meetings does not automatically shield the information discussed with solicitor client privilege. In the same way, routinely submitting documents to in-house counsel “for review” will not shield those documents with privilege if no advice or opinion is sought.

Finally, although otherwise privileged communications from in-house counsel do not necessarily lose their privileged nature if they are shared with lower level employees, excessive circulation of the material or communications within the organization-client, will make it difficult for the party claiming privilege to assert that the communication was meant to be confidential. Counsel should be careful to disseminate this information only to those within the organization who have an apparent need to know, or confidentiality may be lost.

Intra-company investigations

Privilege is assessed on a case by case basis. Whether intra-company investigations by in-house counsel will be shielded by privilege will depend on whether solicitor-client privilege or litigation privilege will apply to the particular communication. In the case of intra-company investigations by in-house counsel, these two types of privilege often overlap.

If the three part test articulated above is met, the communication will be protected. Therefore, an opinion provided by in-house counsel dealing with the investigation will likely be covered by solicitor-client privilege.

Furthermore, litigation privilege attaches to a communication, document or report that was generated for the dominant purpose of reasonably contemplated litigation. The approach to litigation privilege varies in different parts of Canada. In Alberta, all facts gathered by a solicitor are shielded by privilege if they were obtained for the dominant purpose of existing or contemplated litigation. However, in Ontario, although a particular document might be shielded by privilege (e.g. a letter from a lawyer), the facts within that letter are not necessarily covered by privilege, and will likely be disclosable.

If litigation is contemplated by the investigation, arguably many of the facts obtained by in-house counsel *for the purpose* of that litigation would be shielded by privilege in Alberta. However, if litigation is not contemplated, and in-house counsel is acting as an “investigator” rather than as a solicitor, privilege may not apply.



Special Considerations in Canada

Communications between in-house counsel on opposite sides of a transaction are sometimes covered by common interest privilege. This concept allows counsel from each side to exchange information, without waiving the privilege over that information, provided they are working together with a common interest (e.g. closing a transaction).

A recent decision out of the Federal Court, however, found that common interest privilege in the transactional context was inconsistent with the general rules of solicitor-client privilege, and refused to apply it in the context of negotiations for a purchase and sale. Although the decision is currently under appeal, the law appears uncertain with respect to the applicability of transactional common interest privilege, and in-house counsel should therefore be cautious disclosing otherwise privileged material in this context.

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CANADA: QUEBEC

Spiegel Sohmer

SPIEGEL SOHMER

Professional secrecy in Quebec is a fundamental right that is enshrined in the Québec Charter of Rights and Freedoms (“Quebec Charter”). Article 9 of the Quebec Charter provides that the Court must ex officio ensure that professional secrecy is respected.

Who is the client?

In Quebec law, in-house counsels are regarded as being in the same position in every aspect as those attorneys who practice on their own account or in a firm, with the only difference being that the former act for one client only, and not for several clients. Thus, in-house counsels are subject to the same duties to the client and to the Court, and their clients have the same privilege.

In a recent decision the Court of Appeal of Quebec confirmed that the client of an in-house counsel is the corporation itself. Although the corporation must act through representatives, such as its officers and directors, the fact that these representatives are the ones to mandate the in-house counsel on behalf of the corporation does not make the representatives clients of the corporate lawyer. Rather, the directors are acting as the mandataries of the corporations.

Attorney-client privilege exists for the benefit of the corporation itself. In order for a communication to be considered covered by attorney-client privilege, the communication must have occurred between the in-house counsel and those who, from the perspective of the in-house counsel, are those that the attorney must consider as being the voice of the company, as opposed to simple employees. This group is not limited only to the board of directors and may include other superiors of the in-house counsel who have the authority to give instructions.

The confidences received from corporate officers and agents by the counsel who solely represents the corporation are the confidences of the corporation and do not belong personally to the officer or agent.

What constitutes protected attorney-client communications?

Communications between in-house counsel and the representatives of the corporation will be covered by attorney-client privilege insofar as the counsel is consulted only in his capacity as legal counsel, as opposed to in a business capacity. Given the nature of the work performed by in-house counsel, whose functions are often both juridical and non-juridical, the situation



must be analysed on a case-by-case basis in order to determine whether its circumstances justify the application of attorney-client privilege.

As a general rule, whether or not attorney-client privilege attaches to a communication involving in-house counsel in any situation depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

Intra-company investigations

Attorney-client privilege does not apply where a lawyer acts in an investigative function. However, if the counsel is leading an investigation for the purpose of providing a legal opinion to his client (or if the gathered facts are inextricably linked with the juridical opinion), then attorney-client privilege may attach. In other words, in Quebec, there are no special privileges attaching to investigations conducted by in-house counsel. The rules discussed above will apply on a case-by-case basis to determine whether a communication with in-house counsel in the context of an intra-company investigation is privileged or not.

In situations where the in-house counsel retains an expert in the context of litigation, care should be taken since the new *Code of Civil Procedure* which came into effect in January 2016 stipulates that experts are required, on request, to provide the parties and the court with details concerning the instructions received from a party.

Special considerations in Quebec

The right to professional secrecy is not absolute. The Autorité des Marchés financiers, the Quebec securities regulator, can legally summon an in-house counsel to appear before its investigators, despite the solicitor-client privilege owed by counsel to his employer.

In accordance with article 73 of the *Code of Professional Conduct of Lawyers*, counsel who notices or anticipates that the interest of a representative of the client and those of a client may differ must inform the representative of his duty of loyalty towards the client. This may occur for example if there are divergent interests between the representative of a corporation and the corporation itself.

Article 45 of the *Code of Professional Conduct of Lawyers* creates an obligation for all counsel practicing in Quebec to notify a client if any fact learned by the counsel constitutes, in the counsel's opinion, a breach of law by the client. If the client is not a natural person, the lawyer must give such notification to the representatives of the client with whom the lawyer deals when providing his professional services. If the lawyer later becomes aware that the client has not remedied the unlawful situation, he must notify the appropriate higher authority.



Thus, Quebec counsels have a duty to take measures to prevent the senior officers of a corporation from causing it harm, for example by acting against the best interest of the corporation and in violation of regulatory or other rules. In Quebec, counsel has the obligation to act when the counsel has knowledge of facts that, in his opinion, constitutes a violation of the rule of law. The formula used in Québec does not require absolute certainty on the part of the counsel that illegal acts have been committed in order to trigger the duty to act.

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USA: CALIFORNIA Musick Peeler

MUSICK PEELER

General Comments Under California Law

In California, the attorney-client privilege allows a client to refuse to disclose, and prevent others from disclosing, confidential communications between the client and his or her attorney. Under California law, a “client” is defined as “a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity.” A communication between client and lawyer will be protected by the privilege so long as the communication is confidential with the expectation that it will not be disclosed outside the attorney-client relationship.

For in-house counsel, however, determining which communications are privileged can become somewhat more complex. This article will review the basics of California law as it applies to attorney-client privilege issues frequently encountered by in-house corporate counsel.

Who constitutes the client?

Under California law, corporations, limited liability companies, associations, and other groups and entities retaining an attorney are “clients” protected by the privilege. However, for corporate entities, attorney-client communications occur via an individual acting for the entity. When determining which corporate individual’s communications will be protected, the analysis centers around whether the individual is speaking for the corporation. Such privileged communications often come from corporate directors and officers. However, mid and low level employees may also be protected. Communications between a corporation’s attorney and corporate employees, low level or otherwise, are protected **to the extent the communications fall within the employee’s job responsibilities**, or the employee is a co-party with the corporation. If the communication is outside the “client umbrella,” privilege may be deemed waived on the theory that the communication was disclosed to an unnecessary third person.

Moreover, the application of the attorney-client privilege to mid and low level employees does not always extend to **former** employees. For example, the privilege does not apply to communications between corporate counsel and former employees unless the former



employees were members of the corporation's "control group." Thus, when in-house counsel plans to speak with a former employee, an analysis must be undertaken to determine whether that former employee fell within the corporation's "control group." If not, the communication will likely not be privileged.

Content of In-House Counsel Advice

In addition to whom in-house counsel speaks, what counsel says must also be considered. Under California law, the attorney-client privilege will only apply when the attorney is providing *strictly legal services* to the corporation at the time the communication is made.

This analysis can be tricky in situations where in-house counsel has broad duties and involvement with corporate affairs. In-house counsel should keep in mind that the protection of the attorney-client privilege may be lost if the attorney steps out of his or her role as a legal advisor and endeavors to provide services of a non-legal, business nature. Further, when the purpose of a communication has a combined legal and non-legal purpose, it is the "dominant purpose" of the communication that will determine whether the privilege applies.

This analysis holds true when determining whether the privilege applies to intra-company investigations. The determination as to whether the attorney-client privilege will apply to an intra-company investigation depends largely on the nature of the investigation. The privilege will not apply if the attorney engaged "in routine fact-finding on behalf of the company's personnel department rather than legal work." *Wellpoint Health Networks, Inc. v. Superior Court*). Though, generally, the court will not give a "carte blanche" to access an attorney's investigative file, but will base any ruling on "the subject matter of *each* document." In-house counsel should also take particular care when an internal investigation is driven by a government inquiry, rather than in the context of civil litigation. California courts may find communications and documents prepared in relation to a governmental inquiry to be unprotected by the privilege. *In re Syncor ERIA Litigation*. For further information on this complex subject, in-house counsel are well advised to consult with California counsel.

Considerations Regarding Waiver of Corporate Privilege & Conflicts

Generally speaking, the corporate entity client has the sole power to waive the privilege, normally exercised through its officers and directors. Thus, it is ultimately the corporation's choice whether to waive or enforce the privilege with respect to privileged communications relating to an employee. Therefore, when speaking to an employee, counsel should explain that he represents the corporation and that it is the corporation who controls whether or their conversation will remain confidential.



At the same time, it should also be noted that an employee may prevent waiver of the corporate privilege by showing that a joint privilege exists. Joint privilege will be found to exist if:

- (1) the employee approached corporate counsel for the purposes of seeking legal advice,
- (2) the employee made it clear to corporate counsel that he or she was seeking advice in an individual, not a representative, capacity,
- (3) counsel saw fit to represent the employee knowing a conflict could arise,
- (4) communications were made with corporate counsel in confidence, and
- (5) the communications did not concern matters involving the corporation or its general affairs.

In matters involving both the corporation and one or more individual defendants, the corporation should always carefully consider the need to retain independent counsel to represent the employees to avoid this type of conflict. Further, in the case of employment claims, in-house counsel should carefully consider retaining outside experts (usually done through external counsel) to ensure the contents of an investigation remain privileged.

Best Practices

Considering the broad roles of most in-house counsel, it can often be difficult to determine whether a conversation is protected by the attorney-client privilege. Thus, counsel should always take particular care when speaking with corporate employees and analyze potential conflicts prior to undertaking an investigation or other fact gathering.

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Colorado law regarding Attorney-Client privilege is largely based in common law. The closest statutory codification states:

An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

The privilege is intended to promote full and frank communications between attorneys and their clients in order to promote justice and preserve clients' dignity. Yet, privilege is strictly construed and the burden of proving a communication is privileged rests with the individual asserting the privilege.

Who in a corporation is a client?

Privilege exists "without regard to the non-corporate or corporate character of the client," and therefore the attorney client privilege is available to corporations. Seemingly, the privilege can apply to any individual within the corporation regardless of the individual's status, so long as the communication is legal in nature and intended to be confidential. The statute can be broadly interpreted to allow the privilege to apply "down the line." For example if a supervisor receives legal advice from counsel and at counsel's instruction passes this advice down to subordinates within the company in a legal capacity, the supervisor may be deemed an employee or agent of the counselor and the communication between supervisor and subordinate may also be deemed privileged.

Nature of the Communications

The critical question as to whether communications with in-house counsel is privileged is whether the communication was legal in nature. Legal communications are protected. General business communications are not. In *Benardi v. Community Hospital Association*, counsel suggested the hospital draft incident reports. In finding that the incident reports were not privileged, the court stated "To entitle the party to the protection accorded to privileged communications, the communications must have been made to the counsel, attorney or solicitor, acting, for the time being, in the character of legal advisor, and must be made by the



client for the purpose of professional advice or aid upon the subject of his rights and liabilities.” Similarly, in *Munoz v. State Farm Mutual Auto Insurance Company*, the Colorado Court of Appeals held that a lawyer’s communications related to whether an insurance claim should be paid were not privileged as the lawyer was acting in an investigative capacity regarding a business decision and was not serving to provide legal advice. If the communications made to in-house counsel are made for the purpose of obtaining legal advice, the communication will likely be privileged; however, as the nexus fades from legal advice to business advice, the communication is less likely to be privileged.

Boards of Directors

Boards of Directors and other administrators can also avail themselves of attorney client privilege. This privilege is even applicable for public institutions and can overcome the Open Meetings Laws of the Colorado Sunshine Act of 1972. In *Associated Students of University of Colorado v. Regents of University of Colorado*, a group of students and faculty members sought injunctive relief to prevent the regents from entering into executive sessions closed from the public. In denying injunctive relief, the court specifically stated that the “Sunshine Act cannot and does not repeal by implication the statute concerning the attorney-client evidentiary privilege.” If regents of a university may invoke attorney-client privilege in executive session, it is only logical that a board of directors would also be so obliged.

Intra-Company Investigations

Intra-company investigations may be protected depending on the nature of the investigation. If the investigation is intended for the purpose of legal counsel, the communications thereon may be deemed privileged. “However, if a lawyer is acting in an investigative capacity [for business purposes], and not as a legal counselor . . . then neither the privilege created by this statute nor the work product privilege protects communications from a lawyer to [a client].” *Munoz v. State Farm Mut. Auto. Ins. Co.* Essentially, the question comes down to the nature of the communication and the reason for the investigation. If it is legal in nature and related to rights or potential litigation, the communication will likely be privileged. If it is primarily for business purposes, it will not be privileged.

Best Practices

The most important factor in determining privilege in Colorado is the nature of the communication. In deciding whether communication with an employee will be privileged, in-house counsel should ask the question, is this communication being provided in a legal capacity or a business capacity? While often times the lines may be blurred as to what



constitutes legal advice and business advice, in-house counsel should strive to keep such communications separate to the extent practicable and should advise key individuals within the company regarding this distinction.

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M U C H S H E L I S T

General Comments Under Illinois Law

Illinois Supreme Court Rules govern the attorney-client privilege providing that “[a]ll matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure.” The Illinois Supreme Court has recognized that the attorney-client privilege is intended to promote full and frank consultation between clients and legal advisors by removing the fear that disclosure of information will be compelled. Therefore, the privilege is limited to only those communications that the claimant expressly made confidential or communications that, under the circumstances, the claimant reasonably could have believed were understood to be confidential by the attorney.

Importantly, Illinois courts make clear that the privilege provides an exception to the parties' general duty to disclose. As such, the attorney-client privilege is narrowly construed under Illinois law. It thus is the party claiming privilege that carries the burden of presenting facts that give rise to the privilege.

Who constitutes the client?

Illinois law has long recognized that corporations, limited liability companies, limited partnerships, and other business entities can assert the attorney client privilege. However, this protection does not attach to every employee of a corporate client. Instead, Illinois courts have adopted a categorical approach when identifying the corporate employees to which the privilege attaches: “When the client is a corporation, however, the question becomes which employees of the corporation are entitled to the protection of the privilege when they communicate with the corporation’s attorneys.” The categorical approach employed in Illinois is the control group test.

Two tiers of employees qualify as the control group: (1) ‘top management who have the ability to make a final decision’; and (2) employees who advise top management in a particular area such that a decision would not normally be made without their ‘advice or opinion,’ and whose ‘opinion’ forms the basis of any final decision made by those with actual authority.



Doe v. Twp. High Sch. Dist. With respect to the second tier of corporate employees, Illinois law distinguishes between opinion and information. Accordingly, “while employees whose ‘opinion’ forms the basis of a decision are part of the control group, ‘individuals upon whom [top management] may rely for supplying information are not members of the control group.’”

As in the non-corporate setting, “[t]he attorney-client privilege [in the corporate context] belongs to and can only be waived by the client.” Therefore, once a member of the control group leaves the corporation, that person can no longer assert the privilege as the “privilege does not belong to the individual control-group member; it belongs to the corporation because the corporation is the client.”

However, a limited circumstance exists where the attorney-client privilege may attach to the communications of an employee who is not a member of the control group. In this circumstance, the underlying principle upon which the attorney client privilege rests—the free and full disclosure by the client to the attorney of matters relevant to transmitting legal advice—compels the application of the privilege despite the employee not being a member of the control group. For example, the attorney-client privilege may exist “when the employee of the defendant corporation is also a defendant or is a person who may be charged with liability and makes statements regarding facts with which he or his employer may be charged” and those “statements are given or delivered to the attorney who represents either or both of them.”

With respect to derivative shareholder suits, some jurisdictions have adopted the rule that shareholders, as the true owners of a corporation, may compel the managers of a corporation to disclose communications otherwise protected by the attorney-client privilege regarding the corporation upon a showing of good cause. While some Illinois courts have acknowledged this rule, none have adopted it.

The rules set forth above apply whether the attorney who is communicating with corporate employees is an outside counsel or an in-house attorney for the corporation. However, because in-house counsel often wear many hats, some which are purely legal and some which are more business related, an analysis of privilege with respect to in-house counsel can be a little more complicated. Illinois courts hold that the threshold requirements for determining whether a communication between a corporate employee and in-house counsel “include a showing that the communication originated in a confidence that it would not be disclosed; was made to an attorney acting in his legal capacity for the purpose of securing legal advice or



services, and remained confidential. Thus, the initial inquiry that must be made when a communication involves in-house counsel is whether the communication was made to the individual for the purpose of securing legal advice as opposed to business advice.

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General Comments Under Kansas Law

In Kansas, the attorney-client privilege is codified in the Kansas Rules of Evidence. The essential elements of a claim of privilege have been summarized as follows: “(1) Where legal advice is sought (2) from a professional legal advisor in his capacity as such, (3) communications made in the course of that relationship (4) made in confidence (5) by the client (6) are permanently protected (7) from disclosures by the client, the legal advisor, or any other witness (8) unless the privilege is waived.” *State v. Maxwell*.

The attorney-client privilege protects both in-house and outside counsel, but there is a dearth of case law at the state court level relating to the application of the privilege to in-house counsel. Since the courts have observed there is generally no conflict between federal and state law relating to the privilege, the federal cases are instructive on the scope of the privilege.

By and large, the cases have centered upon whether the party seeking to assert the privilege has established that the communication sought to be protected is confidential and was made for the purpose of seeking legal advice, rather than for a another purpose. “Not every communication between an attorney and client is privileged, only confidential communications which involve the requesting or giving of legal advice.” *Burton v. R.J. Reynolds Tobacco Co* “There must be a connection between the subject of the communication and the rendering of legal advice for the attorney-client privilege to shield the communications from disclosures.”

While not exhaustive, the following holdings may be of benefit in-house practitioners in addressing specific issues relating to the attorney-client privilege:

- Giving a preexisting document to counsel: Generally, an attorney may be compelled to produce a document a client has provided to the attorney if the document would not be privileged if left in the hands of the client. However, the identity of the person who provided the document to the attorney, as well as any communications related to the document between the client and attorney, are protected from disclosure. *State v. Young*.



- Waiver: The power to waive the attorney-client privilege rests with the corporation's management, and the privilege cannot be waived by a mere employee. *IMC Chemicals, Inc. v. Niro, Inc*
- Crime-fraud exception: The attorney-client privilege does not apply to consultations made for the purpose of enabling or aiding the commission or planning of a crime or tort. However, the party seeking the communications must make a *prima facie* showing that the crime or fraud has occurred prior to obtaining the communications, and the *prima facie* case cannot be based upon the very documents being sought in discovery. *In Re A.H. Robins Co., Inc.*
- Committee meetings, safety meetings, and minutes of meetings: Unless the meeting was convened for the purpose of obtaining legal advice from in-house counsel, the communications made at the meeting, as well as notes, summaries and/or minutes, are potentially discoverable. "[T]he mere attendance of an attorney at a meeting, even where the attorney is held at the attorney's instance, does not render everything done or said at that meeting privileged. For communications at such a meeting to be privilege, they must have related to the acquisition or rendition of professional legal services and must have retained a confidential character." *Zullig v. Kansas City Power & Light Co.*
- Accident, incident, and investigative reports: The potential discovery of reports will depend upon whether or not the reports were generated for the purpose of obtaining legal advice from in-house counsel, or for some other purpose, such as employee safety recommendations. If the reports are not generated for the purpose of legal advice, they are likely discoverable. Furthermore, even if a report was prepared due to the general prospect of litigation, if it was "prepared in the ordinary course of that business of litigation without a tie to specific litigation, [it] is not protected by work product immunity." *Burton v. R.J. Reynolds Tobacco Co.*
- Attorney billing entries: Narrative statements in attorney billing statements are not per se privileged; however, if the narrative "reflects litigation strategy or specifies the nature of the services provided, such as research to a particular area of law, it may be privileged."
- Communications between attorneys: Communications and consultations between attorneys representing the same parties are privileged, whether between "kept lawyers" or "those retained on a case-by-case basis." *N.Y. Underwriters Ins. Co. v. Union Const. Co.*



- Communications with former employees: The direct issue of whether an in-house attorney's communications with a former employee (that occurred while the employee was still employed by the client), are privileged has not been decided by the courts. However, at least one judge has found that while opposing counsel may contact a former employee in the attempt to gather evidence in support of his client's claims, any "efforts by plaintiff's counsel to induce or listen to privileged communications may violate Rule 4.4 of the Model Rules of Professional Conduct, which requires respect for the rights of third persons." *Aiken v. Business and Industry Health Group, Inc.* In-house counsel facing with this situation may consider filing a motion for protective order from the court relating to the scope of plaintiff's counsel's interviews.
- Role apart than counsel and incidental legal advice: When an in-house attorney "serves also in another capacity, such as vice president, his advice is privileged 'only upon a clear showing' that it was given in a professional legal capacity." *Marten v. Yellow Freight Sys., Inc.* Being a full time, practicing attorney does not imbue all confidential communications with the privilege. In order for the communications to be privileged, they must be made to the attorney in his capacity as a legal advisor. If the attorney is providing legal advice which is merely incidental, the privilege does not apply. To be privileged, the communication must relate to the business or transaction for which the attorney has been retained or consulted.

It is important to remember that each case is dependent upon its own facts. The cases cited may provide guidelines as to the potential application of Kansas law to a certain situation, but are no means the rules which will be followed in every case.

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General Comments Under Massachusetts Law

Communications from, as well as communications to, in-house counsel in his or her role as a business advisor and not in his or her professional capacity as a lawyer where legal advice is at issue, do not fall under the protection of the attorney-client privilege. The routine copying or distribution of non-privileged documents or communications to in-house counsel will not render them privileged merely because in-house counsel was copied. The privilege is ordinarily waived if disclosed to a third party unless the derivative attorney-client privilege applies. The derivative attorney-client protects communications with a third party who is employed to facilitate communications between the attorney and the client and they assist the attorney in rendering legal advice to the client.

If the communication involves a Massachusetts entity and occurred in Massachusetts, its law will govern the privilege. If the communication involves a non-Massachusetts entity or occurs in whole or in part outside of Massachusetts, in-house counsel must exercise care in determining which jurisdiction will govern the privilege. Given the prevalent use of cell phones and e-mail, and the increasingly global nature of business transactions, communications often cross state borders and involve individuals in foreign countries. Massachusetts appellate courts have not addressed this choice of law issue but would probably follow the Restatement (Second) of Conflicts of Law which provides that the jurisdiction with the most significant relationship with the communication will likely govern the privilege.

Who Constitutes the Client?

The attorney-client privilege arises from the relationship between an attorney (both in-house and outside counsel) and the client. In the corporate context, the client is the entity itself. The company, however, acts through individuals including directors, officers, managers and middle and lower level employees. In-house counsel often faces the question of which employees represent the company to which the attorney-client privilege applies.

Massachusetts follows a broader approach than the “control group” test followed in other jurisdictions (defined as those in the uppermost echelon of corporate management). A corporate employee, within or without of the control group, and corporate counsel can have privileged communications with each other where the communication between them is for the purpose of securing or providing legal advice, the subject matter of the communication is within the scope of the employee’s corporate duties, and the communication is made in



confidence. Confidential communications between corporate counsel and the company's employees that are intended to assist counsel in providing the company with legal advice are protected by the attorney-client privilege.

Communications with Former Corporate Employees

The attorney-client privilege continues to protect privileged communications between corporate counsel and the company employees that occurred during the employment relationship after the relationship is terminated.

Massachusetts case law has not addressed the issue whether the attorney-client privilege applies to post-employment communications between corporate counsel and a former company employee. The weight of authority in other jurisdictions is that the privilege applies to confidential communications between corporate counsel and the former employee where the former employee has information obtained during his or her employment and the information will assist corporate counsel in providing the client with sound and informed legal advice. The same rationale for applying the attorney-client privilege to confidential communications between corporate counsel and existing employees applies equally to confidential communications with former employees. If the same communication would be privileged if the former employee had remained employed by the company, it should be privileged after the employment relationship has terminated.

What communications are privileged?

The attorney-client privilege provides a safe harbor allowing clients and their attorneys to speak freely and candidly to each other (orally or in writing) without fear that what is disclosed may someday be discovered or revealed. However, establishing that the communication is between the client and the attorney alone is not sufficient to invoke the protection of the privilege. The written or oral communication must be for the purpose of securing or rendering legal advice. If the role of legal counsel (whether in-house or outside counsel) in making or receiving the communication is as a business advisor to the company or where the communication involves business, technical or administrative issues rather than legal advice, then the privilege umbrella will not extend to protect the communication. In modern corporate practice in-house counsel wears several hats and is responsible for multifaceted duties that go beyond the traditional tasks performed by lawyers, such as conducting internal corporate investigations, attending corporate meetings, negotiating corporate mergers and other deals, and participating in other corporate business activities. When in-house counsel is not acting in a professional legal capacity rendering legal advice, its communications to and from the client will not be privileged.

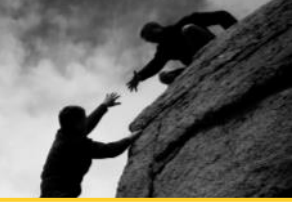


Application of Privilege to Internal Investigations

The attorney-client privilege protects confidential communications, not any underlying facts. Massachusetts law does not recognize any common law internal investigation privilege. Internal corporate investigation reports that are required by statute to be disclosed to public authorities are not protected by the attorney-client privilege as an essential element of the privilege – the expectation of confidentiality – is lacking. Although there is no Massachusetts appellate court case on point, if an internal investigation is conducted by corporate counsel for the purpose of providing legal advice and a report is prepared by counsel providing legal advice, the report is likely protected from disclosure.

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In Missouri, there are several issues that in-house counsel must consider with regards to the application of the Attorney-Client privilege. Pursuant to statute, privilege attaches to:

- (1) information transmitted by
[a] voluntary act of disclosure;
- (2) between a client and his [or her] lawyer;
- (3) in confidence; and
- (4) by a means which, so far as the client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purpose for which it is transmitted.

Under Missouri law, “the attorney-client privilege is to be construed broadly to [promote] its fundamental policy of encouraging uninhibited” attorney-client communication.

Who constitutes the client?

In Missouri, the client can be a corporate entity or an individual. Missouri courts have held that both management and non-management, or “lower level” employees, can be covered by the attorney-client privilege. A “lower level” employee is protected by the attorney-client privilege if the following requirements are met:

- the communication was made for the purpose of securing legal advice;
- the employee making the communication did so at the direction of his corporate superior;
- the superior made the request that the corporation could secure legal advice;
- the subject matter of the communication is within the scope of the employee's corporate duties; and
- the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.



Nature of the Communication

In Missouri, the dividing line to determine whether communications involving in-house counsel are privileged appears to be rooted in the nature of the communications. If the communications with the in-house counsel are made for the purpose of obtaining legal advice or preparing for litigation, the communications will likely be privileged. In contrast, where routine business communications, or general business advice, is passed along to in-house counsel, these communications will likely not be privileged, as the attorney's role in this situation is not to provide any legal guidance.

Boards of Directors

In the case of Commodity Futures Trading Commission v. Weintraub, the United States Supreme Court held that “the power to waive the corporate attorney-client privilege rests with the corporation’s management and is normally exercised by its officers and directors.” It would seem logical that if a director has the right to waive the corporation’s attorney-client privilege, it could also assert it. This case and reasoning has been cited in Missouri courts. Therefore, provided that communications between an attorney and members of the Board of Directors meet the criteria found the statutes, and are made for the purpose of the corporation obtaining legal advice or preparing for litigation, the privilege would exist.

Intra-Company Investigations

Intra-company investigations, and the communications resulting from them, are protected by the attorney-client privilege depending on the role of the attorney. While this case does not involve an attorney in the role of in-house counsel, the legal principles and facts noted in Diversified Industries Inc. v. Meredith are relevant and worth considering within the in-house counsel context. In this case, a law firm was employed to conduct an investigation as to the business practices of a company in the context of the disclosures that have been made in the course of prior litigation. The law firm was neither employed to give legal advice, nor was it employed to represent the company in any pending or potential litigation. In considering these facts, the court determined that the attorneys' role in this investigation did not rise to the level to garner protection via the attorney-client privilege. The court further held that the tasks undertaken by the attorneys could have also been undertaken by non-attorneys.



Best Practices

When considering how to ensure that communications involving in-house counsel will be protected under the attorney-client privilege, the key inquiry in Missouri should involve the following question: What is the nature of the attorney's work or advice? If the communication is intended to procure legal advice or prepare for litigation, the communication is likely protected. If the communication are more of the general business variety that could involve any number of non-attorney professionals, the communication is not privileged.

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General Comments Under New York Law

In New York, the determination of whether a communication with in-house counsel is protected by the Attorney-Client privilege is dependent on various factors. New York's statute on attorney-client privilege states:

Confidential Communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose, such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

In New York, a corporation's communications with counsel are encompassed within the legislative purposes of the statute, whether the communications are with in-house counsel or outside counsel. However, courts in New York apply the attorney-client privilege "cautiously and narrowly" in the case of in-house counsel, to assure that "mere participation of any attorney" is not used to "seal off disclosure." *Rossi v. Blue Cross & Blue Shield*.

Who Constitutes the Client?

"For in-house attorneys, the corporation is the client protected by the attorney-client privilege." *Rossi v. Blue Cross & Blue Shield*. The attorney-client privilege applies to communications between in-house counsel and all levels of employees who need to be included in the communication for purposes of rendering legal advice, from senior corporate officers and directors to low level employees. The termination of the employment relationship does not dissolve the attorney-client privilege, which forever protects the corporation, as the



client, from disclosure against its will of confidential communications that occurred between its in-house counsel and its former employees during the course of employment for purposes of rendering legal advice.

Moreover, where the former employee is a witness for the corporation at a deposition or a trial after the termination of his employment, and is represented by the corporation's counsel, communications between the corporation's counsel and the former employee for purposes of that deposition or trial generally are also privileged.

However, the attorney-client privilege with a former employee is a qualified privilege. For example, communications between in-house counsel and "a former employee whom counsel does not represent, which bear on or otherwise potentially affect the witness' testimony' are generally not privileged." In addition, "[t]he privilege should not be used to deny opposing counsel's 'right to ask about matters that may have affected or changed the witness's testimony' . . . and . . . 'any communication between counsel and [the former employee], occurring after [his] employment . . . that goes beyond [his] knowledge of the circumstances, and beyond [his] activities within the course of . . . employment . . . is not protected by the attorney-client privilege." *Bernard v. Brookfield Props. Corp.*

Protected versus non-protected communications

No bright-line test exists in New York to distinguish between communications with in-house counsel that are protected by attorney-client privilege and communications that are not protected. The inquiry is necessarily fact-specific, with certain guideposts that are used in reaching this determination, such as: 1) whether the communication is confidential; 2) whether the communication has not been disclosed to anyone outside the corporation, and 3) whether there is any dispute as to the in-house counsel's status or role in the communication (i.e., whether the in-house counsel was acting solely as an attorney or acting in a business capacity).

The attorney-client privilege will apply to communications made to an in-house counsel if the communication is "made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose." The attorney-client privilege will apply to communications coming from an in-house counsel – whether or not in response to a particular request – if the communication is "made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship."

So long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters. However, documents that are not primarily of a legal character, but express substantial non-legal



concerns, will not be shielded by the attorney-client privilege.

Intra-company investigations

In New York, “[t]he critical inquiry [in determining whether a lawyer’s investigative report is protected by the attorney-client privilege] is whether . . . it was made in order to render legal advice or services to the client.” *Spectrum Sys. Int’l Corp. v. Chemical Bank*. An investigative report is less likely to be protected by attorney-client privilege where it offers non-legal advice such as “recommendations for desirable future business procedures or corruption prevention measures, or employee discipline.”

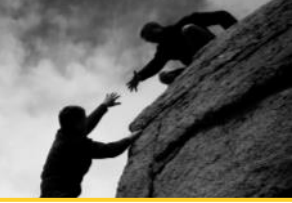
For example, in New York, insurance investigation reports prepared by investigators or adjusters during the processing of a claim are considered to be made in the regular course of an insurance company’s business and not protected by attorney-client privilege.

Additional Consideration – Registration of In-House Counsel not Admitted to Practice Law in New York

In-house counsel employed full time by a company in the State of New York, but not admitted to practice law in New York, must apply for registration as in-house counsel pursuant to Part 522 of the Rules of the New York Court of Appeals. There is currently no case law addressing whether an in-house counsel’s failure to register pursuant to Rule 522 could impact the application of the attorney-client privilege. Prior to the enactment of this rule, one federal court in New York, applying federal common law, held the attorney-client privilege would apply to protect an in-house counsel’s communications, where the in-house counsel was on inactive status as a member of the California bar. That court found that “[t]o require businesses to continually check whether their in-house counsel have maintained active membership in bar associations before confiding in them simply does not make sense.” *Gucci America, Inc. v. Guess?, Inc.* In contrast, in *Financial Technologies Int’l., Inc. v. Smith*, a federal magistrate judge held, in a diversity case applying New York law, the attorney-client privilege would not apply to protect a corporation’s in-house counsel who was not licensed to practice law in any jurisdiction. Given the contradictory federal case law, and lack of case law on whether the failure to register under Rule 522 impacts the attorney-client privilege, the safest course is to ensure that in-house counsel employed full time in New York, but not admitted to the New York bar, register pursuant to Rule 522.

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North Dakota law regarding Attorney-Client privilege is codified and requires:

- b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:
 - (1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer,
 - (2) between the lawyer and a representative of the lawyer,
 - (3) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein,
 - (4) between representatives of the client or between the client and a representative of the client, or
 - (5) among lawyers and their representatives representing the same client.

The purpose of the attorney-client privilege is to provide every client a freedom from apprehension in discussing personal matters with his attorney and to encourage the client to freely communicate with his attorney without fear of disclosure.

Who in a corporation is a Client?

North Dakota courts extend the privilege to communications made between clients and their lawyers each party's respective representatives so long as the communication remains confidential between such parties and was made for the purpose of rendering legal services to the client. The privilege may be claimed by the client including a "representative of a corporation, association, or other organization." In March of 2001, the North Dakota legislature expanded the definition of representative of the client as follows:

"Representative of the client" means a person having authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.



This definition was amended with the intention of broadening the scope individuals who would fall within the definition of “client.” While there is not a significant body of case law on the matter, it seems logical that the privilege would include any individual within the corporation, so long as the communication was confidential and intended for legal advisement .

Nature of the Communication

Privilege extends to

- confidential communications
- made for the purpose of effectuating legal representation to the client.

Under the statute, a communication is confidential if “it is 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.” An inadvertent disclosure of a privileged communication by counsel may not necessarily waive the privilege as it is a right vested with and claimed by the client. However, for best practice, in-house counsel should take measures to assure that communications providing legal advice are conveyed only to those in need of the advice and should further instruct clients to only disclose legal advice to those within the corporation who would necessarily need to rely on such advice.

The statute does not directly define what constitute the rendition of professional legal services; however, North Dakota case law suggests there is a distinction between a legal opinion and a general fact. The former would likely be considered privileged while the latter would not. In *Knoff v. American Crystal Sugar Co.*, a lessor and lessee of a parcel of land brought suit against a neighboring property owner. When the neighboring property owner built wastewater lagoons on his property, the lessor and lessee claimed the lagoons were a nuisance and sought damages. The lessor and lessee’s attorney hired an appraiser to determine the loss of value on the land. The property owner sought to call the appraiser as a witness and the trial court refused to permit the appraiser from testifying stating that he was a representative of the lawyer and therefore the attorney-client privilege applied. On appeal, the North Dakota Supreme Court found that the appraiser was indeed a representative of the attorney; however, the Court found that the trial court had erred because it “failed to distinguish between confidential communications, which are privileged, and underlying facts, which are not.” While elaborating on this holding, the Court went on to state:

Even an attorney, if he were an eyewitness to an event relevant to the merits of the case, could not refuse, by virtue of his employment, to testify as to his knowledge. The



information did not come to him in the form of a confidential communication from his client. The same is true of an expert who obtains firsthand knowledge of facts during his investigation. The attorney-client privilege should be applied only to protect communications, not facts. Experts' reports are communications which may fall within the scope of the privilege. But the experts' observations and conclusions themselves, whether or not contained within a report, and even if based to some extent on communications of the client, are facts which, if relevant, constitute evidence. Therefore, to apply the privilege to prevent an expert from testifying as to his analysis may completely preclude disclosure of evidence and thus be tantamount to the suppression of an eyewitness.

Essentially, the court held that subjective knowledge is not protected by the attorney-client privilege. For a communication to be privileged it must be confidential and based on legal opinion.

Boards of Directors

Boards of Directors and other administrators can apply attorney-client privilege to applicable communications. Although the exact issue has not been litigated, in a suit against a county for a county official's actions, a state's attorney's testimony was properly excluded because the attorney had an attorney-client relationship with the county. Surely if a county official can invoke the privilege, a director of a company would be entitled the same privilege.

Best Practices

As a result of the North Dakota Supreme Court holding that legal opinions are protected but the underlying facts are not, when providing legal advice, in-house counsel should clearly state that the contents of the communication represent legal opinions and should be considered privileged. While this certainly would not be considered dispositive, it would provide some security in a future proceeding. Additionally, in order to maintain the privilege, counsel should only provide legal opinions to employees on a need-to know basis, the company should adopt this practice as company policy and should inform all employees regarding this company policy as well as the fact-opinion distinction.

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In Ohio, the attorney-client privilege for in-house counsel is governed by both statute and common law. The Ohio Revised Code prohibits an attorney from testifying about confidential communications “made to the attorney by a client in that relation or concerning the attorney's advice to a client,” unless the client has consented to the attorney testifying; this statute extends to in-house counsel through the definition of client including a “corporation . . . who communicates, either directly or through an agent, employee, or other representative, with” an attorney. While the statute only prohibits testimony, the common law “protects against any dissemination of information obtained in the confidential relationship.” *Am. Motors Corp. v. Huffstutler*.

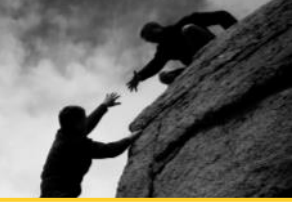
Who is the client?

The statutory definition of client recognizes “that corporations or companies, as legal entities, can only communicate with counsel through their employees or agents.” *Shaffer v. OhioHealth Corp.* Ohio courts determine whether the attorney-client privilege will apply in a corporate setting on a “case-by-case assessment.” *MA Equip. Leasing I, LLC v. Tilton*. Furthermore, the attorney-client privilege “in the corporate context applie[s] to all employees regardless of ‘level’” so long as “the communications were made by the employees to corporate counsel, who was acting as such, at the direction of corporate supervisors in order to secure legal advice.” *Bennett v. Roadway Express*.

As such, courts have held that “[c]orporate executives and managers, if endowed with appropriate authority by their employer, may on behalf of the corporation either assert or waive the attorney-client privilege.” But Ohio courts have also found communications with lower ranking employees may qualify for protection.

Waiver of the privilege

One limitation that courts have noted is that “the privilege can be waived only by a decision of management.” *State v. Today's Bookstore*. Additionally, the waiver must be on behalf of the corporation and not on the employee’s own behalf. Moreover, only current employees, with appropriate authority “may on behalf of the corporation either assert or waive the attorney-client privilege.”



In-House Counsel Performing Non-legal Work

Because in-house counsel may perform both legal and non-legal work on behalf of the corporation, “the mere presence of counsel ‘in the room’ is insufficient to invoke the attorney-client privilege.” *Maddox v. Bd. of Comm’rs*. Accordingly, the burden rests on the party desiring to exclude evidence to prove that the privilege applies. But “when legal advice of any kind is sought from the legal advisor in that [legal capacity] and the client’s confidential communication relates to that purpose” the privilege will apply despite the lawyer’s other roles. *State ex rel. Leslie v. Ohio Hous. Fin. Agency*.

Intra-Company Investigations

In regards to intra-company investigations, Ohio courts have discussed several factors in determining whether the investigation will be covered by the privilege. Courts have considered whether the attorney directed the investigation, whether the attorney provided any guidance, the timing of the investigation to the institution of the lawsuit, whether the documents contained the attorney’s “mental processes or . . . were prepared by the attorney,” and what the corporate practice was regarding investigations following accidents. *Harpster v. Advanced Elastomer Sys., L.P.*

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PENNSYLVANIA, USA: Obermayer, Rebmann, Maxwell & Hippel LLP



In Pennsylvania, whether a communication between in-house counsel and the employees, officers and/or directors of a corporation is privileged depends on the subject-matter of the communication with the central focus being whether the communication was made for the express purpose of securing legal, *not* business, advice.

As an initial matter, in Pennsylvania, attorney-client privilege extends to protect communications between in-house counsel and employees, officers and/or directors of a corporation, provided that such individuals are authorized to act on behalf of the corporation and, as set forth in detail below, the communications were made for the purpose of obtaining or providing legal advice. Of note, in Pennsylvania, communications between corporate counsel and former employees may even be entitled to protection.

To invoke the attorney-client privilege the party must prove the following:

- (1) asserted holder is/seeks to become a client,
- (2) the person to whom the communication was made is a member of the bar, or his/her subordinate,
- (3) the communication relates to a fact of which the attorney was informed by his/her client, without strangers, “for the purpose of securing either an opinion of law, legal services, or assistance in a legal matter, and not for the purpose of committing a crime or tort”, and
- (4) the attorney-client privilege has not been waived.

With respect to in-house counsel, the 1st, 2nd and 4th element are usually not at issue. Because in-house counsel play a variety of roles (i.e. business and legal advisors), the 3rd element is often the one at issue.

In relying on *Upjohn v. United States*, the Pennsylvania Superior Court held that “communications by corporate counsel may fall within the scope of the attorney-client privilege when they are kept confidential and when they are made at the behest of counsel and with the goal of furthering counsel’s provision of legal advice to the client, the corporation.” Thus, because in-house counsel often serve two roles— that of a business advisor and legal advisor -- a party seeking to assert the privilege must affirmatively show that the communication was made “for the purpose of obtaining or providing legal advice.”



“[A] fact does not enter into a non-discoverable sphere solely by virtue of its having been communicated to counsel.” Notwithstanding, “even if the communications between in-house counsel exposes various business concerns, the attorney-client privilege still applies to the communications if the decision was infused with legal concerns and was reached only after securing legal advice.” Accordingly, the determination of whether a communication was made for the purpose of obtaining or providing legal advice is typically made on a case by case basis. A communication will only be protected if the claimant has made an affirmative showing that the communication was made at the behest of in-house counsel.

Intra-company investigations

For example, while intra-company investigations by in-house counsel are typically privileged, courts will not rely upon blanket assertions that an entire internal review was legal in nature and will instead conduct a closer review to determine whether each communication was made for a legal purpose. Further, the privilege may not attach when, for example, in-house counsel are copied on emails that are not made for the purpose of seeking or obtaining legal advice. In addition, the privilege may also not attach when in-house counsel sends an email containing legal advice to employees who neither need nor sought the advice disclosed therein or when employees send documents to in-house counsel without being requested to do so.

Unlike many other states, Pennsylvania’s attorney-client privilege is a two-way street and operates “to protect confidential client-to attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.” Thus, as it relates to communications with in-house counsel, communication both made to and from in-house counsel may be protected provided that they involve legal advice. Taking it one step further, district courts interpreting Pennsylvania’s attorney-client privilege have even held that communications between members of a corporation’s management team are privileged, so long as they evidence the corporation’s in-house counsel’s advice or otherwise reflect in-house counsel’s involvement in decisions relating to legal matters.

Moreover, given the dual function that in-house counsel often plays, corporations and their in-house counsel must be mindful that not all communications are privileged and the burden lies on the corporation to prove that the communication between its in-house counsel and officers, directors and/or employees was made for the purpose of securing or providing legal advice. As such, it is always best to separate legal from general business advice to prevent the privilege from not attaching and/or being waived.

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General Comments Under Texas Law

I

As early as 1879, Texas courts recognized a common law attorney-client privilege. In 1998, Texas Evidence Rule 503 was amended by the Texas legislature to adopt a “subject matter test for the privilege of the corporation. As relevant for in-house counsel, the Texas legislature has defined the privilege as:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client: (A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative . . . (D) between the client’s representatives or between the client and the client’s representative . . .

Who is the client?

In Texas a corporation may be a “client,” and a “client’s representative” is: “ a person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered; or (B) any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client.” Based on this language, Texas courts apply the subject matter test to determine whether a corporate employee’s communications with an in-house lawyer will be covered by the attorney-client privilege. The communication will be privileged “where ‘the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney’s advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.’” *In re DuPont de Nemours & Co.* The Supreme Court of Texas clarified that this means “the attorney-client privilege may apply to communications between attorneys and employees who are not executives or supervisors.”

Furthermore, Texas courts have noted that a prior attorney-client relationship will transfer in a merger of two corporations, but not when there is “merely . . . an acquisition of assets.” *Greene’s Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, L.L.P.*



What communications are covered by the privilege?

The burden is on the party resisting discovery to show that communications between an attorney and client are privileged. The mere fact that a corporate attorney was involved in a communication does not satisfy the burden, because corporate counsel often have dual roles. *Cheniere Energy, Inc. v. Lotfi*. But Texas courts have found that the “subject matter of the information communicated is irrelevant when determining whether the privilege applies.” *In re Small*. Instead, the communication will likely be found privileged if the communication was “intended to be confidential and was . . . for the purpose of rendition of legal services.” *In re Carbo Ceramics*, 81 S.W.3d 369, 374. Indeed, the “primary purpose of the communication [need not] be to facilitate the rendition of legal services” so long as the communication was “made to facilitate the rendition of legal services.” *In re Fairway Methanol LLC*.

Intra-company investigations

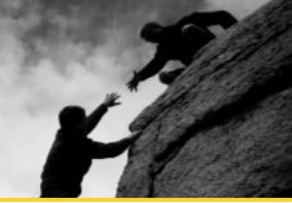
Because in-house counsel may have dual roles, the mere fact that an in-house attorney conducted or directed an investigation does not mean that the investigation will be privileged. Instead, the proper inquiry is whether the communications were made to facilitate legal services” If the investigation is instead “an exercise of business judgment” in which the attorney “is functioning in some other capacity—such as an accountant, investigator, or business advisor,” then the communications are not protected by the privilege. *Seibu Corp. v. KPMG LLP*

Best Practices

In-house counsel frequently wear more than one hat, performing other duties in addition to providing legal services. Therefore, in-house lawyers need to be careful to distinguish the legal work they perform from their non-legal, business work. Attorneys can take actions, such as, clarifying in meeting minutes in what role they are attending and creating separate documents for business and legal advice.

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LAW FIRM

Akzo Nobel Judgement of the European Court of Justice (ECJ)

In 2010 the European Court of Justice (ECJ) confirmed that there is no attorney-client privilege under EU law for communications with in-house counsel when a company is under investigation by the European Commission.

In its ruling in the case of *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, the European Court of Justice reasoned that in-house lawyers are economically dependent on their employers, and thus cannot be regarded as independent.

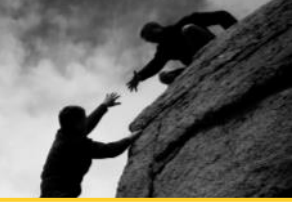
For communications to be privileged, they must be made for the purposes and in the interests of the client's rights of defence, and with an independent lawyer who is not an employee of the company. In addition, the lawyer must be admitted to practice in an EU member state. The rule above applies to matters before European Union institutions and applied till 2016 also to all matters reviewed within Germany as there was no German law recognizing a privilege for communications with in-house counsels.

New legislation on in-house counsels since 1 January 2016

Since the beginning of 2016 German in-house counsels can be admitted to the bar as “in-house attorneys”. To get this admission an in-house counsel must have the employment status to act in professional independence regarding

- the examination of legal questions
- the provision of legal advice
- the design of legal relationships
- the negotiation of contracts

and must have the right to represent the company.



These “in-house attorneys” have some legal privileges:

Civil proceedings

Once admitted to the bar as “in-house attorney” one has the right to refuse to give evidence in civil proceedings and consequently the right to refuse the submission of documents. So business communications between the “in-house attorney” and company members have not to be submitted in civil proceedings.

Criminal proceedings

On the other hand there is no Attorney-Client Privilege for “in-house attorneys” in criminal proceedings. Especially there is

- no right to refuse to give evidence
- no exemption from confiscation
- no exemption from surveillance
- no interdiction of investigation measures

In-house counsels not admitted to the bar as “in-house attorneys”. For in-house counsels not admitted to the bar as “in-house attorneys” the Akzo Nobel Judgement still applies so for them there are no Attorney-Client Privileges at all.

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GREECE: Your Legal Partners

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General Comments Under Greek Law

The attorney-client privilege is a fundamental principle in Greek legislation and it is protected by a number of legal provisions. It is protected by the Greek Constitution, the Attorney's Code of Conduct, the Code of Civil Procedure, as well as the Criminal Code and the Code of Criminal Procedure. The privilege derives from a special relationship of trust between the client and the lawyer and it survives the termination of the attorney-client relationship as well as the client's death.

Statutory provisions

The basic provisions dealing with the protection of the attorney-client privilege are the following:

- **Attorney's Code of Conduct:** Under article 5 of the Attorney's Code, a lawyer, during the performance of his duties, must keep confidential whatever information has been entrusted to him by the client or whatever comes to his knowledge in the course of the practice of the profession of lawyer. Also, according to article 38 of the same Code, lawyers should keep in confidence anything entrusted to them by their clients at the time of their engagement as well as in the course of the execution of their clients' mandate or while dealing with their clients' cases. Furthermore, article 39 prohibits the search and seizure of documents in a lawyer's possession and also prohibits the lawyer from testifying in court about information his client entrusted to him regardless of whether the attorney-client relationship has been terminated.
- **Code of Civil Procedure:** In Civil Procedure rules, the attorney-client privilege plays an important role in the non-disclosure of documents requested by a party in the course of a litigation. All persons who have an ex lege obligation to keep professional secrets are excluded from the duty to testify about the facts that were entrusted to them or they became aware of during the exercise of their profession relating to those communications having a duty of confidentiality. In this context, the attorney-client privilege under Greek law only covers communications, legal advice and internal legal reports exchanged between the lawyer (as well as his/her associates and assistants)



and the client, and it does not extend to the correspondence or exchanges of information between the client's lawyer or to the client itself with a third party, such as, for example, insurers.

Furthermore, Article 401 of CPC provides that "*lawyers [and] their assistants and persons who advise litigant parties*" have "*the right to refuse to be examined, when called as witnesses*" in relation to "*facts that they have acquired knowledge of during the course of their profession*". Therefore, in case documents or information is privileged, it cannot be disclosed to the other party of litigation proceedings or to the Court because the main purpose of the Greek legislation is to protect the relationship of trust which is inherent between certain service providers or professionals and the persons who request their help and their special services.

- **Criminal Code:** The Criminal Code states that lawyers to whom confidential information is entrusted due to their profession are punished with imprisonment or financial penalties payment should they disclose confidential information entrusted to them or that came to their knowledge by reason of their profession.
- **Code of Criminal Procedure:** The attorney-client privilege applies both to civil and criminal cases. Lawyers cannot testify about information their clients entrusted to them and this prohibition exists even if the client who entrusted such information allowed the lawyer to disclose such information to the court. It rests with the lawyer's judgment, however, if he will testify about facts he became aware of during the exercise of his duties.

Scope of protection and nature of communication

As mentioned above, the attorney-client privilege derives from the special relationship of trust between the attorney and the client. In general, it has a wide and broad scope of protection, as it covers all aspects of communications between the lawyer and the client regarding their professional relationship. Therefore, the provision of information and any advice should take place only in case a professional relationship between the two parties (a client and a lawyer) is previously created and the privilege only covers information acquired by the lawyer as professional. So, the professional capacity of the lawyer and a professional relationship is required.



In-house counsel and the attorney-client privilege

The legal professional privilege protection applies equally to the communications with in-house counsel although there is no specific legislation on the matter. This statement is supported by the fact that the Attorney's Code of Conduct does not distinguish between in-house counsel and independent lawyers (external lawyers). Thus all communications held within the scope of the professional relationship of attorney-client are regarded as privileged. However, that in case of in-house counsel attorney-client privilege protection applies only to the extent the communication with the company is covered by the privilege, i.e. constitutes provision of legal services (for example, the privilege does not cover cases where the attorney may participate on administrative decisions, or acts in another capacity).

Waiver and limitations of the attorney-client privilege

The attorney-client privilege is in general in favor of the party who entrusts information to his lawyer, meaning in favor of the client. Because of this, Greek Courts often state that only the client can raise an objection to the attorney's testimony in court, and no objection can be raised by the other litigant. As a result of the above, waiver of the privilege can be made by the client's consent.

Regarding the limits of the attorney-client privilege, the privilege is subject, despite its broad power, to certain limitations set by legislation. Any exceptions to the rule of privilege are specifically described by provisions of law. One important limit is set out by anti-money laundering legislation, which provides the provision of legal services is subject to the protection of the attorney-client privilege unless the lawyer himself participates in money-laundering transactions or his legal advice is provided to the client with the aim of executing such crimes.

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**SWITZERLAND:
Blum & Grob**

Blum & Grob

ATTORNEYS AT LAW

In Switzerland, the Attorney-Client Privilege does not apply to In-House Counsels

Contrary to what the title of this compendium suggests, under current Swiss law the attorney-client privilege applies to external attorneys only and does not extend to lawyers employed by a company as in-house counsels. Consequently, communications between in-house counsels and the officers, directors or employees of the company they serve, are not protected from disclosure in civil, administrative and/or criminal procedures.

Obviously, the scope of the attorney-client privilege in Switzerland is interpreted rather restrictively and differs fundamentally from the approach adopted in other, namely common law, jurisdictions.

Scope of the Attorney-Client Privilege in Switzerland: Exclusion of In-house Counsels

As said, in Switzerland in-house counsels are outside the scope of the attorney-client privilege and therefore communications with in-house counsels are not privileged and in-house counsels may not rely on the right to refuse the disclosure of such communications or testimony within judicial proceedings.

At federal level, the prerequisites regarding the attorney-client privilege are set out in the Federal Act on Freedom of Movement for Lawyers (“Lawyers’ Act”). In order to fall within the scope of the Lawyers’ Act, every lawyer intending to represent parties before judicial authorities must request inscription in the attorney’s register of the canton in which they have their business address. To be inscribed in said register, the lawyer must not only fulfil specific professional qualifications but also certain personal qualifications, such as (among others) the capability of practicing law independently. Only lawyers who fulfil all the conditions for the registration in the attorney’s register will be subject to the professional secrecy provision stipulated in the Lawyers’ Act and therefore only communications with registered lawyers are privileged.

According to the Lawyers’ Act, registered lawyers must observe professional secrecy for all information that has been confided to them by their clients as a result of their professional



activity, whereas the release from professional secrecy does not obligate them to divulge confidential information.

The main argument why the attorney-client privilege has not yet been extended to in-house counsels is the assumption that in-house counsels are not sufficiently independent. According to Swiss case law, the question of independence is inevitably linked to the lawyers' professional duty to exercise their profession conscientiously and with diligence by avoiding every conflict of interest between that of their client and persons/entities they have business or private relations with. Since in-house counsels are bound to the company by means of an employment relationship and subject to the employer's directives, they are deemed to be conflicted between their duties as employees and their duties as lawyers. It is the lack of independence which does not allow in-house counsels to be registered in the attorney's register, which then again is a mandatory requirement for the establishment of the attorney-client privilege.

The fact that in-house counsels are refrained from voluntarily subjecting themselves to the Lawyers' Act has been a controversial topic in the past few years. Since 2007, there have been various legislative attempts to extend the legal professional privilege to in-house counsels and to realize an equal treatment of internal and external attorneys. A parliamentary motion from 2008 aimed to introduce a legislation referred to as the Act on Corporate Counsel Regulation. The initiators felt that the absence of a legal privilege for in-house counsels is regarded as a significant disadvantage for companies based in Switzerland, particularly with respect to discovery proceedings in the U.S.

The parliamentary motion from 2008 was never adopted. In 2015, however, new efforts have begun to address the missing harmonization of in-house counsels' and external attorneys' right to refuse to give evidence and to produce documents in judicial proceedings. According to the motion "Professional Secrecy for In-House Counsels" initiated by a member of the Swiss National Council, it is intended to introduce a new provision to the Federal Act on Civil Procedure, to grant in-house counsels a right to refuse to give evidence and to produce documents. With the intended amendment, in-house counsels would have the right to rely on the attorney-client privilege at least with respect to civil proceedings. However, the new law is not expected to become effective in the near future.

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UK: ENGLAND AND WALES: Edwin Coe



General Comments Under The Law of England and Wales

Much like other jurisdictions, the concept of legal professional privilege in England and Wales recognises a client's absolute right to be frank in its communications with legal advisors without fear of such communications being reproduced, for example, to another party or to the court, provided that the communication possesses the necessary qualities of privileged material.

The concept of privilege applies to communications with various forms of legal advisor acting in their capacity as a lawyer including, for example, solicitors and barristers (being specialist trial counsel instructed by law firms), as well as their respective employees. It may also extend to in-house counsel provided that the same is also acting in a legal capacity, rather than for the purposes of giving business advice or performing other administrative functions.

There are two main types of privilege applicable in England and Wales:

- Legal advice privilege; and
- Litigation privilege.

Legal Advice Privilege

The notion of legal advice privilege applies to confidential communications passing between a client and the client's legal advisor, which have come into existence for the purposes of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context. This means that privilege will also attach to commercial and/or strategic advice, provided that the same relates to the client's legal rights, liabilities, obligations and remedies. Such privilege may arise where the communication forms part of the necessary exchange of information between the legal advisor and client, the object of which is the giving/receiving of legal advice as and when appropriate. This type of privilege can therefore apply whether or not litigation is pending or contemplated, provided that the relevant information is confidential and not within the public domain.



In this context (i.e. that of legal advice privilege, as opposed to litigation privilege, which is discussed below), privilege only applies to communications passing between the client and the legal advisor, rather than third parties. Privilege may attach to communications passed through an agent, provided that the agent is only used as a conduit for the purposes of giving or receiving legal advice. Furthermore, in circumstances where the client is a corporate entity, it is not always the case that documents provided by all employees will be covered by privilege. In such circumstances, the “client” for the purposes of determining privilege consists only of those employees authorised to seek and receive legal advice.

As general rule, matters committed to paper by a legal advisor during the course of the legal advisor’s retainer, which the legal advisor only knows as a consequence of that professional relationship with the client, are likely to be privileged, as are any drafts of such documents and memoranda, provided that the matters relate to the rights, liabilities, obligations and remedies of the client. On this basis, recent case law has served to highlight that transcripts of investigative interviews, even if taken by in-house counsel, will not be privileged, unless the same is capable of revealing the trend of advice given.

By contrast, it is less certain whether memoranda and drafts prepared by the client as a preparatory step to obtaining legal advice may be privileged, particularly in circumstances where the same were not intended to be communicated to the legal advisor.

Litigation Privilege

The concept of litigation privilege attaches to communications passing between a legal advisor and the client, or between either of them and a third party, provided that the same is made for the dominant purpose of litigation. This type of privilege can therefore only apply in circumstances where litigation is pending, reasonably contemplated (i.e. a real likelihood, rather than a mere possibility) or in existence.

This type of privilege extends to adversarial legal matters such as proceedings in the High Court, County Court, Employment Tribunal and, in the context of English procedural law, those which are subject to arbitration. It is less clear whether investigative or inquisitorial proceedings, such as those conducted by a regulator, attract litigation privilege.

Privilege, in this context, applies to communications between the legal advisor, the client and third parties. Privilege may also attach to communications passed through an agent, provided that the agent is only used as a medium of communication. In most cases, the communication will need to be confidential in order to attract litigation privilege (although the situation is less clear where third party witnesses are concerned).



The burden is on the party claiming privilege in respect of a document to prove the same. However, where a claim to legal professional privilege is properly made out, the right (which belongs to the client) is absolute and cannot be overridden by competing interests requiring disclosure.

Privilege in Part of a Document

Broadly speaking, where a document contains some privileged material but the remaining material is not privileged, the privileged material can simply be redacted. Failure to properly redact part of a document may mean that the party is deemed to have waived privilege in the whole document.

Loss of Privilege

Privilege may be lost in several ways including, for example, through loss of confidentiality in the material, implied or express waiver (i.e. by or on the authority of the owner of the privilege) or indeed inadvertent disclosure. Privilege may also be lost if the document in question came into being for the purpose of furthering a criminal or fraudulent design – this is known as the “fraud exception”.

It is possible, in limited circumstances, for privileged documents to be disclosed to an individual on express terms that privilege in them is not waived or, indeed, with a limited waiver such that they are disclosed to a third party on the basis that they will only be used for a specified, limited purpose. That said, caution must be given to the way in which such documents are disclosed in order to avoid the risk of complete waiver of privilege. The issue is of particular importance because a party who has elected to waive privilege in respect of a particular document may also be deemed to have waived privilege in respect of other documents (i.e. collateral waiver), so as to prevent a party from “cherry-picking” documents.

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