Analysis

Preserving the Attorney-Client Privilege for In-House Counsel

By Thomas E. Zeno and Emily E. Root, Squire Sanders

Although much attention is being paid to the recent Halifax litigation for what it can teach about the Stark Law and the Anti-Kickback Statute (AKS), the case already has provided an important reminder about how to preserve the attorney-client privilege for in house counsel.[1] This article discusses some often-overlooked principles of the privilege, as well as five practical tips for preserving the privilege for in house counsel. Although jumping directly to the tips can be useful, understanding the underlying principles will assist in applying them properly.

Often Overlooked Principles

Communications with In House Counsel Are Not Presumed to Be Privileged

Although many lawyers and non-lawyers alike believe the privilege automatically applies to every communication shared with a lawyer, that is not the case. It is true that while communications between a client and its *outside* counsel generally are presumed to be within the privilege unless the other side can show privilege does not apply, the burden is on the organization to prove that communications and documents shared with *in house* counsel are protected. When organizations cannot satisfy their burden, courts have ordered production of emails involving legal counsel, compliance logs, internal audits, and fair market valuation analyses.

When in house counsel are involved, the party claiming the privilege must prove each element for each document or communication sought to be protected by the privilege.[2] Courts review the evidence in support of the privilege rigorously, looking carefully for indications of overly broad privilege claims and perceived abuse of the privilege to protect "business" documents. Moreover, the opinions of individuals within the organization about whether a document is privileged count for little. When litigating about privilege, the decisions will be made by third parties, like judges, magistrates, or special masters, who will scrutinize carefully whether the organization has carried its burden.

The different treatment of in house counsel stems largely from the fact that they have multiple roles in their organizations, not all of which involve the rendering of legal advice. Across the health care industry, health systems, physician groups, and pharmaceutical, medical device, and life sciences companies are adopting new approaches to risk management. In response to pressures like self-disclosure obligations and the specter of False Claims Act investigations, legal personnel are becoming more integrated into these organizations. Increasingly lawyers are involved in and advising on day-to-day operations much more than five or ten years ago. Health care organizations also are facing tightening budgets, and many are trying to control costs by having in house counsel handle matters that previously would have been referred to outside counsel.

These multiple roles exact a cost on the privilege. When organizations assert the attorney-client privilege over communications with lawyers acting in these expanded roles, they seek to shield documents and communications that generally have been available to the government through subpoena or to civil litigants through discovery. Courts are skeptical of this approach and will put an organization to its proof. As a result, courts have rejected claims of privilege by taking the view that the corporate decision to integrate lawyers into previously non-legal tasks is a voluntary act by the organization that, while permissible, destroys the protection of the attorney-client privilege.[3] For example, in the *Vioxx* case, the court rejected Merck's claim of privilege because the court deemed Merck's in house counsel to be acting more like an executive ordering the operations of the company, rather than a lawyer giving advice about how the company should act, when counsel were involved in approving draft press releases and medical journal articles.[4]

Communications Must Have the Primary Purpose of Seeking/Providing Legal Advice

Another key difficulty health care organizations encounter in asserting the privilege in relation to their in house counsel communications is establishing that the communication is made for the *primary* purpose of providing legal advice. A general claim that the entity operates in a highly regulated environment, so that nearly every activity has legal significance, has not been successful in overcoming this hurdle.[5] In *Halifax*, for instance, the court denied protection for any document that was listed by the hospital as relating to "compliance" advice, rather than "legal" advice.[6] Although the hospital asserted that compliance advice and compliance personnel were within the privilege because the compliance department reported to the legal department, the court rejected that argument. The court held the hospital's internal decisions about its corporate structure could not alter the legal analysis of the attorney-client privilege.

Similarly, communications viewed as seeking editorial advice on non-legal documents, such as public statements, advertisements, or meeting minutes, is not considered legal advice, unless the health care entity makes a strong showing that the specific editorial changes were made to address identified regulatory requirements.[7] In contrast, editorial comments on contracts or other traditional legal documents are generally accepted as privileged.[8]

Finally, health care entities and other companies often assert the privilege over emails where in house counsel are copied to "keep them in the loop." Without a direct request for legal advice, these communications generally are not privileged.[9] Even the practice of routinely writing "Attorney-Client

Privilege" on a document does not guarantee protection of the privilege.[10] It is the purpose of the communication, as viewed by a neutral decision maker, that matters.

Counsel Must Direct Investigations to Maintain the Privilege

Another frequently litigated issue is whether the privilege applies to analyses, investigations, or audits that contain sensitive information and are necessary in today's regulatory environment. The key to bringing such investigations into the privilege is proof that the investigation was undertaken at *the direction* of legal counsel for *the purpose* of obtaining legal advice. If in house counsel is involved,[11] audit and investigative documents created by non-lawyers working with counsel can be protected by the attorney-client privilege. The same is true for an investigation where in house counsel requests before starting that it be conducted in a certain manner to ensure its usefulness in rendering legal advice.[12]

If the analysis or investigation is not initiated upon the explicit and specific instruction from an attorney, courts typically will not provide the protections of the attorney-client privilege.[13] In the recent *Halifax* case, for example, a log maintained by a hospital's compliance department and generally used to facilitate discussions between the compliance officer and general counsel on risk exposure had to be disclosed to the whistleblower plaintiff and the government.[14] In part, there was no attorney-client privilege protection because the general counsel's instruction that the log be maintained occurred approximately ten years before the investigation at issue began and was only a general instruction to maintain such a log of complaints received.

Broad Distribution to Non-Lawyers Can Lose the Privilege

Health care organizations also face the challenge of how broadly attorney-client communications can be distributed without destroying the confidentiality necessary to invoke the privilege. Who can receive a legal communication without destroying the privilege depends on the purpose of the communication and the job responsibilities of the non-lawyers receiving it.[15]

If non-lawyers need to know that certain legal advice was requested, they may be copied on communications to in house counsel without destroying the privilege. In making this determination, some courts have taken a literal approach in deciding who has been copied on an email. For instance, the non-lawyer must be listed in the "cc" field and the lawyer listed in the "To" field.[16] When non-lawyers and lawyers are both listed in the "To" field, courts are more likely to determine that the communication was either not primarily made for legal purposes or that it was distributed beyond the group of non-lawyers who needed to know the attorney's legal advice.[17]

Non-lawyer employees who need to know the content of legal advice to properly perform their duties also may receive that advice, either directly from in house counsel or from their supervisors, without compromising the attorney-client privilege.[18]

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Similarly, information from non-lawyer employees that is needed for in house counsel to provide legal advice is privileged, whether those non-lawyer employees communicate that information to in house counsel directly or to other non-lawyers who are responsible for collecting the information on the counsel's behalf.[19]

However, broad distribution to too many non-lawyer recipients can lead a court to conclude that a communication does not come within the privilege. In the *Vioxx* litigation, Merck asserted that emails sent to many departments, including in house counsel, for input into press releases and articles was part of a "collaborative effort to accomplish a legally sufficient draft."[20] The court disagreed, stating that allowing a corporation to claim the privilege on the basis of its voluntary decision to organize its communications so that nearly everything went through in house counsel would place too much information beyond the reach of the government or private litigants. On the other hand, careful distribution can maximize coverage of the privilege. In *Shire Pharmaceutical*, the court found that emails sent by in house counsel to seven management employees were privileged because each of the seven individuals had responsibility for the Food and Drug Administration (FDA) filing at issue.[21]

Five Practice Tips to Maximize Protection of the Privilege

In light of the principles discussed above, health care organizations should consider the following practices to maximize the likelihood that the attorney-client privilege will apply to communications involving in house counsel. Admittedly, some of the practices outlined below may seem cumbersome. These tips also may require changing established habits—particularly regarding the use of technology. However, the benefits to be gained can be significant by allowing the organization to foster frank discussions of its legal obligations and risks within the breathing room provided by the attorney-client privilege.

1. Include Explicit Requests for Legal Advice or Statements that Information Is Being Gathered to Obtain Legal Advice

Clear requests for legal advice and clear provision of legal advice are the best way to protect the attorney-client privilege. An email or text message that reads, "Joe, I'd like your legal advice on the following situation . . ." may sound stilted or overly formal, but it

reinforces to any reviewing court that the primary purpose of the communication is to obtain legal advice, rather than business or editorial advice, from the in house counsel.

Lawyers also can increase the clarity of their communications by providing a clear link between their legal advice and the legal principles motivating it. This tip also applies to counsel's edits to a document. For example, a claim that edits to a document are legal, rather than merely editorial, will be strengthened if the cover email makes statements such as "To comply with FDA rules, the product insert should be modified to state . . ." or "To avoid Stark and AKS issues, the contract should include . . ."

2. Separate Requests for Legal Review from Requests for Business Review

Separate emails should be used when sending documents for review by or otherwise communicating with legal and non-legal employees. This will help avoid questions of whether a communication is primarily made to obtain legal advice or is a non-privileged communication seeking both legal and business advice. Even though courts acknowledge that the requirement of separate emails may be inefficient given modern technology, they have nonetheless taken strict positions that corporations who choose to communicate with legal and non-legal staff simultaneously must accept that the attorney-client privilege does not attach to such mixed-purpose emails.

3. Be Mindful of Who Is in the "To" and "cc" Fields on an Email

Employees who send emails to in house counsel seeking legal advice should carefully consider who is listed in the "To" and "cc" fields of their emails, particularly if some of the recipients are non-lawyers. Although listing everyone in the "To" field is easy, it may result in disclosure of the email. If non-lawyers are receiving a copy of a request for legal advice so they know the request was made, only the lawyer should be in the "To" field, and the non-lawyers should be in the "cc" field only.

This issue can become even more complicated when someone is using "Reply All" to respond to an email that was previously sent to lawyers and non-lawyers. Email programs may automatically organize who goes into the "To" and "cc" fields differently that the sender intends, particularly if the sender was originally in the "cc" field or is using a smart phone or other portable device. Attention to this detail can be crucial when an organization tries to carry its burden of proving that the privilege applies.

4. Carefully Craft Job Descriptions for In House Counsel and Non-Lawyer Employees

Well-defined job descriptions can help an organization successfully assert the privilege, and they are increasingly being requested by courts for use in reviewing privilege claims. Job descriptions for in house counsel positions also should clearly define the attorney's business role(s). Although the official job description likely will not supersede any factual evidence to the contrary, it can be helpful evidence.

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For non-legal employees, documentation of the types of legal information or advice the employee may need to know or be responsible for disseminating can help defend against the claim that the person's receipt of legal advice was not necessary. When a non-lawyer position is responsible for communicating to in house counsel on certain topics or conducting investigations or reviews at the request of in house counsel, explicit statements to that effect can be useful evidence in support of the privilege.

5. Limit Internal Distribution of In House Counsel's Advice or Document Edits

Finally, in house counsel's advice or edits to documents should be disseminated as narrowly as possible, while still fulfilling operational needs. Rather than simply forwarding counsel's advice, management-level employees should consider writing a separate email to subordinates summarizing how operations should change. Similarly, new policies should be drafted without incorporating counsel's actual statements. In the context of edits to a document, accepting the edits before distributing them or removing any indication that the edits were made by counsel also can support privilege claims. Although not as efficient or easy, these means of communicating are more likely to insulate sensitive communications from discovery by the government or private litigants.

Conclusion

The attorney-client privilege is an important foundation of our legal system, and it is a key protection for health care and life sciences organizations that must carefully navigate complex and unsettled legal issues. Yet, as in house counsel become increasingly integrated into the operations of health care organizations, courts are scrutinizing claims of privilege more closely and have ordered the disclosure of thousands of sensitive communications that organizations considered privileged. Organizations must be increasingly mindful of the issues raised by communications between in house counsel and employees and adopt best practices to help clarify the divide between business activities that are subject to disclosure and legal activities that should be protected.

About the Authors

Thomas E. Zeno (thomas.zeno@squiresanders.com) is of counsel at Squire Sanders in Washington, DC, where his practice focuses on defending government contractors and health care providers against qui tam actions, as well as Foreign Corrupt Practices Act (FCPA) investigations. Mr. Zeno has more than 25 years of experience in the U.S. Attorney's Office for the District of Columbia, where he has prosecuted crimes in a number of areas with a focus on the health care industry.

Emily E. Root (emily.root@squiresanders.com) is an attorney with Squire Sanders in Columbus, OH, where she focuses her practice on complex commercial litigation and regulatory disputes, with an emphasis on the health care industry. She has represented clients in state and federal courts and before state and federal administrative bodies. Ms. Root is experienced in internal investigations, Stark and Anti-Kickback Statute claims, product liability matters, business torts, contract actions, and payer disputes.

Endnotes

1 *United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, No. 6:09–cv–1002–Orl–31TBS, 2012 U.S. Dist. LEXIS 158944 (M.D. Fla. Nov. 6, 2012).
2 *Halifax*, 2012 U.S. Dist. LEXIS 158944, at *8-9; *In re: Vioxx Prod. Liability Litig.*, 501 F. Supp. 2d 789, 813 fn.12 (E.D. La. 2007).
3 *Vioxx*, 501 F. Supp. 2d at 797 ("Many courts fear that businesses will immunize internal communications from discovery by placing legal counsel in strategic corporate positions and funneling documents through counsel (*viz*, addressing documents to the lawyers with copies being sent to the employees with whom communications were primarily intended."); *In re Seroquel Prods. Liability Litig.*, No. 6:06-md-1769-Orl-22DAB, 2008 U.S. Dist. LEXIS 39467, at *96 (M.D. Fla. May 7, 2008) ("The structure of certain business enterprises, when their legal departments have broad powers, and the manner in which they circulate documents is broad, has consequences that those companies must live with relative to their burden of persuasion when privilege is asserted.").
4 *Vioxx*, 501 F. Supp. 2d at 813, fn.25.
5 *Vioxx*, 501 F. Supp. 2d at 800-804 ("Without question, the pervasive nature of government regulation is a factor that must be taken into account when assessing whether the work of the in-house attorneys in the drug industry constitutes legal advice, but those drug companies cannot reasonably conclude from the fact of pervasive regulation that virtually everything sent to the legal department, or in which the legal department is involved, will automatically be protected by the attorney-client privilege."); *Seroquel*, 2008 U.S. Dist. LEXIS 39467, at *104-107 ("The fact of extensive or pervasive regulation does not make the everyday business activities legally privileged from discovery. Routine inclusion of attorneys in the corporate effort of creating marketing and scientific documents does not support the inference that the underlying communications were created and transmitted primarily to obtain legal advice as is required to justify a privilege.").
6 *Halifax*, 2012 U.S. Dist. LEXIS 158944, at *23.
7 *Vioxx*, 501 F. Supp. 2d at 802, 807.
8 *Vioxx*, 501 F. Supp. 2d at 811.
9 *Halifax*, 2012 U.S. Dist. LEXIS 158944, at *33.
10 *Halifax*, 2012 U.S. Dist. LEXIS 158944, at *9-10.
11 *Zawadzki v. Community Hosp. Ass/n d/b/a Boulder Community Hosp.*, Nos. 09–cv–01682–LTB–MEH, 09–cv–02450–CMA, 2010 U.S. Dist. LEXIS 91812, at *11-12 (D. Colo. Aug. 6, 2010).
12 *Bresnahan v. Intuitive Surgical, Inc.*, No. 09 C 6272, 2010 U.S. Dist. LEXIS 87392 (N.D. Ill. Aug. 25, 2010).
13 *Halifax*, 2012 U.S. Dist. LEXIS 158944, at *18-19, 25-27 (addressing fair market valuation analyses and investigation/audit documents from the finance, case management, and compliance departments); Bresnahan, 2010 U.S. Dist. LEXIS 87392.
14 *Halifax*, 2012 U.S. Dist. LEXIS 158944, at *18-19.
15 *Orion Corp. v. Sun Pharmaceutical Indus., Ltd.*, 2010 U.S. Dist. LEXIS 15975, at *26 (D.N.J. Feb. 18, 2010) (distribution to 112 non-lawyer "management" employees, without detail regarding each person's job duties, was too broad to retain the privilege).
16 *Vioxx*, 501 F. Supp. 2d at 810.
17 *Id.* at 812.
18 *Id.* at 811; *Cason-Merenda v. Detroit Med. Ctr.*, No. 06–15601, 2009 U.S. Dist. LEXIS 14160, at *25 (E.D. Mich. Feb. 24, 2009).
19 *Vioxx*, 501 F. Supp. 2d at 811-812; *FTC v. Boehringer Ingelheim Pharmaceuticals*, 286 F.R.D. 101, 111 (D.D.C. 2012).
20 *Vioxx*, 501 F. Supp. 2d at 803.
21 *Shire Development, Inc. v. Cadila Healthcare Ltd.*, No. 10–581(KAJ), 2012 U.S. Dist. LEXIS 158046, at *13-14 (D. Del. June 12, 2012).