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E-mails and Privilege for In-House Counsel

Five Cases, Five Lessons

By Todd Presnell

Courts employ a heightened standard when companies attempt to shield their employee–in-house lawyer communications under the attorney-client privilege. The dominant reason for this scrutiny is the recognition that employees often involve in-house counsel in business and legal-related conversations, forcing courts to scrutinize whether the putatively privileged communication pertained to legal or business advice.

E-mails, which serve as the primary (and too often exclusive) means of communications, exacerbate the business-legal dichotomy because they offer employees an easy avenue to "run a (business) issue by" the in-house lawyer. But e-mails also increase the chances of privilege waiver due to the lawyer's lack of, or loss of, control. Employees may easily copy or blind copy non-lawyers with an e-mail or forward an e-mail to internal and external colleagues without restraint.

Unsurprisingly, courts face an increasing number of discovery-privilege disputes that involve e-mail communications. E-mail privilege disputes do not necessarily arise because an e-mail is involved — indeed, an e-mail is, at bottom, simply a form of communication. But privilege issues that otherwise may not ripen for dispute resolution arise because the communication occurred via e-mail. This article briefly reviews five 2013(ish) cases involving privilege issues that arose in the e-mail context, and offers take-aways for in-house counsel's use in 2014 and beyond.

The Cases

1. Phillips v. CR Bard, Inc.

The court's opinion in *Phillips v. CR Bard, Inc.*, 290 F.R.D. 615 (D. Nev. 2013), is instructive on several privilege fronts and well worth the read. In this medical-device, product-liability case, the plaintiff challenged the defendant-company's privilege claims to hundreds of e-mails that directly or indirectly involved in-house counsel. Multiple e-mails involved employees' discussions with in-house lawyers regarding compliance with governmental regulations. Noting that "merely copying or 'cc-ing' legal counsel, in and of itself, is not enough to trigger the attorney-client privilege," the court refused to apply the privilege to many e-mails discussing regulatory compliance issues because, despite the "pervasive nature of government regulation," many e-mails were business-oriented rather than legal-oriented. The court, however, did not find privilege waiver where some legal-advice e-mails were copied to non-lawyers. Identifying the privilege's confidential element, the court found persuasive that the company had a policy mandating that communications between employees and in-house counsel "made for the purposes of giving or receiving legal advice … are kept confidential."

2. General Motors, LLC v. Astro Buick-Oldsmobile, Inc.

Many in-house lawyers fall short of the heightened scrutiny courts utilize when determining whether an employee sent an in-house lawyer an e-mail for purposes of

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rendering legal advice. But the in-house lawyer in *General Motors, LLC v. Astro Buick-Oldsmobile, Inc.*, 2013 WL 4591124 (N.D. W. Va. Aug. 28, 2013), provides a roadmap for how to meet courts' exacting standard. The GM in-house lawyer submitted a detailed affidavit that he is an in-house lawyer, was the principal in-house attorney on legal issues related to Astro, including the questioned e-mails, sent the e-mails to provide legal advice to the business team, and that, "but for [his] status as an in-house attorney, [he] would not have been involved in the discussion reflected in the e-mails." The court found this affidavit persuasive, and upheld the privilege.

3. Adair v. EQT Production Co.

The decision in *Adair v. EQT Production Co.*, 285 F.R.D. 376 (W.D. Va. 2012), emphasizes the scrutiny placed on in-house counsel and the importance of adequate privilege logs in overcoming that scrutiny. The in-house lawyer in *Adair* served in various capacities, including Vice-President and General Counsel, Vice-President of Legislative and Regulatory Affairs, Managing Director of External Affairs, and Deputy General Counsel. He produced a privilege log and supporting affidavit supporting his privilege claim over certain e-mails, but the privilege log did not describe the e-mails as "seeking legal advice" and his affidavit did not specifically describe the e-mails as providing legal advice. The in-house lawyer merely stated that he communicated, in his legal capacity, with company employees when responding to a media inquiry, commenting on pending state legislation, and dealing with royalty issues.

The court stated that "the determination of whether the attorney-client privilege applies … becomes more difficult when the sender or recipient … is in-house counsel for a corporate entity," and noted its concern that in-house lawyers use the privilege to create a "large zone of secrecy" for corporate communications that are otherwise relevant to a particular dispute. The court noted that the party seeking privileged information has little information to challenge a privilege claim and must rely on the opposing party's privilege log descriptions, and held that the party withholding documents under a privilege claim "must specifically and factually support its claim of privilege by way of evidence, not just argument." The log's privilege descriptions must identify each communication as created for the purpose of the in-house counsel rendering legal advice or as otherwise of a predominantly legal character. The in-house lawyer in *Adair* failed to indicate that the e-mails were for legal advice, and this failure in large part sunk the privilege claims without the need for an *in-camera* review.

4. Anwar v. Fairfield Greenwich Ltd.

In the MDL litigation against financial institutions and related entities over losses in the Bernie Madoff investment scandal, the plaintiffs in *Anwar v. Fairfield Greenwich Ltd.*, 2013 WL 6043928 (S.D.N.Y. Nov. 8, 2013), sought production of a company's e-mail communications with its Netherlands-based in-house attorney. This attorney was not licensed, but licensure is not a requirement to serve as an in-house lawyer in the Netherlands. The communicating employees, however, believed this individual was an attorney. The court ruled these e-mail communications were not privileged.

The first issue was whether U.S. law, which recognizes an in-house privilege, or Dutch law, which does not, applies. The court applied the law of the country that has the predominant or most direct and compelling interest in whether the communication should remain confidential. Under this standard, American law generally applies to communications about advice on American law, while foreign privilege law applies when the advice centers on foreign law. While American law applied here, the privilege did not because the Netherlands-based in-house attorney was not licensed, a prerequisite to gain privilege protection under U.S. law. While there is an exception when the employee reasonably believes the person to whom the communications were made is, in fact, a lawyer, this exception applies only where the employee makes a mistake of fact, and not a mistake of law.

5. Hedden v. Kean University

The decision in *Hedden v. Kean University*, 2013 WL 5745994 (N.J. Super. Ct. Oct. 24, 2013), concerned whether the privilege covered a head basketball coach's e-mail to university in-house counsel and whether the coach's distribution of that e-mail to the NCAA constitut-

ed privilege waiver. Applying the subject matter test, the court ruled that the privilege protected "communications made by mid or low-level employees within the scope of their employment to the corporation's attorney for purposes of aiding counsel in providing legal advice." The coach and her e-mail fell into this privileged-employee category. But did her disclosure of this privileged e-mail to the NCAA constitute waiver? Fortunately for the university, the court held that the reverse is not true — not all employees may waive the corporation's privilege, only officers, directors, or "those who manage or control its activities." The coach did not fall into this category, and her disclosure of the e-mail to the NCAA was not privilege waiver.

Lessons

Licensed Attorney: Attorneys licensed in one state commonly accept in-house positions in other states. And companies routinely transfer their in-house attorneys to offices in other states. In these instances, the in-house attorney may neglect to seek licensure in her new state or permit her license in her old state to lapse. The attorney-client privilege applies only to communications with licensed attorneys, so in-house lawyers should endeavor to seek licensure. And when that does not occur, try the "reasonable belief" doctrine discussed in *Anwar* — it is difficult to prove but could save the privilege.

Authority to Waive: The control group test, followed by some states, considers privileged only those communications involving a certain level of employees. The subject matter test, followed by federal courts and the majority of states, holds that all employees may have privileged communications with the in-house lawyer so long as the communication's subject falls within the scope of the employees' duties. But which employees can waive the privilege? Fortunately, courts such as *Hedden* hold that only employees who manage or control the company's activities may waive the privilege. So, when an employee forwards or copies a privileged e-mail to someone outside the company, companies should consider arguing the non-waiver authority doctrine to preclude a waiver ruling.

U.S./Foreign Law: We often think of conflict-of-privilege-laws in the limited domestic sense — which states follow the control group test and which follow the subject matter test. But companies with international operations and international lawyers should also consider the differences in U.S. and foreign privilege law. Many foreign states do not recognize an attorney–client privilege for in-house counsel. And as shown in *Anwar*, U.S. courts will apply a foreign state's privilege law if it has the predominant or most direct and compelling interest in whether the communication remains confidential. International in-house lawyers communicating with U.S. based employees should beware.

Confidential Policy: The confidentiality element required to establish the attorney-client privilege has two prongs: The employee and in-house lawyer must communicate confidentiality at the time of the communication, but also intend that the communication remain confidential. In a small blurb in *Bard*, the court found confidentiality intent because the company had a formal policy requiring employee–in-house lawyer communications remain confidential. Does your company have such a policy?

Adequate Privilege Log: Courts' heightened scrutiny requires in-house lawyers to "clearly show" by "specific facts" that the challenged e-mail was sent for the purpose of securing legal advice. The *General Motors* decision presents an excellent example of how an in-house lawyer should "clearly show" the legal-advice element. Courts often make this determination by reviewing in camera the putatively privileged e-mails and the in-house lawyers' affidavit. But increasingly, the first line of defense is the in-house lawyer's privilege log. The *Adair* decision instructs us that, unless the privilege log adequately describes the e-mail's legal purpose, the court will reject the privilege claim without an *in-camera* review. Conversely, courts may uphold the privilege without an *in-camera* review where the lawyer adequately describes the e-mail's legal purpose in the privilege log.

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