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Guard Attorney-Client Privilege When Sharing Legal Advice

By **Joni Jacobsen, Angela Liu and Selby Brown**
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Corporations commonly share legal advice to employees down the chain of command. But unbeknownst to many managers, such broad distribution of legal advice within a company may waive attorney-client privilege.

Joni Jacobsen

To avoid waiver in the context of this so-called “forwarding issue,” employees must ask whether the recipients had a “need to know” the information: “[D]id the recipient need to know the content of the communication in order to perform her job effectively or make informed decisions concerning, or affected by, the subject matter of the communication?”[1]

Because it is crucial that an organization take steps to reduce the potential risk posed by the forwarding issue, this article will address the legal principles raised by internal distribution of legal advice and provide practical steps for companies to avoid waiving the attorney-client privilege.[2]

Angela Liu

Educate Supervisors About the "Need to Know" Standard: Could the Recipient Act on the Advice?

Organizations should educate managerial and supervisory employees regarding how and when legal advice should be forwarded to other employees within the company. In training supervisors about the “need to know” test, organizations should stress that the crux of this test is whether the recipient of the email could act on the legal advice.[3]

As stated by the Restatement (Third) on the law governing lawyers:

> The need-to-know concept properly extends to ... persons, such as members of a board of directors and senior officers of an organization, whose general management and supervisory responsibilities include wide areas of organizational activities and to lower-echelon agents of the organization whose area of activity is relevant to the legal advice or service rendered.[4]

Selby Brown

The need to know test covers employees who could merely act on the information, rather than only those employees with “managerial responsibilities or decision making authority.”[5] Thus, “[t]he ‘need

to know' standard focuses more on the employee's need for legal advice to do his or her job rather than to make decisions for the corporation."[6]

Accordingly, organizations should train employees to consider whether a potential recipient could rely on the legal advice to direct others, perform his or her job functions or form corporate policy,[7] but should refrain from sending the privileged information to other employees for whom the advice would be irrelevant or unnecessary to their job responsibilities.[8]

When in doubt, employees should be trained to ask legal counsel for permission before forwarding legal advice to avoid inadvertently waiving the privilege.

Stress Confidentiality: Recipients Must Know the Information Contains Legal Advice and Should Be Kept Confidential

To ensure against waiver in the context of the forwarding issue, counsel should explicitly inform all recipients of legal advice that the information is not only confidential and protected by the attorney-client privilege, but should also only be forwarded when necessary.

Indeed, a company could require its attorneys to add a simple notice such as, "Privileged & Confidential — Do Not Forward Unless Necessary," and reiterate the confidentiality of the forwarded legal advice each time the communication is shared.

The importance of keeping confidentiality from being compromised is highlighted in the recent opinion, In re Syngenta AG MIR 162 Corn Litigation.[9] There, the District of Kansas explained that the privilege would be waived if a non-attorney forwarded the privileged information to others unless the proponent of the privilege could "demonstrate that the confidential nature of the [forwarded legal communications] was adequately communicated and respected by" the non-attorneys with a "need to know" the information.[10]

As such, best practices in defending privileged communications require the proponent to show that confidentiality was communicated by all senders (including forwarders) and maintained by all recipients.[11]

Be Thorough in Privilege Logs: Provide Information Regarding Non-Attorneys who Receive Forwarded Information

Last, to avoid potential pitfalls of the "need to know" test, practitioners should ensure that the privilege log and/or accompanying documents provide opposing counsel with sufficient information to evaluate whether a recipient of forwarded legal advice "needed to know" the information. However, practitioners do not need to show "why each individual in possession of the confidential document 'needed the information [therein] to carry out his/her work.'"[12]

For example, in FTC v. GlaxoSmithKline, the proponent of the privilege, GlaxoSmithKline, provided a supplement to the privilege log that "indicated the title or titles of each person therein who was not an attorney" as well as a declaration that explained that the documents were sent to certain "teams" of people and provided a description of the duties of each team.[13]

The D.C. Circuit explained that it is sufficient to provide at least a minimal description of the non-attorney employees' roles in the organization, which should permit the court and opposing counsel to

assess whether the employee needed to know the information to perform her job; anything more would be "unnecessary."[14]

Providing a list of job titles and a description of departmental duties offers an efficient way to establish which recipients needed to know the information.[15]

Conclusion

Courts continue to confirm the importance of the "need to know" requirement in analyzing whether forwarded legal advice is privileged.

The attorney-client privilege may not be sacrificed merely by sharing information within an organization, provided the information is shared only with individuals with a "need to know." The above-mentioned tips regarding the need to know test will help guard against unnecessary waiver by a well-meaning employee.

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[1] E.B. v. N.Y.C. Bd. of Educ., 2002 Civ. 5118 (CPS) (MDG), 2007 WL 2874862, at *4-5 (E.D.N.Y. Sept. 27, 2007) (concluding the attorney-client privilege was waived where underlying privileged documents were shared for a purpose other than to distribute legal advice); accord Harleysville Lake States Ins. Co. v. Granite Ridge Builders Inc., No. 1:06-CV-397, 2008 WL 687003, at *2 (N.D. Ind. March 12, 2008) (granting a request for a protective order for communications that involved "legal advice rendered by [the company's] counsel that was forwarded to [the company's] employees who needed access to the information"); see also Moffatt v. Wazana Bros. Int'l, No. 14-cv-1881, 2014 WL 5410201, at *3 (E.D. Pa. Oct. 24, 2014) (concluding privilege applied where legal advice was disseminated to employees who "'needed to know' the content of the communication").

[2] Importantly, in federal court, there are two possible sources of the law for attorney-client privilege: federal common law or the state law that is applicable to the state claims in the suit. See Fed. R. Evid. 501. The focus of this article is the federal common law of privilege.

[3] Restatement (Third) of the Law Governing Lawyers § 73 cmt. g (Am. Law Inst. 2000).

[4] Id.

[5] See Merenda v. Detroit Med. Ctr., No. 06-cv-15601, 2009 WL 454670, at *8 (E.D. Mich. Feb. 24, 2009), obj. overruled by 2010 WL 3905936 (E.D. Mich. Sept. 30, 2010) (concluding privilege attached to legal advice shared with a senior compensation analyst, a person "with no managerial responsibilities or decision making authority"). The "need to know" test is broader than the "control group" test, which

was rejected by the Supreme Court in Upjohn Co. v. United States, 449 U.S. 383, 397 (1981). Thomas A. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, § 6.1104 (2016).

[6] Spahn, supra note 5, § 6.1104.

[7] See Moffatt, 2014 WL 5410201, at *2-3 (concluding the company's president and CEO needed to know the forwarded legal advice to make informed decisions about the subject matter of the advice).

[8] See Merenda, 2009 WL 454670, at *8 (concluding a nonmanagerial employee needed to know compliance advice regarding employee pay where her responsibilities included making wage recommendations to management and preparing draft wage structures).

[9] In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2017 WL 1106257 (D. Kan. March 24, 2017).

[10] Id. at *6 n.27.

[11] Cf. Schwarz Pharma. Inc. v. Teva Pharma. USA Inc., No. 01-cv-4995, 2007 WL 2892744, at *4 (D.N.J. Sept. 27, 2007) (finding communications were not privileged because, inter alia, the proponent of the privilege was unable "to identify the recipients of the documents in question").

[12] FTC v. GlaxoSmithKline, 294 F.3d 141, 147 (D.C. Cir. 2002) (alteration in original); see also Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 863-64 (D.C. Cir. 1980) ("If DOE were able to establish that some attempt had been made to limit disclosure of the documents to the agency personnel responsible for the audit under discussion in the memorandum, we would have a different case.").

[13] GlaxoSmithKline, 294 F.3d at 145.

[14] Id. at 147-48.

[15] Cf. In re Syngenta AG MIR 162 Corn Litig., 2017 WL 1106257, at *6 (faulting the proponent of the privilege for failing to delineate in its privilege log "the individual recipients (or their corresponding professional titles or job positions)," which left the court with "no way of determining whether" the non-attorney recipients of the documents "had a need to know the contents of those documents").

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