Attorney-client privilege gets tricky with in-house counsel

Widely dispersed communications may lose protection

GUEST COLUMN

Frank Langfitt

Most corporate executives and many of their in-house attorneys believe that communications between corporate employees and in-house attorneys automatically fall within the attorney-client privilege. In many instances, that belief may not be valid, and communications that were thought to be privileged may be made available to outsiders. Corporate executives, counsel and employees should be aware of recent developments in order to take preventive measures to avoid losing the attorney-client privilege.

In Oregon, as in most states, the attorney-client privilege is created by statute. Although there are variations on the theme, essentially the privilege involves: (1) a confidential communication, (2) between a client (or representative of the client) and (3) a lawyer, (4) relating to the provision of professional legal services to the client. In the United States, the privilege is available for intra-corporate communications with in-house counsel if the conditions for applying the privilege are met. However, recent opinions in the Gucci America case show the fragility of the privilege.

In Gucci, the third condition was at issue. A U.S. magistrate judge for the Southern District of New York ruled that Gucci's email communications of its in-house legal counsel, Jonathan Moss, were not privileged because Moss had not been an active member of the California Bar for at least 13 years and had not become an active member of any state bar. Therefore, Moss was not considered to be an attorney. Gucci argued that even if Moss wasn't an "attorney," the privilege would apply if the client reasonably believed the "attorney" to be authorized to practice in some jurisdiction, she or he may be conducting the unauthorized practice of law if based in a state in which the attorney is not licensed to practice. This could be the situation in Oregon for Oregon-based corporate counsel who are not members of the Oregon State Bar. In order to resolve this problem, in 2001, Oregon adopted a corporate counsel admission rule, joining Idaho and Washington in allowing out-of-state lawyers to obtain limited licenses to practice law for corporate clients for whom they are employees. Oregon and Washington have also adopted general reciprocity admission rules.

Even if the corporate attorney meets the standards discussed above, communications between the attorney and corporate personnel may not be privileged. This is because the privilege is limited to the provision of professional legal services – condition No. 4, above. If corporate counsel wears more than one hat, and many often do (providing business advice as well as legal advice), then the privilege only applies to those communications involving legal advice. Therefore, in-house counsel should make a special effort to document that the communications involve providing legal advice or legal services when that is the case. Corporate personnel who routinely communicate with in-house counsel should be educated about the difference between seeking legal advice (privileged) and business or other advice (non-privileged).

> In-house counsel should make **a special effort** to document that the communications involve providing legal advice or legal services when that is the case.

Corporate personnel should also be provided with a general set of guidelines regarding the handling of privileged communications because sharing the communications with others may cause the privilege to be lost.

Finally, for those corporations with a European presence, there may be no attorney-client privilege for in-house counsel. In September, the Court of Justice of the European Union held that there is no attorney-client privilege for in-house counsel. The court concluded that because in-house counsel were economically dependent on the employer, the exercise of independent judgment apart from the company's directives was inherently compromised. In order to have an attorney-client privilege, the communication must be with external attorneys who are "independent."

In conclusion, complacency about the availability of the attorney-client privilege for communications with in-house counsel is a trap. The extra effort required to maintain the privilege is worth it because the consequences can be severe.

law in any state or nation. (Oregon has this reasonable belief standard.) But the magistrate judge held that minimal due diligence included confirming that Moss was licensed in some jurisdiction; that the license he held, in fact, authorized him to engage in the practice of law; and that he had not been suspended from practicing, or otherwise faced disciplinary sanctions. A simple visit to the California State Bar website to conduct an attorney search would have disclosed that Moss had been an inactive member since 1996.

Gucci was saved, however, by Judge Shira Scheindlin, who set aside the magistrate judge's order, finding, in part, that a corporation did not have to conduct due diligence in order to have a reasonable belief that its in-house counsel was an attorney. Therefore, Scheindlin found Gucci had a reasonable belief that Moss was an attorney for purposes of invoking the attorney-client privilege.

Given Scheindlin's ruling, you might wonder what the big deal is. The big deal is that the standard may have been raised, and other courts may not be as forgiving as Scheindlin was. After the original magistrate judge's opinion, many commentators identified best practices to be used by a corporation. At a minimum, when hiring an attorney, the corporation should make an effort to determine, and actually verify, that the attorney has an active license in a recognized jurisdiction. After hiring, the corporation should monitor its in-house attorneys' status for licensing; payment of any annual license, registration, or bar membership fees, as well as required assessments; and completion of all mandatory continuing legal education courses for the state in which the attorney is licensed.

Even if an in-house attorney is licensed

FRANK LANGFITT chairs the litigation department of Ater Wynne LLP where he focuses on litigation and client consultation in business and commercial disputes. He can be reached at 503-226-8475 and fvl@aterwynne.com.