

You Told a Lawyer Something, or Copied them on an Email...Privileged or Not?

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Following the FBI's recent raid of the office and home of Michael Cohen the bounds of the attorney-client privilege have become a topic of debate and discussion. During the raid, the FBI seized business records, documents, recordings, and emails. Earlier this week, Judge Kimba Wood for the Southern District of New York ruled that the U.S. Attorney's Office for the Southern District of New York could review the documents seized with a special team in place to review for privilege despite Mr. Cohen's objections to this process.

Thus, the question has quickly become when is the attorney-client privilege actually applicable? Simply put, just telling a lawyer something, or copying a lawyer on an email, does not make the conversation or email privileged. Not all communications with an attorney are privileged from disclosure under the attorney-client privilege. The reality is that a communication (*i.e.* emails, correspondence, oral communications, etc.) will only be privileged when the subject communication meets certain criteria, and it is confidential (meaning that it is not shared with non-attorney/non-client third parties).

In order for the privilege to apply to the communication itself, the "primary purpose" of the communication must be to seek or provide legal advice. In other words, a communication is not privileged if it does not: (1) request legal advice or (2) convey information reasonably related to a request for legal assistance. Thus, asking an attorney about investment advice or other non-legal issues is **NOT** privileged. Moreover, having a discussion (or email exchange) with an attorney, where others are present (or included) is **NOT** privileged.

Since in-house counsel often act as part of an executive team, they may be providing more than just legal advice. Thus, general "[b]usiness advice, unrelated to legal advice, is not protected by the privilege even though conveyed by an attorney to the client," because the purpose and intent is **not** to communicate legal advice. See *In re Vioxx Prds. Liab. Litig.*, 501 F. Supp. 2d 789, 797 (E.D. La. 2007) (emphasis added) (*quoting In re CFS-Related Securities Fraud Litig.*, 223 F.R.D. 631 (N.D. Okla. 2004)).

Emails to or from in-house counsel that seek both business and legal advice will not satisfy the “primary purpose” requirement. More specifically, an email that lists an attorney and a non-attorney in the “To” field may not be privileged if it has a mixed purpose (i.e. seeks both business and legal advice). Meanwhile, emails that list an in-house attorney in the “To” field and a non-attorney in the “cc” field are **only** privileged if the non-attorney is copied so as to notify that person that legal advice was in fact sought and what legal advice was provided. Also, emails, texts and discussions by an attorney with an opposing counsel or other third party are **not** privileged.

Thus, it is important to: (i) keep the primary purpose of all communications with attorneys clear and state when you are seeking legal advice; and (ii) avoid oral communications in the presence of “third parties,” or copying them on emails, texts and other correspondence.

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