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Regulatory: The dual role of in-house counsel in protecting privilege

Counsel who give both business and legal advice should carefully guard against inadvertent production of privileged documents

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In-house counsel play dual roles of business person and attorney, often at the same time. One of the challenges during litigation is to parse out those roles in order to protect the attorney-client privilege. A recent case in the Southern District of New York highlights the dangers of that process. It also demonstrates how inadvertent production of privileged documents may occur and the importance of asserting attorney-client privilege as soon as possible after such production. In *Jacob v. Duane Reade, Inc.,* assistant store managers at Duane Reade brought a collective action suit for overtime wages under the Fair Labor Standards Act (FLSA). Before the court was a motion by Duane Reade for an order declaring that an email accidentally produced in discovery was protected by attorney-client privilege. The email at issue reported on a meeting that aimed to redraft store managers' job descriptions and create strategies to ensure the managers met those descriptions, so that they would be exempt from coverage by the FLSA. The email contained descriptions of communications that Duane Reade's in-house counsel made at the meeting.

The email had been produced as part of an electronic review and production that involved more than two million documents in less than a month. It apparently slipped through because the in-house legal counsel was identified only by her first name, Julie. It was produced to the plaintiffs, after which one of the recipients was deposed about its contents. Defense counsel did not raise a privilege objection at the deposition or attempt to identify "Julie." In fact, defense counsel conducted some redirect examination with respect to the email. Two months later, in connection with another deposition, Duane Reade's counsel asserted privilege for the email

and requested that all copies be returned. The plaintiffs refused and the motion followed.

The court first found that the email did contain some, but not all, privileged communications. Generally, the party asserting privilege has the burden of showing:

1. Thecommunication was between client and counsel
2. It was intended to be and was in fact kept confidential
3. The communication was made for the purpose of obtaining or providing legal advice

When, an in-house counsel who is also a business executive is involved in the communication, as was the case here, the question is whether the predominant purpose of the communication was “to render or solicit legal advice,” as opposed to business advice. The 2nd Circuit has held that communications made in support of legal advice (weighing the advice; laying out its ramifications by explaining its feasibility, implementation, downsides and the opinions of others on the legal advice; collateral benefits; politics, insurance, commerce, morals and appearances), all come under the umbrella of legal advice, so long as the predominant purpose test is satisfied. Further, legal advice can be redacted from a communication made predominantly for a business purpose.

The court held that the first half of the email, discussing how to comply with regulatory or statutory requirements of FLSA would qualify for protection under attorney-client privilege. However, the proposals that came out of the meeting, described in the second half of the email, were not covered.

The court then addressed whether Duane Reade and its counsel had waived the privilege. Attorney-client privilege may be waived by disclosure, unless the disclosure was inadvertent. The test courts use in so determining involves balancing:

1. The reasonableness of the precautions to prevent disclosure
2. The time taken to rectify the error
3. The scope of the discovery
4. The extent of the disclosure
5. Fairness

Here, the court examined the production process and, citing the large amount of documents, use of an outside vendor and review by contract

attorneys, found that the defense had taken reasonable measures to protect against disclosure. However, the court found that counsel had failed to rectify the disclosure as soon as possible, waiting two months and allowing a witness to be deposed about the email. Moreover, they had never ascertained the identity of the in-house counsel referred to in the email, and there were numerous red flags that should have alerted defense counsel.

The lesson of the *Jacob* case is that litigation counsel needs to work carefully with in-house counsel to determine:

1. Who the relevant people are for purposes of the privilege
2. In what settings (emails, meetings, etc) those counsel may be providing advice
3. How to guard against inadvertent disclosure by developing a robust review process that accounts for the fact that emails may slip through the initial searches