

# Corporate Counsel: The Ethical Duty of Confidentiality and the Attorney-Client Privilege

By Thomas Paschos

## Introduction

The ethical duty of confidentiality and attorney-client privilege are the foundations upon which lawyers provide service to clients. The principle of client-lawyer confidentiality is given effect by the rule of confidentiality established in professional ethics and the attorney-client privilege. The confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

## Ethical Duty of Confidentiality

A model of the ethical duty of confidentiality rule is set forth in the Model Rules of Professional Conduct. Most states have a similar version of the Rules of Professional Conduct. The ethical duty of confidentiality found in the Rules of Professional Conduct is larger in scope than the attorney-client privilege.

Model Rule 1.6, entitled "Confidentiality of Information," provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation. The rule also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. The duty of confidentiality encompasses all information relating to the representation.

Under the rule, unauthorized disclosure is permitted only in specific circumstances, such as to prevent death or bodily harm, to prevent a crime or fraud, or to comply with law or court order. Unlike the attorney-client privilege, the ethical duty of confidentiality is not an evidentiary matter and may not serve as a basis to resist a court's order to disclose information otherwise protected under the rule. Similar to the attorney-client privilege, information protected under the rule remains confidential and that protection survives the termination of the lawyer-client relationship and even the death of the client.

On occasion the trial lawyer will have to deal with a conflict between his duty of candor to the court and his

duty of confidentiality to the client. When that occurs, it is critical to know that candor to the court trumps the rule requiring confidentiality to the client.

## The Attorney-Client Privilege

In 1981, the United States Supreme Court extended the attorney-client privilege to in-house counsel. *Upjohn Co. v. United States*, 101 S.Ct. 677, 449 U.S. 383, 66 L.Ed. 584 (1981). The issue in *Upjohn* was whether, in the corporate context, the attorney-client privilege included communication between the attorney and low level employees of the corporation. The Supreme Court held that any information obtained by a corporate defendant's attorney that is sought for purposes of legal advice is protected by the attorney-client privilege. The client is not just the ranking officers of the corporation, but includes any employee from whom information is sought.

Significant is the fact that corporate counsel does not have the same capacity as outside counsel to have privileged communications with clients. The problem is that courts do not treat a communication as privileged simply because it was made by or to a person who is an attorney. A communication is privileged only if the primary purpose of the communication is to further the objectives of the attorney-client privilege. In other words, the communication must be made for the purpose of seeking, obtaining or providing legal assistance. Specifically, the attorney-client privilege protects communications between a lawyer and a client when the communications are 1) made for the purpose of seeking or providing legal advice, as opposed to business advice; 2) confidential when made; and 3) kept confidential by the client.

## Who Is the Client?

It is generally recognized that not all corporate employees are the "client." Model Rule 1.13(a) states that a "lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." An organizational client cannot act except through its officers, directors, employees, shareholders and other constituents.

The ethical duty of confidentiality of Rule 1.6 applies when one of the constituents of an organizational client communicates with the organization's lawyer in that per-

son's organizational capacity. The Comments to Rule 1.13 provide the following example: if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

With respect to the attorney-client privilege, the scope of the privilege is unique when an attorney represents a corporation. Courts have employed two theories to decide which corporate employees in-house counsel may communicate with in a privileged context.

One theory is the "control group test" under which only those conversations between in-house counsel and the corporation's controlling executives and managers are eligible for protection. Often, a company's "control group" is made up of a very limited number of corporate employees.

In *Upjohn, supra*, the Supreme Court expanded the control group test to include an inquiry into the subject matter of the communication. Under this theory, employees with relevant information regarding the subject matter are considered the "client" regardless of their position in the company. Therefore, it is possible for any corporate employee to have a privileged conversation with corporate counsel. However, the conversations are not always privileged. Issues arise because often many corporate employees are under the impression that they can discuss any corporate legal matter with a corporate attorney and it will be privileged. Not every corporate employee is entitled to a privileged communication on every legal matter. Unless the communication is within the scope of the employee's responsibility, it is not privileged. Further, some employees may be outside the scope of the privilege as to any legal matters. Issues arise when these employees attend meetings where corporate counsel gives legal advice.

Not all jurisdictions use the expanded test in *Upjohn*, some continue to employ the control group test.

### Reporting of Internal Wrongdoing

Issues of confidentiality arise when it comes to laws requiring reporting of wrongdoing. Section (b) of the Rule 1.13 provides, "If a lawyer for an organization knows that an officer, employee or other person associated with

the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization." The issue of confidentiality is affected by this rule. Counsel must determine whether or not reporting under this rule is permitted. This creates a significant ethical dilemma. In addition, the Sarbanes-Oxley Act of 2002 imposes an increased duty on corporate counsel to communicate wrongdoing to corporate authorities, an act which may be in conflict with the confidentiality rules.

### Legal Advice vs. Business Advice

Most in-house attorneys have dual legal and business roles and some hold corporate titles such as Vice President or Secretary, in addition to the title of General Counsel. This dual role can cause ethical conflicts. Often corporate legal advice involves at least some element of business advice; as a result, in-house counsel faces more scrutiny when it comes to applying the attorney-client privilege. Generally, communications made by and to an in-house counsel with respect to business matters or business advice are not protected by the attorney-client privilege.

To invoke the attorney-client privilege, the communication must be primarily for the purpose of rendering legal advice. It is inevitable that legal advice is often intertwined with business advice. Some courts have approved redaction or exclusion of privileged portions of documents containing legal advice mixed with business issues.

Courts have held that there is a need for this heightened scrutiny when it comes to applying the attorney-client privilege to corporate counsel because of the chance that an attorney may participate simply to be able to assert the privilege and keep the documents off limits in discovery. Therefore, courts must often distinguish between a lawyer's legal and business work.

Further, the fact that counsel is carbon copied on a document or attends a meeting, does not invoke the privilege. Typically, the privilege does not apply under these circumstances unless it can be demonstrated that the communication would not have been made but for the client's need for legal advice. If the purpose of the communication is not for the primary purpose of obtaining legal advice, it does not become privileged by adding counsel as recipients. Additionally, counsel's recommendation of, or

involvement in, a business transaction does not necessarily place the transaction under the cloak of privilege.

## Preserving the Attorney-Client Privilege

Communications subject to the attorney-client privilege remain protected unless the client affirmatively waives the privilege or it is indirectly released by the client's actions. The privilege which applies to information shared in representation of the corporation cannot be waived by an individual officer, director or employee without the proper authority.

While in-house counsel may communicate with any employee or agent of the corporation about their work as necessary to render legal services for the corporation, counsel must ensure the attorney-client privilege is preserved.

Thomas Paschos is a nationally recognized attorney in the field of professional liability, employment litigation, insurance coverage, products liability, and complex commercial litigation. He represents, amongst others, corporate officers, physicians, dentists, nursing homes, lawyers, accountants, product manufacturers, insurance agents and brokers, architects and engineers, contractors, and insurance companies. He has been awarded an AV rating with Martindale-Hubbell. He is the managing partner of Thomas Paschos & Associates, P.C., with offices in Haddonfield, NJ and Philadelphia, Pennsylvania. The firm is a member of the International Society of Primerus Law Firms, and Tom is the Co-Chairman of the Professional Liability Practice Group, and also serves on the Executive Committee of Primerus' Employment and Labor Group. Also, he is currently the chair for the Lawyer's Professional Practice Group of the Professional Liability Defense Federation. Tom is a graduate of Temple University School of Law, where he received his J.D. in 1985, and L.L.M. Trial Advocacy in 1998, and Drexel University, where he received his B.S. in 1982. He is admitted to practice in the federal and state courts of Pennsylvania and New Jersey, as well as the U.S. Supreme Court.

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