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General Counsel's Growing Prominence May Prompt Privilege Problems



By *Michael W. Peregrine and William P. Schuman* September 21, 2016

Comment

An emerging best practice of granting general counsel greater organizational prominence can create risks and benefits for corporate governance. The general counsel's ability to serve as a business partner of management helps establish the credibility essential to the successful performance of her roles as legal advisor and guardian of the corporation's reputation. Yet this valuable business partnership can have the unintended consequence of weakening the attorney-client privilege that generally cloaks the general counsel's advice to management.

The model of the organizationally prominent general counsel is rooted in the post-Sarbanes-Oxley era's emphasis on corporate responsibility. Important policy monographs from the American Bar Association (the so-called "Cheek Report") and The New York City Bar Association addressed the critical contributions to corporate governance made by a "strong" general counsel.^[1] They emphasized that an empowered and vigilant general counsel plays an important role in assuring legal compliance and an honest corporate culture.^[2]

Subsequent commentaries by knowledgeable observers have chronicled the rapid growth in importance of the general counsel's role within the corporation.^[3] They characterize the modern general counsel as a lawyer-statesperson who is an outstanding technical expert, a wise counselor and an effective leader.^[4] In this expanded role, the general counsel is a "core member of top management" who participates in leadership conversations on a broad range of topics that extend beyond traditional legal and risk analysis.^[5]

In addition, the general counsel is often tasked with managing business units beyond the legal department.^[6] Indeed, the general counsel is described by one leading observer as having an internal importance and stature comparable to that of the chief financial officer in the eyes of directors, chief executive officers and other managers of the business..^[7]

This dramatic increase in the authority and influence of the general counsel has been validated in a series of recent surveys and analyses conducted by professional associations (e.g., the Association of Corporate Counsel)^[8], governance advisories and search firms (the NYSE Governance Services/Barker Gilmore survey)^[9], and business consultancies (e.g., NABARRO)^[10].

Despite its organizational benefits, the transformation of the general counsel's role carries with it a significant potential cost. The challenges of attempting to attach the protections of the attorney-client privilege to business advice provided by the general counsel have long been acknowledged. These challenges become more consequential as the general counsel's internal communications increasingly extend to operational or strategic considerations, and not just purely legal matters. And the stakes are even higher now that the Justice Department and other enforcers have said they will hold accountable more individuals, for whom the privilege may be unavailable.^[11]

As most general counsel are aware, the basic rule of thumb is that the privilege will apply if the subject communications are *primarily* for the purpose of seeking or providing legal advice.^[12] Courts have considered several factors in determining when a communication constitutes legal advice: (i) the scope of the attorney's duties (e.g., is the general counsel serving multiple roles?);^[13] (ii) the purpose of the communication (e.g., solely a request for legal advice?);^[14] (iii) the nature of the advice given (e.g., legal v. business or factual);^[15] and (iv) the context of the advice (e.g., the circumstances under which the advice is sought and the relationship of those involved in the dialogue).^[16]

The burden of proof is placed on the party claiming the privilege, and courts often apply heightened scrutiny to communications to and from in-house counsel.^[17] This reflects the reality that the input of general counsel often involves a mix of business and legal advice, and that counsel's advice may have

originated not in response to a request for consultation on a particular legal issue, but rather in the context of a primarily business issue confronting the organization.[18]

Thus, it will likely be more difficult for the “general counsel as business partner” to cloak her communications as privileged given the expansion of duties into the business arena, than it would be for the more traditional “general counsel as legal advisor,” whose advice is narrower in scope. This presents a corporate responsibility dilemma. On the one hand, it is in the organization’s best interests to seek the advice of the “general counsel as business partner” on a broad range of corporate matters. On the other hand, some board chairs and CEOs may be reluctant to do so when uncertainty exists as to whether the privilege will apply to the advice. To the uninformed, the benefits of including the general counsel as a business partner may seem less compelling if it is not accompanied by blanket application of the privilege to all general counsel advice.

This dilemma requires the general counsel to take careful, thoughtful steps to maximize the availability of the privilege to the broadest reasonable scope of her internal communications. These steps might include the following:

1. Alert senior leadership to the need to take additional steps to preserve the privilege and to work with the general counsel to implement those additional steps. This would include reminders of the need to identify and label documents that are protected by privilege, to include the general counsel as a recipient on communications in need of privilege protection, and to limit the dissemination of documents to those who need to receive, or facilitate the rendering of, legal advice.
2. Work with governance and legal support personnel to maintain formal privilege designation procedures. Whenever justifiable, designate the communication as being provided for the purpose of rendering legal advice (e.g., “communication with chief financial officer necessary to evaluate legal implications of proposed contract provisions,” as opposed to “e-mail with CFO re: negotiations”).
3. Make effective use of meeting agendas involving the board, its committees and the senior leadership team, in which the general counsel is expected to provide reports and analysis. Use headings such as “General Counsel’s Legal Report” or “Advice of General Counsel.”
4. Be specific in the minutes of meetings in which the general counsel is present so as to accurately record the receipt from the general counsel of communications made for the purpose of providing legal advice. For executive sessions and meetings of the senior leadership team (for which minutes may not be taken), find an unobtrusive means of identifying requests for legal advice and the responses thereto.
5. Develop an internal communication protocol that identifies the types of communications the organization intends to come within the scope of the privilege. The goal will be to retain credibility – particularly with third parties – by “staking out” the areas where privilege protection is required, as opposed to a blanket assertion of privilege over all communications with the general counsel.
6. The general counsel should be unmistakably clear to her colleagues when providing business rather than legal advice, being careful in communications not to mix the two concepts. As one leading observer notes, “When these two become intermixed, the legal advice moves from the realm where it must be listened to, to another realm where [the general counsel’s] voice is robbed of its uniqueness and becomes but one of many.”[19]
7. Encourage use by senior executives of the phrase “*legal compliance*” (rather than the generic term “compliance”) when making inquiry of the general counsel on legal feasibility/compliance program matters. (This applies to the related question of preserving the privilege for communications with a separate compliance officer who is not a practicing attorney.)
8. Understand that some important advice provided by the general counsel may not be protected by privilege. Discussion of topics that will not be protected by privilege needs to be conducted with the awareness of the participants that what they say may someday be disclosed to an adversary.

The need for attention to these issues may, at least initially, seem to annoy to corporate leadership. Implementation of protective procedures will require a level of discipline and formality amongst leadership that may not always be welcomed or appreciated. They will place additional administrative burdens on governance support personnel and staff who report to the leadership team and the legal department.

However, to the extent these efforts are ultimately helpful in protecting with privilege the broadest possible range of internal general counsel communications, they will be worth it. The organization will gain twice: Protection of privileged communications will be strengthened, and enhancement of the organizational prominence of the general counsel will be promoted as safely as possible.

ENDNOTES

[1] Am. Bar Ass’n Task Force on Corp. Responsibility, *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 Bus. Law. 145 (Nov. 2003); The Ass’n of the Bar of the City of N.Y., *Report of the Task Force on the Lawyer’s Role in Corporate Governance* (Nov. 2006), available at http://www.nycbar.org/pdf/report/CORPORATE_GOVERNANCE06.pdf.

[2] *Id.*

[3] Ben W. Heineman, Jr., William F. Lee and David B. Wilkins, *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, Harv. L. Sch. Program on the Legal Prof., available at https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf; Ben W. Heineman, Jr., *The Rise of the General Counsel*, Thompson Reuters (Apr. 27, 2016), available at <https://blogs.thomsonreuters.com/answeron/general-counsel-transforming-law-business/>.

[4] E. Norman Veasey & Christine T. Di Guglielmo, *Indispensable Counsel: The Chief Legal Officer in the New Reality* (2012); Ben W. Heineman, Jr., *The General Counsel as Lawyer-Statesman*, Harv. L. Sch. Program on the Legal Prof.: A Blue Paper, available at https://clp.law.harvard.edu/assets/General_Counsel_as_Lawyer-Statesman.pdf.

[5] Interview by YourABA with Ben W. Heineman, Jr. for the American Bar Association (July 2016), *available at* http://www.americanbar.org/publications/youraba/2016/july-2016/ge_s-longtime-general-counsel-on-what-it-means-to-be-a-great-law.html.

[6] Heineman, *supra* note 3.

[7] Ben W. Heineman, Jr., *How the CFO and General Counsel Can Partner More Effectively*, Harv. Bus. Rev. (July 25, 2016), *available at* <https://hbr.org/2016/07/how-the-cfo-and-general-counsel-can-partner-more-effectively>.

[8] *ACC Chief Legal Officers 2016 Survey*, Ass'n of Corp. Couns. (2016), *available at* <http://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=1422254&recorded=1>.

[9] *The Rise of the GC: From Legal Adviser to Strategic Adviser*, NYSE Governance Servs. & BarkerGilmore (2016), *available at* http://www.barkergilmore.com/hubfs/The_Rise_of_the_GC_-_From_Legal_Adviser_to_Strategic_Adviser.pdf?t=1461255829126.

[10] *General Counsel: Reaching New Heights?*, NABARRO (2016), *available at* http://www.nabarro.com/media/600724/general-counsel-reaching-new-heights_-final.pdf.

[11] Memorandum from Sally Quillian Yates on “Individual Accountability for Corporate Wrongdoing,” Deputy Att’y Gen., U.S. Dept. of Justice, to Heads of Department Components, U.S. Attorneys (Sept. 9, 2015), *available at* <http://www.justice.gov/dag/file/769036/download>; *DOJ’s New Threshold for “Cooperation”*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (May 2016), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/YatesMemoPaper_Pages_web.pdf.

[12] *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 796-810 (E.D. La. 2007); *see also* *McCaugherty v. Siffermann*, 132 F.R.D. 234, 240 (N.D. Cal. 1990); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950) (“[T]he privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.”).

[13] *See* *Argo Sys. FZE v. Liberty Ins. PTE Ltd.*, No. Civ. A. 04-00321-CGB, 2005 WL 1355060, at *3-4 (S.D. Ala. Jun. 7, 2005) (finding that where an attorney acts in a non-legal roll, such as a claims-investigator, and not as an attorney, the privilege does not apply to facts uncovered as part of the investigation).

[14] *In re Cty. of Erie*, 473 F.3d 413, 421 (2d Cir. 2007) (finding that the “purpose of a particular document—legal advice, or not—may also be informed by the overall needs and objectives that animate the client’s request for advice.”); *see also* *Lindley v. Life Inv’rs Ins. Co. of Am.*, 267 F.R.D. 382 (N.D. Okla. 2010), *aff’d* in part as modified, (N.D. Okla. Apr. 28, 2010).

[15] *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037 (2d Cir. 1984); *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 474-75 (N.D. Tex. 2004) (“Where an attorney is functioning in some other capacity—such as an accountant, investigator, or business advisor—there is no privilege.” (citation omitted)).

[16] *In re Cty. of Erie*, 473 F.3d at 420-421 (“The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer”).

[17] *In re Vioxx*, 501 F. Supp. 2d at 799 (“The burden of persuasion on all elements of claims privileges is exclusively the proponent’s”); *see also* *Lindley*, 267 F.R.D. at 389 (summarizing the general law and stating “if in-house counsel is involved, the presumption is that the attorney’s input is more likely business than legal in nature. As a result, most of these courts apply ‘heightened’ scrutiny to communications to and from in-house counsel in determining attorney-client privilege.”).

[18] *Id.*

[19] Robert C. Weber, *Is the GC the Conscience of the Company? Maybe Not*, Corp. Couns. (Jan. 24, 2013), *available at* <http://www.corpcounsel.com/id=1358699364123/Is-the-GC-the-Conscience-of-the-Company-Maybe-Not?mcode=0&curindex=0&curpage=ALL>.

This post comes to us from Michael W. Peregrine and William P. Schuman, partners in the law firm of McDermott Will & Emery LLP. They wish to thank associates Kelsey Leingang and Brad Dennis for helping prepare the post. The views expressed herein do not necessarily reflect the views of the firm or its clients.