



GETTING THE MONKEY
OFF YOUR BACK:
WHOSE
PRIVILEGE
IS IT
ANYWAY?

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The attorney-client privilege is one of the oldest and most respected privileges as it prevents a lawyer from being compelled to reveal his/her client's confidential information. The purpose of this privilege is to ensure that clients receive accurate and competent legal advice by encouraging full disclosure to their lawyer without fear that the information will be revealed to others. Pursuant to RPC 1.6, a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, thus, making clear it is

the client's privilege to waive. In a traditional attorney-client relationship, where the client is a single person, it is easy to determine whose privilege it is to waive. However, in the context of a corporation, which may include board of directors, shareholders, and thousands of employees communicating with general counsel, this becomes a much harder question to answer.

Recently, the New Jersey Appellate Division in an unpublished decision held that an email between a college coach and the school's general counsel did not waive

the attorney-client privilege despite the fact that the coach also shared the email with the NCAA during a pre-suit investigation. In *Hedden v. Kean University*, 2013 N.J. Super. LEXIS 156 (October 24, 2013), the University's head women's basketball coach, decided to organize a summer trip to Spain for her basketball team. In order to defray the cost of the trip, the coach drafted fundraising correspondences to potential donors, requesting their sponsorship. Before releasing it, however, on January 29, 2010, the coach sent an email with the

fundraising letter to the University's general counsel, requesting his review, to which the general counsel apparently responded orally. Thereafter, the University's athletic director at the time conducted an internal investigation and ultimately contacted the NCAA to report violations he uncovered. The NCAA launched its own confidential investigation, which included the coach retaining her own counsel and producing the January 29, 2010, email.

The athletic director was subsequently fired and filed suit against the University for wrongful termination in violation of New Jersey's whistleblower statute. During discovery of that case, the former athletic director requested production of, among other things, the January 29, 2010, email from the coach to the school's general counsel. The University refused, asserting that the email was protected from disclosure by the attorney-client privilege because it was sent to counsel for the purpose of obtaining legal advice. The former athletic director's counsel disagreed, contending that the email was not contained in a privilege log, and, in any event, the privilege was waived by the coach's disclosure of the email to the NCAA without the University's objection. The University countered by arguing that there was no waiver of the privilege because the coach was not authorized by her employer – the actual holder of the privilege – to waive the privilege on its behalf.

While the trial court held that the attorney-client privilege had been waived by the coach's disclosure of the email to the NCAA, on interlocutory appeal, the Appellate Division reversed holding that the coach was not authorized by the University, as holder of the attorney-client privilege, to waive its protection. The Appellate Division found that the coach was an employee of the University, acting within the scope of her employment, and soliciting legal advice from the University's general counsel, thus, an attorney-client relationship was formed. Furthermore, the Appellate Division held that the authority to waive the attorney-client privilege, in the corporate context, does not belong to each and every employee of the corporation, but rather its officers and directors. Here, the coach was neither a director nor officer of the University, nor did she serve in a management capacity. Therefore, the coach was not the holder of the attorney-client privilege, and it was not hers to waive.

What the *Hedden* decision demonstrates is that when a corporate entity is sued, it is important for the company's general counsel to make sure that officers and directors understand the operation of the

attorney-client privilege and its limitations. While the attorney-client privilege may seem straightforward, in practice its application can prove to be quite complex. As a result, officers and directors must be able to identify, with the help of their general counsel, who holds the privilege and who may speak on behalf of the corporation. In general, most jurisdictions take the approach that the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. While most Courts accept that corporate management has the authority to waive the corporation's attorney-client privilege, a difficult situation arises when the corporation asserts the privilege, yet an officer or director makes a disclosure that arguably results in a waiver. Therefore, a corporation's general counsel should be clear as to who is responsible for managing and controlling its activities to protect against an inadvertent disclosure.

Moreover, often times employees will meet with general counsel during an internal investigation or when the company is involved in litigation to obtain relevant information. At the outset of any initial meeting with an employee, it is important for in-house counsel to provide what is referred to as an *Upjohn* Warning. The term originates from the case *Upjohn Co. v. United States*, 449 U.S. 383 (1981), wherein the United States Supreme Court held that the attorney-client privilege is preserved between the company and its counsel when its counsel communicates with the company's employees, despite the fact that communications with third parties normally constitutes a waiver of the attorney-client privilege. However, the privilege is owned by the company and not the individual employee, thus, in the context of an internal investigation, the company is the client and therefore controls the privilege. The purpose of the warning is to remove any doubt that the attorney speaking to the employee represents the company and not the employee. Typically, an *Upjohn* warning consists of an explanation that the lawyer represents the company, not the individual, and that the company may choose to waive this privilege and disclose what the employee says to a government agency or other third party. Therefore, in-house counsel should always provide *Upjohn* warnings, preferably in writing, to all employees before requesting their participation in an internal investigation or litigation.

With regard to protecting emails or other forms of communications, the Appellate Division decision in *Hedden* ap-

peared to put great weight in the fact that the email was sent to general counsel for the purpose of soliciting legal advice as opposed to securing business advice or non-legal services. Thus, even if not expressly stated in the original email, a corporation's general counsel should expressly state that the responding email is made in connection with legal advice so that it is clear that the attorney-client privilege applies. In addition, the subject line of any emails sent by general counsel that may contain sensitive information should include the phrase "PRIVILEGED AND CONFIDENTIAL" or something similar to demonstrate the confidential nature of the communication. Furthermore, a corporation's general counsel should always be mindful of the information they disclose to third parties pre-suit, and how it will affect discovery once the matter goes into full-fledged litigation. To the extent a document or communication must be disclosed to a third party, all reasonable steps must be taken to ensure that it remains privileged, including making clear that it is being produced in anticipation of litigation so that the work-product privilege can be raised as well. Overall, a corporation's general counsel must be diligent in making sure that his/her client understands whose privilege it is to waive and protecting against an inadvertent disclosure that waives the privilege.



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