Snell & Wilmer

LEGAL ALERT

September 12, 2011

Dan W. Goldfine
602.382.6282
dgoldfine@swlaw.com
vCard

Mr. Goldfine chairs Snell & Wilmer's White Collar Defense and Governmental Investigations group. In addition to defending clients with respect to government investigations and conducting internal investigations, he also counsels companies and organizations on how to establish protocols for internal investigations to best protect their interests.

Oracle Busts the Attorney-Client Privilege on an Internal Google Email to Its In-House Counsel

by Dan W. Goldfine

Suppose a competitor with a reputation for suing or a government agent drops by, accusing a company of wrongdoing. In response, in-house counsel concludes that it is prudent to determine whether there is merit to the accusation of wrongdoing. In-house counsel then instructs a senior employee to gather information about the accusation of wrongdoing and report back via email. Senior employee collects information and prepares an email summarizing his/her conclusion, including some less-than-flattering information. Senior employee addresses the email to management and in-house counsel, marking the email "attorney-client privilege" and/or "attorney work product." During the subsequent litigation with respect to the previous accusation of wrongdoing, the company asserts attorney-client privilege and attorney work product with respect to the email and all drafts thereof. The other side moves to compel the production of the email and all drafts thereof.

Google, in a dispute with Oracle, was faced with these facts, and the court ruled that the email and drafts of the email were neither attorney-client privilege nor work product and ordered their production. The order can be found here.

In ruling against Google, the judge focused on several key facts and observations:

- The following facts offered by Google were not sufficient to support an inference that the email was either subject to the attorney-client privilege or attorney work product: (a) Oracle had threatened to sue Google, (b) as a result, Google's attorneys had directed the email's authors to gather information about Oracle's claims, (c) the email was the result of Google's attorneys' direction and (d) the email had been marked "Work Product."
- The court found several items with respect to the email and its creation that contradicted Google's position:
    - There was no evidence in the record that in-house counsel ever reviewed the email.
    - The evidence in the record did not rule out the *possibility* that the email's authors and Google's in-house counsel were engaged in the other business responsibilities of the in-house counsel.
    - There was no evidence that the other recipients of the email were involved in preparation for litigation or the development of legal advice. (The other recipients were co-CEOs and a key VP, but none of them had attended the original meeting with Google's legal counsel.)
    - The content of the email did not state that it was in anticipation of litigation or to further the provision of legal advice.
    - The email states that the CEOs, not the lawyers, instructed the authors to investigate the matter.
    - The email was directed at the VP and not just counsel.
    - The email fails to mention "legal advice,"

"lawyers," "litigation," "Oracle" or "Oracle's claim."
    - The email mentioned an item not raised by Oracle's claim.

- The court also relied on the fact that, when Google's litigation counsel was first confronted with a draft of the email, Google's litigation counsel did not assert either attorney-client privilege or attorney work product.

In conclusion, the court wrote the following opinion (note: Lindholm refers to Tim Lindholm, a Google software engineer; Lee refers to Brian Lee, a former in-house counsel at Google):

> The fact that Lindholm wrote "Attorney Work Product" and "Confidential," and sent the Email to one of Google's in-house counsel does not establish that the Email deserves privileged status. Boilerplate designations do not mechanically confer privilege, *see Manriquez v. Huchins*, No. 09–CV–456, 2011 WL 3290165, at *8 (E.D. Cal. July 27, 2011); *Enns Pontiac, Buick & GMC Truck v. Flores*, 07-CV-1043, 2011 WL 2746599, at *5 (E.D. Cal. July 13, 2011), nor does merely including an attorney in a communication. *See Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981); *ChevronTexaco Corp.*, 241 F. Supp. 2d at 1069-70, 1075. In fact, Lee's role as in-house counsel warrants heightened scrutiny. In-house counsel may act as integral players in a company's business decisions or activities, as well as its legal matters. When attempting to demonstrate that an internal communication involving in-house counsel deserves privileged status, a party therefore "must make a 'clear showing' that the 'speaker' made the communication[] for the purpose of obtaining or providing *legal* advice." *ChevronTexaco Corp.*, 241 F. Supp. 2d at

> 1076 (emphasis added) (quoting *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)) ("In order to show that a communication relates to *legal* advice, the proponent of the privilege must demonstrate that the 'primary purpose' of the communication was securing legal advice." (citation omitted)). Google has made no such showing.

Special care should be taken with respect to the creation of documents and emails when a company initiates an internal investigation as a result of either a claim of litigation or government investigation or inquiry. In this instance, what could have Google done differently to better position it for creating and preserving both the attorney-client privilege and attorney work product protections?

- After the meeting between in-house counsel and the authors of the email, in-house counsel could have sent the authors an email memorializing that counsel, in anticipation of litigation, had directed the authors to conduct the investigation and report back via an email to counsel with specific directions to mark the email, "Attorney-Client Privilege/Attorney Work Product" and including the preamble in the text of the email "I have prepared this email to counsel at counsel's direction in anticipation of litigation and/or to assist counsel in providing legal advice."
- Instead of sending the email directly to the VP copying in-house counsel, the authors could have first sent the email to in-house counsel. In-house counsel could have then forwarded the email to the VP with a cover email stating that "I am forwarding this email to obtain your assistance in developing the company's legal strategy with respect to the potential litigation involving Oracle."
- The involvement of in-house legal counsel or general outside counsel – as the only attorney involved – may create a trap for the unwary, as

observed by the court above. Because courts often presume that both in-house counsel and general outside counsel provide general business advice in addition to legal advice, it becomes difficult to determine what "hat" in-house counsel or outside general counsel is wearing at a particular time. Since the burden of proof falls on the party asserting that a document is privileged, use of in-house counsel or general outside counsel to conduct or supervise litigation or pre-litigation investigation may put otherwise privileged communications at risk of disclosure. (The risk is demonstrably greater if the Company does business in the EU. An article discussing the attorney-client privilege and in-house counsel in the EU may be found here.) Using specially designated litigation counsel – whether in-house or outside – to interact and direct the employees investigating the matter can help address this potential trap.

If you have any questions about the content of this legal alert, you may contact the author or another Snell & Wilmer attorney by email or by calling 602.382.6000.

[Tweet]

Snell & Wilmer
Past Legal Alerts