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New Year's Resolution: Learn from *Halifax* How to Better Protect the Attorney-Client Privilege

The recent *Halifax* decision demonstrates that organizations need new resolve in order to protect emails with in-house counsel and the compliance department. In this discovery decision, a whistleblower, who had filed a False Claims Act action, obtained numerous emails from a hospital's in-house counsel and compliance department regarding physician compensation that was alleged to violate federal Stark law. While this case arose in the healthcare context, its lessons extend to any organization in a heavily-regulated industry, including banking and insurance, that hopes to protect communications with in-house counsel and compliance personnel.

The best practices discussed below show how to address the issues raised in this case by maximizing protection of the attorney-client privilege with in-house counsel and employees working under in-house counsel's guidance. These practices were also discussed in our recent webinar presentation, "Keeping In House Out of the Doghouse – Invoking the Attorney-Client Privilege," materials from which are available on squiresanders.com.

The *Halifax* Decision

In *U.S. ex rel. Baklid-Kunz v. Halifax Hospital Medical Center*, Case No: 6:09-cv-1002, 2012 U.S. Dist. LEXIS 158944 (M.D. Fla. Nov. 6, 2012), a US Magistrate Judge Thomas B. Smith for the Middle District of Florida ruled that hundreds of emails and other documents created by or directed to in-house counsel and compliance personnel were not protected by the attorney-client privilege. Importantly, the court determined that while communications with *outside counsel* enjoy a presumption of protection by the privilege, communications between *in-house counsel* and corporate employees *do not*; and the organization has the burden of proving that a communication is privileged.

Because outside counsel was not involved in the communications, the court evaluated the communications in light of the following principles:

- To be privileged the "primary purpose" of a communication must be to seek or provide legal advice. Emails to or from in-house counsel that seek both legal *and* business advice may not satisfy that requirement.
- A communication that does not actually request legal assistance or convey information reasonably related to the requested legal assistance is not privileged.
- Emails that list an attorney *and* a non-attorney in the "To" field are not privileged because they are deemed to be for both a business and a legal purpose.
- Emails that list an attorney in the "To" field *and* a non-attorney in the "Cc" field are only privileged if the non-attorney is copied in order to notify that person that legal advice was sought and what legal advice was rendered.
- Compliance employees are not acting at the direction of counsel under protection of the privilege just because the compliance department reports to and operates under the supervision and oversight of the legal department.

- Communications regarding "compliance advice" are not privileged because "compliance advice" is not the same as "legal advice."
- Draft documents prepared with the assistance of counsel or for the purposes of obtaining legal advice are privileged, as are drafts that contain information not included in the final version.
- The privilege does not extend to a draft that is "purely a business document."
- Communications labeled "Attorney-Client Privilege" are not privileged unless they satisfy the substantive requirements of the privilege.
- Each email within a string must be separately analyzed and independently come within the privilege (or not).

In applying these principles, the court found the following were not privileged:

- **Compliance logs.** The privilege did not cover logs in which compliance personnel documented complaints and resolutions of those complaints. The hospital asserted that the logs were maintained at the request of in-house counsel and related to potential litigation matters. The court, however, considered the log entries to be factual reports because they recited events, they did not include any lawyer comments, and there was no evidence that the compliance personnel were seeking legal advice through the logs. Emails contained in the logs were not privileged because they were not to or from counsel and "did not expressly reflect information gathered by corporate employees for transmission to corporate counsel for the rendering of legal advice."
- **Audits and fair market value communications.** Communications regarding audits by the compliance, finance, and case management departments and fair market value opinions were generally not privileged because most of them either did not list a lawyer in the "To" or "From" fields or listed a lawyer *and non-lawyers* together in the "To" field. Furthermore, they were not deemed to involve requests for legal advice.
- **Emails to or from in-house counsel and compliance personnel.** Although the hospital structured its compliance department to come under the supervision of the legal department, the court ruled that such a structure was irrelevant to the privilege analysis. Compliance personnel were considered the same as other non-lawyers and must communicate with the primary purpose of seeking legal advice to come within the privilege. Seeking "compliance advice" was not sufficient. Many emails involving in-house counsel were deemed not privileged because they did not list the attorney in the "To" or "From" fields or listed the attorney in the "To" field along with non-attorneys.

Finally, the court held the attorney-client privilege was waived as to communications inadvertently produced in response to an earlier government subpoena because the hospital had not attempted to conduct a privilege review before documents were produced. Furthermore, the hospital had not acted promptly in asserting the privilege once it became aware documents had been produced.

Best Practices

Explicitly Ask for Legal Advice

Explicitly Give Legal Advice

All non-lawyers who engage in communications with in-house counsel should explicitly request legal advice or state that the information they are transmitting is being sent for the purpose of requesting legal advice. Similarly, in-house counsel should explicitly state that they are providing legal advice – particularly when the area of legal advice also touches on matters for which the lawyer may have some business responsibility. In the event of such overlap, it is best to involve a different in-house attorney to render the legal advice on the issue, if possible.

Do Not Copy In-House Counsel on Emails to Non-Lawyers

Do Not List In-House Counsel *and* Non-Lawyers in the "To" Field of Email

Merely copying counsel on an email to non-lawyers is not the best way to request legal advice. The same is true for emails that list the lawyer and non-lawyers in the "To" field or that list the lawyer in the "To" field and non-lawyers in the "Cc" field. Requests for legal advice should be addressed only to counsel. Emails consulting non-lawyers on the business aspects of a matter should be separate from the emails to in-house counsel on the topic. If non-lawyers need to be informed that a request for legal advice has been made or that legal advice has been received, they can be listed in the "Cc" field of an email to a lawyer, but the purpose for which the non-lawyers are copied should be specifically stated in the email.

Clearly State When Employees are Acting on Instructions of Counsel

Communications between non-lawyers are always difficult to bring within the attorney-client privilege. To maximize the privilege, it is best to include explicit statements that a communication is being made at the request of counsel or that the information is being gathered for the purpose of obtaining legal advice. Because each email in a string is analyzed separately, this statement should be repeated, even if it seems redundant at the time.

Admittedly, this practice is in tension with the practical consideration that an organization may not want to highlight potential problems by informing lower-level employees that information is being collected for a lawyer to review. The organization must assess the risk of creating a whistleblower versus the risk that communications may not be privileged. Although the organization may still argue that the email is within the privilege, it will be more difficult to prevail without the explicit statement that information is being gathered at counsel's instruction.

Consider Retaining Outside Counsel

In situations where the attorney-client privilege may be particularly important, consider retaining outside counsel. As the *Halifax* decision recognized, communications with outside counsel are presumed to be privileged because outside counsel does not generally provide business advice in the same way that in-house counsel does. Once outside counsel is involved, the burden shifts to the opposing party, including the government, to prove that a communication is not privileged.

To the extent outside counsel is supervising an internal investigation, rather than directly conducting the investigation, it is still important to follow the best practices described above for internal communications. It also will be important to document that outside counsel is actively supervising the investigation in order to maximize protections of the privilege.

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Contact

Scott A. Edelstein
T +1 202 626 6602
scott.edelstein@squiresanders.com

Emily E. Root
T +1 614 365 2803
emily.root@squiresanders.com

David W. Grauer
+1 614 365 2786
david.grauer@squiresanders.com

Thomas Zeno
T +1 513 361 1202
thomas.zeno@squiresanders.com

Elizabeth E. Trende
T +1 614 365 2728
elizabeth.trende@squiresanders.com

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