



## Which Hat Is Your GC Wearing? How Companies Can Preserve the Attorney-Client Privilege In-House

From crafting business strategy to negotiating substantive deal points, in-house lawyers are becoming increasingly involved in the business aspects of their companies. Although their involvement often benefits companies by bringing a fresh perspective to the table, it can pose challenges in terms of the application of the attorney-client privilege.

Under California law, the attorney-client privilege protects confidential communications between a lawyer and client made in the course of an attorney-client relationship. Given the expanding roles of in-house lawyers, determining whether a given communication was made "in the course of an attorney-client relationship," and, thus, is protected from disclosure by the attorney-client privilege, is not always straightforward. To answer that question, courts look at which "hat" the in-house lawyer was wearing at the time of the communication. If the in-house lawyer was acting in his or her business capacity, the communication likely will *not* be privileged. Conversely, if the lawyer was acting in his or her legal capacity, the communication likely *will* be privileged if it is confidential and not disclosed to any third parties.

Courts across the nation have fashioned a variety of tests to aid in this determination. They have names like the "clear showing" test (requiring a clear showing that the communication was made in the in-house lawyer's professional legal capacity), the "primary purpose" test (examining whether the in-house lawyer's participation was primarily for the purpose of rendering legal assistance), and the "but for" test (the communication would not have occurred but for the company's need for legal advice).

Whichever test may apply, below are a few practical steps businesses can take to maximize the privilege protection of communications between its corporate personnel and its in-house lawyers:

- ▶ Keep legal advice (and requests for legal advice) separate from business advice

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- ▶ Limit the distribution of legal advice (and requests for legal advice) to "need-to-know" recipients.
- ▶ Clearly label communications that request or transmit legal advice as "Attorney-Client Privileged." (But be wary of over-designating, as courts have found such designations to be meaningless if they are overused.)
- ▶ Finally, educate business personnel on these issues so that they can take steps to ensure that privileged communications remain privileged.

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Todd Smith's practice focuses on complex business litigation in state and federal courts, including representation of law firms and lawyers in legal malpractice actions. He also represents companies and individuals in consumer and securities class actions, shareholder and derivative litigation, breach of contract and fiduciary duty claims, financial services litigation, real estate disputes, protection of intellectual property rights, and unfair competition claims. Todd is experienced in all phases of litigation, including trials, arbitrations, mediations, and appeals, as well as regulatory proceedings and internal investigations. Contact Todd at 949.679.0052 or [tsmith@umbergzipser.com](mailto:tsmith@umbergzipser.com).

