

THE EROSION OF THE ATTORNEY-CLIENT  
PRIVILEGE OVER ELECTRONIC  
COMMUNICATIONS:

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A DISCUSSION OF RECENT DEVELOPMENTS  
IN THE LAW AND PRACTICAL GUIDANCE FOR  
IN-HOUSE COUNSEL TO CONSIDER IN  
PRESERVING THE PRIVILEGE

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# Significant Recent Decisions

- Two recent decisions have important consequences for in-house lawyers on the issue of whether their e-mails, and their fellow employees' e-mails, are privileged.
  - *In re Vioxx Products Liability Litigation*, 510 F. Supp. 2d 789 (E.D. La. 2007)
  - *Scott v. Beth Israel Medical Center*, -- N.Y.S.2d --, 2007 WL 3053351 (N.Y. Sup. Ct. Oct. 17, 2007)

# Overview of Attorney-Client Privilege

## Elements:

1. The holder of the privilege is or seeks to become a client.
2. The person to whom the privileged communication was made is a lawyer.
3. The communication was made with the expectation of confidentiality.
4. The communication was made for the purpose of securing legal advice.
5. The privilege has not been waived.

# Overview of Attorney Work Product Privilege

- The attorney work product privilege protects materials prepared in anticipation of litigation.
- The privilege is qualified and may be overcome if the information is essential to the opposing party's case and is not readily obtainable by other means.

# The “Client” Component of the Attorney-Client Privilege

- For corporations, the Supreme Court has made clear that the attorney-client privilege belongs to the company. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
- But who are the employees who represent the corporation for purposes of invoking the privilege?

Two tests have emerged:

The Control Group Test  
The Subject Matter Test

# The *Vioxx* Decision

*In re Vioxx Products Liability Litigation*,  
510, F. Supp. 2d 789 (E.D. La. 2007).

# Guidance Provided by the *Vioxx* Court

1. E-mails sent simultaneously to internal attorneys and to business people are generally not considered privileged.
2. E-mails addressed to lawyers and cc'd to non-lawyers are more likely to be considered privileged.
3. Edits by lawyers to documents that are not obviously legal in nature are less likely to be considered privileged.

# Guidance Provided by the *Vioxx* Court

4. Attachments circulated to both lawyers and non-lawyers for comments are likely discoverable.
5. Attachments sent only to lawyers for comments are more likely to be considered privileged.
6. Attachments containing attorney comments that are forwarded to non-lawyers will likely lose any claim of privilege unless those non-lawyers need to receive those comments in order to fulfill their duties.

# Relevant Second Circuit Case Law

- *Asuncion v. Metropolitan Life Ins. Co.*, 493 F. Supp. 2d 716 (S.D.N.Y. 2007)
- *TVT Records v. Island Def Jam Music Group*, 214 F.R.D. 143 (S.D.N.Y. 2003)
- *SR International Business Inc. Co. Ltd. v. World Trade Center Properties LLC*, No. 01 Civ. 9291 (JSM), 2002 WL 1455346 (S.D.N.Y. July 3, 2002)

# Developments Abroad

- Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd. v. Commission* (Sept. 17, 2007).

# Strategies for Protecting the Privilege

1. Legal purpose
  - a. State up-front in the e-mail that the primary purpose of the communication is to provide legal advice.
2. Content
  - a. Ensure that the e-mail actually contains substantive and identifiable legal advice.
  - b. If an e-mail contains both legal and non-legal advice, divide the advice between two e-mails.

# Strategies for Protecting the Privilege

3. Request legal advice
  - a. Requests for legal advice should expressly ask for that advice; responses should indicate that they are meant to provide legal advice.
4. Limit distribution
  - a. Legal communications should be distributed on a limited, or “need to know” basis.
5. Attorney work product
  - a. Documents prepared with respect to pending or anticipated litigation should note that fact.

# Strategies for Protecting the Privilege

## 6. Files

- a. Legal documents should be maintained by lawyers and not by business people. Wherever possible these files should be segregated into files marked “legal.”

## 7. Meetings

- a. All legal discussion should be conducted and led by lawyers; a lawyer’s physical presence is not enough.

# Strategies for Protecting the Privilege

8. Organization chart
  - a. Where possible, the attorney should be a member of the legal department, and not one of the business units of the corporation.
9. Title
  - a. Where possible, the attorney should maintain one title that relates to the legal department, such as general counsel or assistant general counsel.

# Strategies for Protecting the Privilege

10. Privileged legend
  - a. Written materials should be marked “privileged and confidential.”
11. Satisfy control group test
  - a. Where possible, try to meet the standards of the more stringent control group test (providing legal advice to someone whose responsibilities include making substantial decisions within the corporation).

# Strategies for Protecting the Privilege

12. Over-including lawyers
  - a. Avoid using in-house counsel as a conduit for information: courts may perceive this as an attempt to create an unfounded privilege argument.
13. Provide training
  - a. For in-house counsel;
  - b. And for employees.

# Disclosures to Third Party Vendors

## Guidance:

- Outside consultants should assist with key corporate functions, or possess information that no one else has at the company.
- Outside consultants should assist with matters relating to legal issues.
- The outside consultants' participation in the communications over which privilege is asserted should be necessary.

# The *Scott* Decision

## The Erosion of the Attorney and Work Product Privileges in the Workplace

# Introduction: *Scott v. Beth Israel Medical Center*

- The Scott ruling:
  - E-mails between an employee and his personal attorneys, from the employer's e-mail address and over the employer's e-mail server, were not privileged because the employer's computer use and e-mail monitoring policy eliminated any reasonable expectation of privacy in e-mails sent over employer's e-mail server.
  - Including a pro forma "privileged and confidential" notification in the e-mails was not enough to protect the privilege.

# Introduction: *Scott v. Beth Israel Medical Center*

- **What is behind the *Scott* decision, and what are the implications? Let's consider:**
  - **the case law and statutes that support an expectation of privacy in e-mail communications;**
  - **the *Scott* decision;**
  - **the concerns that have led employers to implement e-mail use and monitoring policies; and**
  - **the implications for in-house counsel and alternatives to consider.**

# Is There Any Basis for Employees to Think Their E-mail is Private?

- **The expectation of privacy in e-mail communications derives from a Supreme Court ruling that extended the Fourth Amendment protection against unreasonable search and seizure to telephone communications.**
  - **In *Katz v. United States*, the Supreme Court held that people have a right of privacy in telephone communications, and therefore FBI recordings of Katz's pay telephone calls, obtained without a warrant, constituted an unreasonable search and seizure.**

# Is There Any Basis for Employees to Think Their E-mail is Private?

- In his concurrence, Justice Harlan developed a two-prong test:
  - the individual has exhibited an actual, subjective expectation of privacy, and
  - society is prepared to recognize that this expectation is objectively reasonable.

# Is There Any Basis for Employees to Think Their E-mail is Private?

- **Federal protection: The Electronic Communications Privacy Act (“ECPA”) criminalizes the interception of e-mail transmissions, and protects an individuals' expectation of privacy against unauthorized third parties, Internet service providers, and the government in the absence of a court order.**
  - **“No otherwise privileged wire, oral or electronic communication intercepted [in violation of the ECPA] shall lose its privileged character.” 18 U.S.C. § 2514(4).**
  - **However, authorization to access e-mail communications exists where the user of the e-mail service consents to the e-mail review. 18 U.S.C. § 2701(c).**

# Is There Any Basis for Employees to Think Their E-mail is Private?

- **State law protection: New York's CPLR § 4548 provides that there is a reasonable expectation of privacy over e-mail communications between parties in a privileged relationship.**
  - **CPLR § 4548 states that "no communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication."**
- **The protection is not absolute: the "for the sole reason" language in CPLR § 4548 is a significant limitation on the extent of the protection provided under the statute.**

# Is There Any Basis for Employees to Think Their E-mail is Private?

- **The method of communication largely determines your expectation of privacy.**
  - **Using a megaphone at a football stadium or other public arena to speak to your attorney – neither subjective nor objective expectation of privacy.**
  - **Sending a letter to an attorney in a sealed envelope, marked “privileged and confidential”, and by special courier – subjective and objective expectation of privacy.**

# Is There Any Basis for Employees to Think Their E-mail is Private?

- **Sending an e-mail marked “privileged and confidential” to one’s attorney?**
  - **The expectation of privacy depends.**
    - › **Who has access to the e-mail?**
    - › **Are the e-mails regularly accessed by someone other than the sender?**
    - › **Is the sender on notice of this third party access?**

# The *Scott* Decision

- The underlying dispute in *Scott* concerned whether Dr. W. Norman Scott, a physician formerly employed by Beth Israel, was entitled to severance pay under his employment contract.
  - Beth Israel's attorneys received e-mail correspondence between Dr. Scott and his attorneys, notified Dr. Scott's attorneys, and asserted that Dr. Scott had waived any privilege by using Beth Israel's e-mail system.

# The *Scott* Decision

- **The Court's ruling on the attorney-client privilege: No attorney-client privilege because Beth Israel's e-mail policy meant that employees did not have any personal privacy rights over communications sent over the company's e-mail server.**
  - **The relevant *Asia Global Crossing* factors that were applied in *Scott* include whether:**
    - **The company maintains a policy banning personal or other objectionable use;**
    - **The company monitors the employee's use of the computer or e-mail;**
    - **The company notifies the employee, or the employee is aware, of the use or monitoring policies.**

# The *Scott* Decision

- Justice Ramos held that the *Asia Global Crossing* factors had been met, and that the attorney-client privilege had been waived.
  - Beth Israel's e-mail policy provided that its electronic mail systems should be used for business purposes only and that employees had no personal privacy right in any material created or sent through the company's e-mail server.
  - Beth Israel's policy notified employees that e-mails could be accessed and disclosed "at any time without prior notice."

# The *Scott* Decision

- **The Court's ruling on the work product privilege: The work product privilege also had been waived.**
  - **The work product privilege is waived when a communication from an attorney to a client prepared in anticipation of litigation "is disclosed in a manner that materially increases the likelihood that an adversary will obtain the information."**
  - **Although an inadvertent production of privileged work product generally will not waive the privilege, there is an exception if the party's conduct is deemed so careless as to suggest insufficient attention to protecting the privilege.**

# The *Scott* Decision

- The Court looked to the lawyer's ethical duty to protect communications with clients:
  - Quoting an ethics advisory opinion issued by the New York State Bar Association, Justice Ramos cautioned that Lawyers who use technology to communicate with clients must use "reasonable care," which means that lawyers "must assess the risks attendant to the use of technology and determine if the mode of transmissions is appropriate under the circumstances."
  - Disciplinary Rule 4-101: Lawyers have an ethical duty to protect client confidences and secrets, and may be subject to discipline for "knowingly" revealing a client confidence or secret.
  - "When client confidences are at risk, [a lawyer's] *pro forma* notice at the end of the e-mail is insufficient and not a reasonable precaution to protect its clients."

# The *Scott* Decision

- To avoid violating the ethical duty to protect client confidences and secrets and waiving the privilege, *Scott* suggests that outside counsel who represent individuals in a company should
  - find out if the client's company has an e-mail use policy;
  - discuss the risks of e-mail communications with clients;
  - advise clients whether e-mail communications over the company's e-mail server should be avoided altogether.

# Implementing E-mail Use Policies to Address The Employer's Litigation Risks and Protect the Privilege

- **E-mails sent over an employer's e-mail server become part of the company's permanent records – even when "deleted", these e-mails often can be recalled. This may include e-mails containing:**
  - **Offensive jokes that may later support a claim of gender or racial discrimination.**
  - **Inappropriate communications with client that may become “evidence” in a regulatory investigation of suspected misconduct.**

# Implementing E-mail Use Policies to Address The Employer's Litigation Risks and Protect the Privilege

- **E-mail use and monitoring policies serve the important company interest in limiting the company's legal exposure. Policies may be drafted to:**
  - **Deter transmission of confidential or proprietary information;**
  - **Ensure appropriate communication with clients (possibly through monitoring);**
  - **Avoid unauthorized download of software onto the company's computer system.**
  - **Assist the employer's deterrence and investigation of misconduct.**
- **There is no “one-size fits all” e-mail use policy.**

# Implementing E-mail Use Policies to Address The Employer's Litigation Risks and Protect the Privilege

## HYPOTHETICAL

- **The Big Bucks Securities Company's e-mail use policy provides as follows:**
  - **the electronic mail system, Internet access system, and related technology, as well as any wired or wireless networks, are the property of the company;**
  - **all information created, received, saved or sent on the e-mail is the property of the company;**
  - **employees have no personal privacy right in any e-mail created, received, saved or sent; and**
  - **the company has the right to access, monitor and disclose any employee e-mail without notice.**

# Implementing E-mail Use Policies to Address The Employer's Litigation Risks and Protect the Privilege

- **Big Bucks learns that it is being investigated by the SEC for improper trading practices involving market timing. The company may have direct liability, or secondary liability for failing to supervise violations by its employees who have been targeted by the SEC for their market timing practices.**
- **Big Bucks helps each of the targeted employees to retain personal attorneys. All of these employees regularly communicate with their attorneys by e-mail. One employee e-mails his attorney a description of the way the company supported his market timing business while failing to pay close attention to certain things he did to avoid bothersome restrictions imposed by Big Bucks and the fund companies whose funds he traded.**

# Implementing E-mail Use Policies to Address The Employer's Litigation Risks and Protect the Privilege

- **The SEC issues a broad request to Big Bucks for all documents relating to market timing practices, including e-mails. Individual lawyers for employees are notified of the production, claim privilege over e-mails with attorneys, and receive support from company counsel, but the SEC claims no privilege could have existed in light of the company's e-mail use policy.**
  - **Lawyers representing a group of plaintiffs in a civil litigation file a complaint claiming plaintiffs were defrauded by market timing at Big Bucks, and issue subpoenas requesting e-mails with anyone (including attorneys) relating to market timing.**
  - **Do Big Bucks and its employees need to produce these e-mails? Might the result be different if its e-mail use policy carved out e-mail with personal attorneys?**

# The Implications of *Scott* to In-House Counsel and Strategies to Consider

- **In-house counsel should determine if the employer shares their employees' interest in maintaining the confidentiality of communications with personal attorneys, and if so, modify e-mail use policies to**
  - **inform employees that they have no expectation of privacy regarding any e-mails sent *except* as provided for in the e-mail use policy;**
  - **state that the company intends to respect the confidentiality of employee communications with personal attorneys, and that the company does not intend to monitor, review or disclose such communications;**

# The Implications of *Scott* to In-House Counsel and Strategies to Consider

- **notify employees that they may use the work e-mail to communicate with personal attorneys provided that the employee notifies the employer that such communication may take place;**
- **advise employees to state in their e-mails with personal attorneys that the communication is “privileged and confidential.”**

# The Implications of *Scott* to In-House Counsel and Strategies to Consider

- **Additional protection against inadvertent disclosure in a litigation:**
  - **add a notification to e-mails sent from the company that the company may monitor employee communications except for those it is on notice are confidential communications with personal counsel;**
  - **enter into a clawback agreement (when the company is a party in a civil litigation) expressly providing (i) that either party may give notice of an inadvertent production of privileged e-mails between employees and their personal attorneys; and (ii) the recipient will not use the information contained in those e-mails in the litigation and will return or destroy any copies.**

# Is narrowing the privilege the current trend?

- There are several signs of a trend by the courts to strip away at the applicability of attorney-client and work product privilege protections, particularly with respect to communications involving electronic media.
  - ***Vioxx***: invites closer scrutiny of e-mails between in-house counsel and employees, and narrows those e-mails from in-house counsel that will be deemed privileged.
  - ***Scott***: concludes that e-mails with personal attorneys are not privileged where the company has an e-mail use policy that puts employees on notice that they do not have the expectation of confidentiality necessary to protect privileged communications.

# Is narrowing the privilege the current trend?

- ***Williams v. Sprint/United Management Co.***: imposing a duty to produce documents in their native format, including metadata, despite the fact that the metadata may reveal privileged communications and its production may result in a waiver of privilege.
- The essential role of the attorney-client and work product privileges to the effective representation of clients demands that attorneys remain vigilant in monitoring attempts to narrow the privilege.