Corporate Attorney-Client Privilege in the Digital Age: War on Two Fronts?

Tom Spahn, Stanford Law School
Corporate Attorney-Client Privilege in the Digital Age: War on Two Fronts?

Introduction .......................................................................................................................................................... 2

The Courts and Corporate Attorney-Client Privilege: Misguided Erosion? ............................................ 3

I. Multi-District Vioxx Litigation ...................................................................................................................... 4

II. Attorney-Client Privilege in Vioxx .................................................................................................................. 7

A. The Attorney-Client Privilege, Generally ...................................................................................................... 7

B. Attorney-Client Privilege in the Digital Era .................................................................................................. 9

C. The Types of Documents at Issue ............................................................................................................... 11

D. Merck’s Privilege Claims ................................................................................................................................ 12

   i. Pervasive regulation .................................................................................................................................... 12

   ii. Collaborative effort .................................................................................................................................... 13

   iii. Reverse engineering ................................................................................................................................ 13

   iv. The ironic rejection of Merck’s claims ...................................................................................................... 14

E. The District Court’s Privilege Ruling ........................................................................................................... 14

III. Was Vioxx a Turning Point for the Attorney-Client Privilege? .................................................................. 18

A. Corporate and In-House Counsel Guidance on Electronic Communications .............................................. 18

   i. Pre-Vioxx ...................................................................................................................................................... 18

   ii. Post-Vioxx – “Litigation Alert” .................................................................................................................. 22

B. Subsequent Cases .......................................................................................................................................... 24

   i. Fueling fears: courts following the Vioxx methodology .............................................................................. 24

   ii. Rays of hope: courts rejecting the Vioxx methodology ........................................................................... 26

IV. Summary: Judicial “Erosion” of the Privilege? .......................................................................................... 28

Executive Agencies and the Privilege: A Coercive “Culture of Waiver”? .................................................. 31

I. The Journey to a Culture of Waiver – and Back ............................................................................................ 32

A. The Holder Memo .......................................................................................................................................... 32

B. The Thompson Memo and the 2004 Federal Sentencing Guidelines ......................................................... 33

C. The McCallum Memo .................................................................................................................................. 34

D. 2006 & 2007 ............................................................................................................................................... 35

   i. The ABA task force, the Specter Bill, and mounting criticism .................................................................... 36

   ii. The McNulty Memo ................................................................................................................................ 37

E. The 2008 Attorney-Client Privilege Protection Act and the Filip memo .................................................. 39

II. Summary: Executive Erosion of the Privilege? ............................................................................................ 40

A. Lingering criticism ......................................................................................................................................... 41

B. The Pendulum Has Swung Back .................................................................................................................. 42

Conclusion .......................................................................................................................................................... 43
INTRODUCTION

Is the corporate attorney-client privilege under attack? Many attorneys and commentators contend not only that yes, it is, but also that this battle rages on two fronts. First, they argue that courts are engaging in a misguided erosion of the privilege when faced with expansive electronic discovery. And second, they insist that policies exercised by executive agencies are chilling compliance conversations within corporations by creating a coercive “culture of privilege waiver.”

2006 and 2007 represented landmark years for the corporate attorney-client privilege. In those years, the District Court for the Eastern District of Louisiana used methodology in In re Vioxx Products Liability Litigation¹ that left many critics convinced that the attorney-client privilege for electronic documents was doomed.² Nearly simultaneously, the American Bar Association (ABA) successfully led a lobbying crusade against the perceived culture of waiver that had grown pervasive within executive agencies. These two pressures – judicial focus away from privilege and a move by the executive toward more robust protection – cut in opposite directions, and left many questioning the current boundaries of the privilege.

Surveying the privilege landscape a few years later, now that the dust has settled, we can consider the result of these shake-ups. Many still contend that the privilege only retains a weakened shell of its former protections³—at severe cost to the public’s confidence that corporate officers will consult their in-house counsel early and often to ensure legal compliance.

¹ 501 F. Supp. 2d 789 (E.D. La. 2007).
³ See, e.g., Sherry Karabin, Thanks, But It’s Not Enough: The Justice Department Won’t Ask Companies To Waive Their Attorney-Client Privilege Anymore, CORP. COUNS., Nov. 2008, at 24.
I disagree. I think (and hopefully will convince the reader) that, despite some bumps in the road, the privilege soldiers on, providing adequate, albeit not complete protection for corporate attorneys.

I will consider both fronts of the privilege battleground. First, looking to Vioxx as a paradigmatic example of a court facing a mountain of electronic communications, I will show that although the argument that Vioxx itself damaged the privilege is valid, courts have generally been reluctant to follow this methodology. And second, examining the trend of executive agencies pushing for waivers, I will show that despite the public pressure to allow full regulatory investigation of corporate compliance, the privilege remains a robust protection for companies willing to internally investigate and cooperate with government intervention.

**THE COURTS AND CORPORATE ATTORNEY-CLIENT PRIVILEGE: MISGUIDED EROSION?**

For many years, courts have struggled to determine how to apply the attorney-client privilege to electronic communications. These types of documents have proven particularly troubling to sort through in the intra-corporate context because of 1) the incredible increase in the sheer volume of communications that circulate within a company in the digital age and 2) the evolving nature of in-house counsel from strictly legal advisor to a mixed business and legal role within companies.

For many years, courts struck a reasonably fair balance when applying the corporate privilege standards laid out in *UpJohn*. Then came *In re Vioxx Products Liability Litigation*. To

---

those convinced of the courts’ erosion of in-house counsels’ attorney-client privilege, \textit{Vioxx} presents a drastic move away from privilege protection. The methodology laid down by the \textit{Vioxx} court proves particularly troubling because this case presents a paradigmatic situation in the era of digital communications. Here a court wrestled with a massive amount of electronic communications, forwarded throughout a company in a highly regulated industry, with lawyers providing a myriad of both legal and non-legal advice – a common scenario in modern corporations. Grappling with this difficult situation, the \textit{Vioxx} court used a simple, easily applied methodology to sort through the privilege review process based on communications’ distribution patterns within the corporation. This allowed the court to extricate itself from a complex and time-consuming document-by-document analysis. However, as discussed below, the methodology does not keep with the spirit of the attorney-client privilege and could significantly discourage ethical corporate behavior in the future.

If \textit{Vioxx} had established a new widespread attorney-client privilege standard, it could have devastated corporations seeking to involve their in-house counsel early and often to ensure legal compliance. In reality, however, the cases that followed show that courts generally have not been convinced to forgo a thorough analysis in favor of \textit{Vioxx}’s expedient methodology.

I. \textit{MULTI-DISTRICT VIOXX LITIGATION}

In September 2004, Merck withdrew its wildly popular drug Vioxx from the market after a clinical trial suggested that extended use increased the risk of heart attack or stroke.\textsuperscript{6} By that time,\textsuperscript{6}

approximately twenty-million patients had taken Vioxx.\(^7\) By February 2005, a litigation storm had begun with plaintiffs alleging various tort, products liability, failure-to-warn, fraud, and warranty claims in multiple federal districts.\(^8\)

To speed the judicial process, a judicial panel on multidistrict litigation organized plaintiff and defendant steering committees to coordinate non-case-specific discovery. During the initial discovery phase, Merck claimed privilege on 30,000 documents totaling 500,000 pages.\(^9\)

Merck’s document production quickly overwhelmed the District Court for the Eastern District of Louisiana. The court initially attempted to adhere to a traditional privilege analysis, undertaking the enormous task of personally reviewing all 30,000 documents. For most of 2006, the district court reviewed every single document. Not surprisingly, this system proved ineffective – often leading to conflicting rulings on duplicate copies of the same document. Of the 30,000 documents reviewed, the district court upheld the privilege for only 491.\(^10\)

The Fifth Circuit, on \textit{writ of mandamus}, stepped-in and ordered the district court to institute new procedures to ensure a timely and effective review of Merck’s privilege claims.\(^11\) Specifically, the circuit court ordered reexamination, \textit{in camera}, of 2000 representative documents to establish the privilege rules to control the entire discovery process.\(^12\) Recognizing the magnitude of even this task, the decision urged the district court to seek assistance in the review process. The Fifth

---

\(^7\) \textit{In re} Vioxx Prods. Liab. Litig., 501 F. Supp. 2d at 790.
\(^11\) \textit{Id.} at *3.
\(^12\) \textit{Id.} at *2. Plaintiffs were also allowed to specify 600 additional documents from Merck’s privilege log in the review. \textit{In re} Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 791-92 (E.D. La. 2007).
Circuit did not provide any additional guidance, and left the duty of determining the technicalities of the review methodology solely to the lower court.\textsuperscript{13} In accordance with the Fifth Circuit’s ruling, the district court sought help from a special master and a special counsel to develop an effective review process for the sample documents.\textsuperscript{14} The court appointed Professor Rice, an American University’s Washington College of Law professor,\textsuperscript{15} as special master and Mr. Barriere, a partner at Phelps Dunbar, LLP, as special counsel.\textsuperscript{16} Together, they reviewed the exemplary documents and developed a comprehensive system to streamline the privilege review process.\textsuperscript{17}

The court relied on Mr. Rice and Mr. Barriere’s recommendations and created a series of document categories, applying a presumption of the primary purpose of communications that fit within each category. In theory, this allowed the court to rapidly review the privilege claims for large quantities of e-mails and other electronic communications. In practice, however, the court’s methodology in establishing and applying these categories does not keep with the spirit of the attorney-client privilege. The court focused on a message’s distribution pattern within the company, rather than the content of the communication when assigning categories. This approach

\begin{itemize}
\item \textsuperscript{13} In re Vioxx Prods. Liab. Litig., 2006 WL 1726675, at *3.
\item \textsuperscript{14} In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d at 791-92.
\item \textsuperscript{15} Professor Rice’s bio can be found at http://www.wcl.american.edu/faculty/rice/ (last visited May 7, 2010).
\item \textsuperscript{16} Mr. Barrier’s bio can be found at http://www.phelpsdunbar.com/attorney-profile/profile/barriere-49.html (May 7, 2010).
\item \textsuperscript{17} The special master conducted a document-by-document review of each of the 2000 sample documents and the 600 documents that plaintiffs selected from Merck’s privilege log. In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 808 (E.D. La. 2007). Professor Rice applied the privilege principles that he developed (discussed in Part E) to each document, sometimes asking Merck for additional affidavits of support. Id. He compiled his recommendations in a spreadsheet, reconsidering duplicate documents or pieces of documents with inconsistent recommendations. Id. at 793. The court adopted the special master’s findings and recommendations in its decision. Id. at 816.
\end{itemize}
ignored the fact that for Merck’s in-house counsel, *the corporation is the client* and internal messages sent across corporate departments, therefore, never leave the confidential attorney-client relationship.

II. ATTORNEY-CLIENT PRIVILEGE IN VIOXX

A. The Attorney-Client Privilege, Generally

Few doctrines are as critical to legal practice as the attorney-client privilege. Without this protection, our adversarial system would crumble as fears of confidential communications coming to light would dissuade open and honest requests for legal advice. Litigation costs would rise and judicial efficiency would fall as attorneys attempt to advise clients after receiving only partial information.

Fundamentally, the attorney-client privilege protects a client’s communication with a lawyer, and the lawyer’s response to this communication. The Vioxx court’s attorney-client privilege definition focused on a “widely quoted” definition from *United States v. United Shoe Machinery Corp.* (adopted by the Fifth Circuit in *In re Grand Jury Proceedings*) and the unenacted Federal Rules of Evidence, proposed rule 502(b). The court condensed the elements of a communication covered by the attorney-client privilege to 1) an attorney, 2) a client, 3) a communication, 4) confidentiality anticipated and preserved, and 5) legal advice or assistance

---

20 517 F.2d 666, 670 (5th Cir. 1975).
21 Fed. R. Evid. 502(b) proposed rule.
being the purpose of the communication. The court also noted that for a lawyer’s response to a communication, only “derivative protection” applies. That is, the response only enjoys protection “to the extent that it reveals the content of the client’s prior confidential communication.”

A proper analysis of whether a communication between attorney and client enjoys attorney-client privilege primarily considers the message’s content, not the context of how they exchanged the communication. Not every communication with a lawyer falls under the privilege, nor can one create a privilege by merely labeling a document “privileged.” Thus, a company cannot veil a non-privileged communication by simply sending a copy to a lawyer.

The attorney-client privilege essentially belongs to clients. For in-house lawyers, the corporation is the client. A client may explicitly waive the attorney-client privilege and disclose a lawyer’s advice to a third-party outside the privilege. A more complicated situation exists when

Oddly, the court does not cite the Federal Rules of Civil Procedure, the statutory source of the rule. However, the court does cite the Federal Rules of Civil Procedure for the requirement that it decide, de novo, objections to findings of fact and legal conclusions made by a special master and for the proposition that courts should allow broad discovery. In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 803, 813 (E.D. La. 2007) (citing Fed. R. Civ. P. 53(g)(3)-(4)).

For a more detailed discussion on the derivative protection rule, see Paul P. Rice, 1 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 5:2 (Thomson West 2d ed. 1999).

Context could be important if the communication occurred in the presence of a third-party. This case, however, dealt with internal company communications. The work product doctrine, on the other hand, focuses significantly on the context (pending litigation) of a communication.

Kobluck v. Univ. of Minn., 574 N.W.2d 436, 441 (Minn. 1998).

United States v. Freeman, 619 F.2d 1112, 1119-20 (5th Cir. 1980).

Avianca, Inc. v. Corriea, 705 F. Supp. 666, 680 n.4 (D.D.C. 1989), aff’d, 70 F.3d 637 (D.C. Cir. 1995); see also MODEL CODE OF PROF’L CONDUCT R. 1.13(a) (1983). This has important implications when considering whether an individual within a corporation has (or could have) waived the attorney-client privilege for a corporate communication. Under Upjohn, employees at any level of the corporation may have a privileged interaction with in-house counsel, depending on the content of the communication. Upjohn Co. v. United States, 449 U.S. 383 (1981).

Again, fellow members of the corporation are usually not considered “third-parties,” but members of the same legal entity. See supra note 28.
a court must determine if a client has implicitly waived the privilege after taking certain actions inconsistent with the privilege, such as relying on an affirmative defense of “advice of counsel.”

Courts have increasingly held that an accidental disclosure will not destroy the confidentiality, but rather a client must take some sort of deliberate action to waive the privilege. Only in these situations, when the message leaves the confidential relationship, does the context of how the party sent the message become important to the analysis.

B. **Attorney-Client Privilege in the Digital Era**

In the past two decades, technological advances have fundamentally changed how the world communicates. E-mail, text messages, electronic document editing, and other digital communication tools have had a particularly dramatic effect on the pace and efficiency of business decisions. Integrating vast networks of corporate personnel spread throughout the globe has become not only possible, but essential for a modern corporation. These communications often defy classification; many resemble written documents in form, but have substance closer to a conversational exchange. For example, a company server may retain a permanent record of an executive’s written e-mail, yet the nature of the communication may be a sentence or two (or even a fragment) that previously would have been spoken over the phone rather than placed in a letter.

The advent of electronic communications has greatly complicated the application of the attorney-client privilege, particularly for in-house counsel. In the modern era, lawyers have

---


stepped far beyond their traditional role as legal advisors. Attorneys with scientific and business backgrounds offer mixed legal and non-legal advice at many points in the decision-making process, especially in highly regulated industries where nearly every decision involves some legal aspect. Lawyers have also become involved much earlier in the decision-making process, often providing legal insight from the very earliest stages of forming company policy or decisions. While in the past conversations between legal and non-legal personnel may have simply been lost to the ether, now there are permanent records of nearly every “conversation” conducted through text messages or e-mails. Legal personnel are party to nearly every document review process, injecting both legal and non-legal comments throughout electronic files. Corporate officers can forward a lawyer’s communication to non-legal personnel, or can include a lawyer on a chain of communications between legal and non-legal personnel. In other words, deciphering the boundaries of the attorney-client privilege has become a tangled mess where traditional review procedures simply will not suffice.

The free flow of communications across corporate departments has greatly enhanced efficiency as legal, business, and scientific members of the company collaborate continuously. In many ways, this efficient use of communication has greatly enhanced the value of in-house counsel. By involving the legal department early in decisions, the company can save time and money by tailoring decisions to legal or regulatory requirements early in the process, or even avoid legally infeasible courses of action at the outset. Many companies even require a final review of all external documents by the in-house legal department.

---

34 Id.
Although electronic communications provide significant efficiency improvement opportunities, they also present a significant danger to a company seeking to maintain attorney-client privilege over their internal communications. The ease with which one can widely distribute a permanent copy of a communication has greatly increased the danger of waiving the privilege, either through inadvertent or intentional disclosure to a party outside the confidential relationship. The *Vioxx* decision demonstrates a more subtle risk. A court seeking to quickly sort through electronic documents can lose sight of the fact that internal company documents do not leave the confidential attorney-client relationship. A court can therefore be tempted to seize on addressing and distribution patterns as a seemingly easy solution for sorting through the tangled masses of electronic documents.

C. *The Types of Documents at Issue*

In *Vioxx*, the special master recommended attorney-client privilege rules governing discovery of seven document categories: 1) memoranda that the author addressed solely to an attorney with a clearly identified legal question, 2) electronic messages addressed to lawyers and non-lawyers for review, comment, and/or approval, 3) communications (or attachments) that served “mixed” legal and non-legal purposes and were addressed to both lawyers and non-lawyers, 4) memoranda written *only* to an attorney within the legal department, 5) additional communications sent to non-lawyers after the discussion with an attorney ended, 6) correspondence addressed to a lawyer but *copied* to non-lawyers, and 7) electronic messages to or from a lawyer that did not reveal the substance of the client’s request or the lawyer’s advice.36 As discussed in Part E, the district court (as the special master recommended) analyzed these

---

categories based on the primary purpose of the communication, placing heavy emphasis on how the company routed (addressed) these internal messages.\textsuperscript{37}

D. Merck’s Privilege Claims

Merck claimed very broad attorney-client privilege for internal corporate communications—typical of companies operating in highly regulated industries. Under the theories of “pervasive regulation,” “collaborative effort,” and “reverse engineering,” Merck claimed that nearly every communication that even tangentially involved its legal department enjoyed attorney-client privilege protection.\textsuperscript{38} The Vioxx court recognized these claims as overly-broad, but instead of analyzing each document and narrowly scaling back the privilege when the primary purpose of the communication did not involve legal advice, the presumption categories drastically narrowed the privilege’s scope.\textsuperscript{39}

i. Pervasive regulation

First, Merck argued that in the highly regulated pharmaceutical manufacturing industry every company decision involves some legal aspect.\textsuperscript{40} This “pervasive regulation” makes legal personnel involvement essential to nearly every aspect of the company’s business. Although the court recognized that such a claim had “some merit,” it properly rejected such a broad application of the attorney-client privilege. The court acknowledged that the burden of regulatory compliance required more involvement from legal personnel on many decisions, but refused to establish a per se rule that every document sent to the legal department gained protection.\textsuperscript{41} Instead, Merck

\textsuperscript{37} See id. at 796-98, 809-13; infra Part E.
\textsuperscript{38} In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d at 789.
\textsuperscript{39} See infra Part E.
\textsuperscript{40} In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 800 (E.D. La. 2007).
\textsuperscript{41} Id. at 800-01.
retained the burden to establish that the type of assistance sought from the legal department was actually legal assistance protected by the privilege.\(^{42}\)

**ii. Collaborative effort**

Second, and similarly, Merck claimed that its strategic decisions involved a “collaborative effort” across all departments.\(^{43}\) Therefore, every communication that eventually passed through the legal department gained the nature of a privileged request for legal advice. Again, taking the position that a document gains *per se* protection simply by passing through a lawyer’s hands does not keep with the spirit of the attorney-client privilege – the advice sought by the client or given by the lawyer must be legal in nature.

**iii. Reverse engineering**

Third, Merck argued that, under a theory of “reverse engineering,” even documents that were not privileged themselves could become privileged as they passed through the legal department for editing, even if the lawyers’ specific comments were redacted.\(^{44}\) Merck insisted that by allowing discovery of an electronic document *before* a lawyer’s advice on changes and then discovery of the same document *after* the lawyer’s recommendations, an adversary could “reverse engineer” the privileged substance of the lawyer’s advice.\(^{45}\)

Again, the court agreed that Merck’s argument had “some truth,” but ultimately rejected this reasoning.\(^{46}\) First, the court analogized to oral communications where an executive’s decision, despite being made after receiving advice from a lawyer, does not become privileged. Second, the court held that delegating decision-making responsibility to attorneys (by requiring them to review

\(^{42}\) *Id.* at 801.

\(^{43}\) *Id.* at 803.

\(^{44}\) *Id.*


\(^{46}\) *Id.*
documents before they are released or disseminated) does not give the transaction a “cloak of secrecy around all incidents of such a transaction.”

iv. **The ironic rejection of Merck’s claims**

The district court correctly dismissed Merck’s privilege claims under these three theories as overly-broad. As the court reasoned, strictly applying any of these theories would essentially render nearly every internal corporate communication protected and therefore non-discoverable. Unfortunately, however, the court based its decision on an arbitrary analysis of how the communication flowed within the company – how documents were routed and addressed rather than the substance of the communication. Ironically, the court rejected Merck’s arguments because they focused on the context of the communication rather than the content – the same logic that the court used to create its categories of documents.

E. **The District Court’s Privilege Ruling**

i. **Primary purpose**

Rejecting Merck’s *per se* privilege claims, the court turned its attention to the representative communications. In its analysis, the court considered each document type’s primary purpose. Simply stated, if a communication’s primary purpose was to seek legal advice, the communication was privileged. Of course applying this seemingly simple rule becomes incredibly complicated in a tangled web of internal company communications. Throughout its primary purpose analysis, the court placed significant emphasis on an electronic message’s

---

47 *Id.* at 805 (quoting United States v. Freeman, 619 F.2d 1112, 1119-20 (5th Cir. 1980)). The court also engaged in a thorough evaluation of how Merck’s legal department functions within the corporate decision-making enterprise. *Id.* at 805 n. 25; *see also* RICE, *supra* note 24, at § 5:15.

48 Merck’s specific objections to the special master’s findings are not discussed here. *See In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 813-14 (E.D. La. 2007).


50 *Id.* at 797.
distribution pattern within the company. The district court’s primary purpose standard is logically correct. The court erred only in the methodology it used to apply the standard.

ii. The court’s use of context-category primary purpose analysis

Applying the primary purpose analysis to each document category, the Vioxx court often arrived at the correct application of the attorney-client privilege. The troubling aspect of the decision does not involve the logic of the primary purpose argument, but rather the part of the communication that the court looked to when establishing presumptions for the primary purpose for a given document type. The Vioxx court did not focus on the content of the message, but rather it considered the internal distribution pattern (the message’s context) when establishing these presumptions.

For example, the court presumed that documents and attachments sent only to Merck’s legal department were sent primarily to obtain legal advice.\(^\text{51}\) This presumption applied regardless of whether Merck routed the documents through the legal department as a matter of company policy (e.g. requiring the legal department to approve all company press releases). The privilege applied to the lawyer’s response only if the document on which the lawyer commented was a “typical legal instrument” (such as a patent or contract).\(^\text{52}\) Furthermore, if the lawyer’s substantive comments related extensively to non-legal issues (technical, scientific, etc.) then the privilege did not cover the response.\(^\text{53}\)

\(^{51}\) Id.

\(^{52}\) Id. at 802.

\(^{53}\) Id.
On the other hand, the court held that electronic documents sent to both lawyers and non-lawyers for both legal and non-legal purposes, held a “mixed” purpose and therefore were not sent *primarily* to obtain legal assistance. The court reasoned that an attorney’s edits could not transform the non-privileged communications into privileged documents under the derivative theory for attorney responses. The court continued, holding that because Merck “chose” the “form” of their attorneys’ advice (electronic line edits on discoverable documents), it could not convert discoverable documents into privileged communications. Sensibly, the court at least allowed Merck to redact the attorneys’ comments.

Finally, if the electronic document began as privileged, received attorney comments, but then subsequently went to other non-lawyers for further review, the court held that Merck had waived the privilege (except for the attorney comments which it could redact). The court correctly recognized that documents sent for both legal and non-legal purposes may or may not enjoy attorney-client privilege protection depending on whether the content of the communication primarily involved a legal purpose. However, the court’s analysis included both the appropriate content discussion *and* a factor relating to the context (who received the message) of the communication. The context of an internal company communication should not influence the

---

54 *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 810 (E.D. La. 2007) (“communications and attachment . . . sent to both lawyers and non-lawyers for both legal and non-legal purposes”).

55 *Id.*

56 *Id.*

57 *Id.*

58 The court does note that if the original document was privileged, the entire document, including the attorney comments, retained the privilege. *Id.*

58 Unless the recipient forwarded the communication merely to keep the non-lawyer appraised of the legal advice sought. In that case, the privilege survived. *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d at 810-11. The court did allow Merck to provide additional information to substantiate its privilege claims. Since often the documents passed through the legal department as part of a mandatory review process (that applied to all documents) the court presumed the communications did not have a request of legal advice as their primary purpose. *Id.* at 805 n. 25.
presumption of whether a mixed-purpose document has a primarily legal purpose. Instead, the analysis of an internal communication, which has not left the confidential relationship, should only consider content.

Essentially, the court focused on the document’s internal routing to determine whether Merck waived the privilege. The court even recognized that a document might “otherwise be privileged” if a copy had only been sent to an attorney. However, the court made a context-based presumption – the communication’s primary purpose was not legal advice but some other business purpose because of the addition of the non-lawyers to the distribution chain. As discussed above, if a non-lawyer received advice from in-house counsel (a privileged document or attachment) the court found that forwarding this document to other non-lawyer personnel within the corporate structure for further comment or review waived the attorney-client privilege (unless the recipient forwarded the document “only to apprise them of the legal advice that was sought or received”). Again, this argument ignores the fact that the other non-lawyer members of the corporation are still members of the same legal entity and therefore within the scope of the confidential relationship. The client (the corporation) did not waive the attorney-client privilege by distributing documents internally.

Furthermore, using the court’s logic, Merck could only avoid the non-privileged presumption by creating separate lines of communications for document edits – one to the legal department and one to non-legal departments. This method would produce significant and

60 Id. at 809-10.
61 Id. at 810.
62 Id. at 805-06 (“If Merck had sent a wholly separate e-mail communication with the same materials to the lawyer, the [attorney-client privilege] claim could be successfully made for that single communication even though it otherwise served mixed purposes.”).
completely unnecessary inefficiency. Also, other members of the corporate team (members of the same legal entity) would not benefit from the legal advice passed to a particular member of the corporate structure.

III. WAS VIOXX A TURNING POINT FOR THE ATTORNEY-CLIENT PRIVILEGE?

A. Corporate and In-House Counsel Guidance on Electronic Communications

The Vioxx decision helped fuel the waves of fear already circulating through various corporate counsel groups who had begun to decry the increasing erosion of the corporate attorney-client privilege before 2007. Commentators widely predicted that courts would quickly adopt the Vioxx methodology because of the seemingly simple solution it offers to electronic discovery privilege difficulties. In reality, after Vioxx, courts wrestling with similar privilege issues arrive at decisions that are widely distributed across the attorney-client privilege spectrum. While in some ways this may alleviate some of the most intense fears that courts will universally follow the Vioxx jurisprudence, the wide distribution also risks validating the Supreme Court’s famous insight in Upjohn, that an uncertain privilege is no privilege at all.

i. Pre-Vioxx

The Association of Corporate Counsel (ACC), sensing “an increasing concern . . . [that] courts seem to be inappropriately mixing up the long-standing recognition and respect for a client’s right to confidential counsel with the current focus on corporate transparency” conducted a

63 See, e.g., ASS’N OF CORPORATE COUNSEL, ATTORNEY-CLIENT PRIVILEGE EROSION IN THE IN-HOUSE CONTEXT (updated 2009).
64 See ASS’N OF CORPORATE COUNSEL, ASSOCIATION OF CORPORATE COUNSEL SURVEY: IS THE ATTORNEY-CLIENT PRIVILEGE UNDER ATTACK? (2005), [hereinafter 2005 Study].
survey to determine the extent of corporations’ diminishing trust in attorney-client privilege protections.\textsuperscript{66} The 2005 study, involving 363 corporate counsels from major companies, demonstrated the conflicting dynamic between the importance that corporations place on the ability to rely on the attorney-client privilege in compliance matters and the increasing fear that the privilege is “under attack.”\textsuperscript{67} In-house counsel overwhelming felt that clients are “aware of and rely on privilege when consulting them” (93% for senior-level employees), that “[a]bsent the privilege, clients will be less candid,” (95%), and that the “[p]rivilege enhances the likelihood that clients will proactively seek advice (94%).\textsuperscript{68}

Despite the nearly universal view that frank and open conversations among company officers and counsel are essential to ensure compliance and proper corporate behavior, the survey found that “clients may be increasingly unwilling to rely on the long-established protections of the confidentiality of their lawyer’s counsel.”\textsuperscript{69} Troublingly, 30% reported that they personally had experienced erosion in their corporate client’s privilege rights.\textsuperscript{70} Corporate counsel expressed several concerns with this trend including a chilling effect on how corporations decide potentially legally risky matters, impaired self-regulation, and a decline in “informal” legal guidance shared throughout the corporation.\textsuperscript{71}

A second survey, conducted in 2006 by a coalition of corporate counsel groups including the ACC, the Business Roundtable, the Retail Industry Leaders Association, and the U.S. Chamber

\begin{itemize}
\item \textsuperscript{66} 2005 Study, \textit{supra} note 66 at 1.
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} \textit{Id.} at 3.
\item \textsuperscript{70} 2005 Study, \textit{supra} note 66 at 2.
\item \textsuperscript{71} \textit{Id.} at 9-10.
\end{itemize}
of Commerce expressed deepening concerns in the erosion of the privilege. The survey results, presented to Congress and the U.S. Sentencing Commission, stressed that the “attorney-client privilege is . . . essential to corporate compliance regimes. Without reliable privilege protections, executives . . . will be discouraged from asking difficult questions of seeking guidance regarding the most sensitive situations.”

Notably, many in-house counsel expressed concern that their ability to perform their critical function of encouraging compliant and ethical behavior has suffered as the privilege has eroded. Various in-house counsel stated, “[t]he assault on privilege seems . . . deeply misguided. . . . Counsel serve a critical role in encouraging compliance and transparency. These current policies run a significant risk of chilling attorney client communications in the future which will heighten . . . compliance risks.” Corporate executives expressed similar sentiments: “Our corporate strategy is to have in-house counsel active and involved in business deals early and often. We have found that this significantly minimizes the risk that employees engage in questionable behavior.”

In 2006, mere months before Vioxx, the ACC published a guide to “Pragmatic Practices for Protecting Privilege” that demonstrated a decreased willingness to rely on the attorney-client privilege to protect open and frank internal communications. In the face of the eroding privilege,

---

72 2006 Study, supra note 72, at 1. The American Bar Association worked in conjunction with the coalition and presented similar views to Congress.
73 Id. at 13-14.
74 Id. at 14. Interestingly, this survey foreshadows a subtle issue that Vioxx presents—less scrutiny for outside counsel asserting the privilege than when in-house counsel do the same. One company stated “Outside counsel urge their retention in part because they contend in-house counsel cannot assert the privilege as effectively as outside counsel” id.; see In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 797 (“In the few communications that were to and from Merck outside counsel . . . we assumed that legal advice was being sought and given unless the content of the communications indicated otherwise.”).
75 SUSAN HACKETT, ASS’N OF CORPORATE COUNSEL, PRAGMATIC PRACTICES FOR PROTECTING PRIVILEGE (2006).
the guide notes that some corporations have taken drastic approaches to protecting internal communications such as “[c]onduct[ing] only bare bones internal investigations, or none at all if possible, to minimize creation of privileged material.”76 The ACC notes that this “cautious approach,” including giving “only oral advice to management . . . constrain[s] the ability [of] corporate lawyers to provide effective legal counsel.”77 With respect to electronic communications, some corporations have even resorted to “e-mail policies prohibiting certain topics from even being discussed over e-mail.”78 At best, this practice leads to incredible inefficiencies and at worst it drastically chills the legal compliance dialogue within a corporation.

Even the National Conference of Chief Justices perceived a growing threat to the attorney-client privilege. The justices issued a resolution in 2006 to emphasize their support for maintaining robust attorney-client privilege protections for internal corporate communications. The resolution stated that “in response to the national concern raised by the conduct of corporate officials . . . some law enforcement and regulatory authorities have adopted policies . . . that could have the effect of eroding the attorney-client privilege, the Conference endorses and supports . . . committees devoted to the preservation of the attorney-client privilege and work-product doctrine that are so vital to our legal system.”79

The evidence points to the fact that, justified or not, before the Vioxx decision, corporations perceived erosion in their attorney-client privilege protections. Reacting to this perception, they changed the way that they do business—shifting policies away from involving lawyers early and

76 Id. at 23.
77 Id.
78 Id. at 32.
79 CONFERENCE OF CHIEF JUSTICES, RESOLUTION 9 IN SUPPORT OF STATE COMMITTEES ON ATTORNEY-CLIENT PRIVILEGE (2006).
often, and risking compliance failures rather than having their internal documents exposed through discovery.

ii. *Post-Vioxx – “Litigation Alert”*

If one could describe corporate counsel as “concerned” about attorney-client privilege before *Vioxx*, after this decision they descended into a full panic. The first widely disseminated notice explaining that the sky was falling came from the well-respected Practising Law Institute (PLI). In 2008, they published Hogan and Hartson LLP’s80 “Litigation Alert,” authored by partner Stuart M. Altman.81 The alert predicted that the *Vioxx* court “set out standards by which assertions of privilege over communications with in-house counsel may be judged by courts across the country.”82 The memo continued, warning that the “court’s analysis on issues such as mixed-purpose communications . . . will likely create guidelines to be adopted by other courts.”83 In response to this concern, Mr. Altman recommended several “best practices” for corporate electronic communications including “[k]eeping the two e-mail chains separate” when seeking advice on a document that will also be sent to non-legal personnel for advice and comment, not “mix[ing] general business discussion in with requests for legal advice,” “separat[ing] legal comments on documents from non-legal ones,” and “stat[ing] explicitly that you want legal advice of comments” when sending an e-mail or document to in-house counsel.84

---

80 Now named Hogan Lovells LLP.
81 Mr. Altman, a partner in Hogan Lovells’ Washington, D.C. office, regularly counsels companies on the adoption and operation of their compliance programs. His bio can be found here: http://www.hoganlovells.com/stuart-altman/.
82 ALTMAN, supra note 2, at1-5.
83 Id.
84 Id.
Roman Silberfeld, managing partner of Robins, Kaplan, Miller & Ciresi LLP’s Los Angeles office, offered similar advice in the Los Angeles Daily Journal.\textsuperscript{85} Since the court placed “emphasis . . . not only on the substantive nature of the communication, but also on the method of the communication to determine the privilege, . . . do not include nonlegal parties in communications expected to be privilege [regardless of whether these parties are within the confidential relationship].”

These recommendations are logical considering the \textit{Vioxx} court’s methodology when applying the attorney-client privilege to Merck’s internal communications. Unfortunately, they also create significant inefficiencies by requiring in-house counsel to create separate chains of e-mails and comments and continually evaluate the nature (legal or non-legal) of their conversation with their fellow corporate employees. Besides the explicit inefficiencies, these steps also likely implicitly chill corporate officers’ willingness to even approach in-house counsel. If even a perceived risk of disclosure of a corporate officer’s request for advice exists (especially in “gray-areas” where the advice involves both legal and business judgments), the officer will likely just not ask the question.

Even Congress recognized the chilling effect from forcing in-house counsel to engage in complex (and artificial) decision-making as to whether a particular conversation fits into business or legal advice. In 2008, Senator Specter introduced a bi-partisan bill to attempt to protect the attorney-client privilege because “[t]he ability of an organization to have effective compliance

programs and to conduct comprehensive internal investigations is enhanced when there is *clarity and consistency* regarding the attorney-client privilege.”

**B. Subsequent Cases**

i. *Fueling fears: courts following the Vioxx methodology*

Several of the cases that followed *Vioxx* show that the ACC’s fears are not without merit. In rapid succession during 2008 and 2009, three courts seized on the *Vioxx* methodology as an effective tool to sort through internal electronic document attorney-client privilege review issues.

In *In re Seroquel*, the District Court for the Middle District of Florida explicitly followed *Vioxx* by both rejecting AstraZeneca’s *per se* privilege claims and by placing heavy emphasis on the distribution patterns of internal communication.\(^87\) Citing *Vioxx*, the *Seroquel* court viewed AstraZeneca’s claims with suspicion, placing a heavy burden on the company: “The structure of certain business enterprises, when their legal departments have broad powers, and the manner in which they circulate documents is broad, has consequences.”\(^88\) The judge also implicitly spoke critically of free exchange of information within the corporation: “If Merck had sent a wholly separate e-mail communication with the same materials to the lawyer, the same claim could be successfully made. Merck, . . . ‘could have had a V-8,’ but it chose another format . . . and cannot now be heard to complain about the consequences.”\(^89\) The *Seroquel* court does not address the inefficiency of maintaining separate lines of communications with legal and non-legal personnel,

---

88 *Id.* at *4.
89 *Id.*
the possible chilling effect that such a “wall” would create, nor the fact that the communications in question remained within the confidential attorney-corporation (as the client) relationship.  

Following Seroquel, another Florida court, the district court for the southern district, chastised Humana, Inc. for a “structure of certain business enterprises, when their legal departments have broad powers, and the manner in which they circulate documents is broad.” The court opined that such distribution “has consequences that those companies must live with relative to their burden of persuasion when privilege is asserted.” Similarly, the Humana court ignored the benefits, such as an improved culture of compliance, from the choice to widely circulate legal advice throughout the company.

Finally, in late 2009, Jerome J. Shestack, special master in the In re Avandia multi-district litigation, filed his report with the District Court for the Eastern District of Pennsylvania. His report followed the Vioxx trend of focusing on the addressing patterns of electronic communications. For example, his analysis of one communication proceeds “the prior e-mail from Krall was sent to four [GlaxoSmithKline] employees (directly to three and copied to one) only one of whom was an attorney. Moreover, the text of the prior email from Krall was specifically

---

90 The discovery fight in Seroquel continued into late 2009 when plaintiffs filed a renewed motion to de-designate documents from AstraZeneca’s privilege log. The court, seemingly giving up on the discovery process, denied the motion because it was filed “at the ‘eleventh hour’” and reserved additional case-specific discovery for the “transferor courts after remand.” In re Seroquel Prods. Liab. Litig., No. 6:06-md-1769-Orl-22DAB, 2009 WL 3739347 (M.D. Fla. Nov. 6, 2009).


92 Id.

93 Mr. Shestack’s bio can be found here: http://www.schnader.com/professionals/xprProfessionalDetailsSchnader.aspx?xpST=ProfessionalDetail&professional=246 (last visited May 7, 2010).

addressed to the non-attorneys and not to attorney Christopher.”95 Using only this addressing information, Mr. Shestack concluded that “the primary purpose of the prior e-mail was not obtaining or giving of legal advice.”96

ii. Rays of hope: courts rejecting the Vioxx methodology

Despite the battle cry from the ACC to rally to the defense of privilege and the troubling line of privilege-eroding cases, there are promising indications that most courts will not follow the Vioxx methodology. Since 2008, there has been a steady stream of decisions that recognize the potential threat that the Vioxx methodology poses for ethical corporate behavior. While few of these decisions outright reject or criticize Vioxx, they all formulate different tests that do not create rigid presumptions based on message distribution. Although these approaches certainly require more time to conduct the analysis, they all focus more appropriately on the content of the document subjected to the privilege review.

One day before the Seroquel decision, in In re New York Renu, the special master, Daniel J. Cara,97 recognized that “intra-corporate communications to counsel may fall within the privilege if the predominant intent is to seek legal advice [and these] communications . . . can retain a privilege if disclosure is limited to those who have a ‘need to know’ the advice of counsel.”98 Mr. Cara also acknowledged that that “legal advice may be sought implicitly or explicitly.”99 This standard does not allow for rapid sorting of documents, nor does it provide a mechanism for

95 Id. at 10.
96 Id.
97 Mr. Capra’s bio can be found here: http://www.fordham.edu/law/faculty/capra/main.htm (last visited May 7, 2010).
99 Id. at *6 (emphasis added).
quickly applying presumptions to internal documents. It requires a document-by-document analysis to determine whether the attorney-client privilege applies. While courts may grimace at this time-consuming methodology, it is the only acceptable way to ensure a balance between forbidding a company from trying to cloak non-privileged communications with protection by unnecessarily sending them to attorneys and encouraging in-house counsel involvement early and often in corporate decision-making.

Likewise, a string of cases from across the country decided in late 2008 and early 2009 similarly reject the Vioxx methodology and conduct rigorous document-by-document reviews. Rowe v. E.I. Dupont de Nemours & Co., Southeastern Pennsylvania Transportation Authority v. CaremarkPCS Health, L.P. Roth v. Aon Corp., Stoffels v. SBC Communications, Inc., and most recently Lindley v. Life Investors Insurance Company of America all rejected context-category presumptions and instead conducted various methods of document-by-document analyses. The courts universally acknowledged that “in the corporate community, legal advice ‘is often intimately intertwined with and difficult to distinguish from business advice.’” A court, therefore, must determine “whether the communication is designed to meet problems which can fairly be characterized as predominately legal.” Where the Vioxx court simply used the distribution pattern to superficially (albeit rapidly) make this determination, these courts recognized that “[w]hen the client is a corporation . . . a document need not be authored or

105 Rowe, 2008 WL 4514092, at *8.
106 Id.
addressed to an attorney in order to be properly withheld on attorney-client privilege grounds. . . .

[Privileged communications may be shared by non-attorney employees in order to relay information requested by attorneys.]107 The Roth court provided a realistic picture of how corporations use their in-house counsel:

In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals constantly go to lawyers to find out how to obey the law. . . . To disallow corporations the space to collectively discuss sensitive information with legal counsel would be to ignore the realities of large-scale corporate operation.108

This acknowledgement that early and often communication with in-house counsel can improve corporate ethical and legal compliant behavior contrasts sharply with the Vioxx disdainful comments that Merck must suffer the consequences of its communication choices.109 In truth, with the chilling of intra-corporation legal dialogue, society suffers the consequences as corporate officers will simply stop asking the difficult questions rather than risking exposure during litigation.

IV. SUMMARY: JUDICIAL “EROSION” OF THE PRIVILEGE?

As Vioxx and other privilege cases make their way through the litigation process, appellate courts will soon find themselves wrestling with these complicated corporate attorney-client privilege issues. The question remains whether they will decide to follow the seemingly simple Vioxx methodology, or if they will choose to maintain appropriate attorney-client privilege

protections for electronic documents, despite a time intensive review process. Ultimately, modern electronic discovery has created enormous procedural complications in the litigation process. Despite these challenges, however, the judicial system cannot afford to eviscerate attorney-client privilege for the sake of efficiency. The sheer volume of documents left the Vioxx court with two choices: slug through each document individually, greatly delaying the litigation process or find a suitable proxy for a document-by-document content analysis to facilitate the privilege review. Unfortunately, by seizing on message context as a proxy for “rough justice,” the Vioxx court’s methodology ultimately discourages ethical corporate behavior. By involving attorneys early and often in its decision-making process, Merck strove to ensure that its decisions conformed to the law.

The nature of internal company communications has fundamentally changed over the last two decades. To chastise Merck for choosing to involve lawyers early, the court takes a very narrow view of why Merck involved its in-house counsel in its decision-making process. The company did not seek to render its internal communications safe from the discovery process, hidden behind a veil of attorney-client privilege. Rather, it sought to make the legally correct decisions, involving in-house counsel early to ensure compliance with the law.

Furthermore, the importance of involving lawyers early and often in corporate decision-making will continue to increase as the government takes a more active regulatory role. As a society, we should encourage corporations to involve their legal personnel in important decisions to ensure legal and regulatory compliance. The recently revised American Law of Products Liability 3d Treatise, updated this year, sums up the problem with the Vioxx methodology:

[The] problem of determining the type of services rendered by in-house counsel has been exacerbated by the advent of e-mail that has made it so convenient to copy legal counsel on every communication . . . regardless of whether it is ripe for legal analysis. The benefit from this expanded use of lawyers, however, comes at a cost in the form of differentiating between the lawyers’ legal and business work when the attorney-client privilege is asserted for their communications within the corporate structure.¹¹¹

If the costs or risks for corporate officers to seek their in-house counsel’s advice early and often becomes too great, they will simply stop asking the difficult questions. On the contrary, these are the situations where society will benefit the most from open dialogue which ultimately encourages ethical corporate behavior. Maintaining a content-focused attorney-client privilege review for internal corporate documents may slow the litigation process, but as the Fifth Circuit said, “the time it takes is the time it takes.”¹¹²

Fortunately, the evidence from subsequent decisions points to the fact that the threat to the privilege has been largely exaggerated for now. Taken alone, to ensure a document remained privileged post-Vioxx, an in-house counsel would have to place significant safeguards on her communications, often in the form of dual-channeled communications, to ensure routing patterns did not result in a presumption of privilege waiver. Fortunately, from the subsequent cases, it appears that courts are willing to forgo ex-post expediency in the discovery process to maintain a candid ex-ante exchange of legal communications within a corporation. Therefore, in-house counsel should remain comfortable that courts will generally continue to consider the content of their communications, regardless of how the information flowed through the company, so long as the communication has a primarily legal nature.

¹¹² In re Vioxx Prods. Liab. Litig., No. 06-30378, 2006 WL 1726675, at *3 (5th Cir. May 26, 2006).
EXECUTIVE AGENCIES AND THE PRIVILEGE: A COERCIVE “CULTURE OF WAIVER”? 

Despite the relatively good news coming from courts maintaining in-house privilege protection, a second perceived threat to the corporate attorney-client privilege appeared around the same time as the Vioxx controversy. Just as electronic documents fundamentally changed the way that courts must view discovery, the widespread adoption of these forms of communication has changed government investigations of companies. While a corporation is merely a legal construct and cannot “know” anything, internal communications, especially the most sensitive ones shared with in-house counsel constitute the deepest “thoughts” of the company.113 As discussed in Part II.B, supra, the advent of electronic communications means that a nearly permanent record of corporate decision-making processes now exists. Government investigators, faced with increased public pressure to investigate corporations after a wave of scandals in the 90s, quickly realized that access to these documents would provide a rich narrative of the exact thought process of the corporate “brain.” However, the most sensitive (and often damning) communications usually remained veiled behind the attorney-client privilege – often the result of internal investigations conducted by in-house counsel. The struggle for whether the effectiveness of government investigations was worth sacrificing the freedom of candid internal communications raged for the next decade.

113 If one agrees that internal communications are the “thoughts” of the corporation, then in-house counsel could be consider the corporations conscious—counseling the ethical courses of action to ensure legal compliance.
I. THE JOURNEY TO A CULTURE OF WAIVER – AND BACK

A. The Holder Memo

Beginning in 1999, the DOJ sought to codify the factors that influenced decisions to prosecute corporations.\textsuperscript{114} Seeking to counter accusations that US Attorney’s offices and the DOJ inconsistently exercised their prosecutorial discretion, then Deputy Attorney General Eric Holder issued a memorandum, the “Holder Memo” that outlined non-mandatory factors intended to influence the decision on whether to bring charges against a corporation.\textsuperscript{115} One factor pointed to the entity’s willingness to waive the attorney-client privilege, “[i]n gauging the extent of the corporation’s cooperation, the prosecutor may consider the corporation’s willingness . . . to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.”\textsuperscript{116}

The memo sent shivers of fear through the corporate bar. Now that the government linked cooperation (and therefore the decision to prosecute) with this waiver, many argued that in-house counsel would become “the government’s agent,” advising company officers to waive the privilege to avoid prosecution.\textsuperscript{117} While the ex-post effect of such a memo aids government investigation into corporate behavior, decreasing costs and increasing efficiency by helping DOJ investigators verify compliance, the ex-ante effect created of a coercive “culture of waiver.” After the Holder

\begin{itemize}
\item \textsuperscript{115} Memorandum from Eric Holder, Deputy U.S. Att’y Gen., to Heads of Dept. Components & U.S. Att’ys (June 16, 1999).
\item \textsuperscript{116} Id.
\item \textsuperscript{117} See, e.g., Robert A. Del Giorno, Corporate Counsel as Government’s Agent: The Holder Memorandum and Sarbanes-Oxley Section 307, CHAMPION, Aug. 2003, at 22.
\end{itemize}
Memo, company officers deciding whether to seek in-house counsel’s advice on compliance matters necessarily assumed that they would be implicitly forced to waive the privilege and disclose the communication as a sign of cooperation in the face of a government investigation.

**B. The Thompson Memo and the 2004 Federal Sentencing Guidelines**

Following the Enron and WorldCom crises and responding to mounting public pressure to address corporate misconduct, Deputy Attorney General Larry D. Thompson expanded on the Holder Memo in 2003. The “Thompson Memo” reiterated Holder’s guidelines for gauging corporate cooperation, but framed them as mandatory considerations. The Thompson Memo also took an extremely skeptical tone toward purported corporate cooperation. Particularly, “[t]he main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.” The memo then insisted that “[t]oo often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing. . . . [S]uch conduct should weigh in favor of . . . prosecution.”

If a culture of waiver did not exist after the Holder Memo, it certainly did after the aggressive posture of the Thompson Memo. In a 2005 survey conducted by the National Association of Criminal Defense Lawyers (NACDL), 85% of respondents reported that the “DOJ

---

120 *Id.*
121 *Id.*
and the SEC frequently require ‘discussions’ of waiver as part of ‘settlement’ negotiations.”

Waivers of the attorney-client privilege were even “often offered before . . . requested.”

One critic argued that the practice of aggressively seeking waivers, “a practice which may ultimately undermine the very goal that vigorous post-Enron enforcement is intended to foster—responsible corporate conduct.”

Nearly simultaneously, the 2004 amendment to the Federal Sentencing Guidelines referred to waivers of the attorney-client privilege in its “culpability calculations.”

Section 8C2.5, footnote 12 specified that “[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”

While this reference seemed to only add a non-mandatory consideration of a corporation’s willingness to agree to a waiver, commentators worried “about the negative ramifications of this amendment because the language appears to encourage waivers of the attorney-client privilege.”

C. The McCallum Memo

Prompted by criticism of this harsh waiver climate, Acting Deputy Attorney General Robert D. McCallum, Jr. ordered US Attorneys and DOJ department heads to “establish a written

123 Id. at 9.
126 Id. at § 8C2.5 note 12.
waiver review process.”

While the McCallum Memo sought to establish a uniformed process to judge whether an investigation warranted a privilege waiver, it instead returned the system to the variable standard pre-Holder era by allowing different standards, albeit written, between different DOJ and US Attorney offices. Furthermore, the very act of creating a written procedure addressing privilege waivers contributes to a culture that views these waivers as a common occurrence.

D. 2006 & 2007

While the discovery battle came to its conclusion in Vioxx, executive agencies and the “culture of waiver” entered a similarly crucial phase. Almost as a counterbalance to the Vioxx methodology’s deviation away from traditional privilege protections, 2006 marked a dramatic shift toward more robust privilege protections from executive agencies requesting waivers.


129 Although it discusses payment of employee legal fees under the Thompson Memo and not privilege waivers, a complete discussion of the privilege landscape at this time is not complete without at least mentioning the KPMG case. In 2006, a landmark privilege case, United States v. Stein, more commonly known as the “KPMG case” challenged the constitutionality of the Thompson Memo. United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) aff’d 541 F.3d 130 (2d Cir. 2008). Although the case deals with attorney’s fees for employees under investigation rather than direct privilege waivers, it still provided powerful ammunition for those claiming that the government’s investigative policy had become overly aggressive. The Stein court held the Thompson Memo “applied . . . direct . . . pressure” for KPMG to “cut off all payments of legal fees and expenses to anyone who was indicted” and therefore violated the defendant employee’s Fifth and Sixth Amendment rights. Id. at 353, 366-67.

The circuit court later agreed and found that “KPMG’s adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government’s overwhelming influence, and . . . therefore amounted to state action.” Stein, 435 F.3d at 136 (2008). Although the Thompson Memo had since been superseded, the court held that through the memo “the government . . . unjustifiably interfered with defendants’ relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment.” Id. Even though not directly addressing privilege waivers, this ruling will likely discourage the government from shifting back toward a more aggressive waiver posture.
i. **The ABA task force, the Specter Bill, and mounting criticism**

During 2007 Senate Judiciary Committee hearings held in conjunction with Senator Arlen Specter’s “The Attorney-Client Privilege Protection Act of 2006,” proponents of corporate client privilege joined in one chorus criticizing the trend toward the culture of waiver. The ABA Attorney-Client Privilege Task Force, formed in 2004, submitted a written statement urging the “preservation of the attorney-client privilege” and contending that DOJ policies “ha[ve] created a ‘culture of waiver’ that [are] seriously undermining the confidential attorney-client relationship in the corporate community.”

Joining the ABA, a group of ten former U.S. Attorney Generals, Deputy Attorney Generals, and Solicitor Generals wrote to Attorney General Alberto Gonzales “agree[ing] with the position taken by the [ABA], as well as by the members of a broad coalition to preserve the attorney-client privilege representing virtually every business and legal organization in this country.” In their letter, the former officials raised similar policy concerns as those raised by the ACC following Vioxx:

The Department’s carrot-and-stick approach to waiving attorney-client privilege . . . gravely weakens the attorney-client relationship between companies and their lawyers by discouraging corporate personnel at all levels from consulting with counsel on close issues. Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity’s best interest. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management, and line operating personnel, so that they

---

may . . . ensure that compliance is maintained (or that noncompliance is quickly remedied). By making waiver of privilege . . . protections nearly assured, the Department’s policies discourage personnel within companies . . . from consulting with their lawyers, thereby impeding the lawyers’ ability to counsel compliance with the law. This, in turn, harms not only the corporate client, but the investing public as well.133

Even Eric Holder, then a partner at Covington and Burling, criticized the increasing trend toward an immediate expectation of a waiver to indicate cooperation. “Today, it’s maddening,” he said. You’ll go into a prosecutor’s office . . . and fifteen minutes into our first meeting they say, ‘Are you going to waive?’”134 Although he stood by his original memo, he criticized the evolution within the DOJ to a culture of waiver, arguing that “[i]t was never the intent to view waiving the attorney-client privilege as a negative. . . . If you made a decision to waive the privilege, you could get credit for that, but it was only in extraordinary circumstances and should have only been viewed as a positive.”135

ii. The McNulty Memo

The DOJ responded quickly to the mounting pressure. Deputy Attorney General Paul J. McNulty issued a memorandum that sought to clarify the DOJ’s stance, and steer policy away from the growing culture of waiver.136 Addressing the ABA and other groups’ lobbying efforts, Mr. McNulty acknowledged that “[m]any of those associated with the corporate legal community have expressed concern that our practices may be discouraging full and candid communications

133 Id.
135 Id.
between corporate employees and legal counsel.”¹³⁷ He then insisted that “it was never the intention of the [DOJ] for our corporate charging principles to cause such a result.”¹³⁸ Superseding the previous guidance, the McNulty Memo stipulated that “[p]rosecutors may only request waiver of attorney-client . . . protections when there is a legitimate need for the privileged information.”¹³⁹

Despite the seeming victory against the culture of waiver, several critics remained skeptical on the effectiveness of the McNulty memo. Chief Justice, E. Norman Veasey, former Chief Justice of Delaware, compiled an anecdotal sampling of stories from lawyers whose companies “have personally experienced instances of prosecutorial abuses of power in the coercion of the waiver” to determine if the McNulty Memo has changed the culture of waiver.¹⁴⁰ After “sp[eaking] personally to each lawyer whose information appear[ed] in [ ]his report,” the Chief Justice determined that “while many respondents acknowledged that the DOJ . . . ha[s] made strides to address the[] concerns [raised by] the McNulty Memorandum, those presenting the post-McNulty information believe that practices under that Memorandum often fall short of providing meaningful protections from prosecutorial abuses in the field.”¹⁴¹ Justice Veasey’s report also noted that “other federal agencies not governed by the McNulty Memorandum (such as the SEC, HUD, IRS, FCC, EPA, DOL, and FERC) continue to engage unabated in privilege waiver and employee coercion modeled on DOJ practices.”¹⁴²

¹³⁷ Id.
¹³⁸ Id.
¹³⁹ Id.
¹⁴¹ Id.
¹⁴² Id.
Similarly, Mr. Andrew Weissmann, the former Director of the DOJ’s Enron Task Force, testified that a “problem under the McNulty Memorandum . . . is that companies will continue to feel undue pressure to waive the privilege because the memorandum still permits a prosecutor to consider a company’s refusal to waive.”

E. The 2008 Attorney-Client Privilege Protection Act and the Filip memo

In 2008, Senator Specter reintroduced his Attorney-Client Privilege Protection Act, this time with language prohibiting all government agencies from requesting privilege waivers in civil or criminal investigations. This bill again died in committee, but played a formative role in Deputy Attorney General Mark Filip’s Memo. In a letter to Senators Specter and Leahy, Mr. Filip urged patience before seeking a legislative solution to the culture of waiver problem.

The Filip Memo, issued immediately after Mr. Filip’s letter, lays out the most robust protection of the attorney-client privilege since the Holder Memo. First, it acknowledges the criticism of previous DOJ practices, insisting that “waiving the attorney-client privilege has never been a prerequisite . . . for a corporation to be viewed as cooperative.” Second, the memo specifically eliminates agreement to a waiver as a measure of cooperation, stating that “

---

143 Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 128 (2007) (written testimony of Andrew Weissmann, former Dir. Of the Dep’t of Justice’s Enron Task Force).


145 Alexis, supra note 115, at 6.

146 Letter from Mark Filip, Deputy Att’y Gen., to Hon. Patrick Leahy, Chairman, S. Comm. on the Judiciary and Hon. Arlen Specter, Ranking Member, S. Comm. on the Judiciary (July 9, 2008), available at http://www2.acc.com/resource/v9892.

Now that Senator Specter has lost his 2010 Democratic Primary bid, we have likely seen the end of the quest for attorney-client privilege protection legislation – at least for now. See Mark Z. Barabak & Seema Meht, Voters in Primaries Shake Things Up for Both Major Parties, L.A. Times, May 19, 2010, at A1.

government’s key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct . . . not whether the corporation discloses attorney-client or work product materials.”\textsuperscript{148} And third, the Filip Memo reiterates the basic tenant of the corporate attorney-client privilege, that “the corporation has no obligation to make[] such disclosures” and “a corporation’s failure to provide relevant information does not mean that the corporation will be indicted.”\textsuperscript{149}

So, after nearly 10 years of wrestling with the balance between cooperation and coercion in waiver requests, it seems that the privilege has returned to its pre-Holder Memo balance. However, as discussed below in Part III, lingering fears remain that this is merely a temporary shift in policy.

\textbf{II. \textit{Summary: Executive Erosion of the Privilege?}}

Now, several years after the backlash against the culture of waiver, we can consider the current corporate attorney-client privilege climate. After the trend towards a culture of waiver and then an abrupt swing in the opposite direction, where is the corporate attorney-client privilege today? Are corporate officers avoiding their attorney’s in their headquarters’ hallways—afraid to ask even the simplest legal questions for fear of lack of confidentiality? Or has the executive struck the right balance between encouraging corporate cooperation in ex-post government investigations and allowing privileged internal communications to enhance ex-ante legal compliance? Although more difficult to judge than the courts view on privilege protections, anecdotally the evidence

\textsuperscript{148} Id.
\textsuperscript{149} Id.
seems to suggest that despite lingering fears among some critics, the executive has returned to the correct balance in seeking privilege waivers.

A. Lingering criticism

Despite Mr. Filip’s waiver request policy changes which, unlike the previous memos, were incorporated into the United States Attorney’s Manual, criticism of the DOJ’s stance remains.\textsuperscript{150} Former Attorney General Dick Thornburgh argued that “[t]he new guidelines are a victory that is hollow unless or until legislation is enacted that guarantees there will be no more experimenting by the Justice Department in this area.”\textsuperscript{151}

Many see a renewed threat in Eric Holder’s appointment as Attorney General. Critics railed against the confirmation hearings, criticizing the Senate Judiciary Committee’s hearings for “fail[ing] to focus on the threat to constitutional rights posed by what is known as the ‘Holder Memorandum.’”\textsuperscript{152} Senator Specter’s wish that “in his confirmation hearings, Mr. Holder will provide assurances that he will review and reverse the effects of his 1999 memorandum” was not granted—Mr. Holder’s confirmation hearing transcript barely mentions the 1999 Memo or his current stance on corporate privilege protections.\textsuperscript{153} As public pressure again mounts for the government to investigate large corporations in the wake of the financial meltdown, it remains to be seen whether Mr. Holder will revert to his 1999 Memo views on waivers, or maintain the opinion he expressed as a private attorney.\textsuperscript{154}

\textsuperscript{150} United States Attorneys’ Manual § 9-28.710-720.

\textsuperscript{151} Karabin, supra note 3, at 24; see also Dick Thornburgh, Waiver of the Attorney-Client Privilege: A Balanced Approach 30-32 (2006).


\textsuperscript{153} Id.

\textsuperscript{154} See Lattman, supra note 133.
B.  The Pendulum Has Swung Back

Despite lingering doubts, it appears more likely that the pendulum has swung back to a relatively stable equilibrium for federal investigations. Former Deputy Attorney General James B. Comey describes the DOJ’s ultimate goals as “not generally seeking legal advice or opinion work product; they are just seeking the facts.” Responding to defense bar complaints, he emphasized that the DOJ does “not require waiver, and do[es] not even require cooperation. . . . [I]f a corporation that chooses to cooperate can do so fully without waiving any privileges, that is fine. Waiver is not required as a measure of cooperation.” Deputy Attorney General Filip’s reiterates those sentiments by instructing prosecutors to give corporations “the same credit for disclosing facts that are contained in unprotected materials as they would for disclosing the identical facts contained in protected materials.” This policy also enjoys “sharper teeth” because of its incorporation directly into the United States Attorney’s Manual.

The Filip Memo (or probably more appropriately the “Filip Policy” after codification in the manual) has silenced some of the most vocal criticism of the culture of waiver with some scholars now questioning the efficacy of a legislative solution. Professor Mike Seigel, a former prosecutor and once a vigorous critic of the culture of waiver, argues that the “the proposed law ‘is unclear in terms of exactly what it would do, and the lack of clarity potentially creates more problems than it would solve.’”

\[\text{References}\]

156 Id.
158 Id.; UNITED STATES ATTORNEYS’ MANUAL § 9-28.710-720.
160 Karabin, supra note 3 (quoting Prof. Seigel).
Furthermore, despite claims that the memoranda discussed only bind the DOJ,\(^\text{161}\) other federal agencies have taken similarly strong measures to undue any perceived culture of waiver. The Security and Exchange Commission’s 2010 Enforcement Manual adopts very strong language requiring its investigators to respect the attorney-client privilege.\(^\text{162}\) In bold, italicized type, the manual insists that “staff should not ask a party to waive the attorney-client privilege . . . without prior approval of the Director or Deputy Director.”\(^\text{163}\) “As a matter of public policy, the SEC wants to encourage individuals, corporate officers and employees to consult counsel about potential violations”, therefore the enforcement manual stipulates that “[t]o receive cooperation credit” a corporation only needs to provide “factual information” and “the corporation need not necessarily produce, and the staff may not request without approval, protected notes or memoranda.”\(^\text{164}\)

Finally, the ABA task force also enjoyed a major success in preserving the corporate attorney-client privilege by successfully lobbying the Senate Judiciary Committee to delete the privilege language from footnote 12 from the 2006 Federal Sentencing Guidelines.\(^\text{165}\)

### CONCLUSION

For now, the corporate attorney-client privilege seems to have regained its previous balance despite all of the shake-ups introduced by the transition into the digital age. However, we almost

---

\(^\text{161}\) Alexis, \textit{supra} note 115 (quoting Chief Justice Veasey).

\(^\text{162}\) \textit{SEC. \& EXCH. COMM’N DIV. OF ENFORCEMENT, ENFORCEMENT MANUAL} § 4.3 (2010).

\(^\text{163}\) \textit{Id.}

\(^\text{164}\) \textit{Id.}

\(^\text{165}\) \textit{See} \textit{U.S. SENTENCING COMM’N, 2006 FED. SENTENCING GUIDELINES} § 8C2.5 (2006); letter from Michael S. Greco, President, Am. Bar Ass’n, to Hon. Arlen Specter, Chairman, Comm. on the Judiciary, U.S. Senate (May 9, 2006); see also Amendments to the Federal Sentencing Guidelines, Policy Statements, and Official Commentary, Amendment 13 (May 1, 2006).
certainly have not seen the last of the heated exchange between those that favor increased transparency for internal company communications and those that decry the erosion of traditional privilege protections. From the courts perspective, electronic communications have meant that judges must now deal with increased regulation, increased mingling of business and legal advice, and the simple fact of overwhelming quantities of documents. Meanwhile, following the financial meltdown, the public has renewed calls for increased government investigation of corporations.  

Ultimately, the courts’ or executive agencies’ decisions on the level of attorney-client privilege protections that corporations enjoy hinges on two key questions: First, who better polices corporate behavior – the corporation itself or an external agent? And second, after an issue of legal compliance arises, is ex-post efficiency (by easier access to information) to investigate and remedy the problem worth the ex-ante internal communication chilling effects of diminishing the privilege?

It is important to note that a third front may be opening in this on-going battle for privilege. On April 29, 2010, Juliane Kokott, the Advocate General of the European Union, issued an opinion that “legal professional privilege does not apply to communications with in-house lawyers.” The case that solicited the opinion, *Akzo Nobel Chemicals Ltd. & Akros Chemicals Ltd. v. European Commission*, involved a seizure of e-mails between an employee in the United Kingdom and an Akzo in-house counsel, a member of the Netherlands Bar. Although both these countries recognize an in-house corporate attorney-client privilege, the Advocate General nevertheless found that the protection of communications between a lawyer and his client (legal

---


professional privilege) under EU law applies solely to communications between a client and an independent lawyer.”

Although this opinion does not bind the parties or the court deciding the underlying lawsuit, it presents a troubling problem for corporations that now operate on a global scale.

Still, at least in this country for the present, the attorney-client privilege seems relatively stable and reliable. The courts and executive agencies have struck an appropriate balance between allowing corporations to police themselves as long as they exercise good faith, but overcoming the privilege when required. Critics will always complain that current rules don’t allow enough protection, but the simple fact is that a corporation cannot expect to cloak all communications with lawyers with the privilege, even in highly regulated industries.

As evidenced by the recent privilege decisions involving electronic communications, as long as courts are willing to stay away from faulty methodologies like Vioxx, they will likely arrive at the correct balance. And the evidence also points to the fact that the executive branch has listened to concerns about ex-ante chilling of internal investigations and despite ex-post efficiency advantages have throttled back from aggressive (arguably coercive) demands for waivers.

Ironically, perhaps the worst harm to ex-ante internal compliance communications comes from the most vocal critics of Vioxx methodology decisions and coercive waivers. Regardless of actual threats to the privilege, insisting that the privilege is eroding day-by-day will create a self-fulfilling prophecy where corporate officers buy in to the fears and become no longer willing to risk communications with in-house counsel on sensitive matters. For now, therefore, I urge temperance in the rhetoric – given the chance, courts and executive agencies are reaching the correct balance despite the challenges from electronic communications.

\[168 \text{Id.}\]