

# Think Twice – Avoiding Waiver of the Attorney-Client Privilege Through Issuance of a Press Release

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**Imagine that your company has just been sued by a competitor for patent infringement, deceptive advertising, unfair competition, or any number of other business torts.**

The news of the lawsuit has been reported in various industry publications and blogs. Your customers are calling, writing, and e-mailing you to express concern.

They want to know whether your company will be able to continue to sell its products and whether the company's advertisements are false.

You want to reach out to your customers and potential customers and make clear that the lawsuit has no merit. You want to explain that you are right and your competitor is wrong. Given this scenario, you determine that a press release is the most effective way to communicate your position. After all, a press release can reach a broad base of the general public quickly and easily.

Although a press release is an appealing option for quickly and effectively responding to a lawsuit, it is important to consider the impact a press release might have on your company's attorney-client privilege. If you are not careful, a hastily drafted press release could waive the privilege and allow your opponent to have access to communications you and your attorney intended to remain confidential.

This article addresses two items you should consider prior to issuing a press release in order to ensure that communications with your attorney remain protected by the attorney-client privilege: (1) the content of the press release and (2) the involvement of third parties (public relations firms, etc.) in the creation of the release.

## **The Content of the Press Release**

Generally speaking, courts analyzing whether the attorney-client privilege has been waived with respect to a specific communication will look first to whether the actual substance or a "significant part" of a privileged communication has been disclosed to persons outside the attorney-client relationship. If such a disclosure has occurred, the court likely will find that the attorney-client privilege has been waived. Thus, prior to the issuance of a press release responding to a lawsuit, it is important to consider whether the press release discloses the substance of any privileged communication.

For example, assume Company A, a producer of computer components, has been sued for patent infringement by its competitor, Company B. Hoping to calm the fears of its customers, potential customers, and investors, Company A contemplates issuing one of the following three press releases:

1. We recently have been sued by Company B for patent infringement. We dispute the allegations in the Complaint, intend to vigorously defend against this lawsuit, and expect to prevail.
2. We recently have been sued by Company B for patent infringement. We dispute the allegations in the Complaint, intend to vigorously defend against this lawsuit, and expect to prevail. Our attorneys have informed us that we have not infringed any valid or enforceable patent of Company B.
3. We recently have been sued by Company B for patent infringement. We dispute the allegations in the Complaint, intend to vigorously defend against this lawsuit, and expect to prevail. Our attorneys have informed us that we have not infringed any valid patent of Company B. Specifically, our attorneys have advised us that, although there is a small possibility we have technically infringed Company B's patent, the patent is unenforceable because Company B obtained this patent by engaging in fraudulent conduct.

The first press release is unlikely to result in a finding that the attorney-client privilege has been waived because it contains no detail regarding the substance of any attorney-client communication. Of course, a company may want its press release to contain more detail, especially if addressing a nasty accusation in a complaint.

The second press release contains a bit more detail than the first. Although this press release certainly could be worded more carefully (not expressly mentioning the opinion of the company's attorneys, for instance), the added detail probably would not result in waiver of the attorney-client privilege. Courts have found that the detail added in the second press release does not result in waiver because it is similar to the type of general denial that would be contained in an answer to a complaint.

The third press release contains the most detail. This press release also is the most likely to result in a waiver of the attorney-client privilege. Although it is unlikely that a company would admit in a press release that there is even "a small possibility" of infringement, that statement is included here to illustrate the point that waiver of the attorney-client privilege through a hasty, ill-conceived press release could have a serious impact on the lawsuit going forward. For instance, based on the statements in the third press release, Company B might demand documents, including communications with Company A's attorneys, regarding the statement that Company A may technically have infringed the patent, and then use those communications against Company A. It is very possible that a court would permit such a request, based on a waiver of the attorney-client privilege.

What if the roles are reversed, and you want to go on the offensive? Imagine that you, Company A, suspect that Company B has infringed your patent. You have conducted an investigation, hired counsel, and are prepared to file a formal Complaint in Court. Ahead of filing, you want to drum up goodwill and believe that directing your attorney to share your story with the press will do the trick.

Beware: This could unwittingly open the door to discovery of communications between you and your counsel regarding media strategy/public relations and information related to your counsel's investigation, evaluation, and knowledge of facts underlying the threatened lawsuit and claims up to and including the time at which your counsel communicated with the media.

However, at least one Court has recently held that if what was shared with the press was a final version of the complaint—identical to the complaint actually filed—it did not constitute a communication made in confidence by a client seeking legal advice from their attorney nor work product. Thus, the sharing of a final complaint

did not operate as a waiver of either protection. And so, the disclosure of the sensitive information outlined above was avoided.

### **Involvement of Third Parties in the Creation of a Press Release**

Communications between an attorney and a client that also involve, or are made in the presence of, a third party typically are not privileged in the first place because the client, knowing of the third party's presence, could not have possessed a reasonable expectation that the communications would remain only between the client and the attorney. Even a communication that is considered to be privileged may lose that protection initially when it is disclosed to a third party who is not part of the attorney-client relationship. However, the attorney-client privilege, in some circumstances, is not waived for privileged communications that involve, or are disclosed to, third parties who are "assisting the lawyer in the rendition of legal services" such as legal assistants and investigators hired to assist the attorney.

The preparation of a press release often involves a third party, such as a public relations company. Whether the involvement of such a third party waives the attorney-client privilege is a very fact-specific inquiry, but the argument that such a third party is "assisting the lawyer in the rendition of legal services" is not likely to succeed. Therefore, if you do decide to hire a public relations firm to assist with a press release, the best approach is to avoid involving the firm in any communication that is, or that you would like to remain, privileged.

Additionally, some specific items that should be discussed with your attorney prior to exposing a public relations firm to otherwise privileged communications include:

- Who will hire the public relations firm – your company or your attorney;
- The type of assistance the public relations firm will provide to the attorney;
- Whether privileged communications need to be disclosed in order for the public relations firm to render the desired assistance; and,
- Whether your company has a previous relationship with that public relations firm.

Each of these factors could bear on whether involving the public relations firm in otherwise privileged communications will impact your ability to assert the attorney-client privilege with respect to those communications.

Furthermore, it is possible that even if no third party is involved in your discussions with your attorney about media strategy or a press release, more specifically, those communications still may not be fully protected.

Some courts will examine the individual communication at issue to analyze whether the attorney is drawing on his legal training and applying legal principles to the specific circumstances of his client in order to determine whether the attorney-client privilege applies. It is possible for a court to conclude that discussions about media strategy or public relations are more properly characterized as business advice rather than legal advice and, therefore, not entitled to any protection at all.

### **Conclusion**

The simple message here is to think twice when commenting publicly on any threatened or active litigation. If you decide to issue a press release, make sure you have consulted with your attorney to ensure that a press release will not impede your ability to assert the attorney-client privilege in the future.

***This is a part of our September series: "The Power of Preparedness." For more insights, [click here](#).***

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