Question:

How do you handle internal email communications that are possibly privileged when communicating in-house? Do you have a standard disclaimer below your signature, or signify each individual email as privileged when it potentially is? What is the most practical way of maintaining privilege without having to make a case-by-case determination if possible?

Wisdom of the Crowd:

- **Response #1:** The disclaimers at the bottom of the email are not really that relevant when a court makes a privilege determination. If an email actually is privileged, then putting "Privileged and Confidential" in the email subject line and/or at the top of the email body is the best way to signal that you believe it is covered by privilege. Regardless of putting such language on an email or other document, though, if the email isn’t actually privileged (whether because of the content, or the recipients, or the sender, etc.), then it will not be protected if a fight over its production ensues and the judge performs an in camera review.

- **Response #2:** It is true that how you label is not dispositive. But it can be persuasive. Tips:
  1. Don't overuse. Case-by-case determination is best or at least use category-by-category determination. I have a default signature with privilege and work product language that I edit or delete as appropriate. Courts have held that pro forma assertion is meaningless. But inadvertent disclosure without systematic protection can be waiver. Strike balance.
  2. Train staff to include you in significant matters. Not cc you all times but certainly if "anticipating" litigation or responding to a request by you or involving you.
  3. Don't leave email unanswered. Cases hold that cc attorney is not enough. The email needs to be seeking and getting legal advice.
  4. Make legal aspects clear and be honest with self. If an email really just concerns an operational business matter – especially low risk matters – don't dress it up as privileged legal communiqué. You will lose credibility when your privilege log hits a judge's bench/desk – especially when s/he has that in camera review of disputed assertions.
  5. Stay alert for less common privileges and protections like settlement discussions, self-evaluative analyses, etc. And label appropriately.
  6. Remember to include your title. In large document productions, title and label go a long way in staff catching potentially privileged documents before they go out the door. If the labeling and titling are done right, you can waive and produce without losing subject matter privilege.

I wish it were easier. Design software with keyword algorithm for legal privilege like they have for PHI encryption and you'll be rich!

- **Response #3:** Attorney-Client privilege applies when the purpose of the communication is to seek or provide legal advice. Privilege does not arise when an in-house lawyer is acting in a business capacity or performing business functions. Likewise just because an e-mail copies or includes an
attorney, or an attorney sits in a meeting does not create a privileged communication. The communication must be for the purpose of seeking or providing legal advice. Likewise putting a privilege notice (sample below) on the bottom of all emails doesn't make all your e-mails privileged. Overuse of the disclaimer may dilute the privilege. To be safe put "Attorney-Client Communication", "Privileged and Confidential" or "Attorney Work Product" in the subject of the e-mail, or on privileged documents. Other elements must be maintained to properly maintain the privilege and you should train your business folks on privilege so they understand privilege and how to maintain privilege.

- I was recently on a panel at the 2014 ACC Corporate Counsel University titled "Session 700 - Attorney-Client Privilege for In-house Counsel" that is a good reference on privilege and how it may arise in an in-house setting (http://www.acc.com/legalresources/resource.cfm?show=1374414). Also ACC has a ton of articles and practical advice on privilege in their website, including training materials for your business people. ACC's staff can also help you, they have a lot of staff that is up to date on in-house privilege issues.

- Not to ignore work product privilege but this protects work product created in anticipation of litigation.

- Response #4: I have looked into this issue previously, and unfortunately never found a good "one size fits all" approach. What I do encourage people to do, is to add "**Confidential** and/or **Privileged** in the subject line if they are asking a specific legal question, so that it is flagged up front. I will also add that to the subject line in my response if I think it is warranted.

- I think that using a disclaimer is most effective if it is not used on every single email you send, but rather, applied in very discrete situations. I have created different versions of my automatic signature in Outlook, and I can switch between them very quickly. Also, if you are interested, I can share an educational email that I sent out to a group of managers to explain to them why I do not encourage blanket use of a privilege/confidentiality disclaimer. In the "Notice/Disclaimer" of that email I hid a message that if you responded to me with a specific phrase in the "subject line" I would be giving out a prize. I did it to illustrate to those managers that no one reads the notice/disclaimer under a signature (of the 46 individuals who received it, only 6 read the entire email, and claimed a prize -- and that was even after one person 'replied all' and gave away the game).

1Response from Courtney Ozer, Senior Counsel – Litigation, Unilever United States, Inc., Englewood Cliffs, NJ (New to In-house Committee eGroup, June 20, 2014).
2Response from Andrew Walsh, General Counsel & Chief Legal Officer, Partners BHM, Gastonia, NC (New to In-house Committee eGroup, June 20, 2014).
3Response from James Office, Vice President & General Counsel, Victory Wholesale Group, Springboro, OH (New to In-house Committee eGroup, June 20, 2014).
4Response from Stephanie Krebs, Senior Staff Attorney, Clearwater Paper Corporation, Spokane, WA (New to In-house Committee eGroup, June 20, 2014).

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