

## AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE: HOW TO ENSURE ATTORNEY-CLIENT COMMUNICATIONS REMAIN PROTECTED DURING A HEALTH CARE TRANSACTION

When an entity merges with or acquires another business, the parties to the transaction face a variety of issues. When attempting to sort out some of the more-dominant deal points (e.g., ever-changing regulatory requirements, successful employee integration, preferred methods of financing, etc.), many entities inadvertently overlook other details that, despite being seemingly routine, could greatly impact the business down the road. One such oversight tends to be deciding which party will own the privileges covering attorney-client communications after the definitive agreement is executed. Entities can avoid making this mistake (and remain in control of the privilege) by putting certain preventive measures to good use.

The attorney-client privilege, which exists to maintain the confidentiality of lawyer-client communications, is owned and controlled by the client. As such, one of the most important first-steps that an entity can take in ensuring the transaction communications remain private is to actually define itself as the client. Specifically, a holder of privileged information should consider negotiating a provision into the definitive agreement identifying itself as the permanent holder of the attorney-client privilege, even after the transaction closes. How this provision operates would largely depend on the structure of the transaction being considered (e.g., the official holder of the privilege would be different in an asset sale versus a stock or equity sale). By doing so, the entity can ensure that, from a preventative perspective, it will retain the power to control all privileged communications it makes going forward.

### PRACTICAL TAKEAWAYS

Implementing certain contractual protections during the negotiation stage can help prevent exposure of attorney-client communications before the transaction process even begins. Additionally, a transacting entity may also consider implementing one or more of the following simple yet valuable preventative measures:

- **Claw Back Provisions.** Should the entity successfully negotiate to be named the holder of the attorney-client privilege, though, it will also have the power to waive the privilege – even if it does so unintentionally. An entity can keep the damage of inadvertent disclosure to a minimum, however, by placing a “clawback” provision into the definitive agreement. Most commonly used in the finance industry, but increasingly seen in the health care world, clawback provisions are contractual obligations that require the party that inadvertently received privileged material to return and/or destroy another party’s privileged information or materials it receives accidentally. The provision also allows an entity to assume control over the misplaced communications, and the entity may dictate when, how and/or where the receiving party will be expected to dispose of the privileged exchanges. The clawback provision creates a safety net for any attorney-client communications that are unintentionally passed on to an unprivileged party during the transaction process.
- **Transfer Restrictions.** An entity may add a provision to the definitive agreement specifying that it is not obligated to transfer any of its attorney-client privileged communications made before or during the transaction to the other party. Protecting this interest is particularly important if the arrangement involves transferring electronic storage systems, such as computer software or email servers, as the system may still be storing private exchanges made between the client entity and their legal counsel long after the transaction is finalized. For that reason, an entity should consider moving existing attorney-client communications to an independent hard drive. That way, if the entity is unable to successfully secure a designation of the privilege “holder” after the transaction, the entity’s privileged communications will still be excluded (both contractually and physically) from any kind of equipment/software transfer that may take place as a result of the transaction’s completion.
- **Operational Organization.** Good communication can make all of the difference for an entity undergoing a complex transaction process. As such, the entity should explain how the transaction process works and what it means for the entity’s communications with its legal counsel to all levels of relevant entity staff, employees and/or other stakeholders. In doing so, the entity should speak with its counsel to create a communication plan, which can help ensure that everyone who needs to know is made aware of the privilege’s purpose moving forward.

- **Early Establishment.** As noted previously, an entity should consider including a provision in the definitive agreement that identifies the permanent holder of the attorney-client privilege. In fact, the entity can also stake this claim even earlier in the process by including it in either the Attorney Engagement Letter or; if applicable, a Common Defense Agreement. Particularly in the Attorney Engagement Letter, an entity should consider where in the corporate structure the engagement should take place (i.e., at the system level, entity level or somewhere in between). Entities should check with their counsel to determine the most appropriate way to establish the entity as official holder of attorney-client communications.
- **Creating a Legacy Board.** If the entity is the party to be acquired in a stock or equity transaction, it may not legally exist afterwards to enforce the provisions in the definitive agreement - including those which address attorney-client communications. An entity should consider establishing a legacy board or other designated organization to ensure that the terms of the definitive agreement are overseen and enforced in accordance with the original intentions of the parties long after the transaction is over. In establishing such an organization, an entity should consult with its counsel to determine the best way to handle the organization both at its inception and after the transaction is complete.

Every transaction is unique and, as a result, requires personalized legal advice. However, regardless of the type of acquisition, a health care entity should both carefully plan for the ownership rights of the attorney-client privilege and consider the role it might play in the structure of the transaction. By taking certain contractual and practical steps early in the transaction process, health care entities can help ensure that their attorney-client communications are accounted for and remain well protected.

If you have any questions or would like additional information, please contact:

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