

Legal Alert: Court Holds Forwarding Privileged Legal Advice To Employees Not Directly Concerned With Its Subject Matter May Waive Privilege

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A recent decision by Magistrate Judge Geraldine Soat Brown of the United States District Court for the Northern District of Illinois continues the development of the application of attorney-client privilege doctrine to email communications. In *Muro v. Target Corp.*, No. 04 C 6267, 2007 WL 1630407 at *8 (N.D. Ill. June 7, 2007), the court held that forwarding privileged legal advice to company personnel who are not “directly concerned” with the subject matter of that advice may lead to waiver of the privilege with respect to the advice. The decision, which is particularly relevant to large companies that employ in-house counsel, highlights the risks of disseminating confidential legal advice by email when the advice becomes part of an email “chain” that is distributed more widely than counsel originally intended. As the chain evolves, the circle of recipients tends to expand, and the likelihood of waiver increases.

In *Muro*, the court considered 89 documents withheld from discovery under a claim of attorney-client privilege by Target Corporation and Target National Bank (collectively, “Target” or “defendant”). All of the documents were chains of email communications among Target employees. In a prior proceeding on plaintiff’s motion to compel production, the court reviewed the withheld documents *in camera* and found that although some or all of them might be privileged, the defendant’s privilege log was inadequate to establish that the privilege applied. The court granted the defendant an opportunity to submit a revised privilege log with information demonstrating the privileged nature of the communications. *Id.* at *1; *see also Muro v. Target Corp.*, No 04 C 6267, 2006 WL 3422181 at *6 (N.D. Ill. Nov. 28, 2006). In response, the defendant submitted a revised privilege log containing additional information. Plaintiff then renewed its motion to compel production of the documents. *Muro*, 2007 WL 1630407 at *1-2.

In addressing the adequacy of the defendant’s revised privilege log, the court first focused on the proper logging of email chains claimed to be privileged. The court followed the decision of the District of Kansas in *Universal Service Fund Telephone Billing Practices Litigation*, 232 F.R.D. 669 (D. Kan. 2005), which held that listing email chains as single

documents in a privilege log did not satisfy the requirements of Federal Rule of Civil Procedure 26(b)(5).¹ Rule 26(b)(5) requires that documents withheld on the basis of the attorney-client privilege or work product protection be described in a way that permits other parties to assess the applicability of the claimed privilege or protection without revealing the privileged information. In *Muro*, as in *Universal Service Fund*, the defendants listed only the last email in each chain on their privilege log, and the court found that this practice did not satisfy Rule 26. *Muro*, 2007 WL 1630407, at *4-5. Rather, the court held, each email in a chain is a separate communication, and must be listed separately on a privilege log if it is to be withheld as privileged. *Id.* at *5.

The court recognized the labor and expense involved in itemizing each privileged email in a chain. *Id.* at *5, n.5. Citing an article by two Sutherland Asbill & Brennan attorneys, the court suggested that the cost of discovery and the risk of court-ordered sanctions could be reduced by reaching an agreement at the Rule 26(f) conference as to how to address email chains containing privileged communications. *See id.* (citing Jennifer M. Moore and Gregory S. Kaufman, *Discovery Can Get Tangled Up in ‘Strings’: It’s Not Yet Clear How Privileges Should Apply to E-Mail Exchanges*, 29 Nat’l L.J. 17 (Dec. 4, 2006)).

It is the second part of the *Muro* decision, however, that should be of particular interest to counsel. The court noted that a privileged communication must be made with an expectation of confidentiality, *Muro*, 2007 WL 1630407, at *3. The court further stated that the attorney-client privilege can be waived “if the communication is shared with corporate employees who are not ‘directly concerned’ with or did not have ‘primary responsibility’ for the subject matter of the communication.” *Id.* at *4 (citing *Sylgab Steel & Wire Corp. v. Imoro-Gateway Corp.*, 62 F.R.D. 454, 456 (N.D. Ill. 1974)). The court held that the defendant’s revised privilege log failed to provide enough factual information for the court to determine whether the communications claimed to be privileged were limited to people who were within the scope of the privilege. *Muro*, 2007 WL 1630407 at *5-6. The log reflected that some emails were distributed to unidentified distribution lists. As to these emails, the court held that no privilege may be asserted as to communications shared with a group of persons not specifically identified in the privilege log. *Id.* at *5. For individual recipients identified, the log provided only generic titles for the recipients and whether they were attorneys, without explaining their role in the matter on which the legal advice was given. As a result, the court said that it could not determine whether they were entitled to know privileged communications. *Id.*

¹ The *Universal* court did note one situation in which listing email chains as single documents may not violate Rule 26(b)(5): when each email in the chain concerns “a distinct and identifiable set of individuals, all of whom are clearly within the attorney-client relationship in which legal advice is being sought or given.” 232 F.R.D. at 673.

The court's finding that the defendant failed to include enough information in its privilege log was not the sole basis for its decision to grant plaintiff's motion to compel, however. The court expressed the view that the defendant's difficulty in sustaining its assertion of privilege "reflects a style of dealing with internal corporate communications that is inherently at odds with the basic principle that the ability to withhold otherwise-discoverable information is a *privilege* and an exception to the general rule of discoverability." *Id.* at *8. The court found that the defendant's failure to restrict the internal dissemination of legal advice to those employees directly concerned with or primarily responsible for the subject matter of the advice proved fatal to its claims of privilege.

The court described examples of the "style" of internal communications it found to be problematic. The court noted that many of the defendant's emails were distributed among large numbers of recipients, which "does not suggest confidentiality. . . ." *Muro*, 2007 WL 1630407 at *5. With one exception, none of the purportedly privileged emails expressed or contained a restriction on further dissemination. *Id.* at *6. The sole exception involved an email chain containing legal advice sent by in-house counsel to certain Target executives, labeled "Confidential. Attorney-client privileged communication. Do not forward without author's consent." *Id.* at *7. The court noted that the small number and consistency of the recipients in this email chain tended to support the assertion of the privilege. However, the entire chain was later forwarded by one of the executives, along with a non-privileged, business-related message, to a new, non-lawyer recipient not shown to be within the scope of the attorney-client relationship. *Id.* Accordingly the court concluded that the failure to heed the author's instruction concerning limited distribution defeated the defendant's claim of privilege. *Id.* at *7-8. Despite its admitted reluctance to find that the defendant's privilege had been waived, the court held that defendant's failure "to prove an intention to create and guard confidential and privileged communications" could lead to no other conclusion. *Id.* at 8. Accordingly, plaintiff's motion to compel was granted, and the defendant was directed to produce the documents.

The *Muro* decision is an example of one court's application of the existing law governing attorney-client privilege to the evolving world of e-communication and e-discovery. As the law continues to develop in this area, companies should evaluate whether there are changes in their "style" of dealing with internal electronic communications that would increase the confidentiality of privileged communications, should additional courts adopt the reasoning of *Muro*.

To view the court's opinion, please click [here](#).



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