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The Changing Role of In-House Counsel

From Legal Advisor to Strategic Partner — and the Privilege Risks in Between

Dina M. Cox
Managing Partner
LEWIS WAGNER & TRIMBLE
Indianapolis, Indiana
dcox@lewiswagner.com

I. INTRODUCTION

The role of in-house counsel has changed more in the last two decades than in the previous fifty years. What was once a reactive, largely administrative function — brought in to paper a deal after the business terms were set, or to answer a discrete legal question after the fact — has become, in many organizations, a standing seat at the strategic table. General counsel and their teams now sit in the room while deals are structured, products are designed, and enterprise risk is assessed, and they are increasingly measured not by the risk they avoided but by the value they helped create.

That evolution is, on balance, good for clients and good for the profession. It is also, without careful attention, a significant threat to the attorney-client privilege. The same proximity to the business that makes in-house counsel valuable also makes it harder to keep legal advice separate from business advice, harder to resist pressure to simply bless a deal already in motion, and harder to maintain the boundaries that the privilege depends on. In-house counsel does not enjoy a lower privilege standard than outside counsel — if anything, courts apply a more skeptical eye, precisely because in-house lawyers so often wear more than one hat.

This white paper accompanies a twenty-minute seminar presentation on that tension. Part II traces how the role has changed and why those forces converged. Part III describes what a genuine seat at the table looks like, and the business pressure that comes with it. Part IV surveys the doctrinal fundamentals of the privilege. Part V examines the ways in-house counsel is uniquely exposed. Part VI translates that doctrine into practical habits that preserve both the seat at the table and the privilege that comes with it.

II. FROM THE BACK OFFICE TO THE BOARDROOM

Traditionally, in-house counsel operated at the perimeter of the business. The role was reactive — counsel was brought in after the deal was negotiated to paper what business people had already agreed to. The mandate was narrow: contracts, disputes, and compliance. Success was measured by risk avoided, and counsel was often excluded from strategic and commercial discussions altogether, earning the department the unaffectionate label of “the department of no.”

The modern role looks very different. Today's in-house counsel is expected to be proactive — in the room while strategy is being shaped, not just reviewing the output once it is finalized. The mandate has broadened well beyond contracts and disputes to include risk management, ethics, ESG, corporate strategy, and reputation. Counsel's value is increasingly measured by deals enabled and risk well-managed, not simply risk avoided, and the general counsel's office is expected to be a standing voice in commercial decision-making rather than an occasional check on it. In short, in-house counsel today is expected to be a business partner, not just a lawyer.

FORCES BEHIND THE SHIFT

Four converging forces explain why the role has moved from the back office to the boardroom. Cost and efficiency pressure: boards and CFOs increasingly expect legal spend to create value rather than simply mitigate risk, pulling

counsel upstream into the deal itself. Regulatory complexity: data privacy, sanctions, export controls, ESG disclosure, and cross-border regulation now require legal judgment embedded in day-to-day operations rather than episodic review. C-suite integration: general counsel increasingly report directly to the chief executive officer and sit on the executive committee, and in many organizations attend board meetings as a matter of course. And the speed of business: digital products and compressed deal cycles leave little time for legal review after the fact, so the only way to keep pace is to be present at inception, when a deal or product is still being conceived.

III. WHAT “A SEAT AT THE TABLE” ACTUALLY MEANS — AND WHAT IT COSTS

“A seat at the table” is not a slogan; it describes a concrete shift in when and how counsel is engaged. Four areas illustrate the point.

- M&A and Deal Strategy — shaping deal structure and walk-away points before the term sheet is final, and spotting issues before contracts are signed, rather than reviewing a signed agreement after the business terms are locked in.
- Product and Technology — weighing in on product design, data use, and AI deployment before launch, when design choices can still be changed cheaply.
- Enterprise Risk — advising the board directly on risk appetite, crisis response, and reputational exposure, rather than confining legal input to litigation that has already been filed.
- Corporate Strategy — serving as a standing voice in planning sessions on market entry, restructuring, and governance, alongside finance and operations leadership.

The common thread is that counsel is shaping inputs, not merely reviewing outputs. That is precisely what makes the role more valuable — and precisely what creates the tension this white paper is about.

THE PRESSURE TO “JUST SAY YES”

A seat at the table cuts both ways. The closer counsel sits to the business, the more often counsel is asked to help close deals — and the harder it becomes to say no. That pressure takes several familiar forms: compensation, bonuses, and professional standing tied, directly or indirectly, to deal velocity and business goodwill; informal but very real deadline pressure — “we need this closed by quarter-end” — applied directly to counsel rather than filtered through a business sponsor; the risk of being perceived as an obstacle if legal concerns are raised too often or too late in the process; and blurred loyalty between advising the deal team counsel works alongside every day and advising the company as a whole, which is counsel's actual client.

This tension matters for more than professional comfort. It is also, as the next two Parts explain, the mechanism by which privilege gets lost. Business pressure to get to yes tends to compress the distinction between legal advice and business advice — the same email thread starts to carry both, the same meeting covers both, and the record no longer shows which purpose predominated. Managing that pressure deliberately is not just good judgment; it is a privilege-preservation strategy.

THE EMPIRICAL PICTURE: THE “TOURNAMENT OF INFLUENCE”

This dynamic is not merely anecdotal. Richard Moorhead and Steven Vaughan, in research summarized for Harvard Law School's Center on the Legal Profession and drawn from a larger study conducted with Cristina Godinho, interviewed 67 in-house lawyers and senior compliance personnel and surveyed roughly 400 in-house lawyers in England and Wales^[20]. Their data give the pressure described above a name and a set of numbers. Sixty-five percent of respondents agreed that achieving what their organization wants has to be their main priority. Roughly 40 percent said they were at least sometimes asked to advise on actions that were ethically or legally debatable, and nearly half reported that their organization had gone on to act against legal advice on an important matter.

Moorhead and Vaughan describe the mechanism behind those numbers as a “tournament of influence”: in-house lawyers continuously position themselves within a network of internal relationships, and because they need to be seen as helpful in order to be heard at all, resisting a business ask carries a cost that compounds over many small interactions rather than arriving as one dramatic moment of saying no. One interviewee's description of what the authors termed “shouty man syndrome” — an urgent, impatient internal stakeholder who cannot understand why legal is “being so difficult” — will be familiar to most in-house practitioners, as will the authors' finding that lawyers who spend years embedded on the same deal team can, in one interviewee's words, start to lose objectivity with the people they work alongside every day^[20]. Only a minority of the lawyers interviewed placed independence at the center of how they understood their own role, and the study found that in-house legal departments generally offered little formal or informal infrastructure — training, guidance, or even routine internal discussion — to help lawyers recognize and manage that pressure when it arose.

The practical takeaway is not that business pressure is illegitimate or avoidable; the authors are careful to note that a purely reactive, arm's-length “department of no” model is not the answer either. It is that the pressure to accommodate is structural and cumulative, not an occasional test of nerve, which is exactly why the deliberate habits described in Part VI — rather than good intentions alone — are what keep counsel's independence, and the privilege that depends on it, intact.

IV. THE ATTORNEY-CLIENT PRIVILEGE: A REFRESHER

The privilege is old, and its purpose has not changed even as the corporate context around it has grown far more complicated. In 1888, the Supreme Court explained that the privilege exists because the administration of justice depends on clients being able to consult freely with those skilled in the law, without fear that the consultation itself will later be used against them^[1] — a purpose as relevant to a general counsel's inbox today as it was to a nineteenth-century client meeting with a lawyer in person.

The modern doctrinal statement of the privilege, still widely cited, requires: (1) that the person asserting the privilege is or sought to become a client; (2) that the person to whom the communication was made is a member

of the bar acting as a lawyer in connection with the communication; (3) that the communication was made without the presence of strangers and for the primary purpose of securing legal advice or legal services, and not for committing a crime or tort; and (4) that the privilege has been claimed and not waived^[2]. Every element of that four-part test creates a potential failure point for in-house counsel, but the third element — primary purpose — is where most disputes actually arise, because it turns on why the communication was made, not merely who made it or to whom it was sent.

A related foundational point bears mention because it defines the population of protected communications inside a corporation. The privilege is not limited to communications with a small “control group” of senior executives; it can extend to communications between counsel and employees at any level of the organization, so long as the communication is made to enable counsel to give legal advice to the corporation^[3]. That breadth is what makes the modern, embedded role of in-house counsel workable at all — but it is not a license to treat every communication touching legal subject matter as privileged, as the next Part explains.

WHAT IS — AND IS NOT — PROTECTED

Put simply, the privilege protects confidential communications made for the purpose of giving or getting legal advice. It does not protect business advice, even when a lawyer is the one giving it.

- Protected: analysis of legal risk or exposure; advice on regulatory compliance; litigation strategy and case assessment.
- Not protected: negotiation strategy that contains no legal analysis; pure business or financial recommendations; facts, once disclosed outside the privileged circle.

That last point deserves emphasis. The privilege protects the communication of advice, not the underlying facts. A fact does not become privileged merely because it was mentioned to a lawyer, and it does not stay privileged once it has been shared outside the privileged circle — a distinction that becomes especially important when counsel is copied on business emails “for visibility.”

V. WHERE IN-HOUSE COUNSEL IS UNIQUELY EXPOSED

Outside counsel and in-house counsel are bound by the same privilege doctrine, but in practice courts scrutinize in-house communications more closely, for reasons rooted in the structure of the role itself.

1. THE ORGANIZATION IS THE CLIENT

Under ABA Model Rule of Professional Conduct 1.13^[4], in-house counsel represents the organization itself — not any individual officer, deal team, or executive pushing for a “yes.” That principle sounds elementary, but it has real consequences: counsel's obligation runs to the entity as a whole, which means the pressure described in Part III to accommodate a particular deal team's timeline or preferences is, in a privilege sense, beside the point. It also means that when counsel's loyalty is functionally captured by a single business unit, the case for treating that counsel's work as legal advice to the company — rather than business advocacy for a faction within it — gets correspondingly weaker.

2. THE DUAL-HAT PROBLEM AND THE PRIMARY PURPOSE TEST

In-house counsel routinely gives both legal and business advice, often in the same email thread or the same meeting, which makes it hard after the fact to show which purpose predominated. Courts assess the primary purpose of a communication dynamically, in light of the specific advice being sought or rendered, and ask whether the advice could have been given only by consulting legal authority, as opposed to advice any knowledgeable non-lawyer could have given^[5]. A general counsel who wears multiple hats — attending board meetings, weighing in on finance and business strategy, and giving legal advice, sometimes all in the same week — creates exactly the ambiguity this test is designed to probe. And because the temptation is to over-claim privilege whenever counsel is involved in any capacity, the opposite risk emerges as well: overuse of the privilege designation can jeopardize even the communications that are genuinely privileged, because it signals to a reviewing court that the label is being applied reflexively rather than deliberately.

3. BROAD INTERNAL DISTRIBUTION

Copying business colleagues “for visibility” on legal analysis, or forwarding it outside the group that actually needs it, can waive the privilege entirely. Courts have moved away from a rigid “need-to-know” test toward a broader inquiry into whether the recipients fell within a “proper circle of confidentiality”^[7], but that shift is not a license for wide internal circulation. The more people who receive privileged analysis, the harder it becomes to show that confidentiality was actually maintained, and the easier it becomes for a court to conclude the circle was never proper in the first place.

4. SERVING AS A BUSINESS DECISION-MAKER

When counsel signs off as a deal approver rather than as a legal advisor, that approval may not be privileged at all, because the communication is functioning as a business decision rather than legal advice about one. A Delaware court applied exactly that reasoning to strategy slides presented at a business meeting to address a competitor's patents: even though some legal concerns were implicated, the slides addressed business concerns and were not predominantly directed to securing legal advice, and so fell outside the privilege^[8]. The lesson is that mixing counsel's role as business adviser and counsel's role as attorney within the same set of materials is itself what destroys the privilege — not any single business-flavored sentence.

A similar dynamic played out in *United States v. Sanmina Corp.*, where in-house counsel had prepared privileged memoranda analyzing the tax consequences of certain intercompany agreements. The Ninth Circuit held that the company waived the attorney-client privilege over those memoranda when it later disclosed them to an outside valuation firm retained to support a tax position — illustrating that privilege, once established, is only as durable as the discipline used to keep the resulting work product inside the privileged circle^[9].

THREE ILLUSTRATIVE CASES

A trio of cases rounds out the picture of how these principles play out in practice.

- In re Kellogg Brown & Root, Inc. — KBR had learned of possible fraud involving an overseas subcontractor and conducted an internal investigation under its compliance program, delegating witness interviews to non-attorney investigators supervised by in-house counsel. The D.C. Circuit held the investigation privileged, applying a test that asks whether one of the significant purposes of the investigation was to obtain or provide legal advice, and confirming that Upjohn does not require the involvement of outside counsel and that in-house counsel's status does not dilute the privilege^[6]. KBR's discipline — involving counsel at the outset, closely supervising the investigators, and informing interviewees of the need for confidentiality — is what made the privilege hold.
- Datel Holdings Ltd. v. Microsoft Corp. — an email chain was compelled, though the original email in the chain was not, because the original was sent by a non-attorney employee who had participated in a call with in-house counsel, and the company could not show that legal advice was actually transmitted in the rest of the chain^[10]. The case is a reminder that a privileged conversation with counsel does not automatically cloak everything that follows from it in the same privilege.
- In re Chevron Corp. — an attorney whose role had expanded to encompass lobbying, media relations, and fundraising activity — described in the litigation as “field general” of those efforts — was permitted to be deposed as to the non-privileged aspects of that work^[11]. When an attorney's role is expanded well beyond legal advice, the protection expands no further than the legal advice actually given.

VI. PROTECTING PRIVILEGE IN PRACTICE

None of the doctrine above requires in-house counsel to retreat from the strategic table. It does require a set of deliberate habits, consistently applied, that keep the record clear about what was legal advice and what was not.

1. LABEL DELIBERATELY

Mark communications “Privileged & Confidential — Attorney-Client Communication” only when legal advice is actually being sought or given — not reflexively, and not simply because a lawyer is on the distribution list. Courts see through rubber-stamped designations, and as discussed above, over-designation can undermine the credibility of legitimate privilege claims elsewhere in the same document set.

2. SEPARATE THE MEMOS

Issue legal risk analysis and business recommendations as distinct documents, even when both arise from the same deal or the same investigation. Target's response to its 2013 data breach is a useful model: the company engaged in-house and outside counsel at the outset and established a Data Breach Task Force to inform counsel's legal advice, while a separate business-focused workstream — using a different Verizon team that did not coordinate with the first — handled the operational response. A court later upheld privilege over the counsel-directed track precisely because the two tracks had been kept separate^[12]. Contrast that with the AbbVie result described above, where business and legal content were combined in a single set of slides and the whole document lost the privilege it might otherwise have had for its legal content.

3. CONTROL DISTRIBUTION

Share privileged analysis on a need-to-know basis, and summarize conclusions for wider audiences instead of forwarding the underlying advice itself. Courts now ask whether recipients fell within a proper circle of confidentiality rather than applying a rigid need-to-know test^[7], but that is a reason for discipline, not license — a broader circle is harder to defend as “proper” after the fact. Recipients should also be briefed on the basics: what cannot be shared, with whom it cannot be shared, and the consequences of over-sharing, including that board members who forward privileged material carelessly may create fiduciary duty exposure of their own.

4. ESCALATE SENSITIVE MATTERS TO OUTSIDE COUNSEL

Use outside counsel for high-risk or adversarial matters where independence and privilege protection matter most. When third parties must be involved — investment bankers, accountants, public relations consultants — the privilege can extend to their work only if they function as the client's agent in facilitating counsel's legal advice. An investment banker retained to advise counsel on materiality has been held to fall within the privilege^[16], consistent with the long-standing rule that a third party's involvement is protected when it is genuinely useful to counsel's ability to render legal advice, not merely convenient^[13], and consistent with cases finding an independent contractor to be the functional equivalent of an employee where the relationship with the company was close and continuous^[14].

Not every third-party relationship clears that bar. One court declined to treat a financial advisor as the client's agent where the advisor lacked primary responsibility for the company's functions and lacked a close, continuous relationship with company principals^[15]. Public relations and communications consultants deserve particular caution for the same reason: Pennsylvania's Superior Court held that a common-interest privilege did not extend to communications with a PR firm retained to run a social media campaign during pending litigation, because the firm was not the functional equivalent of the client — it was used only intermittently, and the law firm had no direct interaction with it that would show its work was necessary to the delivery of legal advice^[17]. The lesson generalizes well beyond PR: any third party engaged to assist counsel should have a genuine, ongoing, and documented relationship to counsel's legal work, not merely a role that happens to run parallel to it.

5. DOCUMENT THE LEGAL QUESTION ASKED

Frame communications around the specific legal issue being addressed, not just the business outcome, so the purpose is clear on the face of the record. Headings alone will not save an otherwise business communication — courts have rejected privilege claims for documents labeled “compliance advice” where the substance was not actually legal in character^[18], and have compelled communications from an attorney functioning as a management consultant on wage-and-hour compliance rather than as counsel giving legal advice^[19]. Because the primary-purpose inquiry is assessed dynamically and in context^[5], the surest protection is a contemporaneous record — even a single introductory sentence — that identifies the legal question counsel was actually asked to answer.

VII. CONCLUSION: KEY TAKEAWAYS

A seat at the table is both an opportunity and a responsibility.

The Changing Role of In-House Counsel



- Business pressure to “get to yes” is a normal part of the modern in-house role; managing it deliberately, rather than absorbing it reflexively, is what preserves counsel's credibility over time.
- Privilege is not automatic for in-house counsel. It must be actively protected through deliberate labeling, separation of legal and business work product, controlled distribution, and a clear record of the legal question being addressed.
- The client is the organization, not the deal team, and independence is what makes counsel's advice worth having in the first place.

The closer in-house counsel sits to the business, the more valuable — and the more exposed — that position becomes. The habits described in Part VI are not a constraint on being a strategic partner; they are what allows counsel to be one without giving up the privilege that makes candid legal advice possible in the first place.

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3. Upjohn Co. v. United States, 449 U.S. 383 (1981).
4. ABA Model Rules of Professional Conduct, Rule 1.13(a) (Organization as Client).
5. In re County of Erie, 473 F.3d 413, 420–21 (2d Cir. 2007).
6. In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014) (“In re KBR”).
7. Wellnx Life Sci. Inc. v. Lovate Health Sci. Research Inc., 2007 U.S. Dist. LEXIS 39290 (S.D.N.Y. May 22, 2007).
8. AbbVie Inc., 2018 WL 2995677 (D. Del. 2018).
9. United States v. Sanmina Corp., 968 F.3d 1107 (9th Cir. 2020).
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11. In re Chevron Corp., 749 F. Supp. 2d 141, 144 (S.D.N.Y.), *aff’d sub nom. Lago Agrio Plaintiffs v. Chevron Corp.*, 409 F. App’x 393 (2d Cir. 2010).
12. In re Target Corp. Customer Data Sec. Breach Litig., No. 14-md-2522, 2015 WL 6777384 (D. Minn. Oct. 23, 2015).
13. United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).
14. In re Bieter Co., 16 F.3d 929 (8th Cir. 1994).
15. Export-Import Bank v. Asia Pulp & Paper Co., 232 F.R.D. 103 (S.D.N.Y. 2005).
16. Calvin Klein Trademark Trust v. Wachner, 124 F. Supp. 2d 207 (S.D.N.Y. 2000); see also *Urban Box Office Network, Inc. v. Interfase Managers, L.P.*, 2006 WL 1004472 (S.D.N.Y. Apr. 17, 2006).
17. *BouSamra v. Excelsa Health*, No. 1637 WDA 2015, 2017 PA Super 235 (July 19, 2017).
18. *United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2012 U.S. Dist. LEXIS 158944 (M.D. Fla. Nov. 6, 2012).
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20. Richard Moorhead & Steven Vaughan, *The Tournament of Influence, The Practice* (Harv. L. Sch. Ctr. on the Legal Profession, May/June 2019), <https://clp.law.harvard.edu/article/the-tournament-of-influence/> (summarizing findings from Richard Moorhead, Steven Vaughan & Cristina Godinho, *In-House Lawyers' Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (Hart Publishing 2019)).

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