

Privileged Conversations: The Future of In-house Attorney-Client Privilege

Litigation and Dispute Resolution



The ACC Docket *series "Privileged Conversations" is a collection of interviews and discussions on in-house privilege and ACC's efforts to defend it worldwide.*

Attorney-client privilege is central to the role of in-house lawyers. Without the guarantee of special confidential treatment that privilege entails, it becomes difficult for barred in-house lawyers to fulfill their roles as officers of the court and agents for compliance. In-house lawyers initiate and direct internal investigations to determine compliance and are key in preventing or putting an immediate end to inappropriate practices, and privilege is the basis for the trust upon which candid conversations between attorneys and company employees depends.

In 2020, ACC members asked us to defend in-house privilege in *AG of Massachusetts v. Facebook*, a case before the Supreme Judicial Court of Massachusetts involving fallout from the Cambridge Analytica privacy investigation. Tom Bean from Verrill Dana LLP agreed to take the case and filed an amicus brief on behalf of ACC on the narrow issue of the importance of preserving privilege for internal investigations directed by in-house counsel.

Early this year, Tom sat down with the ACC to discuss what motivated him to accept this case, why he became an appellate lawyer, and why he thinks the court's decision in *AG of Massachusetts v. Facebook* could have far-reaching consequences for in-house counsel.

An interview with Thomas Bean



Thomas Bean

You are a partner in the Boston office of Verrill Dana LLP. Tell us more about your background and experience, as well as what you enjoy most about law.

I have been in private practice for almost 30 years, and I served as an assistant attorney general of Massachusetts for five years. The common law is “made” through appellate decisions. I enjoy participating in the process of “making law” as an advocate. I have been honored to have been asked to brief and argue more than 25 cases before the United States Court of Appeals for the First Circuit and the Massachusetts Supreme Judicial Court, and I have been fortunate to have prevailed in the great majority of those cases.

How did you become interested in representing ACC in preparing and filing an amicus brief in the Facebook case?

One of my law school classmates who serves on the board of ACC Northeast knew of my interest and experience in appellate litigation and recommended me. When I learned that the case concerned the government’s ability to obtain documents that, on their face, should probably be protected by the attorney-client privilege and/or work product doctrine, and after I considered that the trial court’s decision in favor of the Massachusetts Attorney General would discourage or constrain internal investigations, I agreed to represent ACC.

Why do you think the issues in this case are important for companies and their counsel?

In this case, the government issued a civil investigative demand for documents created during an internal investigation by inside and outside counsel for Facebook. Internal investigations have not only become increasingly common, but they are now an integral (and sometimes mandated) part of an effective compliance program. A US Department of Justice (DOJ) manual directs federal prosecutors to consider, in deciding whether to investigate a company, bring charges, and negotiate plea and other agreements, “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision.” Beyond this DOJ incentive, the promotion of effective compliance serves the public interest by encouraging organizations to continually improve their performance. The law should thus encourage internal investigations by protecting material created by or at the behest of attorneys during such investigations. With internal investigations on the rise, in-house counsel should stay tuned for the decision because it will affect more than just tech giants like Facebook.

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Tell us how you approached the task of formulating ACC’s position in the amicus brief. What were the key drivers? What challenges did you face?

Part of the challenge in this case was that Facebook is not, at least in some circles, the most sympathetic appellant. While the case concerned an internal investigation at Facebook into Cambridge Analytica and other app developers that might have misused personal data obtained through the Facebook platform — which may warrant investigation by the government to prevent unfair and deceptive acts or practices — it raised issues that would greatly affect other organizations that rely on internal investigations as a standard part of their compliance programs.

We decided to focus the ACC's amicus brief on the healthcare sector, a heavily regulated industry and a key driver of the Massachusetts economy, to exemplify the broader possible ramifications of affirmance of the trial court's decision. Healthcare organizations often conduct internal investigations not only as part of effective compliance programs, but because they are obliged to by federal or state law, or are at least incentivized to do so by the DOJ policies discussed earlier. We wanted to address the importance of the attorney-client privilege and the work product doctrine on these organizations' ability to perform internal investigations.

The Massachusetts Supreme Judicial Court heard oral arguments in early December. From the judges' questions, what do you think most concerns the court? When do you think the court is likely to issue its decision?

Having been an appellate litigator for quite some time, I am loath to infer the direction the court might go from the justices' questions. That said, it appeared that at least some members of the court thought the Massachusetts Attorney General had a job to do in investigating potential unfair and deceptive acts or practices, but that she might not be able to perform that job by piggy-backing on the results of Facebook's internal investigation led by inside and outside counsel.

Based on your work for ACC on this case, what advice do you have for in-house counsel for protecting the attorney-client privilege?

We'll know more after the court issues its decision, but I think it is important for in-house counsel to participate in all stages of an internal investigation to increase the likelihood that the privilege will be preserved: from design, to implementation, to reporting. Counsel should ensure that all participating employees understand that the internal investigation is intended to be confidential, that all facts are being gathered to facilitate in-house counsel's delivery of legal advice to management, and that the privilege is the company's rather than any employee's. Additionally, organizations often tout their internal investigations to (re)gain public confidence. They should, however, be wary about how much they disclose to the public to avoid a waiver of the privilege.

According to your firm bio, you have volunteered your expertise handling significant pro bono cases, and you have been recognized for that. Why are you committed to pro bono?

Many years ago, a chief judge in a "state of the district" address said that all lawyers have a role to play in making the system work. I am grateful to have had the privilege to become a lawyer. Having enjoyed that privilege, I agree with the chief judge: Part of my obligation is to help make the system work for the people. That is why, when the Massachusetts Supreme Judicial Court asked me several years ago to investigate and, if appropriate, prosecute, alleged wrongdoing by a gubernatorially-appointed clerk-magistrate, I said "yes." Little did I know when I accepted the responsibility that the engagement would ultimately require 500 pro bono hours of my time, and over 2,000 pro bono hours of attorney time at my firm for the investigation, six-day trial, and appeal. Verrill is a great proponent of equal access to justice; the firm culture has allowed me to focus on not only providing great service to my clients, but to allow me to engage in significant pro bono efforts.

Read an update on the case in Privileged Conversations: Ruling in US Facebook Case Clarifies Attorney-Client Privilege and Work Product Doctrine.

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