# Attorney-Client Privilege Revisited

*Wal-Mart* decision serves to caution directors about what they say and to whom.

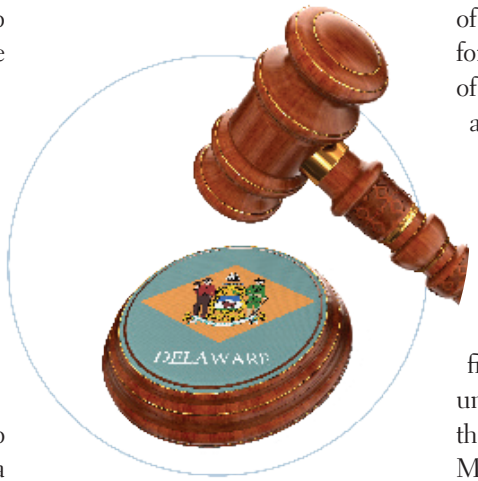
By Francis G.X. Pileggi

The Delaware Supreme Court recognized for the first time an exception to the rule that communications between a board and its lawyers are protected from disclosure based on the time-honored attorney-client privilege. In a case against Wal-Mart, the court decision also clarified the types of board-related documents stockholders can force a corporation to produce. The upshot: think twice before sending that e-mail.

The opinion affirmed the Court of Chancery's decision—pursuant to Section 220 of the Delaware General Corporation Law—that ordered Wal-Mart to produce a wide variety of documents, including ones with content privileged or protected by the work-product doctrine, to shareholder and plaintiff Indiana Electrical Workers Pension Trust Fund, IBEW (IBEW).

On April 21, 2012, *The New York Times* ran an article headlined "Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle." The article described a scheme of illegal bribery payments made to Mexican officials between 2002 and 2005 at the direction of the then-CEO of WalMex, Wal-Mart's Mexican's subsidiary. Wal-Mart executives were aware of the conduct no later than Sept. 21, 2005, the article noted.

In June 2012, IBEW sent a letter to Wal-Mart demanding inspection of broad categories of documents relating to the bribery allegations described in the article. In particular, IBEW wanted to investigate in connection with the WalMex allegations mismanagement, the possibility of breaches of fiduciary duty, and whether a pre-suit demand on the board would be futile as part of a derivative suit.




Also that month, Wal-Mart agreed to make available board materials such as minutes, agendas, and presentations relating to the WalMex allegations, as well as existing policies relating to Wal-Mart's Foreign Corrupt Practices Act (FCPA) compliance. Wal-Mart refused to produce information that it deemed not "necessary and essential" to the stated purposes in the request or that were protected by the attorney-client privilege and work-product doctrine.

In August, 2012, IBEW filed a complaint in the Court of Chancery alleging, among other things, that certain documents falling within the scope of the demand had not been produced. The court agreed. In May 2013, it ordered Wal-Mart to produce a wide variety of information including "all documents" (including electronic information such as e-mail content) in the custody of 11 custodians (including the former board member and chair of the audit committee) and their assistants. Wal-Mart previously had searched the data relating to the WalMex allegations, FCPA compliance, and internal investigations. The court also required Wal-Mart to produce, among other things, officer-level and lower-level documents "regardless of whether they were ever provided to Wal-Mart's board of directors or any committee thereof."

### Did Chancery Err?

On appeal, Wal-Mart argued that the Court of Chancery erred in ordering Wal-Mart to produce documents that "far exceed" the proper scope of a Section 220 request and that IBEW's request lacked the "rifled precision" required by Delaware law in Section 220 cases. Moreover, Wal-Mart argued that IBEW failed to meet its burden of showing that the scope of production ordered by the Court of Chancery was "necessary and essential" to IBEW's proper purposes, and that the end result provides

IBEW with the type and amount of discovery that is reserved for plenary proceedings.

Wal-Mart also argued that the Court of Chancery abused its discretion and committed legal error by requiring it "to produce documents that were never presented to or created by members of [Wal-Mart's] board of directors" and by creating a "presumption" that "officer-level knowledge should be imputed wholesale to the board." Wal-Mart contended that it is "undisputed that the purpose of IBEW's inspection here is limited to determining whether demand on the current board with respect to the WalMex allegations would be futile," and that, accordingly, officer-level documents are not "necessary and essential to [IBEW's] stated purpose." The other stated purposes of IBEW's demand, however, were to investigate allegations of the underlying bribery and how the ensuing investigation was handled.

While Wal-Mart acknowledged that officer-level documents that "refer to communications with members of the board" regarding the WalMex investigation were "necessary and essential" to the demand futility inquiry, Wal-Mart argued that the court's ruling went too far by ordering production of "officer-level *communications* with directors."

The state Supreme Court referenced the Court of Chancery's finding that officer-level documents from which director awareness of the WalMex investigation might be inferred are also necessary and essential to IBEW's request and must be produced.

The high court agreed with the Court of Chancery, which held that officer-level documents are necessary to the plaintiff's inspection because the plaintiff may establish director knowledge of the WalMex investigation by establishing that certain Wal-Mart officers were in a "reporting relationship" to Wal-Mart directors, that those officers did in fact report to specific directors, and that those officers received key information regarding the WalMex investigation.

### Attorney-Client Privilege

Generally speaking, communications between members of the board and attorneys for the board regarding the receipt or provision of legal advice cannot be compelled for production in connection with a lawsuit. Now, however, board members must be aware that under certain circumstances formerly confidential communications to or from their lawyers regarding legal advice may be subject to forcible disclosure.

The fiduciary exception to the attorney-client privilege was recognized in a 1970 decision by the U.S. Court of Appeals for the Fifth Circuit in *Garner v. Wolfinbarger*. The court applied a fiduciary exception when a stockholder sues a corporation or its board and can demonstrate good cause why it should not be limited by the attorney-client privilege.

The Delaware Supreme Court has never directly endorsed the exception under the *Garner* doctrine, but it tacitly has recognized that the attorney-client privilege is "not absolute, and if the legal advice relates to a matter which becomes a subject of a suit by a shareholder against the corporation, the invocation of privilege may be restricted or denied entirely."

Although this Supreme Court decision involved a request by a stockholder for records of Wal-Mart based on Section 220, the court recognized that the exception also applies in plenary corporate litigation. The court observed that the "attorney-client privilege can be traced back to Roman times and is the oldest privilege recognized by Anglo-American jurisprudence." Even though Delaware agrees with the U.S. Supreme Court that the attorney-client privilege is important to encourage "full and frank communication between attorneys and their clients, and thereby promoting broad public interests in the observance of law and administration of justice," there are narrow exceptions that achieve a proper balance between competing interests.

In *Wal-Mart*, the Supreme Court agreed with the Chancery Court that documents otherwise subject to the privilege were necessary to be produced to determine what the board knew regarding the alleged bribery scheme and whether a cover-up took place.

### Exception to Work-Product Doctrine

The court also observed an exception similar to the attorney-client privilege known as the work-product doctrine. The work-product doctrine generally protects the mental impressions and related trial preparation materials of a lawyer. Although *Garner* does not apply to information protected by the work-product doctrine, based on Court of Chancery Rule 26(b)(3), a party may obtain access to non-opinion work-product "upon a showing that the party seeking discovery demonstrates substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Although the *Garner* factors overlap with the standard for the work-product doctrine, they are distinct.

As in the *Grimes* case, the Supreme Court in *Wal-Mart* recognized that the same showing of "good cause" to overcome a claim of attorney-client privilege also can apply to demonstrate substantial need for the information otherwise protected by the work-product doctrine.

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