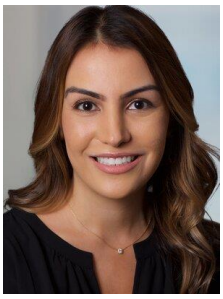
Privilege Waiver Risk Lessons From Twitter v. Musk

By **Melissa Sawyer, Jacob Croke and Sheeva Nesva** (October 24, 2022)

Melissa Sawyer

Jacob Croke



Sheeva Nesva

For busy CEOs glued to their phones, using their corporate email account for communications unrelated to work may be second nature.

For cautious executives, copying an attorney and adding "Privileged and Confidential" at the top of any sensitive email may seem like a safe way to maximize privilege protections. And for a board member responding to an urgent email about a pending merger, carefully reviewing the list of recipients may not be top of mind.

But as recent discovery disputes in the Twitter Inc. v. Musk litigation pending in the Delaware Chancery Court[1] have highlighted, these seemingly innocuous steps can expose executives and companies to a risk of privilege waiver for communications that they might have assumed would be protected from disclosure.

The risks of a potential privilege waiver can be particularly significant in the transactional context — discussions are often fast-paced, there may be several parties and outside advisers involved, and a failed transaction can lead to contentious litigation in which some of the most sensitive communications will be sought in discovery.

Thanks in part to Delaware's corporate law preeminence, Delaware courts have developed an exceptionally thorough body of law regarding the many privilege-related issues that can arise in transaction-related litigations.

It is perhaps unsurprising that the Twitter litigation already has generated multiple discovery disputes and related rulings that underscore key risks and offer helpful guidance for executives and companies seeking to minimize the risks of potential privilege waivers.

Using Work Email for Matters Unrelated to Work: Twitter's Motion to Compel Production of Musk's Tesla and SpaceX Emails

Many executives might be surprised to learn that using their work email for communications unrelated to work could waive any attorney-client privilege that otherwise might apply to those emails.

In the litigation context, this issue typically arises where an employee uses work email to discuss privileged matters unrelated to work that later become the subject of discovery requests.

Delaware courts faced with these situations historically have applied a four-factor test from the 2005 In re: Asia Global Crossing Ltd.[2] case in the U.S. Bankruptcy Court for the Southern District of New York to evaluate whether an employee has an objectively reasonable expectation of confidentiality and privacy in their work emails:

1. Whether "the corporation maintain[s] a policy banning personal or other objectionable use";

2. Whether "the company monitor[s] the use of the employee's computer or e-mail";

3. Whether "third parties have a right of access to the computer or e-mails"; and

4. Whether "the corporation notif[ied] the employee, or ... the employee [was] aware, of the use and monitoring policies."[3]

In the Twitter litigation, Twitter moved to compel production of Musk's emails regarding the Twitter transaction that he had sent using his Tesla Inc. and Space Exploration Technology Corp., or SpaceX, email addresses and subsequently had withheld from production on the basis of attorney-client privilege.

Twitter noted that both Tesla and SpaceX had policies stating that emails on company systems or devices were company property, that employees should have no expectation of privacy or confidentiality in their work email and that work emails may be monitored.[4] Twitter argued that Musk thus did not have an objectively reasonable expectation of privacy under Asia Global, and that any attorney-client privilege had been waived.[5]

The court denied Twitter's motion to compel, acknowledging that the language of the Tesla and SpaceX policies was substantively similar to language that Delaware courts previously had cited in finding a privilege waiver, but holding that other factors here warranted a different result, including that:

- Tesla and SpaceX also had policies stating that employee emails would be accessed only in limited circumstances — e.g., to comply with a legal request — and only with approval from legal or human resources;[6]

- Musk submitted an affidavit stating that he believed his work emails could not be accessed without his consent except to the extent legally necessary — e.g., in response to a subpoena;[7] and

- Tesla and SpaceX executives submitted affidavits stating that Musk was not subject to the default company email policies and that Musk's work emails had not been accessed without his consent except to the extent legally necessary.[8]

Takeaways

Although the court noted the unique circumstances of Musk's roles at Tesla and SpaceX, it did not expressly limit its ruling to the facts of this case, and certain aspects of this ruling may be more broadly applicable.

Nevertheless, executives should understand that using a company email account or device for privileged personal communications or privileged communications related to another company creates a risk of waiver.

These risks may be especially acute for executives or directors serving in roles at multiple companies. Those individuals should consider taking steps to ensure appropriate segregation of potentially privileged communications — for example, by using separate email accounts or devices for communications regarding each company.

To the extent an executive anticipates using company email for communications unrelated

to work that the executive would like to maintain as privileged, the executive should consider seeking confirmation from the company's general counsel that such communications will retain their privileged character notwithstanding any general corporate policy allowing corporate review and access.

Ensuring Credibility of Privilege Assertions: Musk's Motion to Compel Production of Withheld Documents on "Blanket Waiver" Grounds

When it comes to assertions of privilege, more is not always better. In situations involving egregiously overbroad or inaccurate assertions of privilege, some courts have gone so far as to find a blanket waiver of privilege as to all documents.[9] Musk sought a similar remedy in the Twitter litigation, moving to compel Twitter to produce more than 7,000 documents that had been withheld as privileged.[10]

Musk argued that a wholesale waiver was justified for several reasons, including that Twitter's employees allegedly were "specifically instructed to flag any 'sensitive' material as privileged and to copy a lawyer on the communication," regardless of whether the communication sought legal advice.[11]

Musk also pointed to a whistleblower complaint from a former Twitter employee, which claimed that "Twitter staff often applied [privileged and confidential stamps] indiscriminately."[12] The court rejected Musk's request, holding that a blanket waiver was an extreme remedy not warranted under the circumstances.[13]

With respect to Musk's assertions that Twitter employees had at times indiscriminately applied privilege labels to communications or copied attorneys into nonprivileged communications, the court concluded that those claims did not carry much weight given that Twitter's Delaware litigation counsel had certified the accuracy of Twitter's privilege log and submitted an affidavit detailing its process for reviewing privilege assertions.

As further support for its holding, the court also noted that during the course of that review, Twitter's Delaware counsel had downgraded and produced thousands of documents that Twitter initially had withheld as privileged.[14]

Takeaways

Companies should ensure that employees are adequately trained regarding privilege issues and understand that the involvement of a lawyer does not necessarily make a communication privileged.

Companies should also ensure that any policies regarding privilege labeling of communications are appropriately tailored to avoid improper overuse.

Even in situations where individual employees may have overused privilege labels in their communications, companies can protect themselves from the risk of a blanket waiver finding by conducting a careful privilege review during discovery and avoiding questionable privilege assertions.

Communicating With Third Parties and the Common Interest Privilege: Twitter's Motion to Compel Production of Communications Between Musk and Outside Advisers

Any complex transaction typically involves one or more outside advisers to each party,

including financial advisers.

Recognizing the important role of these outside advisers and their aligned interests in completing the transaction, many courts have recognized a common interest privilege that protects certain categories of privileged communications from disclosure notwithstanding the presence of these outside advisers.[15]

Whether the common interest privilege protects a particular communication often is a nuanced and fact-intensive question. In the Twitter litigation on Sept. 16, Twitter moved to compel the production of communications between, on the one hand, Musk and his counsel, and on the other hand, certain Morgan Stanley entities acting as Musk's financial adviser and lender and their counsel.[16]

Twitter argued that New York law applied to this dispute, and that under New York's relatively restrictive view of the common interest privilege, any potential privilege had been waived because the communications did not concern pending or anticipated litigation, and because the Morgan Stanley entity acting as lender was a commercial counterparty to Musk and therefore did not have "any plausible claim of 'common interest.'"[17]

The Morgan Stanley entities argued that Delaware law applied, and that under Delaware's more expansive view, the common interest privilege extended to protect from waiver communications where, as here, the parties shared a common interest in "seeing the merger to its completion."[18] This motion remains pending before the court.

Takeaways

Executives should be cautious about including outside advisers in privileged transaction-related communications, and should consult with counsel whenever it is unclear whether the involvement of a third party might result in a privilege waiver.

Executives should also be mindful that although Delaware law contemplates a relatively expansive view of the common interest privilege, that privilege is not absolute, and the question of whether it extends to a particular communication will depend on the timing, subject matter and participants.

Conclusion

At every stage of a transaction, companies and executives should be mindful of the risk of potential privilege waiver. These recent disputes in the Twitter litigation, along with the existing body of Delaware law on these issues, highlight key considerations and offer useful guidance for executives and companies seeking to minimize these risks.

Melissa Sawyer and Jacob Croke are partners, and Sheeva Nesva is an associate, at Sullivan & Cromwell LLP.

Disclosure: In connection with the Twitter litigation, Sullivan & Cromwell represents Twitter's financial advisers, neither of which is a party to the litigation.

[1] Twitter, Inc. v. Elon R. Musk et al., C.A. No. 2022-0613-KSJM (Del. Ch.).

[2] 322 B.R. 247 (Bankr. S.D.N.Y. 2005).

[3] Id. at 257.

[4] Id. at 3-6.

[5] Id. at 2.

[6] Twitter, Inc. v. Elon R. Musk et al., C.A. No. 2022-0613-KSJM, Dkt. 479 at 13 (Del. Ch. Sept. 13, 2022).

[7] Id. at 4-5, 7, 14.

[8] Id. at 5-7.

[9] See, e.g., Klig v. Deloitte LLP, 2010 WL 3489735, at *5 (Del. Ch. Sept. 7, 2010).

[10] Twitter, Inc. v. Elon R. Musk et al., C.A. No. 2022-0613-KSJM, Dkt. 556 (Del. Ch. Sept. 13, 2022).

[11] Id. at 4.

[12] Id. at 16.

[13] Twitter, Inc. v. Elon R. Musk et al., C.A. No. 2022-0613-KSJM, Dkt. 593 at 3-4 (Del. Ch. Sept. 23, 2022).

[14] Id. at 6.

[15] See, e.g., 3Com Corp. v. Diamond II Holdings, Inc., 2010 WL 133915, at *8 (Del. Ch. May 31, 2010).

[16] Twitter, Inc. v. Elon R. Musk et al., C.A. No. 2022-0613-KSJM, Dkt. 529 (Del. Ch. Sept. 16, 2022).

[17] Id. at 2, 6. See also Ambac Assurance Corp. v. Countrywide Home Loans, Inc., 2016 WL 3188989 (N.Y. June 9, 2016).

[18] Twitter, Inc. v. Elon R. Musk et al., C.A. No. 2022-0613-KSJM, Dkt. 596 at 4 (Del. Ch. Sept. 23, 2022). See also 3Com Corp. at *8 (Del. Ch. May 31, 2010).