A bright young chap in your company's law department thinks you should use a shared intranet that provides you with easy access to legal resources, documents, and work product. Sounds like a good idea, but what precisely are the risks of a shared intranet to the protections afforded by the attorney-client privilege and work product doctrine? And what steps should you take to reduce those risks?

The Ins and Outs of Intranets

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Two good questions! Precise answers are hard to come by. While there are concerns about the confidentiality of materials accessible through a company's intranet, there is little legal scholarship, and no reported case law, that authoritatively addresses this issue. This is particularly surprising given today's increasing use of intranets.[1] Unraveling this question will require us to go back to basics: back to the legal principles that courts have applied to typical hard-copy files and documents.

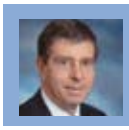
Let us first acknowledge the unhappy truth: Courts view in-house counsel's assertions of the attorney-client privilege and the work product doctrine more skeptically than equivalent assertions by outside counsel.[2] While the general principles for invoking these protections are the same, in-house counsel, especially those with the dual roles of both legal and business advisor, face greater hurdles in establishing that communications with them are privileged. Courts fear corporations might use the lawyers' dual roles to prevent disclosure of otherwise discoverable corporate information.[3] Many courts, therefore, do not presume, as they do with outside counsel, that communications with in-house counsel are privileged.[4]

Some Traditional Principles

In a privilege or work product analysis of a hard-copy document or emails, the court will examine the purpose for which the document was created. One of the first factors used to determine this purpose is the identities of the author and recipient. This exercise is obviously more difficult for a document posted on an intranet. A court could conclude that intranet materials were prepared for the purpose of providing business rather than legal advice (and consequently not protected by the attorney-client privilege) where the intranet had a broad range of authorized users.[5] Similarly, a court could conclude that the identity or position of intranet users such as managerial personnel or lawyers engaged in regulatory filings indicates that the materials were prepared for future risk management or other business purposes, rather than in anticipation of litigation, thereby undermining work product protection.[6] Finally, if the corporation indiscriminately places in its privileged intranet many pure "business" documents, the court could conclude that the intranet is being used improperly to shield discoverable information from opposing parties.

But let us assume that the materials are by their nature protected by the attorney-client privilege and/or work product doctrine. In order to retain their protected status, some decisions require that hard copy be maintained in a confidential manner,[7] i.e., accessible only to those within the corporation who "need to know" the substance of a communication or the legal advice.[8] Disclosing privileged information or advice beyond those who have a "need to know" has been found to undermine confidentiality and jeopardize the attorney-client privilege.[9] Applying this principle to the intranet, permitting electronic access to documents prepared "in anticipation of litigation" by personnel who are not involved in the litigation, may hobble a claim of work product immunity, since a court may view broad access as an indication of a nonlitigation purpose.

In considering the issue of waiver of the attorney-client privilege or the work product protection with respect to hard-copy documents, some courts focus on the reasonableness of the precautions taken by the corporation to prevent an unauthorized disclosure of confidential information.[10] For example, what is the corporation's protocol for identifying, storing, and providing access to confidential materials? Specifically, are confidential documents labeled as such;[11] are they segregated from, or intermingled with, nonconfidential materials;[12] is access restricted to only certain employees?[13] These same principles have been found applicable to email transmissions of confidential information.[14]



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The Intranet and Tradition

Traditional principles govern the privilege questions that arise for hard-copy documents. Those questions are similar to the ones that arise with corporate intranets. The trick is to extend the traditional principles in a sensible way to intranet data. In order to reduce the risk of waiver, here are a few suggestions, some of which have been implemented by other corporations:

- Compartmentalize access to the intranet to ensure that only those lawyers and legal personnel directly involved in the litigation, and their supervisors, can access the documents. Password protection should be used to implement this firewall.[15]
- Train users and provide them with written instructions regarding the proper uses of intranet data, which, of course, is solely for the conduct of litigation.
- Require, as a prerequisite to each access to the intranet, that the user respond to a question that requires her to affirm that she is aware of the limitations on the use and dissemination of the information and has agreed to abide by them.
- Establish, maintain, and periodically review an electronic log of all employees who access the intranet to ensure that the restrictions are being followed, and promptly investigate any suspected violations or attempted improper intrusions.
- Display a warning on all documents that exist on and are printed from the intranet that the documents cannot be shared with anyone outside the XYZ team without the express written approval of a designated very senior lawyer and that they cannot be used for any purpose other than the conduct of pending or anticipated litigation.
- Place only documents that are important to the conduct of the litigation—true work product—in a "privileged" intranet. Placing other data in the privileged intranet may convince courts that it is a contrivance to shield information improperly from discovery.
- Establish a second intranet for unprivileged but important legal documents such as filed pleadings, depositions, expert reports, legal forms, and other useful but not privileged materials.[16]

In today's world a "privileged" intranet has great potential benefits but carries with it the inherent risk of every new concept or technology: It lacks fifty or a hundred years of jurisprudence that defines its limits. If you adopt the most stringent rules that have been applied to traditional documents, that risk should be sharply reduced.

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Notes

1. This article focuses on an intranet accessible only to those within a corporate law department. An intranet that is accessible to third parties or to outside counsel presents different issues and complications that are not addressed here. It has been estimated that by the fall of 2001, approximately 90 percent of all companies utilized some type of intranet system. *See* Gregory I. Rasin and Joseph P. Moan, "Fitting a Square Peg into a Round Hole: The Application of Traditional Rules of Law to Modern Technological Advancements in the Workplace," 66 *Mo. L. Rev.* 793, 824 (Fall 2001).
2. *See generally* 1 John K. Villa, *Corporate Counsel Guidelines* § 1:5, at 1-50–1-51.
3. *See* SEC v. Gulf & Western Industries, Inc., 518 F. Supp. 675, 681–682 (D. D.C. 1981).
4. Compare Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1977) (a matter committed to outside counsel is *prima facie* committed for purpose of seeking legal advice), *with* Independent Petrochemical Corp. v. Aetna Cas. and Sur. Co., 672 F. Supp. 1, 5 (D. D.C. 1986) (in-house counsel communications distinguishable from facts in *Diversified*).
5. *See, e.g.*, Oil Chemical and Atomic Workers Intern. Union (OCAWIU) v. American Home Products, 790 F. Supp. 39, 41 (D. P.R. 1992) (the attorney-client privilege does not ordinarily apply to business correspondence, inter-office reports, file memoranda, or notes of business meetings); *see generally* Villa, *supra*, § 1:16.
6. *See Restatement (Third) of the Law Governing Lawyers* § 87, comment i.
7. *See* Scott Paper Co. v. U.S., 943 F. Supp. 489, 499 (E.D. Pa. 1996), *aff'd*, 943 F. Supp. 501 (E.D. Pa. 1996).
8. Diversified Industries, 572 F.2d at 609; U.S. v. American Tel. & Tel. Co., 86 F.R.D. 603, 619 (D. D.C. 1979); *see, e.g.*, F.T.C. v. GlaxoSmithKline, 294 F.3d 141 (D.C. Cir. 2002).
9. *See* Glaxo, Inc. v. Novopharm Ltd., 148 F.R.D. 535, 541 (E.D.N.C. 1993) (declining to apply the attorney-client privilege to a memorandum seeking legal advice from inside counsel that was sent to a file); In re Air Crash Disaster, 133 F.R.D. 515, 520 (N.D. Ill. 1990) (no expectation of confidentiality in a memorandum sent to 500 people).
10. *See* Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 292–293 (D. Mass. 2000).
11. *See* Hardy v. New York News, Inc., 114 F.R.D. 633, 644 (S.D.N.Y. 1987).
12. *See* In re Grand Jury Proceedings Involving Berkley and Co., Inc., 466 F. Supp. 863, 870 (D. Minn. 1979), *aff'd as modified*, 629 F.2d 548 (8th Cir. 1980).
13. *See* Jarvis, Inc. v. American Tel. & Tel. Co., 84 F.R.D. 286, 292 (D. Colo. 1979).
14. *See ABA Formal Op.* 413 (1999); *see also Attorney-Client Privilege in the Electronic Age*, Comm. on Corp. Couns. Newsl. (ABA Sec. on Litig.) Aug. 1996 (checklist).
15. *See* Joseph P. Moan and Gregory I. Rasin, "Fitting a Square Peg into a Round Hole: The Application of Traditional Rules of Law to Modern Technological Advancements in the Workplace," 66 *Mo. L. Rev.* 793, (2001) (firewalls); Todd Woody, "The Best Web Sites You'll Never See," 9/30/1996 *Legal Times* 35 (how one legal department's intranet is controlled).
16. *See* "Cover Story Innovative GCS," 4 *Corp. Couns.* 80 (2004).