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Preserving The Attorney Client Privilege In Corporate America

Beth S. Rose

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Introduction

As the law departments of corporate America grow, the responsibilities of in-house counsel have become more diverse than ever before. While in-house counsel are, of course, called upon to dispense legal advice, they are also sometimes asked to wear multiple hats – legal, business and financial – in some instances, at the same time. In this dynamic environment, questions of whether a communication is privileged can be daunting. Pervasive use of e-mail and other electronic forms of communication add yet another layer of complexity. This article discusses the contours of the attorney client privilege in the corporate environment, and provides in-house counsel with practical strategies to preserve vital attorney client communications.

Basic Principles

The attorney client privilege is the oldest of the privileges for confidential communications known to the common law.[1] Over twenty years ago, our Supreme Court recognized that full and frank communications between lawyers and their clients promoted broader public interest in the observation of law and the administration of justice, and that sound legal advice and advocacy depends on lawyers being fully informed by their clients.[2] The Court further recognized that the privilege necessarily applies regardless of whether the client is an individual or a corporation. It likewise extends to communications with in-house and outside counsel alike. But because application of the privilege can, some argue, interfere with the truth finding process, it is construed narrowly. This strict analysis is especially evident when a corporate entity seeks to invoke the privilege to protect communications to in-house counsel. One court has written that this approach is "necessary to prevent corporations from shielding their business transactions from discovery simply by funneling their communications through a licensed attorney."[3]

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Nature And Scope Of The Attorney Client Privilege In The Corporate Setting

Even an advocate with the most expansive view of the attorney client privilege would be hard pressed to argue that all communications between in-house counsel and his/her client are privileged. Most courts recognized that the "privilege only exists for those confidential communications which necessarily occur in the course of requesting or giving legal advice."[4] Where a dispute arises, the burden rests on the party asserting the privilege to clearly demonstrate that the communication in question was made in confidence for the purpose of securing or rendering legal advice.[5] This test is far from straightforward in a corporate setting.

These days, in-house counsel are likely to perform multiple roles within their respective organizations. In addition to acting as counsel, they often serve as administrators, financial/business advisors, committee chairs, and negotiators to name just a few. The conventional wisdom is that the privilege attaches to those communications in which in-house counsel is acting in his/her capacity as a lawyer or legal advisor. Similarly, the privilege exists only if the lawyer is giving legal advice; there is no protection if the attorney is dispensing technical advice or business advice.

The problem with these rules is that they fail to give adequate consideration to the multi-faceted world in which in-house counsel perform their jobs. The reality is that legal and business advice are often intertwined. In those instances, courts find that the legal advice must predominate for the communication to be protected. What it means for legal advice to "predominate" – the communication is sometimes anyone's guess – the analysis is typically fact-bound. Some courts opine that if the legal advice is incidental to the business advice, it is not privileged. The variety of matters on which in-house counsel are called to

***Beth Rose** is a Member of Sills Cummis Epstein & Gross P.C. and is Co-Chair of the Firm's Litigation and Product Liability Practice Groups.*

Please email the author at brose@sillscummis.com with questions about this article.

comment make it as clear as mud to figure out when a court will agree that a communication is privileged. What happens when the client is seeking both business and legal advice from its counsel? Why shouldn't these communications be protected? What steps can corporate counsel take to protect them?

Although there are no easy answers, the case law provides the following guidance for the analysis of privilege in the corporate context:

• Information is not privileged simply because it comes from an attorney.

• The mere presence of in-house counsel at a meeting does not make all communications made during the meeting privileged.

• The privilege does not apply to the fact of a communication between a client and its counsel – only the substance of the communications is protected.

• A general description of work performed by an attorney may not be privileged.

• When an attorney is merely acting as a conduit for information, the privilege does not apply.

• Copying a lawyer on a document does not transform an otherwise non-privileged communication into a privileged one.

• Legal advice can be protected – business advice cannot.

• Where confidentiality of a document is not maintained, privilege may be lost.

Consider the following unfortunate real life examples regarding meeting minutes. Plaintiff, a senior scientist and nine year employee, was terminated and sued his employer for age discrimination.[6] During discovery, plaintiff sought documents created by the company's Personnel Action Review Committee ("PARC") – the entity that made the decision to end plaintiff's employment. Defendant acknowledged that the PARC made the termination decision, but sought to withhold minutes of the meeting on privilege grounds. The company's in-house counsel was a member of the PARC; indeed, the bylaws of the committee required his participation. The court rejected the company's argument that the communications made during the PARC meetings were privileged, because in-house counsel was acting as a legal advisor. Rather, the court found that although legal review was one purpose of the meeting, it was merely "incidental" to the primary purpose, namely to review and concur in termination decisions, and to approve proposed terminations.

A similar issue arose in a product liability case in which plaintiff sought all documents relating to defendant's Corporate Product Liability Management Team's analysis of a particular forklift that plaintiff apparently claimed injured him.[7] The company's general counsel served as a member of the committee, and to support defendant's position that the requested documents were privileged, submitted an affidavit explaining that the very purpose of the team was to analyze and take measures to reduce product liability claims, and that his specific role was to provide legal advice to the group. The Court's conclusions were sobering: "From this affidavit, it is apparent that some, perhaps many, of the communications that occurred in CPLMT meetings were to be protected by the attorney-client privilege. The affidavit does not establish, however, that all communications in the CPLMT meetings are protected by the privilege, much less that the communications at issue here are so protected. Indeed, there is nothing in any of the communications submitted for the court's review that suggests that the communications were made primarily for the purpose of securing legal advice." *Id*. at 5. But wasn't the committee formed so that counsel could provide legal advice on product liability claims?

Best Practices To Preserve The Attorney Client Privilege In A Corporate Environment

Practical steps to meet these challenges are set forth below.

1. Segregate legal functions from those that are arguably non-legal. The question for some courts is whether the task could have been performed readily by a non-lawyer. Related to this inquiry is whether the lawyer performed a legal task – applying the law to a set of facts (*i.e*., analyzing compliance with a particular statute or regulation). Examples of tasks which some courts have found to be non-legal include preparation of a tax return, negotiating an agreement, accounting advice, engineering advice given by a patent lawyer in a patent litigation, an attorney acting as a money manager, business agent or lobbyist.

2. Where appropriate, advise employees in writing that communications/cooperation with in-house counsel is required to assist counsel in providing legal advice to the company.

3. Advise employees in writing that the communications with in-house counsel are confidential and must be maintained as such.

4. Limit the number of employees who receive attorney client communications. Attorney client communications should only be shared with those who need the information to perform their job function.

5. Legend documents and emails as "Attorney Client Communications" as appropriate. Don't overdo it. A legend may not be determinative of whether the communication is privileged – the substance of the communication is.

6. Maintain separate legal and business files where practical.

7. Use appropriate titles to identify counsel. Just because the VP of Business Development may have a law degree will not transform his communications into privileged ones if he is not acting as counsel.

8. Consider and address challenges posed by pervasive use of e-mail and other electronic forms of communication. To be sure, e-mail is one of the greatest communication tools ever. It is easy to use, and allows for the exchange of information among multiple parties. Yet, the nature and extent to which otherwise privileged communications are forwarded or are embedded in lengthy e-mail strings may be a part of a court's privilege analysis. Conduct e-mail training for in-house counsel to facilitate better understanding of how electronic exchanges can affect privilege determinations.

Conclusion

Judicial evaluation of the attorney client privilege in the corporate context is too narrow and rigid. Because of the varying roles in-house counsel play in the corporate setting and the increasing use of electronic communications, courts should develop more flexible criteria to evaluate when a communication is protected. Until then, in-house and outside counsel should be mindful of the existing rules and take practical steps to protect privileged communications.

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[1] 8 J. *Wigmore Evidence* section 2290 (McNaughton rev. 1961).

[2] *Upjohn v. United States*, 449 U.S. 383 (1981).

[3] *Teletron, Inc. v. Bert D. Alexander, et al.,* 132 F.R.D. 394 (E.D. Pa. 1990).

[4] *David Burton v. Reynolds Tobacco Company*, 170 F.R.D. 481, 484 (D. Kansas 1997).

[5] *Kramer v. The Raymond Corporation,* 1992 Lexis 7418 (E.D. Pa. May 29, 1992).

[6] *Neuder v. Battelle Pacific Northwest National Laboratory*, 194 F.R.D. 289 (D.D.C 2000).

[7] *Kramer*, 1992 Lexis 7418 at 4.