Applying The Attorney-Client Privilege To In-House Counsel
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In-house counsel and attorneys acting as corporate officers are often called upon to dispense advice with both legal and business components. Often the line between legal and non-legal advice is not apparent. For example, should a memorandum from in-house counsel to a corporate president concerning a joint venture be considered legal advice even though it does not cite case law or discuss any legal theories? If the memorandum is considered primarily legal it will, in all likelihood, be shielded from disclosure under the attorney-client priviledge. Alternatively, the document must be produced if it is considered solely as a business communication.

This article analyzes the attorney-client privilege as it applies to in-house counsel. Strategies to protect privileged communications from disclosure will be discussed. First, though, the following is a brief summary of the attorney-client privilege and certain basic concepts governing its enforcement.

A. The Basis Of The Privilege

The attorney-client privilege is designed to encourage full and frank communication between attorneys and their clients. Obviously, a client who feels he is dealing with his attorney are not privileged may be less forthcoming when seeking legal advice concerning a proposed transaction. Absent full disclosure of the facts, counsel may be unable to properly analyze the legality of the transaction. In this state, the public may suffer if, for example, the client goes forward with the transaction, based on incomplete advice from his attorney, and the transaction violates the antitrust laws. The attorney-client privilege exists to avoid this result.

In a nutshell, the attorney-client privilege protects both client communications to their attorneys and communications from the attorney to the client which include legal advice or reflect information provided by the client in confidence.

The privilege protects both oral and written communications, provided such communications are not in aid of a crime or a fraudulent scheme or activity. However, a document is not privileged merely because a client sends it to a lawyer. Thus, a client cannot shield general business documents from disclosure by furnishing them to an attorney. Rather, the attorney-client privilege only applies to communications that contain confidential information concerning legal advice or are intended to facilitate the rendering of legal advice.

Moreover, the privilege only applies to the communication itself; it does not shield disclosure of the underlying facts. Thus, while an attorney cannot be compelled to reveal what his client said prior to a particular transaction, the attorney's independent knowledge of an event or transaction is not privileged. Similarly, a client's knowledge of an event or transaction cannot be shielded from disclosure simply because he communicated that information to his attorney.

Lastly, like any privilege, the attorney-client privilege is subject to waiver, particularly where the subject matter of the communication is clearly the subject of litigation and is relevant to the issues in the litigation. Thus, communications between the attorney and client should be treated as privileged if the communication was made to avoid liability in the litigation.

B. The Attorney-Client Privilege In The Corporate Setting

The attorney-client privilege applies to corporations and in-house counsel. As a result, corporate communications act not only through its officers, directors, agents and employees, communications between in-house counsel and corporate personnel are privileged to the same extent as communications between lawyer and client.

However, applying the privilege to in-house counsel is often difficult. Corporate communications are not always protected by a confidentiality agreement. In addition, the privilege of in-house counsel is often protected from disclosure.

1) The situation where a client individually engages a lawyer in a particular matter, staff attorneys may serve as company officers, with all the attendant responsibilities; whether or not attorneys, their day-to-day involvement in their employers' legal affairs may blur the line between legal and non-legal communications; and their advice may originate not in response to the client's consultation about a particular problem but in the course of an ongoing, permanent relationship with the organization. In that the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose, the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure.

2) Courts have applied various rules to analyze whether communications between corporate employees and in-house counsel should be privileged. In general, the most fundamental inquiry is whether the communication was made to avoid liability in the litigation.

3) Memoranda addressed to or from counsel should include an "Eg" after the attorney's initials.

4) In-house counsel should make it clear in memoranda to corporate employees that they are providing legal advice or rendering legal advice to facilitate the rendering of legal advice and documents that are privileged should be marked as such, forwarded only to those corporate officers or employees with a need to know, and should be segregated from day to day business correspondence.

Conclusion

Due to the increasing role of in-house counsel as business strategists, courts have begun to more closely scrutinize the attorney-client privilege as it applies to in-house counsel. Consequently, an effort on the part of the corporation to follow the above guidelines will enhance the probability that a court will find a communication privileged.