Applying The Attorney Client Privilege To In-House Counsel

By Alan S. Naar and Gary K. Wolinetz

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 nonlegal 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 in litigation. Alternatively, the document must be produced if it is considered solely a business communication.[1]

This article analyzes the attorney client privilege as it applies to in-house counsel.[2] 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.[3] Obviously, a client who fears that communications 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 the end, 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 problem.

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."[4] 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 funnelling 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 told him about 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 deliberately revealed to a third party. As a result, parties cannot use the attorney client privilege as a sword by disclosing certain favorable communications and, at the same time, as a shield by claiming the privilege as to damaging communications on the same topic. Additionally, a party can also waive the privilege in certain circumstances even if documents are inadvertently produced. However, this rule is often relaxed in cases involving large scale document productions.

B. The Attorney-Client Privilege In The Corporate Setting

The attorney client privilege applies to corporations and in-house counsel.[5] As a result, because a corporation can act only through its officers, directors, agents and employees, communications between in-house counsel and corporate personnel are privileged "so long as they concern matters within the scope of the employees' corporate duties."[6]

However, applying the privilege to in-house counsel is often difficult because of the dual business/legal responsibilities of many in-house counsel. On the one hand, in light of the public policy to encourage full and frank disclosure between attorney and client, the attorney client privilege must be zealously protected. On the other hand, corporations should not be permitted to use in-house counsel to hide damaging corporate records. As the New York Court of Appeals has explained, this balancing act is often difficult:

> [U]nlike the situation where a client individually engages a lawyer in a particular matter, staff attorneys may serve as company officers, with mixed business-legal responsibility; whether or not officers, their day-to-day involvement in their employers' legal affairs may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client's consultation about a particular problem but with them, as part 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.[7]

Courts have applied various rules to analyze whether communications between corporate employees and in-house counsel should be privileged. Perhaps the most fundamental inquiry is whether the communication/document was made by or provided to in-house counsel in "their professional capacity as lawyers." That test is met if the communication is "primarily or predominately of a legal character."[8] A communication is "primarily legal" if the corporation demonstrates that it "would not have been made but for the [corporation's] need for legal advice or services."[9]

A document prepared by in-house counsel does not have to cite case law or statutes to be privileged. However, courts have recognized that an in-house counsel's memorandum is privileged if it "concerns legal rights and obligations and where it evidences other professional skills such as a lawyer's judgment and recommended legal strategies."[10] Assuming those criteria are met, the privilege is not lost if the memorandum refers to or incorporates business considerations. Of course, if the evidence suggests that the memorandum could have been prepared by any employee without legal training, the privilege will not attach. As a result, a court has recognized that risk management reports prepared by in-house counsel that merely summarize past or pending litigation without any legal analysis are not privileged.[11]

C. Strategies To Protect Privileged Communications

In-house counsel can take steps to insure that privileged communications remain privileged. For example, in *Hardy v. New York News, Inc.*,[12] the court held that certain documents sent to or prepared by a newspaper's Vice-President and Director of Employee Relations/in-house counsel were not privileged based on the following factors:

1) nothing indicated that the attorney requested or received the documents at issue in order to render legal advice;

2) the attorney was not addressed as "counsel" and did not identify himself as "counsel" in any of the documents;

3) none of the documents were marked "confidential" or "privileged;"

4) the claimed "legal" files were intermingled with "non-legal" personnel files.[13]

Clearly, although several of these factors appear to elevate form over substance and may not be dispositive, they provide a useful checklist for internal memoranda sent to and from in-house counsel. As a result, corporations seeking to preserve the attorney client privilege should adhere to the following guidelines:

1) corporate employees writing to in-house counsel about a legal matter should make clear that they are seeking legal advice or providing information to facilitate the rendering of legal advice;

2) memoranda addressed to or from counsel should include an "Esq." after the attorney's name;

3) in-house counsel who also serve as corporate officers should specify (where appropriate) that they are writing legal memoranda in their capacity as corporate counsel and for the purpose of rendering legal advice or to request information to facilitate the rendering of legal advice;

4) in-house counsel should make it clear in memoranda to corporate employees that they are providing legal advice or requesting information to facilitate the rendering of legal advice; and

5) 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 strategist, courts have begun to more closely scrutinize the attorney client privilege as it applies to corporate 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.

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ENDNOTES

[1] *If a communication contains both legal and business advice, and those components are severable, some courts will permit the "legal" portion of the communication to be redacted before production of the "business" portion.*

[2] *This article relies primarily on federal law. However, in federal diversity cases, state law applies.* Leonen v. JohnsManville, *135 F.R.D. 94, 98 (D.N.J. 1990).* See *Fed. R. Evid. 501. This article does not address the work product doctrine that shields from disclosure documents and tangible things prepared in anticipation of litigation or trial.* See *Fed. R. Civ. P. 26(b)(3).*

[3] Upjohn Co. v. United States, *449 U.S. 383, 389 (1981).*

[4] Fine v. Facet Aerospace Products Co., *133 F.R.D. 439, 444 (S.D. N.Y. 1990).*

[5] Leonen, supra, 135 F.R.D. at 98.

[6] Shriver v. Baskin-Robbins Ice Cream Co., Inc., *145 F.R.D. 112, 115 (D. Colo. 1992).*

[7] Rossi v. Blue Cross & Blue Shield of Greater New York, *73 N.Y. 2d 588, 591 (Ct. App. 1989).*

[8] Rossi, supra, *73 N.Y.2d at 593.*

[9] Leonen, supra, 135 F.R.D. at 99.

[10] Rossi, supra, *73 N.Y.2d at 593.*

[11] Fine, supra, *133 F.R.D. at 444.*

[12] *114 F.R.D. 633 (S.D.N.Y. 1987).*

[13] Id. *at 644.*