Attorney-Client Privilege for Corporate Communications Made to In-House Counsel

The notion and protections of the “attorney-client” privilege varies from state to state within the U.S. Many factors affect the general attorney-client privilege regarding corporate communications including the various requirements for different states, federal requirements, international requirements, and various ethical restrictions. In this article, we will be exploring some of these factors.

The “Attorney-Client Privilege and the Work Doctrine”, Section of Litigation, American Bar Association, regarding in-house counsel attorneys mentions “Conversations between a corporation’s employees and in-house counsel are protected by the privilege. Nonetheless, because in-house counsel may be involved in giving advice on many issues that are more business, rather than legal, in nature or may be involved in such discussions as a matter of course, conversations in which in-house counsel is a participant, as well as documents addresses to or from in-house counsel, are readily susceptible to challenge on the ground that it is business advice that is being given and not legal advice.” (Epstein)

The matter of attorney-client privilege with respect to in-house counsel was considered by the United States Supreme Court in Upjohn Company v. United States, 101 S.Ct. 677, 449 U.S. 383, 66 L.Ed. 584 (1981). The Court found that attorney-client privilege protects communications between a corporation’s employees and the corporation’s lawyers only if the following criteria are satisfied:

1. The corporate employees must have made the communication to corporate counsel acting as such, i.e., acting for the purpose of providing legal advice to the corporation.
2. The substance of the communication must involve matters that fall within the scope of the corporate employee’s official duties.
3. The employees themselves must be sufficiently aware that their statements are being provided for the purpose of obtaining legal advice for the corporation.
4. The communications also must be confidential when made and must be kept confidential by the company.

The tests for attorney-client privilege in communications with in-house counsel

Subsequently, the federal courts have developed two tests to determine whether a corporate employee’s communications with the in-house counsel are privileged. The first test is concerned with the employee’s position and his/her capacity to act on behalf of the corporation following the advice of the attorney (See City of Philadelphia v. Westinghouse Electric Corp., 210 F.Supp. 438 (E.D. Pa. 1962)), and the second test is
concerned with the reason why consulting an attorney was required rather than with the parties to the privileged communication (See Harper and Row Publisher, Inc. v. Decjer, 423 F2d 487 (7TH Cir. 1970)).

Though it has been held that client communications intended to keep the attorney apprised of business matters may be privileged if the communications embody ‘an implied request for legal advice based thereon’ the position has been challenged time and time again. In reality, the general standard of review is: if an in-house counsel has other non-legal responsibilities, the party invoking the privilege has the burden of producing evidence in support of its contention that in-house counsel was engaged in giving legal advice and not in some other capacity at the time of the disputed conversation.

When a corporate communication may enjoy an attorney-client privilege

This means that just because some factual information passes through the office of an in-house counsel, the communication does not automatically become confidential in nature. In order to call upon the rights of attorney-client privilege and claim any communication to be confidential, each of the following elements listed below need to be proved. (See In re Grand Jury Proceedings, 517 F.2d 666 (5th Cir. 1975); New Orleans Saints v. Griesedieck, 612 F.Supp. 59, 62 (E.D. La.1985), aff'd, 790 F.2d 1249 (5th Cir. 1986).)

- The holder of the privilege is, or sought, to become a client.
- The communication is made to an attorney or his/her subordinate in his/her professional capacity.
- The communication is made outside the presence of strangers.
- The communication is made for the purpose of obtaining an opinion on the law or legal services.
- The attorney-client privilege has not been waived by subsequent conduct.

Naturally, meeting the conditions that satisfy the claim of attorney-client privilege regarding communications to in-house counsel is extremely difficult given the nature of the duties performed by an in-house counsel attorney. First, it is difficult for a business to prevent disclosure of a document and maintain confidentiality if the document is prepared in the ordinary course of business, including the fact that an in-house counsel prepared it. Secondly, factual information discovered and reported by an attorney is not covered by attorney-client privilege since it is not information communicated with the intent to obtain legal opinion or service. Hence, unless communications is specifically kept confidential from its inception and communicated to an attorney only for the purpose (explicit or implicit) of obtaining legal advice, such business communications cannot be protected under attorney-client privilege. However, this information may be protected under other applicable privileges.

**The information contained herein does not constitute legal advice. If you have questions regarding whether information is protected under a privilege please contact an attorney for a consultation.

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