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3 Myths Of In-House Attorney-Client Privilege

Law360, New York (May 03, 2010) -- Corporate employees too often believe that they are having privileged communications with in-house lawyers, when in fact they are not. This happens when corporate employees believe one or more of three myths.

These myths probably developed because corporations and their in-house lawyers want the privilege to apply to as many communications as possible. Corporations understand that in-house attorneys are a readily available source of a powerful tool — the privilege — that can keep information secret from competitors, governments and litigants.

In-house lawyers want their corporate clients to be as honest and open with them as possible. The result can be a tacit understanding between in-house lawyers and their corporate clients that all of their communications will be privileged. That understanding is wrong, and it is usually based on one of the following myths.

Myth #1: The Privilege Applies Equally to Outside and In-House Counsel

This first myth actually is true on the surface. In-house counsel have the same capacity as outside counsel to have privileged communications with clients.

The first significant case to address the question noted that the "apparent factual differences between these house counsel and outside counsel are that the former are paid annual salaries, occupy offices in the corporation's buildings and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege." United States v. United Shoe Machine Corp., 89 F. Supp. 357, 360 (D. Mass. 1950).

Numerous other courts have reached the same conclusion. There is no question that in-house lawyers can have privileged communications with their clients to the same extent that outside lawyers can. Corporate employees expect that their communications with outside counsel are protected by the privilege, and they see no reason to have a different expectation with respect to in-house counsel.

The problem is that despite what courts say about this in the abstract, they often do not treat in-house and outside counsel equally. The difference in treatment is a result of the fact that a "communication is not privileged simply because it is made by or to a person who happens to be a lawyer." Diversified Industries Inc. v. Meredith, 572 F. 2d 596, 602 (8th Cir. 1977).

A communication is privileged only if the dominant purpose of the communication is to further the objectives of the attorney-client relationship. 2,202 Ranch LLC v. Superior Court, 113 Cal. App. 4th 1377, 1390 (2003).

In other words, the communication must be made for the purpose of seeking, obtaining, or providing legal assistance. Restatement, The Law Governing Lawyers § 118. “For example, the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice.” Costco Wholesale Corp. v. Superior Court, 47 Cal. 4th 725, 743 (2009).

The reality is that outside counsel face less scrutiny than do in-house counsel when the question is whether the lawyer provided legal advice or business advice. Most corporate legal advice involves at least some element of business advice, and whether any particular communication is “legal” or “business” in nature can be unclear.

But when there is a challenge to a claim of privilege involving an outside lawyer, it makes sense to presume that the corporation hired outside counsel to provide legal advice. After all, the corporation already has employees who can render business advice. When a corporate officer picks up the phone to call outside counsel, it is probably to seek the lawyer’s legal advice.

But do corporations necessarily turn to in-house counsel for the same purpose? Some courts have said no, for two reasons. The first is that in-house lawyers often have dual legal and business roles, whether explicitly or implicitly. The second is that the in-house lawyer’s employment and constant availability creates a risk that the corporation will attempt to shield business communications by filtering them through in-house lawyers.

For these reasons, the New York Court of Appeals held that the need to apply the attorney-client privilege 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.” Rossi v. Blue Cross & Blue Shield, 73 N.Y.2d 588, 593 (1989).

A good example of this “heightened” scrutiny occurred in TVT Records v. Island Def Jam Music Group, 214 F.R.D. 143 (2003). Island Def Jam attempted to withhold from discovery internal e-mails sent by two of its in-house lawyers.

The court noted that it is more “complicated” to apply the privilege to communications from “in-house counsel as opposed to outside counsel because ‘in-house attorneys are more likely to mix legal and business functions.’” Id. at 144 (quoting Bank Brussels Lambert v. Credit Lyonnais SA, 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002)).

The court pointed out that the in-house lawyers held titles that included the words “Business and Legal Affairs” and that as “the titles indicate, these representatives served within the company not only as lawyers, but as high-ranking management executives.” Id. at 145. The court examined each e-mail at issue, finding that several of the e-mails addressed “business strategy and negotiations” instead of legal questions and were not privileged. Id.

Because communications with in-house counsel are more likely to be scrutinized when the corporation claims the privilege, the best thing in-house counsel can do is to educate their corporate clients about what will and will not be protected by the privilege and the differences between legal and non-legal advice. At the very least, this should minimize surprises when a litigation opponent seeks discovery of a communication.

Myth #2: All Corporate Employees Can Have Privileged Communications With In-House Counsel

As with the first myth, this myth is in once sense literally true. Ever since the United States Supreme Court rejected the “control group” test in Upjohn Co. v. United States, 449 U.S. 383 (1981), it has been true that, depending on the circumstances, it is possible for any corporate employee to have a privileged conversation with the corporation’s attorney. The problem, again, for in-house attorneys is that many corporate employees believe that they can discuss any corporate legal matter with an in-house attorney under the cloak of the privilege. This is a myth.

The problem stems from the fact that the in-house attorney's client is the corporation, not each of the corporation's employees. Not every corporate employee is entitled to have a privileged communication with a corporate attorney as to every legal matter. For a communication to be privileged, the communication must be within the scope of the employee's responsibility. D.I. Chadbourne Inc. v. Superior Court, 60 Cal. 2d 723, 736 (1968).

This usually does not present a problem for outside lawyers, who generally only seek out and speak with corporate employees who are involved in the legal matter at hand. But in-house lawyers may work in the same office as corporate employees who are outside of the client umbrella as to any particular legal matter. Those employees may even attend meetings in which in-house counsel provide legal advice. To the extent in-house counsel provides legal advice to such employees, the privilege that might otherwise attach to that advice could be waived. Id. at 735.

Another context in which in-house counsel uniquely face this issue is when they report directly or indirectly to corporate executives. An executive in charge of a business unit might have a lawyer as a direct report in that business unit. In this case, the executive may be heard to refer to the lawyer as "my lawyer." But of course, the lawyer's client is the corporation, not the executive, who happens to the lawyer's boss. When the company asks the lawyer for advice that has nothing to do with the executive, the in-house lawyer's communications with the executive likely are not privileged.

A final difference in this regard is that corporate employees of all levels may expect that they can seek advice from in-house counsel (but not outside counsel) when their personal interests conflict with those of the corporation. This may stem from the fact that an in-house attorney may be seen as a fellow employee — someone who is in the same boat as other employees.

Even when in-house counsel investigates the conduct of another employee, the employee may view in-house counsel as someone who — unlike outside counsel — is likely to protect his or her interests. In these cases, in-house lawyers must ensure that they disclose the truth about their representation.

California Rule of Professional Conduct 3-600 provides that when "dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent."

Once again, this myth presents the problem that corporations and their employees view the privilege as protecting more communications with in-house counsel than it does. By explaining the boundaries of the privilege to corporate employees, in-house counsel can avoid having unnecessary and unprivileged conversations with corporate employees.

Myth #3: Including In-House Lawyers in the Conversation Creates a Privilege

The most absurd of the three myths is the idea that by copying an in-house lawyer on an e-mail or inviting the lawyer to a meeting, the corporation can cloak otherwise nonprivileged communications with the privilege. The worst promoters of this myth are outside litigation counsel, who frequently list e-mails on privilege logs solely because an in-house lawyer was copied on them.

In a recent jury trial, I successfully offered into evidence an e-mail in which the plaintiff's CEO wrote to the company's head of human resources and other executives, with a copy to the general counsel. The CEO's e-mail was a "reply to all" to an e-mail from the head of human resources, who had addressed her original e-mail to the

CEO and copied the general counsel. The CEO's e-mail did not seek legal advice or respond to any legal advice. Yet, my opponent argued that because the general counsel received a copy, the entire e-mail chain was privileged. The judge disagreed.

As reported decisions make clear, the judge reached the right result. "Documents prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged since they are not communications made primarily for legal advice." Pacamor Bearings Inc. v. Minebea Co., 918 F. Supp. 491, 511 (D.N.H. 1996).

Therefore, a "corporation cannot be permitted to insulate its files from discovery simply by sending a 'cc' to in-house counsel." United States Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 163 (E.D.N.Y. 1994). Similarly, "the mere fact that an attorney attended a meeting does not render everything said or done at that meeting privileged." Miner v. Kendall, 1997 WL 695587 (D. Kan. 1997).

If the law were otherwise, corporations could protect every corporate communication and decision from disclosure by copying an in-house lawyer on every e-mail and inviting a lawyer to every meeting. While that would make discovery easier (there wouldn't be much of it), it would not promote the purpose of the attorney-client privilege, which is to allow clients to speak freely with their lawyers about legal matters.

Nevertheless, it seems common for corporate employees to copy lawyers on e-mails for no purpose other than to assert a privilege later. In-house lawyers should counsel clients that such communications likely will not be privileged, which at the very least, again, could eliminate surprises in litigation.

Of course, there is a risk that educating corporate clients about these myths will result in clients excluding in-house lawyers from conversations in which the lawyer would have otherwise participated. But when clients do communicate with lawyers, they need to know whether the communication will be disclosed in litigation. These myths give clients a false sense of security. And guess whom the clients will blame when the myths are busted in a lawsuit?

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