IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

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Six months after beginning her job as the company's "Vice President & General Counsel," Stephanie Cloud receives an email from the company's General Manager requesting her attendance at a hastily scheduled meeting. Upon arrival at the meeting, Ms. Cloud sees that the General Manager and Production Supervisor are present, and discovers that the topic of the meeting is the upcoming termination of 61-year-old employee Joe Morgan. The discussions focus upon Mr. Morgan's work performance over the last year, whether his position is still profitable for the company, whether to eliminate the position entirely or give another (younger) employee an opportunity, and any consequences, legal or otherwise, of terminating Mr. Morgan. Ms. Cloud offers her insight on all of these subjects, takes copious notes, provides her recommendation, and returns to her office to tackle the next issue.

Two years later and in the midst of an age discrimination lawsuit, Mr. Morgan and his attorney request in discovery copies of lawyer Cloud's notes of the meeting and request that she appear for a deposition. Mr. Morgan believes that the notes and details of the discussions held at the meeting will reveal that his termination was solely the result of his age and not because of his performance in that job. The company dutifully objects to the deposition and to producing any notes on the grounds that both are protected by the attorney-client privilege. The company argues that, because Ms. Cloud was an attorney and present at the meeting, the entire conversation is subject to the privilege. A slam dunk for the company, right? Wrong.

The Corporate Attorney-Client Privilege

To understand the potential problems in Ms. Cloud's situation, it is important to review the elements necessary to sustain the attorney-client privilege. While these elements are now set forth in many state statutes and state rules of evidence, the widely accepted requirements of the privilege were described long ago by Judge Wyzanski as follows:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Co., 89 F. Supp. 357, 358-59 (D. Mass. 1950). In other words, "where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived." *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992).

While it is certainly true that the attorney-client privilege applies when the client is a corporation, *see Upjohn Co. v. United States*, 449 U.S. 383 (1981), the application of the privilege to a corporation's in-house counsel is problematic and anything but straightforward. The problem arises when the in-house attorney is charged with providing business advice in addition to legal advice. Courts are quick to note that the attorney-client privilege does "not protect disclosure of non-legal communications where the attorney acts as a business or economic adviser." *Edwards v. Whitaker*, 868 F. Supp. 226, 228 (M.D. Tenn. 1994). The business/legal advice distinction is many times difficult to make, and courts readily recognize that "legal advice is often intimately intertwined with and difficult to distinguish from business advice." *Leonen v. Johns-Manville*, 135 F.R.D. 94, 99 (D.N.J. 1990). An in-house lawyer such as Ms. Cloud, therefore, should know when corporate communications involving an in-house lawyer will fall within the attorney-client privilege, and what steps she should take to ensure that the privilege remains intact.

Presumptions, Standards, and Heightened Scrutiny

Courts usually presume that, when a corporate client communicates with its outside counsel, the attorney is acting in his or her capacity as a lawyer and that the communication is for the purpose of seeking legal advice. *See, e.g., Diversified Industries Inc. v. Meredith*, 572 F.2d 596, 610 (8th Cir. 1977). Moreover, "[t]here is a presumption that a lawyer in the legal department or working for the general counsel is most often giving legal advice ... " *Boca Investerings Partnership v. United States*, 31 F. Supp. 2d 9, 12 (D.D.C. 1998). If the in-house counsel also works under a business unit of the corporation or otherwise acts in some management role, however, then the opposite presumption arises — the communication was *not* for the purpose of obtaining legal advice. *Id.* Thus, the in-house counsel with multiple roles in the company begins the privilege analysis with a presumption that he or she was not acting as a lawyer during the subject communication and, therefore, the communication is not privileged. This presumption represents a tremendous burden for in-house counsel to hurdle that is not imposed upon a company's outside counsel. At least one commentator, moreover, perceives an actual prejudice by the courts against in-house counsel asserting the attorney-client privilege. *See* Giesel, "The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing

continued on page 13

 continued from page 9

Corporations." 48 *Mercer Law Rev.* 1169 (1997).

Because of the skepticism courts show towards in-house counsel, and because of the dual business and legal roles that many in-house lawyers play, courts apply a heightened standard in determining whether a communication to in-house counsel should receive protection of the privilege. In *In re Sealed Case,* 737 F.2d 94 (D.C. Cir. 1984), then-Judge Ginsburg was presented with the issue of whether the attorney-client privilege protected certain communications of an in-house attorney, identified as C, who also served as the company's vice president. The court outlined the burden of the company as follows:

> We are mindful, however, that C was a Company vice-president, and had certain responsibilities outside the lawyer's sphere. The Company can shelter C's advice only upon a *clear showing* that C gave it in a professional legal capacity.

Id. at 99 (emphasis added). Following Justice Ginsburg's ruling, many courts hold that "[a] corporation can protect material as privileged only upon a clear showing that the lawyer acted in a professional legal capacity." *Boca Investerings Partnership,* 31 F. Supp. 2d at 12. This requirement of a clear showing is a form of heightened scrutiny, and means that the proponent "must show by affidavit that *precise facts* exist to support the claim of privilege." *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.,* 110 F.R.D. 511, 515 (M.D.N.C. 1986).

This heightened standard, however, does not compel a finding that every communication mixing business and legal issues and involving an in-house lawyer will lose its privilege. As one court recognized, "[t]he mere fact that business considerations are weighed in the rendering of legal advice does not vitiate the attorney-client privilege." *Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co.,* 951 F. Supp. 679, 685-86 (W.D. Mich. 1996). Thus, courts will examine the entire circumstances surrounding the discussion and use a "predominantly legal" or "but for" analysis to determine whether the privilege applies. The court will most likely first examine the title and usual role of the in-house counsel. The court in Boca Investerings Partnership, for example, noted that "[o]ne important indicator of whether a lawyer is involved in giving legal advice or in some other activity is his or her place on the corporation's organizational chart." 31 F. Supp. 2d at 12. The main inquiry of courts, however, will be "whether the communication is designed to meet problems which can fairly be characterized as predominantly legal." *Leonen v. Johns-Manville,* 135 F.R.D. 94, 99 (D.N.J. 1990). In other words, the "advice given must be predominately legal, as opposed to business, in nature." *Boca Investerings Partnership,* 31 F. Supp. 2d at 11. To meet this standard, "the claimant must demonstrate that the communication would not have been made but for the client's need for legal advice or services." *Leonen,* 135 F.R.D. at 99.

Practice Tips

It is clear that simply involving an in-house attorney in a purely business meeting will not permit a corporation to prevent discovery of that meeting using the attorney-client privilege. If in-house counsel is involved in a meeting that mixes business and legal matters, however, there are steps that the in-house lawyer can take to put the corporation in the best possible position to invoke the privilege to protect truly legal advice.

Single Title

Where possible, the in-house counsel should maintain one title — general counsel or member of the legal department. In some situations this is impracticable due to the in-house counsel's job duties; however, many times the title is more ceremonial. With a single, legal title, courts will more likely presume that the in-house counsel participated in a meeting solely in her legal capacity. *See Boca Investerings Partnership,* 31 F. Supp. 2d at 12.

Statements of Privilege

If the in-house counsel takes notes or prepares a memorandum about a communication with corporate management or employees, the document should expressly state that the communication or discussion was made for legal purposes. This statement should come at the beginning of the document, and contain statements such as "The meeting was held to discuss the legal ramifications of ... " or "This meeting was held to discuss the legal steps that need to be taken to accomplish ... " It is important to remember that the in-house lawyer's notes will be ultimately reviewed by a court years later, and such introductory statements will go a long way in persuading a judge that the discussions at the meeting were "predominately legal." *See Malco Manufacturing Co. v. Elco Corp.,* 45 F.R.D. 24 (D. Minn. 1968).

Privilege Stamp

Written documents that contain potentially privileged information should be stamped with some variation of "privileged communication to attorney for legal advice." While such a stamp is not conclusive of its privileged status, *see, e.g., In re Air Crash Disaster,* 133 F.R.D. 515 (N.D. Ill. 1990), it will serve as additional evidence of its legal purpose. These documents should also be maintained with the in-house counsel's files rather than with the files of some management figure, as this fact will further enhance the chances that a reviewing court will deem it to be legal in nature.

Conclusion

The in-house counsel, rightly or wrongly, is subject to heightened scrutiny when she or her company seeks to protect communications under the attorney-client privilege. With a full understanding of this scrutiny and by taking precautions, however, the in-house lawyer can counter that scrutiny and increase the likelihood of preventing the discovery of sensitive, confidential documents and other corporate communications. ✳

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