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The Law of Inside Counsel

II. IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

Just as the dual role of in-house counsel complicates liability as discussed above, communications with in-house counsel, ordinarily subject to the attorney-client privilege, have become suspect. The blurred line between in-house counsel as legal adviser and business executive threatens this once sacrosanct rule. When is an attorney acting as a legal adviser, so as to invoke the privilege? Any piercing of the privilege works indelibly against the underlying purpose of a privilege - to promote full and candid disclosure with counsel. The attorney-client privilege and the work-product doctrine are the primary means by which a corporation can protect its confidentiality. However, merely placing an attorney in charge of issues which a corporation wishes to keep confidential is not sufficient. The complications and pitfalls facing corporations and their counsel in this area are discussed below. See also Corp. Legal Depts., Chapter 9.

The issues surrounding attorney-client privilege as they relate to in-house counsel have recently drawn academic attention. For more on this topic, see Mark C. Van Deusen, Note, The Attorney-Client Privilege for In-House Counsel When Negotiating Contracts: A Response to Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp., 39 Wm. & Mary L. Rev. 1397 (March, 1998); Amy L. Weiss, In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege, 11 Geo J. Legal Ethics 393 (Winter 1998); Grace M. Giesel, The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorney's Representing Corporations, 48 Mercer L. Rev. 1169 (Spring 1997).

A. General.

1. Statutes.

In New Jersey, N.J.S.A. 2A:84A-20(1) states that "communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged . . . ." The privilege applies where the lawyer is consulted for "legal service or advice from him in his professional capacity." See N.J.S.A. 2A:84A-20(3). In addition, there is a presumption in the last sentence of the rule that "the privilege shall be claimed by the lawyer unless otherwise instructed by the client . . . ." (emphasis added).

In New York, CPLR, section 4503 provides "unless the client waives the privilege, an attorney or his employee . . . shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action . . . ."

2. Attorney-Client Privilege.

(a) New Jersey

When the corporation is the client, the attorney-client privilege does not always apply merely because the communication occurs with in-house counsel. In New Jersey, the leading case on the attorney-client privilege for in-house counsel is United Jersey Bank v. Wolosoff, 196

on the attorney-client privilege for in-house counsel is United Jersey Bank v. Wolosoff, 196 N.J. Super. 553 (App. Div. 1984).

In Wolosoff, the court addressed two issues: (1) the extent to which confidential communications between corporate officers, in-house counsel and others are protected under the attorney-client privilege; and (2) when the privilege may be pierced. The court explained that the attorney-client privilege shield can be penetrated where the communications were made a material issue by virtue of the client's allegations in the litigation. The privilege can be used as a shield, but not as a sword.

Specifically, in Wolosoff, the bank sought rescission of a settlement agreement with its borrower. The in-counsel participated in the settlement discussions. The court reversed the lower court's determination that none of the documents were subject to the privilege. Instead, the Appellate Division determined that an *in camera* inspection of the subject documents would be necessary to determine the nature and content of the communications with in-house counsel. See also U.S. v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991). In Bilzerian, the defendant was prosecuted and convicted of various securities violations. The defendant wanted to testify about his good faith defense without revealing attorney-client conversations. The court held that if the defendant testified about his good faith belief in the legality of his actions, it would open the door to cross examination of attorney-client communications. The court reasoned that the defendant could not use the privilege to deter discovery, then use the same "evidence" to defeat liability.

In National Utility Service v. Sunshine Biscuits, 301 N.J. Super. 610 (App. Div. 1997) the Appellate Division reversed the trial court's holding that because the analysis of a dispute embodied in a memorandum of in-house counsel differed from the position taken three years later by litigation counsel the crime-fraud exception to the attorney-client privilege was applicable and the memorandum was discoverable. The Appellate Division sustained the claim of privilege for in-house counsel's memorandum.

The Tax Court of New Jersey extended the definition of "client" in N.J.S.A. 2A:84A-20 (3) to include the parent and subsidiaries of the company employing the attorney. Edison Corporation v. Town of Secaucus, 17 N.J. Tax 178, (1998). In this case, the court permitted an employee of the parent company to claim a privilege for discussions with an attorney employed by the subsidiary company. Id.

Recently R.P.C. 1.13, 4.2 and 4.3 were amended to define more precisely which business people are the client for purposes of determining if they are off limits to opposing counsel unless their employer's counsel is present. R.P.C. 1.13 provides:

> (a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

It remains to be seen if this "control group" test will be applied in New Jersey in determining who in the corporation can have privileged communications with counsel. Cf. Sicpa North America v. Donaldson Enterprises, 179 N.J. Super. 56 (Law Div. 1981). And these R.P.C.'s provide little if any guidance to in-house transactional counsel about with whom they may speak in negotiating deals or transactions because absent litigation the definition of a "litigation control group" is difficult.

(b) New York

In New York the leading case is Rossi v. Blue Cross & Blue Shield of Grtr. N.Y., 73 N.Y.2d 588, 540 N.E.2d 703, 542 N.Y.S.2d 508 (1989). There defendants' in-house counsel had written a four paragraph memorandum to its Medical Director, the first paragraph of which described discussions between the author and plaintiff's attorney about a possible suit by

described discussions between the author and plaintiff's attorney about a possible suit by plaintiff for defamation of plaintiff's product. The memo's second paragraph described conversations with the FDA; the third the author's understanding of the Blues' reimbursement policy for products like plaintiff's, and the last gave the author's advice about language to be used in rejecting claims.

The court took as well established that corporations have an attorney-client privilege, and that in-house counsel are lawyers for this purpose. It held the memorandum privileged. Its holding on the question of legal advice and business advice being mixed in the same document is discussed below at p. 25. See also Kraus v. Brandstetter, 185 A.D.2d 300, 586 N.Y.S.2d 270 (2d Dept. 1992) (recognizing privilege between hospital law committee and a hospital); cf. New York State Bd. of Elections v. Fricano, 147 Misc. 2d 597, 558 N.Y.S.2d 464 (Albany Co. 1990) (holding that research director of Republican State Committee, although a lawyer, was not used as a lobbyist, not a lawyer by the committee or its employees); Sackman v. Liggett Group, 920 F. Supp. 357 (E.D.N.Y. 1996)(spokesperson's role for lawyer in tobacco cases vitiates privilege).

In New York, DR 7-104(A)(1), the equivalent of RPC 4.2, prohibiting contact with a represented party, has been interpreted differently. In Niesig v. Team I, 76 N.Y.2d 363 (1990) the New York Court of Appeals held the control group test too narrow, and "define[d] "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel." The Court of Appeals expressly excluded former employees, making its definition in this regard narrower than New Jersey's. But even in New York, what is the "matter under inquiry" in a transaction?

In Miano v. AC & R Advertising, 148 F.R.D. 68, adopted and affirmed, 834 F. Supp. 632 (S.D.N.Y. 1993) the court held that, absent litigation, the mere presence of in-house counsel for an organization on the other side does not render it represented. The inquiring lawyer must know counsel has actually been consulted about the matter for the DR to be at issue.

(c) Federal

The most notable case federal regarding the confidentiality of communications with in-house counsel is the Supreme Court decision in Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677 (1981). The in-house counsel conducted an investigation of questionable payments made to foreign government officials and the IRS demanded production of the questionnaires and notes of interviews conducted as part of that investigation. Expanding the "control group" theory, the court explained that such a theory "overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." Id. at 683.

The federal courts have viewed the question of eligible in-house counsel expansively. For example, in Hertzog v. Prudential Ins. Co. of America, 850 F. Supp. 225 (S.D.N.Y. 1994) Judge Haight held that because partnerships, like corporations, must appear through counsel, the status of the lawyer of record as also being a partner or associate of the partnership does not bar the privilege.

On the other hand, in Teltron v. Alexander, 132 F.R.D. 394 (E.D. Pa. 1990) the court held that Teltron failed to meet its burden of proof to sustain objections to deposition questions of a witness who had been Teltron's outside counsel, then its inside counsel, then its president, on grounds of attorney -client privilege.

In addition to discussing the distinction between in-house counsel acting as business persons and them acting as lawyers, Restatement (Third) Law Governing Lawyers Section 122 (T.D. No. 1) Reporter's Note, Comment C, observes:

> In-house counsel are professional legal advisers for purposes of the privilege, whether locally admitted or not. See, e.g., Bruce v. Christian, 113 F.R.D. 554, 560 (S.D.N.Y.1987); Research Instit. for Medicine & Chemistry, Inc. v. Wisconsin Alumni Research Foundation, 114 F.R.D. 672, 676 (W.D.Wisc.1987); Valente v. Pepsico, Inc., 68 F.R.D. 361, 367 (D.Del.1975).
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> For a contrary view, see, e.g., AM & S, Ltd. v. Commission of the European Communities, [1982] 2 E.C.R. 1575, 1612 (Ct. Just. of Eur. Comm.) (communications

by client to lawyer who is "bound to his client by a relationship of employment" not covered by privilege otherwise recognized in European commission proceedings).

Foreign patent agents have been a fertile source of cases on who is a lawyer for purpose of the privilege. See Hercules Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977) (seminal case); Honeywell, Inc. v. Minolta Camera Co., 1990 U.S. Dist. LEXIS 5954 (D.N.J.); Bayer AG & Miles, Inc. v. Barr Labs, Inc., 1994 U.S. Dist. LEXIS 17988 (S.D.N.Y.).

Government counsel can have privileged communications, even including unpublished opinions of New York City's Corporation case, even though his office, not the client agency decides whether the opinion will be confidential or published. Women in City Govt. v. City of NY, S.D.N.Y Slip op. 75 Civ. 2868 1986)(on LEXIS); cf. Mitzner v. Sobol, 136 F.R.D. 359 (S.D.N.Y. 1991) (Holding State Ed. Dept. Counsel memo to official of dept. reviewing question about school district privileged but waived); Bruce v. Christian, 113 F.R.D. 554 (S.D.N.Y. 1986) (Housing Authority Counsel); Nicolo v. Greenfield, 163 A.D.2d 837, 558 N.Y.S.2d 371 (4th Dept. 1990).

As discussed more fully below, investigations conducted by in-house counsel are particularly suspect. The New York Code of Professional Responsibility, EC 5-18 states that counsel representing a corporation does not represent its employees or other individuals affiliated with it. Strict adherence to this rule subjects an in-house attorney's investigation of potential liability to scrutiny. Spectrum Systems Int'l v. Chemical Bank, 78 N.Y.2d 371, 575 N.Y.S.2d 809 (1991), the New York Court of Appeals allowed an investigative report prepared by outside counsel to remain privileged because it served as the foundation for the law firm's legal advice. Spectrum therefore provides an explicit warning to counsel - counsel directing an investigation should ensure that it is solely for the purpose of rendering legal advice.

See generally Determination of whether a communication from a corporate client is entitled to privilege, 26 A.L.R. 5th 628 (1995) and What corporate communications are entitled to attorney-client privilege, 27 A.L.R. 5th 76 (1995).

3. Work Product Doctrine.

In contrast to the attorney-client privilege, the work product doctrine provides broader protection. It typically exempts from disclosure all materials prepared by or on behalf of a party or its attorneys in anticipation of litigation. The work product doctrine is well laid out in Hickman v. Taylor, 329 U.S. 495 (1947). In Hickman the owners of a tug boat that sank retained counsel immediately after several crewmen drowned. The tug owners sought representation regarding potential liability. The plaintiff's then sought discovery of documents prepared by the tug owner's counsel regarding statements made by surviving crewmen. The District Court held the defendants in contempt for failing to produce the documents. The Court of Appeals reversed and was affirmed by the United States Supreme Court which held that "an attempt . . . to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties . . . falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims." Id. at 510. See also Rossi, above at 19 (attorney's legal analysis and conclusions are immune from discovery as an attorney's work product). In Rossi, plaintiff was denied access to a memorandum prepared by counsel for the insurance company regarding potential liability from the company's denial of claims for services performed by the plaintiff.

(a) New Jersey

In Leonen v. Johns-Manville, 135 F.R.D. 94, 96 (D.N.J. 1990), the court noted that "opinion work-product, such as an attorney's legal strategy or evaluation of a case's strengths and weaknesses, is almost absolutely privileged." The party claiming the work-product privilege must show that the document was prepared in "anticipation of litigation." The court required a close connection in parties or subject matter for the documents to be protected. It could not be protected if the document was prepared for an unidentifiable specific claim. "The mere fact that litigation does eventually occur, does not by itself bring documents within the ambit of the work-product doctrine." Id. at 97. In this case, the court would not confer the privilege on the subject documents.

(b) New York

In Redvanly v. NYNEX Corp., 152 F.R.D. 460 (S.D.N.Y. 1993), U.S. Magistrate Judge Sharon

In Redvanly v. NYNEX Corp., 152 F.R.D. 460 (S.D.N.Y. 1993), U.S. Magistrate Judge Sharon E. Grubin ruled that corporate counsel's notes of a meeting regarding the anticipation of litigation must be produced to the other side in litigation. In determining whether or not the notes were work-product, the Judge determined that they sounded like factual recitations and not opinion or legal advice. See also U.S. v. Adlman, 1994 U.S. Dist. LEXIS 6393 (S.D.N.Y. 1994) (in-house counsel's memos regarding a corporate restructure, based upon reports by accountants, are not protected by the attorney-client privilege or work product doctrine). The court in Adlman refused to protect the in-house attorney's memos, even though he argued that they were prepared in anticipation of the IRS challenging his client's change of corporate structure. The court held that "the possibility of future litigation based on a transaction which has not yet occurred . . . fails to establish that the work-product doctrine applies to a communication." Id. at 6-7.

(c) Maryland

In E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc., 351 Md. 396 (1998) the court refused to extend either the attorney-client privilege or the work product doctrine to documents prepared by the legal department of a creditor and transmitted to a third party for collection of the outstanding debt. The court, relying on Md. Rule 2-402 (c), said "the work product doctrine protects from discovery the work of an attorney done in anticipation of litigation or in readiness for trial." Id. at 407. The court concluded that "the materials were not produced in anticipation of litigation or in rendition of legal services, but instead were produced for the purely business purpose of debt collection." Id. at 425. As such, the attorney-client privilege and work product doctrine claims were rejected.

B. Communication Must Be Legal Advice.

The requirement that the relationship be strictly legal is key - the consultation must be in the lawyer's capacity as an attorney. See Matter of Grand Jury Subpoenas, 241 N.J. Super 18 (App. Div. 1989); Rossi v. Blue Cross & Blue Shield of Greater NY, 73 N.Y.2d 588, 540 N.E. 2d 703, 542 N.Y.S.2d 508 (1989); and First Chicago Int'l v. United Exch. Co. Ltd., 125 F.R.D. 55 (S.D.N.Y. 1989).

In New Jersey to be privileged, the communication must be regarding legal advice from the attorney as an attorney. In Metalsalts Corp. v. Weiss, 76 N.J. Super 291, 297 (Ch. Div. 1962), counsel for the plaintiff corporation, who was also a stockholder, director and officer, was asked to conduct an investigation of certain acts regarding the removal of defendant as president. The defendant sought discovery of the investigation and the corporation asserted the attorney-client privilege as a bar. The court refused to permit the privilege, explaining that the general counsel "undertook to serve as an investigator and not as a lawyer . . . nor was he being called upon to render *legal* advice . . . [and] was not acting peculiarly within the province of an attorney at law, and therefore the attorney client privilege cannot be asserted as a bar to discovery proceedings." Id. at 299. See also United Jersey Bank v. Wolosoff, 196 N.J. Super 553 (App. Div. 1984) (communications must fall strictly within the attorney's professional capacity and the shield may be pierced where communications are made a material issue and there is no less intrusive source); Matter of Grand Jury Subpoenas, 241 N.J. Super. at 30.

New York, articulated by the Court of Appeals in Rossi, above at 19, takes a somewhat broader view (73 N.Y.2d 594): So long as the communication is primarily or predominantly or a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain non-legal matters. Indeed, the nature of a lawyer's role is such that legal advice may often include reference to other relevant considerations. Here, it is plain from the contact and context of the communication that it was for the purpose of facilitating the lawyer's rendition of legal advice to his client. While we are mindful of the concern that mere participation of staff counsel not be used to seal off discovery of corporate communications, here "[nothing] suggests that this is a situation where a document was passed on to a defendant's attorney in order to avoid its disclosure." It appears that Blaney was exercising a lawyer's traditional function in counseling his client regarding conduct that had already brought it to the brink of litigation. (citations omitted).

Cf. Cooper-Rutter Assocs. v. Anchor Natl. Life Ins. Co., 168 A.D.2d 663, 563 N.Y.S.2d 491 (2d Dept. 1990) (documents prepared by in-house counsel/corporate secretary concerned both business and legal aspects, were not primarily of a legal character, and, therefore, were not shielded by the attorney-client privilege.)

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In Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp., 1996 WL 29392 (S.D.N.Y. 1996), the court rejected the defendants invocation of the attorney-client privilege to protect communications surrounding negotiations. The court said that the negotiations involved "business judgments of environmental risks" and not legal advice protected by attorney-client privilege. Id. at *4. Note that while this opinion was not reported, it was significant enough to attract academic attention. See Van Deusen, cited at p. 15 above.

Similarly, in Fine v. Facet Aerospace Products Co., 133 F.R.D. 439 (S.D.N.Y. 1990), the court rejected a claim of privilege for a report drafted by the defendant's engineering department for purposes of risk management. The defendant sought to protect the documents because of information included in the report provided by their in-house counsel. However, the court determined that because the in-house counsel also serves as Assistant Secretary of the company, there is a higher "probability that the communications were made for general business purposes." Id. at 444.

In U.S. Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156 (E.D.N.Y. 1994) the court recognized the problem with in-house counsel frequently having multifaceted duties, including increased participation in day-to-day operations of large corporations. However, the court explained that it tended to find a dominant legal purpose in cases where the advice sought may have involved both business and legal considerations. The court reviewed each document to determine the character and legal nature of each. The conclusion - some documents were subject to the privilege and others were not. For instance, communications with an engineering firm regarding environmental studies to develop a remedial program were not privileged. Cf. EEOC v. Kidder Peabody, 1992 U.S. Dist. LEXIS 3939 (S.D.N.Y.) (in-house counsel investigation in response to EEOC investigation privileged); Mendenhall v. American Booksellers Assn., 1990 U.S. Dist. LEXIS 5153 (S.D.N.Y.) (privilege applies to in-house counsel collecting information about emerging legal dispute.) Cf. Cooper-Rutter Assocs. v. Anchor Natl. Life Ins. Co., 168 A.D.2d 663, 563 N.Y.S.2d 491 (2d Dept. 1990) (documents prepared by in-house counsel/corporate secretary concerned both business and legal aspects, were not primarily of a legal character, and therefore, were not shielded by the attorney-client privilege).

A Pennsylvania court limited the attorney-client privilege to communications between an attorney and an employee who

> is in a position of control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer. . .

City of Philadelphia v. Westinghouse Electric Corporation, 210 F. Supp. 483, 485 (E.D. Pa. 1962). To define who is the client, the court said that an employee who does not have actual authority to make the decision relevant to the communication is a witness providing information for the client. See Id. at 484. This communication is not privileged. See Id.

C. Waiver.

As shown above, the mere fact that the communication is made to an attorney does not make it privileged. The privilege is not absolute and the United States Supreme Court has held that it may be waived. Upjohn Co. v. U.S., 101 S.Ct. 677 (1981) (the privilege is not absolute and may be expressly or impliedly waived by the clients conduct; internal investigations by in-house counsel are not necessarily privileged.)

An implied waiver usually arises when holder of privilege raises as a defense details about what transpired between a client and its counsel. In order to fall within this waiver, the holder of the privilege must voluntarily inject new facts, not just deny allegations. The court in Wolosoff, supra, would not allow the privilege to be used as a sword rather than a shield, refusing to permit a party to divulge whatever information was favorable, but to preclude disclosure of detrimental facts. Although the court did not rule that the privilege had been waived, it expressly recognized that a waiver could occur.

Many recent federal district court decisions have defeated the claim of privilege by finding an implied waiver. See e.g. Amer. Home Assur. Co. v. Fremont Indemnity Co., 1993 WL 426984

(S.D.N.Y. 1993) (waiver because of belief of counterclaim for rescission); Dorr-Oliver Inc. v. Fluid-Quip Inc., 834 F. Supp 1008 (N.D. Ill. 1993) (defendants could not rely upon undisclosed advice of counsel as part of their "good faith" argument in a trademark case); In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982) (waiver by disclosing to auditors and underwriters' counsel).

In U.S. v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991), the defendant was prosecuted and convicted of various securities violations. The defendant wanted to testify about his good faith defense without revealing attorney-client conversations. The court held that if the defendant testified about his good faith belief in the legality of his actions, it would open the door to cross examination of attorney-client communications. The court reasoned that the defendant could not use the privilege to deter discovery, then use the same "evidence" to defeat liability.

A recently recurring pattern of waiver issues arises after a former subsidiary, serviced by in-house counsel of its parent is sold off and sues its former parent. The privilege is usually destroyed. Bass Pub. Ltd. v. Promus, 1994 U.S. Dist. LEXIS 5474 (S.D.N.Y.); Bowne v. Ambase, 150 F.R.D. 465, 491 (S.D.N.Y. 1993). Likewise, a lender who plays the role of manager of a real estate investment becomes a fiduciary, and the real estate department's counsel's communications loses his privilege, Quintel Corp. v. Citibank, N.A. 567 F. Supp. 1357 (S.D.N.Y. 1983).

But Cf. Vermont Gas Systems Inc. v. U.S. Fidelity and Guaranty Co., 1993 WL 372049 (D. Vt. 1993) (no implied waiver); Chase Manhattan Bank N.A. v. Drysdale Sec. Corp., 587 F. Supp. 57 (S.D.N.Y. 1984) (no implied waiver); Barr Marine Prods Inc. v. Borg-Warner Corp, 84 F.R.D. 631 (E.D. Pa. 1979) (no waiver merely because party brings or defends lawsuit); and Kraus v. Brandstetter, 185 A.D.2d 300, 586 N.Y.S.2d 270 (2d Dept. 1992) (no waiver).

Although implied waivers of the attorney client privilege occur, even where a waiver is upheld, it usually is limited to the specific issue and is not a waiver of all privileged communications. See Buck v. Aetna Life & Casualty Co., 1992 WL 130027 (E.D. Pa. 1992) (holder of privilege asserted bad faith failure to settle as an affirmative defense; the circumstances surrounding the settlement negotiations were known only to holder's counsel); and North River Ins. Co. v. Phil. Reins. Corp., 797 F. Supp 363 (D.N.J. 1992) (implied waiver where privilege holder has asserted a claim or defense that it intends to prove by disclosing attorney-client communications).

D. How to Protect Yourself and Your Communications.

1. General.

Giving legal advice must be distinguished from rendering business decisions. This is particularly important if an attorney is asked to make a business decision which may later be the subject of litigation in which the attorney could be called as a fact witness. An in-house attorney also does not want to risk being asked to issue a legal opinion on a decision or action on which he/she made a business decision. Such dual roles may present counsel with an ethical problem. In addition, in-house counsel must bear in mind that they have one client - the corporation. See Code of Professional Responsibility EC 5-18 (in-house/corporate counsel does not represent corporation's employees or other individuals). See also N.J. R.P.C. 1.13 and R.P.C. 4.2. Although these situations may be difficult to identify and predict, any decision-making should be done after a careful analysis. Counsel should be sensitive to the problems their dual position presents.

In-house counsel should also be alert to the situations in which a court may uphold an implied waiver of the attorney-client privilege. Being informed may avoid an inadvertent waiver, or at least identify circumstances in which special care must be taken. The holding in Redvanly v. Nynex Corp, 93 Civ. 2325 (1993) clearly instructs in-house counsel to be wary of these traps. "[The notes] were taken merely as notes of a meeting are often taken by those who attend meetings - - to have some record of what occurred. They were not taken in anticipation of litigation." Id. at 467.

2. Precautions.

1. Management should be instructed to consult with counsel as soon as it becomes apparent that an investigation is necessary for the express purpose of rendering legal advice.

1. Management should be instructed to consult with counsel as soon as it becomes apparent that an investigation is necessary for the express purpose of rendering legal advice.

2. If interviews are required, no unnecessary documents should be created and the employees should be instructed that in-house counsel represents the corporation. If the interviews must be recorded in writing, the notes should be restricted to thoughts and opinions based on what was learned, as opposed to facts and statements. In this way, it is more likely to be deemed as "opinion" work product and, thus subject to broader protection than the attorney-client privilege.

3. Consideration of retaining outside counsel to conduct the investigation is important where it could be construed as a business decision, regardless of the fact that an attorney is conducting the investigation.

4. Reports should not be circulated beyond those with a need to know. The more access employees have to the report, the less likely it will be protected.

5. Most importantly, the communication with in-house counsel must qualify as predominantly legal advice. If management needs to consult counsel on issues which are legal and non-legal, they should be addressed separately to avoid losing the privilege.

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