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Attorney-Client Privilege Considerations for the In-House Counsel

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Clients depend on their lawyers to provide advice confidentially and to protect that advice from disclosure to the fullest extent permitted by law. In many instances, it is easy to determine whether a particular communication is privileged and confidential. There are other instances, however, when the scope of protection is not as clear. This uncertainty arises, in part, because applying the attorney-client privilege raises intensely fact-specific questions. As a result, courts have reached different, sometimes conflicting, decisions when determining the scope of protection provided to confidential and privileged communications.

Whether a particular communication is protected by the attorney-client privilege is further complicated when the attorney doing the communicating is an in-house attorney, whose job responsibilities inevitably include a blend of legal consultation and general business functions. In-house counsel working for companies that do business internationally or in several states face additional complications due to differences in the controlling law. Although this fact-intensive nature of privileges makes it difficult to proclaim bright-line rules, this article discusses useful guidelines and best practices that in-house attorneys should follow to maximize the protection of the legal advice given to their clients. Part I of this paper provides a brief overview of the attorney-client privilege and some of the common privilege questions that arise for in-house and transactional attorneys. Part II discusses complications inherent in working with third-party consultants. Part III addresses attorney-client communications in the context of a merger or asset acquisition, and particularly who controls privilege after closing. Finally, Part IV discusses common ways in which parties inadvertently waive protection over otherwise privileged communications.

I.
AN OVERVIEW OF THE ATTORNEY-CLIENT PRIVILEGE & COMMON PRIVILEGE ISSUES FACING IN-HOUSE COUNSEL[1]

The attorney-client privilege protects communications between a client and his attorney in two key ways: (1) by prohibiting the attorney from disclosing the communications, and (2) by protecting the client from being compelled to disclose the communication in legal proceedings. In Texas, the privilege is governed by Rule of Evidence 503. The rule provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."[2] The basic elements of the attorney-client privilege are:

1. **a communication;**

2. **made between privileged persons (*i.e.,* attorney, client or agent);**

3. **in confidence; and**

4. **for the purpose of obtaining or providing legal assistance for the client.**[3]

The purpose of the privilege is the promotion of unrestrained communication and contact between the lawyer and client in matters in which the attorney's professional judgment is sought.[4] The attorney-client privilege has developed from two assumptions: (1) good legal assistance requires full disclosure of a client's legal problems, and (2) a client will reveal details required for proper representation only if his confidences are protected.[5] But because the privilege can prevent a judge and jury from learning of otherwise relevant and admissible evidence, courts construe the privilege narrowly.[6]

There are two fundamental aspects of the attorney-client privilege, both of which must be met in order for the privilege to apply. The first is that the communication must have been made for the purpose of *obtaining legal advice*, rather than business or other advice.[7] The second is that there must be an expectation that the communication will not be disclosed.[8] If either of these fundamental aspects is missing, the attorney-client communication is not privileged.

B. When a Lawyer Wears Two Hats: The Special Role of In-House Counsel.

The attorney-client privilege applies to all attorneys, whether they work "in-house" or outside of an organization.[9] However, in-house attorneys often fill multiple roles in an organization, and those roles may require that they give legal advice, business advice, or both. Because communications are protected only when an attorney is acting in a legal capacity,[10] whether a communication with an in-house attorney meets all of the requirements of the attorney-client privilege is not always straight-forward. Both in-house attorneys and their clients must be careful not to assume that communications are privileged simply because they were made to someone in the legal department, or because an attorney was present when they were made.[11] In addition, communications made for business rather than legal purposes are not protected by the privilege.[12] In order to be privileged, a communication must satisfy two requirements: (1) the in-house counsel must have been acting in his role as an attorney; and (2) the advice given must be legal, not business, advice. Courts will look carefully at a case to make sure that an organization did not assign an in-house attorney to a project merely so that privilege might be asserted over otherwise non-privileged communications.

C. Who Is the Client?

As stated above, a communication is privileged only if it is between an attorney and his client (or his client's agent). Accordingly, both in-house counsel and outside counsel should always be mindful of who is the client. Texas Rule of Evidence 503 defines a "client" as "a person, public officer, or corporation, association, or [any] other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer."[13] When representing an individual, identifying the client is typically easy. However, when the client is an entity, the question can be more difficult to answer.

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