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To Be Legal Opinion or Not to Be Legal Opinion – That Is the In-House Communication Question

White-Collar Crash Course

October 10, 2017

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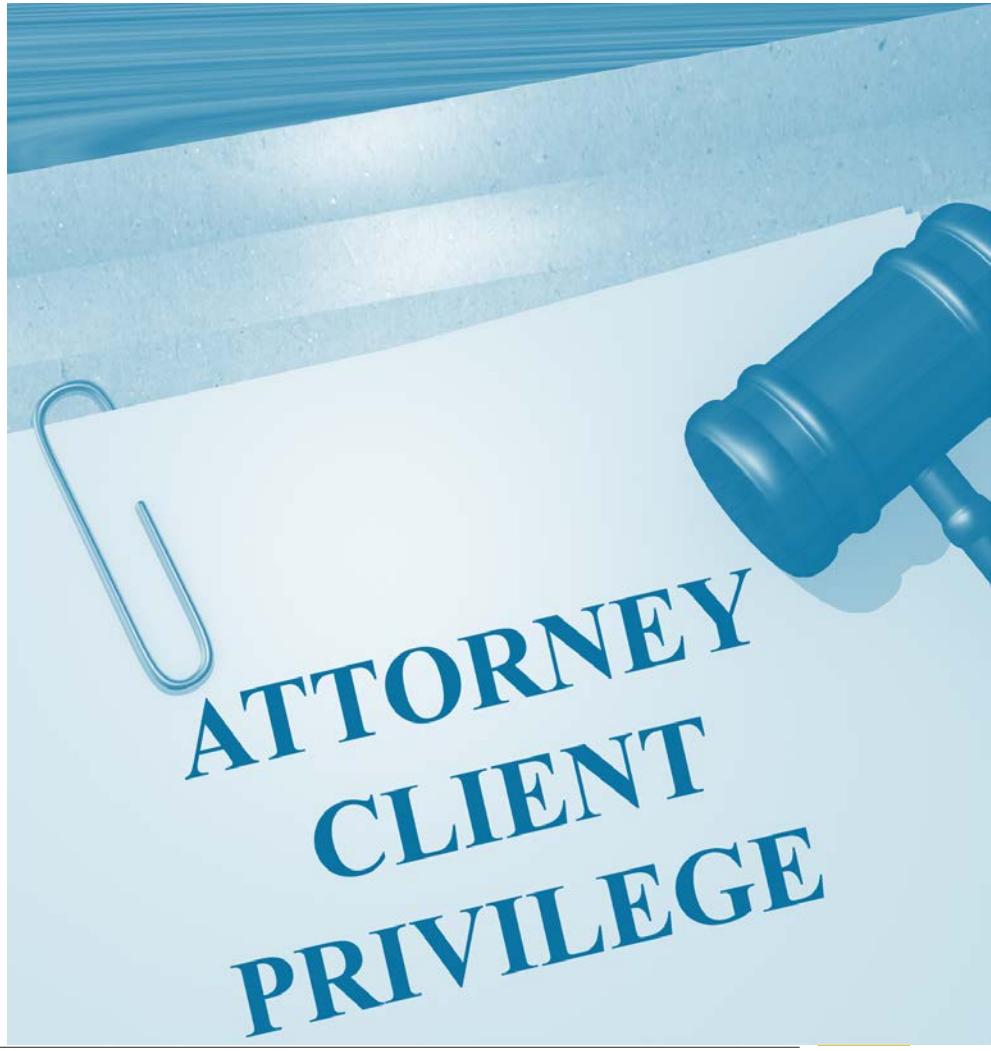
Attorney Client Privilege for In-house Counsel

- Attorney-client privilege **applies equally** to in-house as well as outside counsel – it protects communications made for the purpose of providing legal advice to the client.
- To apply, a communication must satisfy two requirements:
  (1) attorney must be acting in the role of an attorney; and
  (2) the advice must be legal, not business advice.



What is privileged?

- Generally, there is a presumption that a lawyer in the legal department of the corporation is giving legal advice, and an opposite presumption for a lawyer who works on the business or management side. *Breneisen v. Motorola, Inc.*, 2003 U.S. Dist. LEXIS 11485, at *10 (N.D. Ill. July 3, 2003).
- **No bright line rule** - However, merely having a lawyer present during a communication is not sufficient to cloak the communication in privilege. Also copying an attorney on e-mail or correspondence does not make it protected.
- *Stoffels v. SBC Communications, Inc.*:

  …[T]he attorney-client privilege attaches only to communications made for the purpose of giving or obtaining legal advice or services, not business or technical advice or management decisions. **The critical inquiry is, therefore, whether any particular communications facilitated the rendition of predominantly legal advice or services to the client.**

Legal Advice

- Opinion on applicability of existing law overall or to address specific conduct
- Legal research memos
- Advising on imminent or ongoing litigation

Requests for legal advice are often implied and therefore client communications intended to keep the attorney apprised of continuing business developments, with an implied request for legal advice based thereon or self-initiated attorney communications intended to keep the client posted on legal developments and implications ***may also be protected***.

Business Advice

- Attending business meetings
- Performing duties of another office – e.g., corporate secretary
- Acting as scrivener in any business setting
- In-house counsel communications with public relations consultant where consultant provided ordinary public relations advice

Major Caution - Foreign jurisdiction rules

- Generally, documents sent to employees or created in jurisdictions that do not protect in-house counsel communications are not privileged in U.S. courts. See e.g., *Celeron Holding, BV v. BNP Paribas SA*, No. 1:2012cv05966 (S.D.N.Y. 2014) (compelling production of documents under either Russian or Dutch law because relations were entered and centered there, and neither jurisdiction protected communications with unlicensed or in-house counsel).

Attorney Work Product Considerations

- Work product doctrine does not apply to documents prepared in the ordinary course of business. *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 304 (S.D.N.Y. 1991)("If a party prepares a document in the ordinary course of business, it will not be protected[.]")

- Examples of ordinary course of business:
  - technical information sketches, drawings, graphs, and test results gathered for patent application
  - documents created "too distant in time" from litigation
  - meeting minutes and memoranda of committees dealing with overall business purposes

Best Practices to Preserve Privilege

- When possible, separate legal and business advice by starting a new e-mail chain with either question/issue.
- Include **"Attorney-Client Privilege"** or similar language to subject lines or opening text of communication where legal advice is being provided (but don't blanket every communication in that manner).
- If acting in capacity as scrivener or secretary in a meeting, note where discussion turns to legal issues and be sure to exclude (and record the exclusion) anyone whose presence would break the privilege; don't be member of committee that asks for legal advice.
- Where appropriate, advise recipients not to forward the privileged information.
- Involve outside counsel in discussion.

Yates Memo Implications

- Most significant aspect is that a company must provide the government **"all relevant facts relating to the individuals responsible for the misconduct"** in order for the company to be eligible for **"cooperation credit."**
- Yates herself clarified that nothing in the memo requires companies to waive attorney-client privilege or in any way calls back protections already in place. The policy specifically requires only that companies turn over all relevant non-privileged information. (May 10, 2016)
- Problem is that Yates memo suggests the government makes the decision as to whether all relevant facts were provided.
- Ultimately, one issue to be considered by corporate in-house counsel is parsing facts from privileged communications and work product will now entail greater care and legal expenses given that the consequences of getting it wrong is higher both because government could fail to grant cooperation credit and the risk of waiver being found in subsequent civil litigation.

Questions?

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White Collar Crash Course Series

- **What Are the Risks? Business Types Facing Increased Scrutiny**
  Tuesday, October 17 at 2:00 – 2:15 p.m. ET
  Presenter: David J. Marck

- **Criminalization of Health Care**
  Tuesday, October 24 at 2:00 – 2:15 p.m. ET
  Presenter: Jack Wenik

- **Signs You May Have a Problem**
  Tuesday, October 31 at 2:00 – 2:15 p.m. ET
  Presenter: Richard W. Westling

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Thank you.