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How can corporate lawyers who also serve as directors, board members, or senior executives protect themselves against conflict of interest charges?

Attorneys serve as both their clients' advisors and advocates, however in-house counsel may also wear different "hats" within their corporations and also serve as directors and/or corporate officers. Given these dual roles and day-to-day involvement in the corporation's affairs, determining whether the attorney-client privilege should protect communications with in-house counsel from disclosure often presents complex issues.

The application of attorney-client privilege to communications with in-house counsel is largely driven by the role in which the attorney is functioning at the time of the communication, and the primary purpose of the communication.

Let's review the doctrine of Attorney-Client Privilege.

The [attorney-client] privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom communication was made (a) is a member of the bar...and (b)...acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his[/her] cli-

ent (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 Mach. Corp.*, 89 F.Supp. 357, 358-59 (D. Mass. 1950).

The burden is on the party asserting the privilege to demonstrate that an attorney-client relationship existed at the time of the communication and that the privilege was not waived.

How does this Attorney-Client Privilege apply to communications with in-house counsel?



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Courts frequently apply heightened scrutiny when an assertion of attorney-client privilege is made to protect communications involving in-house counsel. *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust* No. 1B, 230 F.R.D. 398 (D. Md. 2005); *Marten v. Yellow Freight Sys.*, 1998 U.S. Dist. LEXIS 268, at *16 (D. Kan. Jan. 6, 1998) ("[a]lthough such status does not alter the attorney/client privilege ... when the attorney serves also in another capacity, such as vice president, his [/her] advice is privileged 'only upon a clear showing' that it was given in a professional legal capacity"); JOHN VILLA, CORPORATE COUNSEL GUIDELINES § 1:16 (2009). Many courts deem the higher burden appropriate because in-house counsel's daily activities tend to blur the line between legal and business communications, hence discourages misuse of the doctrine, and prohibits a corporate client from shielding otherwise discoverable information through an overbroad assertion of the privilege. *DAVID M. GREENWALD ET AL., TESTIMONIAL PRIVILEGES* § 1:44 (3d ed. 2005).

In order to assert the privilege, in-house counsel must "clearly demonstrate" that the communication at issue was made for the purpose of securing legal advice or services, and that both

parties intended for the communication to remain confidential. This “clear demonstration” may be made by showing that the “primary purpose” of the communication was to procure legal advice or services or that legal advice predominates the communication.

Under some courts’ narrow interpretation of the “primary purpose” test, if the communication would not have occurred “but for” the need to seek business advice or for a business purpose, the communication is not protected by the attorney-client privilege. Other authorities take a more expansive view and deem a communication to be privileged if it is made to a lawyer whom the client consults for the purpose of obtaining legal advice and not predominately for another purpose. In sum, because legal advice is often intertwined with business advice, the proponent of the privilege must “clearly” demonstrate that the primary purpose of the communication was to obtain legal advice or services, and was not merely incidental to a business purpose.

Though the communication must be made for the primary purpose of securing or soliciting legal advice, the communication itself must also concern a confidential matter, and the author and recipient must have intended that the communication remain confidential.

Are there methods to adequately protect communications involving in-house counsel?

To avoid challenges to privilege assertions that may arise in subsequent (and even unforeseen) litigation, in-house

lawyers should take prophylactic steps to protect client communications. Lawyers should clearly label and identify as “privileged and confidential” documents and other communications they believe are protected and, to the extent possible, clearly identify the legal-focused purpose, without disclosing the privilege, as well as identify that he or she is acting in a legal capacity, within the communication itself.

A recent case highlights the importance of ensuring that in-house counsel makes clear the capacity and context in which he or she is providing advice. In *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust* No. 1B, 230 F.R.D. 398 (D. Md. 2005), the defendants alleged that scores of documents sent to and from an attorney, Stephen Miller, were protected by the attorney-client privilege. In addition to serving as an attorney to some of the defendants, Mr. Miller functioned in multiple non-lawyer capacities for certain defendants and related entities, including as a corporate officer. Throughout the dispute, the defendants produced four privilege logs, all of which failed to adequately describe the communications for which protection was sought, and/or identify the capacity in which Mr. Miller was acting when the communication was made.

To support their privilege assertions, the defendants submitted an affidavit from Mr. Miller in which he described his duties as 90% legal, generally acting as corporate counsel to the defendants, but failed to identify with any specificity the work he performed, for which entity he performed the work, and the capacity

(business or legal) in which he was performing the work for each communication at issue. Further, his affidavit was contradicted by a statement filed with the SEC in which the defendants asserted that Mr. Miller actually spent most of his time as an officer and director of various entities, not as their counsel. Thus, the defendants failed to “clearly” show that Mr. Miller acted as a legal advisor rather than a business advisor for each such communication.

As *Neuberger* demonstrates, in the event of litigation, the party asserting the privilege must meet its burden to show that the communication at issue is legal in nature, confidential and was made in the context of an attorney-client relationship. The proponent of the privilege may mitigate the risk of discovery disputes by offering a privilege log that contains sufficient support for its privilege claim. In the event of a challenge to the privilege assertion, the proponent should offer an affidavit by either in-house counsel or a person knowledgeable of the communications at issue, containing specific factual support for the privilege asserted for each challenged assertion. The affidavit should detail the legalistic nature of the work performed, including the capacity in which in-house counsel was operating at the time the communication was made, and the intent to keep the communication confidential. The *Neuberger* decision shows that blanket assertions of privilege, even if found in an attorney’s affidavit, are insufficient to support privilege claims where a lawyer wears multiple “hats.” ■

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