Maintaining the Attorney Client Privilege as In-House Counsel

UNDERWOOD

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The Last of The General Practitioners

- City Attorneys work in a multitude of different areas of the law:

  - Transactional, including real estate
  - Litigation
  - Customer service issues,
  - Utilities,
  - Employment matters,
  - Tax issues,
  - Election Law,
  - Healthcare, including ambulance services,
  - Government services like fire and police,
  - Regulatory issues, and
  - Economic development

Changing Role of The City Attorney

- Forty years ago a city attorney was judged on their acumen and the ability to draft legal documents.

- No longer is the role restricted to providing legal advice.

- In many cities, the city attorney is now also a member of the city management team, a city spokesman, a crisis manager, a business advisor, and a brain storming partner for administration and department heads.

Our Job Description

- Administering oaths and affidavits;
- Prosecuting all cases brought before the municipal court;
- Approving as to form all proposed ordinances before they are adopted;
- Drafting all proposed ordinances, including those granting franchises;
- Inspecting and passing upon all papers, documents, contracts, and other instruments in which the city may be interested;
- Being the legal advisor the city manager, the city council, all official boards and commissions and all city officers and employees with respect to any legal question involving an official duty or any legal matter pertaining to the affairs of the city;

Our Job Description

- Advising the city council, the city manager, and all the departments of the city concerning new or proposed state or federal legislation and representing the city before all legislative bodies and matters affecting the city;
- Appearing in any and all litigation affecting the city in representing the city in such manner as he or she deems to be in the best interest of the city and instituting such legal proceedings as may be necessary or desirable on behalf of the city;
- Hiring or discharging personnel for the city attorney's department;
- Advising or representing officers and employees of the city in litigation matters arising out of the official conduct of their office or duties or in the course of their employment; and
- Performing such other duties as the Council may direct or request.

Changing Role of The City Attorney

- These ever-expanding roles are extremely important and allow city attorneys to provide increased value to their client -- but not all of these roles work within the traditional understanding of the attorney-client privilege.

- City attorneys have transitioned from advice givers to decision makers – or at least part of the decision making team.

- These expanding roles make it imperative that in-house attorneys be able to immediately determine the professional role they are acting in at any given moment – other staff will not be considering such delineations.

How City Employees View Counsel

- In-House counsel can also be seen as overcompensated employees who seemingly get paid to impede others' work.

- Outside counsel is often seen as a problem solver who is called when the need arises.

- Same duties, but a very different perspective.

Texas Rules of Professional Conduct

- The rules of professional conduct apply equally to in-house attorneys but how those rules often apply is not always clear.

- Professional standards often seem to contemplate private practice and not an in-house employee/attorney of a single client.

- The Texas Disciplinary Rules of Professional Conduct define "Firm" and "Law Firm" to include lawyers in a private firm, lawyers employed in a legal department of a corporation ***or in a unit of government***.

The Attorney – Client Privilege

- The purpose is to promote unrestrained communication between an attorney and their client in any matter ***where the attorney's professional advice or services are sought***, without fear that these communications will be disclosed.

- Inherently, the privilege recognizes that sound legal advice is foundational to public order, and informed legal advice is wholly dependent on complete and open disclosure by clients.

The Attorney -- Client Privilege - Texas

- Texas codified the attorney-client privilege in Rule 503 of the TRE.

- Elements are:

  (1) a confidential communication;

  (2) made for the purpose of facilitating the rendition of ***professional legal services***;

  (3) between or amongst the client, lawyer, and their representatives; and

  (4) the privilege has not been waived.

The Attorney -- Client Privilege -- Texas

- TRE 503 defines "client" to include public or private corporations, associations, organizations, or entities that are rendered legal services by a lawyer or consult a lawyer to obtain legal services.

- Employees of a party claiming privilege are "representatives" within Rule 503 if they have authority to "obtain professional legal services" or "to act on advice thereby rendered."

- A representative is a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of the client's employment.

- Because communications "between representatives of a client" are protected if they otherwise meet the requirements of Rule 503, a lawyer does not need to be involved as an author or recipient.

The Attorney -- Client Privilege -- Federal

- FRE 501 of the Federal Rules of Evidence directs that state common law should govern claims of privilege where state law is the basis of the action.

- Where a federal statute governs the claim (i.e., federal question jurisdiction), federal common law governs.

- This is important given that cities are often subject to potential federal legislation.

The Attorney -- Client Privilege -- Federal

- Under federal common law, the Fifth Circuit has found the elements of attorney-client privilege are:
  - that a client made a confidential communication;
  - to a lawyer or his subordinate;
  - for the primary purpose of securing either a ***legal opinion or legal services***, or assistance in some legal proceeding.

Subject Matter Test

- Determining which employees can speak for the corporation in their client capacity can be difficult.
- To decide when an employee is privy to the confidential relationship, Texas and federal courts adopted the two-part subject matter test.
- First, communication must be made at the direction of the employee's superiors in the organization.
  - This reflects the understanding that attorney-client privilege may apply to communications between attorneys and employees who are not executives.
  - Pre 1998, the Texas Rules of Evidence mandated a control test regime. This test was rejected by the Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).

Subject Matter Test

- The subject matter upon which the attorney's advice is sought by the organization should be within the scope of the employee's duties.
  - Although attorney-client privilege applies in a corporate setting, it is more difficult to ascertain the scope of the privilege in the context of in-house counsel given their participation in the day-to-day operations of the entity.
  - In-house counsel is not automatically or categorically protected in their communications just by virtue of their title.
  - Instead, each communication must be separately analyzed to determine if counsel was functioning in their legal capacity.

Subject Matter Test

- The privilege only attaches to communications made for the purpose of giving or obtaining legal advice, not business, technical, or management advice.
- The Fifth Circuit has determined that there is no presumption that a company's communications with in-house counsel are privileged.
- Context is key, and courts must engage in a highly fact intensive inquiry
- Where in-house counsel's advice intertwines business and legal advice, attorney-client privilege protects the communication only if the legal advice predominates.

Welcome to The Courts

- In *EEOC v. BDO USA, LLP*, the district court allowed the company to hold back documents solely because in-house counsel was copied on them and because "anything that comes out of [BDO]'s lawyer's mouth is legal advice."
  - *EEOC v. BDO USA, LLP*, 876 F.3d 690, 694 (5th Cir. 2017).
- The Court of Appeals disagreed and determined that documents were not protected solely because they were also sent to or came from in-house counsel
- The Court emphasized that simply describing a lawyer's advice as being "legal," without more, is conclusory and insufficient to protect the documents from disclosure.

Welcome to The Courts

- *Seibu Corp v. KPMG LLP* revolved around allegations of misrepresentation in an audit conducted by KPMG in connection with the sale of a Seibu subsidiary.
    - *Seibu Corp. v. KPMG LLP*, 2002 WL 87461 at 1(N.D. Tex. 2002).
- KPMG disputed production of over 70 documents.
- After finding that a majority of documents were mere meeting notes, payment schedules, and breakdowns of unit holdings, there were only two documents that the Court was unsure about.

Welcome to The Courts

- The first document included handwritten notes made between KPMG's counsel and their COO.
- The second document was a memo based on that conversation which bore the label "Confidential, For the Briefing of Legal Counsel."
- The Court concluded the memo contained a mere superficial designation of confidentiality and held it was not enough that the documents contain the impressions of a lawyer or were prepared for a lawyer.
- The actual contents of the documents were primarily a "personnel matter," thus not subject to protection.
- This case demonstrates the high bar of what courts consider to be actual, legal advice.

Welcome to The Courts

- *Navigant Consulting, Inc. v. Wilkinson* discussed what types of evidence to offer to prove that particular documents are privileged. 220 F.R.D. 467 (N.D. Tex. 2004).

- This litigation arose after Wilkinson purportedly stole trade secrets from Navigant Consulting (NCI). Wilkinson tried to compel production of documents relating to an internal investigation after he left the company, but NCI resisted.

- NCI produced only the declaration of their general counsel who provided only conclusory statements that documents that were part of his investigation were protected.

- The Court ultimately protected less than 30 pages.

- The Court opined that a proper claim of privilege requires a specific designation and description of the documents within its scope and precise and certain reasons for preserving their confidentiality.

Welcome to The Courts

- Counsel's claim of attorney client privilege in *In re Monsanto Co.* was successful. 998 S.W.2d 917, 928 (Tex. App.—Waco 1999, no pet.) The attorney's affidavit read:

  - I am an attorney and have been licensed to practice law . . . since 1979 . . . Since 1983, I have been employed by Monsanto as an attorney. I was asked to and did, in fact, provide legal services to Monsanto as my client, generally in connection with Bollgard cotton. During the course of providing legal services to Monsanto . . ., documents containing confidential attorney-client communications and attorney work product were generated. Attached hereto as Exhibit A is a list of documents by description which contain or reflect (1) confidential attorney-client communications among me and other in-house and/or outside attorneys for Monsanto, or other Monsanto employees, representatives or agents, and (2) work papers reflecting attorneys' mental processes developed in rendering legal services to Monsanto. Those documents containing confidential communications among me and other inhouse and/or outside attorneys for Monsanto or other Monsanto employees, representatives, or agents, as well as those work-product documents reflecting the mental processes of attorneys, were intended to be and were kept confidential, and were made for the purpose of facilitating the rendition of professional legal services.

- There were also multiple memos between attorney's and representatives asked for suggestions, review, or input. The Court found those requests to indicate that Monsanto counsel was providing legal advice and thus were entitled to protection.

Exceptions To The Privilege

- There are several areas where the attorney client privilege does not apply.

- These include:

  - (a) furtherance of crime or fraud,
  - (b) claimants through same deceased client,
  - (c) breach of duty by client or attorney,
  - (d) document attested by attorney, and
  - (e) joint clients.

- Although situations could arise relating to "joint clients" for a municipal client, most of these are inapplicable to the daily work of a city attorney.

Practical Advice

- Courts normally construe attorney client privilege narrowly, but they are even more suspicious in the context of in-house counsel.

- Commentators have dubbed this suspicion as Corporation Bias or In-House Counsel Bias.

- In effect, courts are so wary that in-house counsel are cloaking otherwise non-privileged material, that there is effectively a bias against protecting in-house counsel attorney-client privilege.

- However, courts do regularly protect the attorney-client privilege of in-house counsel, even if they are extra cautious in doing so.

Practical Advice

- Keep communications separate.
  - Both the entity and in-house counsel should avoid mixing legal and nonlegal issues together in one email or communication.
  - Where a document or communication must include business information, in-house counsel should insert legal conclusions and analysis throughout.
  - Reminiscent of writing a law school exam, counsel should endeavor to apply legal reasoning to business information.

Practical Advice

- Ask employees to preface any need for legal advice with something to the effect of "In your capacity as legal counsel…" or "I am requesting a legal opinion on…"

- Likewise, in-house counsel should preface their responses to clients with "My advice on the legal issue presented is…" or "This memorandum responds to your request for legal advice on the issue of…"

Practical Advice

- In-house counsel's advice should appear formal and official.
    - Even in informal communication, applying legal reasoning, citing case law, or referencing statutes all emphasize they are providing true legal services.
- Ensure in-house counsel's signature block identifies them as legal counsel, an attorney, or esquire, especially when they are providing legal advice.

Practical Advice

- Train employees on email hygiene.
  - If too many people are copied on an email asking for advice, that makes it seem like in-house counsel is not providing confidential, privileged information.
  - If counsel's response is forwarded to those outside of the privileged relationship, then the privilege has been waived.
  - Most employees erroneously assume that everyone within the company enjoys privilege.

Practical Advice

- Apply labels to privileged or confidential information but do so discerningly.
  - Adding "Confidential and Privileged Attorney-Client Communication" can be a useful tool both to courts and recipients.
  - However, just because a document or communication bears a label does not automatically protect it, especially if those labels are attached to everything going or coming from in-house counsel.
- Where possible, in-house counsel should use operative phrases like "in anticipation of litigation" or "response to request for legal advice."

Practical Advice

- In the event of a discovery dispute, it is best to be as specific as possible.
  - Pleading that they should be protected because they were generated by an attorney is not enough.
  - Instead, submit affidavits with specific information about who generated the documents, what their purpose was, and who the recipient was (including reasoning why they are privileged).
  - If the court does an *in camera* review and finds that the organization was exaggerating the confidentiality, they will not be forgiving.

Practical Advice

- Own this issue and make it a regular talking point with City employees.
- Teach employees to think before they hit “send” and visualize how this communication would read to an outside set of eyes.
    - Teach yourself to think the same way.
- Reinforce the importance of the “need-to-know recipients” and who should be included on communications.
    - Work to avoid “creep” – new names being added to email strings.

Practical Advice

- Develop the habit of reinforcing when advice is not legal in nature so there are no misunderstandings.
- Assume that no communication is automatically protected and behave accordingly.
  - Avoid unnecessary conclusory statements.
  - Avoid discussing multiple matters in one communication.
  - Avoid speaking in generalities.
- Ask yourself how a communication would be explained to the media.

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