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THAT'S PRIVILEGED—OR IS IT?

Determining in-house attorney-client privilege in Connecticut proves challenging

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Connecticut has a long-standing public policy of protecting attorney-client communications made in confidence for the purpose of seeking legal advice. This is a two-way privilege: It protects the client's legal questions to the lawyer, and it protects the lawyer's responsive legal advice.

For outside counsel, it is often (though not always) easy to determine whether a communication qualifies for the privilege. The same cannot be said, however, for in-house lawyers, whose role in the day-to-day business of a corporation often extends beyond merely giving legal advice. The communications these staff counsel have with their fellow employee "business clients" routinely present pure business issues or mixed questions that involve both legal and business matters. Determining whether a particular communication between a nonlawyer corporate employee and an in-house attorney is a privileged one can, therefore, be challenging.

The analysis is made more difficult by the absence of instructive case law from Connecticut courts. In fact, it was only 10 years ago that the Connecticut Supreme Court first recognized that a corporate client's communications with *outside* counsel may be privileged. In *Shew v. Freedom of Information Commission*, the Supreme Court established the following four-part test governing whether a lawyer's communication with a corporate client qualify for the privilege: (1) The lawyer must be acting in a professional capacity. (2) The communication must be between the lawyer and current (i.e., at the time of the communication) employees of the corporation or agency. (3) The communication must relate to legal advice sought from the lawyer. And (4) the communication must be made in confidence.

Although the Connecticut Supreme Court has not applied this test to corporate in-house counsel, it has suggested in *dicta* that the test applies to agency counsel, as it did in *Cadlerock Props., J.V. v. Commissioner of Environmental Protection* in 2000. Furthermore, several Superior Court judges have applied the *Shew* test to claims of corporate in-house attorney-client privilege, and, appropriately, no Connecticut court has questioned this application. Those cases, and others analyzing the privilege, provide some guidance on the scope and application of the privilege in this context.

THE FIRST

SHEW CRITERION ESTABLISHES THAT THE IN-HOUSE ATTORNEY'S COMMUNICATIONS ARE NOT PRIVILEGED WHEN COUNSEL ACTS AS A BUSINESS EXECUTIVE RATHER THAN AS AN ATTORNEY.

The First Prong: Professional Capacity

The first *Shew* criterion establishes that the in-house attorney's communications are not privileged when counsel acts as a business executive rather than as an attorney. The line between these roles is difficult to draw. Courts often look to the purpose of the communication, reasoning that a communication qualifies for the privilege only if it is intended to facilitate a lawyer's rendering of legal advice.

The legal advice need not concern pending or threatened litigation, but if communications are merely aimed at keeping the in-house attorney apprised of the company's business decisions and there is no current need for legal advice regarding a particular issue, they are not likely to be privileged.

The Second Prong: Lawyer And Current Employees

Generally speaking, the disclosure of an attorney-client communication to a third party destroys the privilege. The rule is no

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different in the corporate context.

The Connecticut Supreme Court has, however, adopted a generous understanding of who the corporate "client" is for privilege purposes. It has rejected the "control group test" followed in other jurisdictions, explaining that communications with low-level employees are protected because these employees frequently have information an attorney needs to render advice to the company.

Including in the communication employees who are not necessary for the rendering of advice, such as by an overly broad "reply to all" e-mail, risks a waiver of the privilege, however.

The Third Prong: Relate To Legal Advice Sought

Any analysis of this third prong should focus on the term "relate." Because a lawyer must be able to provide informed advice, Connecticut law affords protection to facts that a client transmits, even if they are merely tangentially related to legal issues about which the lawyer is giving advice.

The reason for this is obvious: The client cannot be expected to know what information is crucial to the lawyer, and the client should not be forced to choose between withholding facts or risking disclosure. Arguably, if the client transmits a fact with a good faith belief that the information will facilitate the provision of the legal advice, this prong of the *Shew* test should be satisfied.

That said, a communication that *solely* transmits facts will only qualify for the privilege if the facts are inextricably linked to the provision of legal advice.

The Fourth Prong: Communication In Confidence

Typically, attorney-client communications are presumed confidential. An in-house attorney may, however, be one of many recipients of internal e-mails and memoranda, making the question of confidentiality more problematic.

A communication need not be marked "confidential," but that designation is a factor courts consider. The content of the communication also matters; if it recounts information conveyed to a third party, such as a conversation, or if it expresses an intent that its recipients will discuss its contents with third parties, the communication will not be considered confidential.

Also, if the communication is widely disseminated throughout the corporation, such as in an employee manual or on display in a common area, a court will likely conclude that the communication is not confidential.

Lessons for In-House Attorneys And Their Clients

As with any claim of privilege, the party invoking the in-house attorney-client privilege bears the burden of establishing all four of the *Shew* criteria. Although external evidence may sometimes be introduced to support the application of the privilege, the best course is to include content in the communication that satisfies *Shew*.

For example, in-house counsel should consider marking any document relating to a legal subject on which he is advising the company as "privileged and confidential." Additionally, he should remind his colleagues not to disclose the document or its contents to others, either inside or outside the company. ■