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Protecting the attorney-client privilege in corporate compliance matters

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For more than a decade, the corporate attorney-client privilege has been eroding. The nature of the corporate privilege — belonging to an entity that is only able to conduct business through the collective actions of individual directors, managers, or employees — seemingly makes government enforcers and, in some cases, the courts uneasy. This reaction likely results from a sense, whether justified or not, that the privilege is used, all too often, to shield questionable corporate activities from government scrutiny.

The attorney-client privilege is the oldest privilege. It protects confidential communications, and applying it to the traditional relationship of an individual client and his/her attorney is relatively straightforward. In contrast, in the corporate setting, applying the privilege and determining its contours can be complex, because the privilege can potentially cover communications across a large group of individuals and often involves attorneys who work directly for the entity and provide regular legal and business advice. As one court has noted:

> It is often difficult to apply the attorney-client privilege in the corporate context to communications between in-house corporate counsel and those who personify the corporate entity because modern corporate counsel have become involved in all facets of the enterprises for which they work. As a consequence, in-house legal counsel participates in and renders decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues.[1]

Whether the skepticism about the corporate attorney-client privilege is justified or fair, it is a reality for corporations, their in-house attorneys, compliance officers, and outside counsel. It has become commonplace for the government and other litigants to challenge a corporation's assertion of corporate attorney-client privilege or to argue that privilege has been waived or otherwise abrogated. Given this practical reality, vigilence in protecting the privilege is more important than ever.

Attorney-client privilege

Generally, courts have held that 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 the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (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.[2]

More recently, another court distilled this test, holding a party must show: (1) a confidential communication, (2) to a lawyer or subordinate, (3) for the primary purpose of securing a legal opinion, legal services, or assistance in the legal proceeding.[3] It is well accepted, of course, that the attorney-client privilege applies to corporations.[4]

In light of these cases, it may be difficult to understand what makes applying the privilege in the corporate context so challeging. The answer lies in the "primary purpose" test, which requires that the primary purpose of the communication must be securing a legal opinion, legal services, or assistance in a legal proceeding. Determining whether this test is met when evaluating communications between an in-house attorney and other corporate officers or employees is often complicated.