

Understanding Attorney-Client Privilege in the In-House Setting

Association of Corporate Counsel – Northeast NextGen

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What is a Privileged Communication?

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Cavallaro v. United States, 284 F.3d 236, 245 (1st Cir. 2002) (quoting 8 J.H. Wigmore, *Evidence* § 2292, at 554 (McNaughton rev. 1961)).

Upjohn Co. v. United States, 449 U.S. 383 (1981)

Employee as Client?

- **Employees may try to claim an individual attorney-client privilege with corporate counsel**
- **First Circuit in *In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001), adopts so-call *Bevill* Test, under which proponent of individual privilege must establish:**
 - 1. they approached counsel for the purpose of seeking legal advice;**
 - 2. when they approached counsel they made it clear they were seeking legal advice in their individual rather than in their representative capacities;**
 - 3. counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise;**
 - 4. Their conversations with counsel were confidential; and**
 - 5. The substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.**

Communications with Third Parties to Facilitate Legal Advice

- ***Cavallaro v. United States*, 284 F.3d 236 (1st Cir. 2002) – Accountants**
 - **Applies test from *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) – communications with third-party professionals may fall within the scope of the privilege if “necessary, or at least highly useful,” for the effective consultation between the lawyer and client and the communication is made for the purpose of obtaining legal advice from the lawyer**
 - **Consultation with accountant was primarily for accounting advice, not legal advice, so no privilege.**

Communications with Third Parties to Facilitate Legal Advice

- ***Dahl v. Bain Capital Partners, LLC*, 714 F. Supp. 2d 225 (D. Mass. 2010) – Financial Advisors**
 - ***Kovel* test applied to corporate counsel communications with financial advisor regarding a potential leveraged buyout.**
 - **No privilege because the communications were primarily geared toward business advice, not financial advice**

Privilege Across the Corporate Family

- ***In re Teleglobe Communications Corp.*, 493 F.3d 354, 379 (3d Cir. 2007)**
 - **Joint-client relationships between parents and subsidiaries**
 - **“[I]t is important for in-house counsel in the first instance to be clear about the scope of parent-subsubsidiary joint representations. By properly defining the scope, they can leave themselves free to counsel the parent *alone* on the substance and ramifications of important transactions without risking giving up the privilege in subsequent adverse litigation.”**

Work-Product Protection

- ***United States v. Textron Inc. and Subsidiaries*, 577 F.3d 21 (1st Cir. 2009)**
 - **Tax work papers regarding potential liabilities to the IRS were held not to constitute work product because they were prepared to comply with securities laws and accounting principles, not in anticipation of litigation**
 - **Dissent claimed that majority tacitly abandoned standard that material is work product if prepared “because of” the prospect of litigation, which the work papers were**