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PERSPECTIVES

THE IMPORTANCE OF PURPOSE IN AVOIDING UNINTENTIONAL WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

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Just because you are talking to an attorney does not mean that your conversation is protected by the attorney-client privilege. And just because your company has hired outside counsel does not mean that privileged documents you send them remain protected by the privilege either. The Ninth Circuit recently concluded that a company's disclosure of a privileged memorandum to outside counsel for use in a valuation report resulted in waiver of the company's attorney-client privilege with respect to that memo. The Ninth Circuit's opinion underscores that the only information covered by the attorney-client privilege is that which is shared with counsel for the purpose of obtaining legal, not business, advice.

The attorney-client privilege protects from disclosure confidential communications between an attorney and a client that are made for the purpose of obtaining or providing legal advice. The privilege covers communications made in any medium, including email, phone, text or online messenger, but it only covers those communications that meet all of the elements: (i) the communications must actually be confidential (i.e., limited exclusively to the attorney and client); (ii) the communications must be made by or to a client (even if no engagement or

retainer letter is signed); and (iii) the communications must be made for the purpose of obtaining legal advice. The privilege belongs to the client, and so the only person who can assert it is the client, or an attorney on the client's behalf.

Of course, a company can be a client too. In that situation, the privilege extends to communications between the company's employees and the company's counsel, whether in-house counsel or 'outside' counsel (a law firm retained to represent the company), as long as the communications are within the scope of the employee's duties. For example, if an employee in the company's advertising department asks the company's counsel via email whether the company can include a certain statement in an ad, the employee's email would be privileged. If counsel replies, providing legal advice in response to the employee's question, that response would also be privileged.

But what happens if the employee then forwards counsel's response to someone outside the company? Intentional disclosure of communications protected by the attorney-client privilege to a third party ordinarily waives the privilege. That waiver occurs, however, only where the company has disclosed the actual substance of its privileged communication, and not merely the fact that a privileged communication occurred. Similarly, the company's disclosure of the subject matter of a privileged communication should not result in waiver. For example, if, after having a privileged meeting with counsel, the company were to disseminate a memorandum on the advice of counsel, the release of that memo would not waive privilege with respect to the attorney-client communication recommending that the memo be released, so long as the memo does not itself reveal any privileged information.

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The rules of waiver as it relates to privilege are not always so straightforward. It would be easy, and often correct, for a company to assume that all its communications with its counsel are privileged. But for privilege to apply, that communication must be made for the purpose of obtaining legal advice. Thus, privileged material prepared by a company's inside counsel could be subject to waiver when shared with a company's outside counsel if it is shared for a purpose other than obtaining legal advice.

The importance of a having a clear legal purpose to maintaining privilege was recently brought into the spotlight in *United States v. Sanmina Corporation*. The dispute in *Sanmina* arose when the Internal Revenue Service (IRS) took issue with a $503m 'worthless stock' deduction that Sanmina had claimed on its federal tax return years earlier with respect to its ownership of shares in a Swiss subsidiary. In support of its deduction, Sanmina engaged an outside law firm, DLA Piper, LLP, to prepare a valuation report, which provided a lengthy analysis of the estimated fair market valuation of the stock in a 102-page report. The report relied on and cited two memoranda providing legal analysis of the tax treatment of that stock that had been prepared by Sanmina's internal tax attorneys.

When the IRS began its examination of Sanmina's taxes, Sanmina provided the DLA Piper report to the IRS to support its decision to take the worthless stock deduction. The IRS reviewed the report and requested that Sanmina also produce the legal memoranda prepared by its inside counsel that DLA Piper had relied on. Sanmina refused to turn over the memoranda, invoking the attorney-client privilege. After some protracted discovery hearings, the district court ultimately sided with the IRS, ruling that, although those legal memoranda were privileged attorney-client communications, Sanmina had waived its privilege by voluntarily disclosing the memoranda to its outside counsel, DLA Piper, to obtain a valuation opinion. Critical to the district court's conclusion was its finding that Sanmina had

shared the memoranda with the law firm "not for the purpose of receiving legal advice, but for the purpose of determining the [stock's] value" – a non-legal purpose. Sanmina appealed.

On appeal, the Ninth Circuit affirmed the district court's conclusion that Sanmina had waived the attorney-client privilege. In its opinion, the court of appeals highlighted that the DLA Piper report itself stated that "Sanmina engaged DLA Piper for the purpose of conducting a fair market value analysis to be used for tax compliance reasons". That language, the court reasoned, supported the district court's inference that Sanmina had shared the memoranda for non-legal purposes. Still, the Ninth Circuit observed that the report also bore "some indications of an attorney-client privilege" – it was signed by an attorney and marked "attorney-client privilege" on each page. The court then noted the possibility that Sanmina engaged DLA Piper for the purpose of seeking both legal and non-legal advice, as is not unusual in the tax law context. But the court ultimately passed on that issue, deferring to the district court's factual finding that Sanmina had engaged DLA Piper to obtain a non-legal valuation analysis, rather than legal advice. Because Sanmina had engaged DLA Piper for a non-legal purpose, its communications with DLA Piper were not protected by the attorney-client privilege. And because its communications with DLA Piper were not privileged, Sanmina also waived the privilege over its internal legal memoranda when it shared them with DLA Piper.

Ultimately, the Ninth Circuit's conclusion that a company's engagement with an outside law firm was non-legal, while surprising, was very fact-specific. Still, below are some practical tips that companies can consider to help ensure that their communications with outside counsel remain privileged.

First, when sharing privileged material with outside counsel, consider documenting the legal purpose for which the material is being shared. Contemporaneous documentation could be especially helpful in contexts where there is a dual purpose for the communication, such as where the company is seeking both legal and non-legal advice. For example, the Ninth Circuit in *Sanmina* considered various indicia of a legal purpose for Sanmina's engagement with DLA Piper. In the absence of a clear legal purpose, the court declined to overturn the district court's finding that the engagement was non-legal. Had Sanmina and DLA Piper documented a clear legal purpose, the court may have reached a different result.

Second, consider whether you are seeking legal advice, business advice or both. Whenever possible, try to separate communications surrounding legal advice from business advice. For example, when seeking business advice, such as a fairness opinion, it may be more convenient to share an internal legal memorandum that presents facts intertwined with

legal analysis to the outside experts. But doing so will waive privilege over that legal analysis. Sharing facts alone, without any accompanying analysis, will help ensure that privilege is preserved.

Finally, when communicating with outside counsel, make sure that only people who are necessary for the discussion are included. If, after receiving a legal memorandum from outside counsel, the company distributes it widely, it risks waiving privilege over that analysis. Instead, the company should distribute legal memoranda and the like only to those on a need-to-know basis. And when distributing information widely, consider drafting independent direction to employees that is consistent with the advice of counsel, rather than sharing counsel's advice. CD

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