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Think Twice Before Sharing: Keeping Privileged Documents Privileged

June 1, 2014

One concern that businesses must keep in mind when sending a communication that contains legal advice to a third party[1] is whether the attorney-client privileged information will remain privileged.

Just because a document is subject to attorney-client privilege does not mean that the document will always retain that status. A document may lose its privileged status if it is shared with a third party, not treated as confidential, or contains a mix of both business and legal advice. Examples of potentially privileged documents often requested by third parties include board and committee meeting minutes, email communications, legal memoranda, attorney comments to business documents and drafts of legal documents.

There are two tests that courts use when determining whether to extend the attorney-client privilege to a third party: a broad approach test or a strict multi-part test. The Colorado Supreme Court has adopted the strict multi-part test. Due to this, a business in Colorado has a higher burden of proof to show that the document in question should be protected under the attorney-client privilege.

One example of when a document retains its privileged status is when a financial advisor provides information to an attorney that assists the attorney with rendering legal advice to the client. However, the privilege could be lost if the advisor is not necessary to the communication between the client and the attorney. If an accountant is simply double checking an attorney's work to make sure that it matches the accounting documents, privilege could be lost if the accountant's viewing of the document is determined to not be necessary.

In addition, a privileged communication always needs to be treated as confidential. If an email containing legal advice is sent to multiple recipients, then all of the recipients should be involved in the issue, and the issue must be within the scope of the duties of each recipient. If one recipient is not involved, the attorney-client privilege may be waived.

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[1] This includes: employees (if outside the scope of his or her duties), agents, affiliated corporations, independent contractors, consultants, compensation advisers, external auditors, tax accountants, lenders, investment bankers, potential acquirers, governmental agencies or national securities exchanges.

Finally, it is important to consider what other information is included in a correspondence that contains legal advice. If a communication contains a mix of business advice and legal advice, the communication may not be privileged if subpoenaed. Some courts may attempt to redact the legal advice in the correspondence; but that is not always the case, especially if there was not a clear cut separation of where the legal advice ended and the business advice began.

There is much that a business must consider before sharing a document that contains legal advice with a third party. In order to ensure that a document retains its privileged status, we recommend that a business consult with their attorney before the document is shared with others.

For more information or to discuss specific scenarios, please contact:

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