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SPECIAL FEATURE

Mass. court weighs in on disclosure to consultants



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Companies and in-house counsel rely on a wide array of consultants and professionals, such as accountants, brokers, investment bankers and public relations experts. What becomes of attorney-client privileged information when it is disclosed to

these consultants?

The general rule is that the voluntary disclosure of privileged information to a third-party consultant for the company's business purposes will be deemed to waive the privilege. There is, however, a narrow exception to this rule, which was the subject of a recent decision by the Massachusetts Supreme Judicial Court, *Commissioner of Revenue v. Comcast Corporation, et al.*, SJC-10209 (March 3, 2009).

In *Comcast*, the SJC considered whether the attorney-client privilege or the work product doctrine protect communications between an in-house cor-

porate counsel and outside tax accountants.

Colorado-based corporate counsel retained two Massachusetts-based Arthur Andersen partners to provide Massachusetts tax law advice in connection with a proposed stock sale. The Andersen partners spoke with in-house counsel and prepared several memoranda discussing various options for the company relating to the stock sale and also assessing the litigation risks for each option considered.

Litigation ensued concerning the tax implications of the stock sale, and the commissioner of revenue sought production of the Arthur Andersen memoranda, which Comcast withheld on the basis of the attorney-client privilege and/or work product doctrine. The SJC held that the memoranda were not protected by the attorney-client privilege.

A limited exception

In its most classic formulation, the attorney-client privilege is available where legal advice of any kind is sought from a professional legal adviser and the communications relating to that advice are made in confidence by the client. The principal purpose underlying the privilege is to encourage clients to make full disclosure to legal counsel of all relevant facts so that counsel can render fully informed legal advice.

Disclosing attorney-client communications to a third party generally waives



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the privilege. There is, however, a limited exception to the waiver rule known as the "derivative attorney-client privilege." In *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), the 2d Circuit held that the attorney-client privilege is not waived when disclosure to a third-party consultant is necessary to facilitate communication between the attorney and the client and thereby assist the attorney in rendering legal advice to the client.

The purest example of the derivative privilege is that of an interpreter brought in to translate for a client and his attorney who speak different languages. With respect to accountants, the court in *Kovel* held that the privilege is



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waived unless the communication is made for the specific purpose of the client obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting services, or if the advice sought is the accountant's rather than the lawyer's, the privilege is waived.

In *Comcast*, the SJC agreed with the majority of courts that the *Kovel* doctrine applies only when the accountant's role is to clarify or facilitate communications between attorney and client. It then went on to find that the role of the Andersen partners was not necessary for effective communication between the client and the attorney. Corporate counsel's purpose in consulting Andersen was to obtain advice about Massachusetts tax law, not merely to assist him in understanding his own client's information.

Martha Stewart's case

The SJC's holding in *Comcast* is well within the mainstream of other similar cases regarding third-party professionals with whom clients routinely consult.

For example, communications with public relations consultants have routinely been held to waive the privilege because the communications do not assist the lawyer in providing legal advice.

One rare exception is the *Martha Stewart* case, in which the public relations consultants were deemed to have played an integral role in formulating and implementing the defense strategy of selective prosecution. By contrast, communications with an electrical engineer or computer scientist retained to assist the lawyer in understanding complex technical data so that the attorney can render legal advice will almost always be protected.

Although the derivative attorney-client privilege doctrine is narrowly circumscribed, in appropriate cases the communications may be protected under the work product doctrine. The work product rule protects documents prepared by a client, the client's lawyer or a non-lawyer consultant in anticipation of litigation or where litigation is actually pending. Even though the

Andersen memoranda were not actually prepared to assist in litigation, the court in *Comcast* reasoned that a litigation analysis prepared so that a party can make an informed business decision should be afforded the protections of the work product doctrine. The court found that the Andersen memoranda were prepared because of the *prospect* of litigation and, as such, should be entitled to protection.

While companies and in-house counsel regularly engage consultants and professionals to discuss and/or implement strategic initiatives, great care should be taken before confidential and privileged information is shared. Remember that, in general, disclosing attorney-client communications to a third party waives the privilege.

Before making such disclosure, ask yourself whether the third party is being consulted in order to facilitate communication between the attorney and the client or simply to provide his own advice. If the latter, disclosure of the confidential information will likely waive the privilege.

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