

Does the Attorney-Client Privilege Protect Communications With A Company's Outside Consultants?

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A recent decision by the Massachusetts Land Court provides helpful guidance to clients who frequently rely on independent contractors such as brokers, project managers and public relations consultants to interface with their attorneys. *But first*, a brief tutorial on the attorney-client privilege.

The attorney-client privilege is a time honored legal rule that prevents an adverse party from discovering communications between a lawyer and her client and using those communications against the client in court. The privilege is necessary to facilitate candid communication between lawyers and clients. Because the privilege arguably impedes the truth seeking function of our adversary system, however, courts often construe it narrowly. The privilege can also be waived, either intentionally or inadvertently. One way clients often waive the privilege is by sharing confidential communications with third parties (persons not directly employed by the lawyer or the client), either contemporaneously or after the fact.

In the complex, modern world third party consultants are often indispensable to the proper functioning of an attorney-client relationship. Imagine, for example, a client who speaks only Greek hiring an attorney who speaks only English. If the attorney hires an interpreter to help her communicate with the client, has the privilege been waived? Probably not. In 2009, the Massachusetts Supreme Judicial Court embraced a concept known as the "derivative attorney-client privilege," ruling that disclosing confidential legal information to consultants necessary to assist a lawyer in communicating with and properly advising her client does not necessarily waive the privilege.

In a case of first impression in Massachusetts, the Land Court recently ruled that the attorney-client privilege should also be extended to individuals who, while not technically "*employees*" of the client, serve as the "*functional equivalent*" of employees. One Ledgemont LLC v. Town of Lexington Zoning Board of Appeals, Misc. 13-PS-477585, 2014 Mass. LCR LEXIS 92 (Ma. Land Ct. 2014), addressed the question of whether the inclusion of a real estate broker, who was not an employee of the company, on e-mails with the company's lawyer waived the attorney-client privilege. Following a leading federal court precedent, the Land Court ruled that, in the particular circumstances of the One Ledgemont case, the broker was the "*functional equivalent*" of an employee, and the privilege was not waived by including him on e-mails.

While the One Ledgemont decision appropriately recognizes the complex realities of the modern business world, the court was careful to limit the scope of its ruling. The broker in question had served as the company's exclusive leasing agent and real estate advisor for a number of years and had become "a key decision leader" for senior management. In the court's view, it was critical that the broker had a "close, long-standing, pivotal role in the business transactions of the client company." The court added, "Not all (or even many) real estate brokers and advisors who work with corporate clients will be able to be part of the entity's dialogue with its lawyers without undoing the privilege."

Clients like the real estate firm in One Ledgemont who rely heavily on third party consultants to conduct their regular business affairs can take steps to improve the chances that communications among the client, its consultants and legal counsel remain covered by the attorney-client privilege. Those steps might include adding appropriate language to the consulting contract indicating that the consultant will assist the client in legal matters and interface with the client's attorneys. Clients might also add language to their legal engagement letters, specifically identifying any consultants who may be necessary in communications with the attorney and stating that the parties will regard communications with those consultants as privileged. Clients also need to be aware of the other requirements necessary to maintain the privilege, such as the fact that the privilege only applies to communications necessary for seeking and providing *legal advice*, as opposed to routine business communications.

Following these precautions does not guarantee that a court will later uphold a claim of privilege when third party consultants are included in attorney-client communications, under either the derivative attorney-client privilege or "*functional equivalent*" doctrines. Both rules have their limits. Clients should proceed with caution in this area, and seek specific guidance from their attorneys before routinely copying consultants on e-mails and other confidential communications.

For questions about the information contained in this advisory, please contact your usual Goulston & Storrs attorney or the attorneys listed below.

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