Attorney-Client Privilege in the Corporate Context: Can Corporate Officers Waive the Corporation's Privilege?

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When a corporate entity is sued, it is important for officers and directors to understand the operation of the attorney-client privilege and its limitations. While the attorney-client privilege may seem straightforward, in practice its application proves complex. As a result, officers and directors must be able to identify I) Who Holds the Privilege; II) Who Speaks for the Corporation and III) Situations When Inadvertent Waiver May Occur.

I. Who Holds the Privilege?

In the seminal case, *Upjohn Co. v. United States*,[1] the Supreme Court determined that the attorney-client privilege attaches not just to individuals, but to corporations as well. Thus, as the client, the corporation, not management, holds the attorney-client privilege. While it is undisputed that corporations can hold these privileges, the corporation itself is a legal fiction: it lacks an ability to speak for itself. Who, then, speaks for the corporation when it comes to applying and waiving the attorney-client privilege?

II. Who Speaks for the Corporation?

The Supreme Court addressed the question of who may waive corporate privilege in *Commodity Futures Trading Commission v. Weintrab*.[2] There, the Court found that "the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors."[3] While most circuits accept that corporate management has the authority to waive the corporation's attorney-client privilege, a difficult situation arises when the corporation asserts the privilege, yet an officer or director makes a disclosure that arguably results in a waiver. Circuits are split as to whether the

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privilege asserted by a corporation can be deemed waived when a corporate officer discloses otherwise privileged communications.

III. When May Inadvertent Waiver Occur?

Courts follow two predominant approaches when analyzing corporate waiver: the per-se waiver approach, and the case-by-case approach. In the per-se waiver approach, courts find that any disclosure of otherwise privileged communications by a corporate officer waives the corporation's attorney-client privilege. The case-by-case approach, however, rejects a per-se approach to waiver, instead of examining the facts of each case before determining the outcome.

The per-se approach is illustrated by the Seventh Circuit case, *Velsicol Chemical Corp. v. Parsons*.[4] In *Velsicol*, the Court deemed that disclosures by Velsicol Chemical Corporation's general counsel, during grand jury testimony regarding communications with outside counsel constituted a waiver of the corporation's attorney-client privilege. Although Velsicol argued that the corporation expressed no intent to waive, and that their general counsel had no authority to bind the corporation by his disclosures when testifying on his own behalf, the court disagreed. Because general counsel constituted corporate management, the Court determined that any disclosures made by in-house counsel regarding his communications with outside counsel, effectively waived the corporation's privilege. Thus, *Velsicol* implements a per-se waiver, indicating that any corporate officer has the authority to waive the corporation's attorney-client privilege, regardless of the fact that the corporation did not intend to waive. In circuits following this approach, corporate counsel must be particularly mindful that any disclosure from a corporate officer, seemingly regardless of the context, can waive corporate privilege.

The Second Circuit instead follows the case-by-case approach when determining waiver. In *In re Grand Jury Proceedings*,[5] both in-house counsel, and the corporation's founder, chairman, and controlling shareholder disclosed privileged material in front of a grand jury. The corporation argued that it never waived the

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attorney-client privilege, and that neither its in-house counsel nor its corporate officer could waive the privilege held by the corporation. In this instance, the Court found that the corporation held the privilege and that the grand jury testimony did not constitute a waiver. Instead of following the per-se waiver approach adhered to by the Seventh Circuit, the Second Circuit proclaimed that each instance of waiver should be examined on a case-by-case basis. The Court noted, "we believe it is not prudent to formulate a per se rule in this area of the law."[6] Instead, it advocated "that the implied waiver analysis should be guided primarily by fairness principles."[7] Importantly, the Second Circuit acknowledged that the corporate officers in *In re Grand Jury Proceedings* were subpoenaed in their individual capacities. The court noted that while they were still officers of the corporation, the officers' testimony was not offered on behalf of the corporation.[8] In fairness to the corporation, a waiver was not warranted. This case-by-case analysis indicates that the Second Circuit is more protective of corporate attorney-client privilege than those circuits applying the per-se method.

IV. Conclusion

Ultimately, not all circuits adhere to one approach or the other. Notably, the Sixth Circuit has not yet ruled on this issue. Because of the failure of the circuits to adopt a universal approach to a waiver of corporate privilege, corporate officers and directors must be particularly mindful when communicating with third-parties. Even though courts concede that corporations themselves hold the attorney-client privilege, and management can speak for the corporate entity, it is not always clear when corporate privilege has been waived inadvertently. Until a uniform rule is implemented, it is important that corporate counsel monitor corporate officers to ensure that any inadvertent disclosures do not waive corporate privilege.

[1] 449 U.S. 383, 389 (1981).

[2] 471 U.S. 343 (1985).

[3] *Id.* at 348.

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[4] 561 F.2d 671 (7th Cir. 1977).

[5] 219 F.3d 175, 185 (2000).

[6] *Id.* at 185

[7] *Id.*

[8] See *id.*

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