Attorney-Client Privilege in Corporate Tax Compliance and Planning

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I recently purchased a program on CD from Strafford Tax Law Teleconferences (Strafford Publications, Inc., Atlanta, Georgia) that had been broadcast live on May 7, 2008. The seminar is packaged in a collection of 3 CDs—two on the audio teleconference and one containing copies of cases and the participants' written outlines. The seminar is very informative. In fact, it provides arguably vital information for all lawyers.

The program discusses the attorney-client privilege, the work-product privilege (doctrine) and the tax practitioner privilege provided by Section 7525 of the Internal Revenue Code. Apart from the statutory privilege, these privileges are found in the common law. Despite their age and origin, they have evolved recently due to new reporting requirements under FIN 48 and the wave of tax shelter investigations.

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The panel focused on what many now see as the demise of the attorney-client privilege. Panelists described how companies need to put safeguards into place to maximize the protection afforded by the privilege, and to protect against inadvertent waivers of it. There is legislative activity in the form of new Federal Rule of Evidence 502, which statutorily defines the attorney-client privilege and exceptions to third-party waivers. The bill was written in the wake of the KPMG criminal case (*U.S. v. Stein, et al.*) and with reference to the government pressure on KPMG to cooperate with the government and waive its privilege.

A topic that frequently arises in any discussion of privilege is the waiver of the privilege. The presenters did a good job of explaining the difference between inadvertent and intentional waivers. They also discussed issues involving internal e-mails with employees (the ever-increasing volume of e-mails made this an important topic). They covered dealing with ex-employees and representing multiple corporate entities.

Work Product

The work-product privilege has been in the news even more than attorney-client privilege lately. George Clark of Baker & McKenzie started out his presentation with the statement, "All organizations have two sets of books." But what he explains (and correctly so) is that a company has tax books and financial books.

Indeed, FIN 48 (applicable to reporting companies for the first quarter 2007) acknowledges that a company has to reconcile real cash to book tax, and may include reserves on the tax returns that may never materialize. FIN 48 deals with recognizing these reserves and the measurement of the reserves. In order to disclose information to a company's independent auditors (a third party), the company usually prepares work papers. Because FIN 48 requires a company to assume its position will be examined, the company's work papers (prepared for its independent auditors) may be protected by the work-product privilege.

The panelists discussed three cases which are relevant to M&A counsel:

1. **Confidentiality Agreement.** Before buying a company, a bidder must evaluate litigation pending against the company. The seller will sometimes arrange for its counsel to make disclosures to prospective bidders. Yet, that can be dangerous. Consider *Nidec Corp. v. Victor Co. of Japan*, 2007 U.S. Dist. Lexis 48841 (N.D. Cal. July 3, 2007). In that case, the seller disclosed information about litigation to prospective bidders. The plaintiffs in a derivative suit brought by shareholders sought to learn what was disclosed. The court held the disclosures were not privileged

because there was no common legal interest with the prospective purchaser.

2. **Parent & Sub.** Two-party representations can contain another trap. After all, sometimes legal counsel represents both a corporate parent and its subsidiary. *In re Teleglobe Communications Corp.*, 493 F3d 345 (3d. Cir. 2007), two bankrupt subsidiaries filed suit against their ultimate parent for failing to fund them adequately, leading to their bankruptcy. In that litigation, communications with counsel about work product were relevant, and the court had to decide the applicability of privilege. The court held that the common-interest privilege does not apply to representation of parent and subsidiary, which are two different clients.
3. **Board Members.** Often, a board of directors is comprised of individuals who may have a conflict with the corporation. In *Ryan v. Gifford*, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007), a public company special committee was formed to address misconduct. The committee report was communicated to defendant board members. The question was whether this transmittal waived the privilege. The court held that it did.

Conclusion

This seminar was very informative, giving current highlights on a topic that M&A lawyers should keep in the back of their mind at all times. Litigators may be slightly more used to discussing attorney-client privilege. However, if anything, it seems more important today for transactional lawyers to stay fresh in the rudiments of privilege and waivers.

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