Does the Attorney-Client Privilege Protect Documents that Corporate Employees Send to the Corporation's Lawyer?

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The attorney-client privilege rarely, if ever, protects pre-existing business documents that corporate employees send to their corporate employer's lawyer. However, the privilege can clearly protect draft business documents that such employees and their lawyers jointly prepare (as long as the drafts reflect lawyers' legal advice rather than business, stylistic, or grammatical advice, etc.). Surprisingly, some decisions have trouble distinguishing between these two scenarios.

In Federal Housing Finance Agency v. HSBC North America Holdings Inc., the court recognized "[t]o the extent that the request for advice [from a company's lawyer] attaches business records created in the ordinary course of business, those business records do not become privileged." No. 11 Civ. 6189 (DLC), 2014 U.S. Dist. LEXIS 46519, at *24 (S.D.N.Y. Apr. 3, 2014). However, the court also indicated that "[t]o the extent business records have been altered to assist counsel in providing advice, those altered business records are privileged." Id. at *25. The word "altered" seems awkward — presumably, the court was referring to draft documents. Four days later, the Delaware Court of Chancery issued a troubling opinion that cast doubt on a long-standing Delaware legal principle. In In re ISN Software Corp. Appraisal Litigation, Civ. A. No. 8388-VCG, 2014 Del. Ch. LEXIS 52 (Del. Ch. Apr. 7, 2014), the court cited a well-known 1986 Delaware case protecting as privileged draft SEC disclosure documents. Jedwab v. MGM Grand Hotels, Inc., No. 8077, 1986 Del Ch. LEXIS 383 (Del. Ch. Mar. 19, 1986). However, the court seemed to limit Jedwab's holding to lawyer-created documents — rejecting a privilege assertion for draft board minutes the company claimed were "created by management but sent to attorneys 'for review.'" Id. at *3.

These and other ambiguous or confusing decisions highlight the wisdom of corporate employees seeking legal advice about their draft documents articulating this context in their transmittal communications — confirming that the attached documents do not constitute pre-existing ordinary business documents, but are instead newly-created draft documents about which the employees require legal advice.