When Can the Privilege Protect Employee-to-Employee Communications?

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Because privilege logs generally list the authors and recipients of withheld communications, corporations’ adversaries frequently cite such logs in challenging the corporations’ privilege claims when a log shows that no lawyer sent or received a withheld document. Corporations normally win such disputes if they demonstrate that one employee who received legal advice relayed it to another employee who needed it. Occasionally corporations also successfully withhold employees’ contemporaneous notes of a privileged communication.

But there is a third, albeit less frequent, scenario in which the privilege can protect intra-corporate communications not involving a lawyer. In Crabtree v. Experian Information Solutions, Inc., the court held that defendant corporation “appropriately designated as privileged the communications between its non-lawyer employees.” No. 1:16-cv-10706, 2017 U.S. Dist. LEXIS 173905, at *4 (N.D. Ill. Oct. 20, 2017). The court noted that the “employees gathered information to assist counsel with rendering legal advice,” and that “those facts were eventually channeled to counsel to aid in the provision of legal services.” Id. at *5. In other words, company lawyers had essentially deputized such employees to gather facts the lawyers needed. Of course, wise in-house and outside lawyers memorialize such deputation.

This type of protected employee-to-employee communications represents the chronologically first of the intra-corporate lawyerless trifecta of protected scenarios, which can extend privilege protection to such communications (1) before employees go to the lawyer with facts the lawyer needs; (2) that are memorialized while employees communicate with the lawyer; and (3) after they receive legal advice from the lawyer, which they then relay to other employees who need it.