Burns & Levinson LLP

SECURITIES LAW UPDATE

Protecting the Attorney-Client Privilege When Drafting SEC Filings

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OVERVIEW:

A recent court decision helps clarify the scope of the attorney-client privilege as it applies to emails and drafts of documents in connection with the preparation of SEC filings. In *Roth v. Aon Corporation*, Case No. 04 C 6835 (N.D. Ill. Jan. 8, 2009), the district court determined that the attorney-client privilege can apply to drafts of SEC filings. Although an Illinois court decision is not binding precedent in all jurisdictions, the principles from the case are widely accepted in virtually all states. The decision therefore provides important insight for all public companies as to steps to take to maintain the confidentiality of internal discussions about the content of final SEC filings.

SUMMARY OF FACTS:

The plaintiffs in *Roth* were a class of investors who alleged that Aon failed to disclose information relating to a so-called contingent commission kickback and steering scheme. The result of this arrangement, it is alleged, led to substantially inflated earnings and consequently misled investors. As part of the discovery process, the plaintiffs attempted to compel production of an internal email and memo, arguing that the email and memo were business communications not protected by the attorney-client privilege because they did not specifically state that legal advice was sought.

The email and its attached memo were sent internally from the CFO to other executives, including the General Counsel, and to a handful of other non-executive level employees. The attachment contained a memo with an expanded draft of the "Compensation for Services" section of Aon's 10-K (the later filed 10-K redacted information from this draft). The email asked recipients to comment on the language of the draft.

COURT'S ANALYSIS & HOLDINGS:

The court first determined that, because legal advice was sought, the content of the email and attachment were privileged. The essential elements necessary to invoke the privilege include communications from the client (in this case, the Company) to its attorney (here, the General Counsel) for the purpose of seeking legal advice. The court agreed with the defendant Aon's argument that determining the scope of SEC disclosures and how to best comply with SEC requirements involve core legal issues and are not business decisions, even though in this case the draft disclosure concerned an operational aspect of Aon's business. However, in doing so, the court was clear to point out that the mere fact that an attorney was one of the recipients alone does not make the content privileged. Rather, the privilege applied because legal advice was sought.

In addition, the court held that the draft of the filing remains privileged even though the revised final version of the document was filed publicly with the SEC. The court held that "So long as the initial legal advice sought from an attorney in legally formatting the drafts is made in confidence and protected by the client as confidential information without waiver, there is no apparent reason why the drafts should cease to be privileged once the final product becomes public."

The court also clarified the scope of the attorney-client privilege within the corporate environment. As a general matter, the privilege may be considered waived if a non-client third party is privy to the communications; however with corporations, determining the precise scope of who is deemed a "client" remains unclear. In its holding, the court acknowledged the fact that in corporations there may be many people who have relevant information that are consulted in order to reach an informed decision. "To disallow corporations the space to collectively discuss sensitive information with legal counsel would be to ignore the realities of large-scale corporate operation." Thus, the fact that non-executive level employees were privy to the communications did not waive the privilege here, as all recipients were employees and were necessary parties.

LESSONS FROM THE CASE:

The *Roth* case provides the following guidance for corporations to better protect the privacy of their communications involving attorneys in connection with drafting SEC filings:

- Limit the recipients of emails, memos, and other documents to internal employees who are directly involved in the process and in-house or outside counsel. By confining the range of communications to only necessary parties, it is less likely that an inadvertent waiver of privilege will occur. Also, courts are more willing to treat such carefully distributed information as privileged legal advice and not mere business advice.
- Particularly sensitive emails, memos, and documents might specifically state that legal advice is sought. For example, all such communications could be labeled "ATTORNEY-CLIENT PRIVILEGED COMMUNICATION" or have a similar statement on the document. Though this is not a specifically required element of the attorney-client privilege, it helps to clarify that the intent of the client was to seek legal advice, which is the heart of what the privilege is designed to protect.
- In order to qualify for the privilege, all the elements of the privilege must apply, which includes not only that legal advice is sought, but also requires that the communication come from the client to an attorney (or vice versa). If emails or memos are not addressed to an attorney (as at least one of the recipients), then the privilege will not apply to such emails, drafts, or memos.

This Securities Update was written by Alison R. Conboy, an Associate in Burns & Levinson's Corporate Group.

Explanatory Notes:

This update is intended to call your attention to a number of rule interpretations of possible interest and relevance to you, but it is not intended to constitute a legal opinion or definitive summary of all changes that could be material to you.

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