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Litigation and Securities Alert: Using the Attorney-Client Privilege to Protect Drafts of SEC Filings

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The *Roth* Decision

Just in time for annual reporting season, a recent decision by the Federal District Court for the Northern District of Illinois provides guidance on how the attorney-client privilege may apply to drafts of Securities and Exchange Commission (SEC) filings.

In *Roth v. AON Corp.*,[1] a company inadvertently produced emails and draft documents related to disclosures made in that company's annual Form 10-K filing during discovery in a class action suit.[2] An internal company team, whose members included the company's deputy general counsel, exchanged these materials while working on draft disclosures of an operational matter.[3] Opposing counsel argued that the attorney-client privilege did not apply to the subject documents because:

- they involved business and not legal advice;
- the email in question did not "specifically state that it [sought] legal advice"; and
- the privilege could not protect drafts of documents that would eventually become public.

Despite these arguments, the court held that the privilege protected these documents from disclosure.[4] Because of the important reminders this case delivers about the scope of the attorney-client privilege, the court's reasoning merits further discussion.

The *Roth* court noted that companies file documents like 10-Ks with the SEC pursuant to federal securities law and that companies must include certain disclosures in these documents.[5] A portion of this mandated content pertains to both the legal structure of a company and sensitive legal matters like pending litigation.[6] Accordingly, just as management did in the case-at-bar, companies must regularly consult with in-house counsel to get legal opinions on the content of drafts of filings to ensure disclosures comply with federal securities law.[7] Dismissing the notion that such drafts lose protection because refined versions of the documents eventually become public when filed, the *Roth* court noted that, "[s]o long as the initial legal advice sought from an attorney in legally formulating 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."[8] The *Roth* court reasoned that such consultations, and the drafts and commentary that evolve from them, meet the qualifications for the attorney-client privilege.[9] Thus in this case, the court found that even though the consultation at issue involved business operations, the core question posed to counsel—what the company must disclose for purposes of compliance with federal securities laws—involved a legal and therefore privileged matter.[10]

In reasoning in favor of the attorney-client privilege in this case, the court illuminated two further principles on the scope of the privilege. First, management cannot co-opt the aegis of the privilege merely by routing otherwise non-privileged material through counsel.[11] The attorney-client privilege will only apply to those consultations that truly seek legal advice and the drafts and comments that emerge from such inquiries. Second, the court acknowledged that due to the large scale of many modern companies, internal working groups on SEC filings and disclosures may necessarily involve non-legal personnel.[12] These non-lawyers are essential to facilitating the disclosure process and their presence alone will not destroy the attorney-client privilege.[13]

Recommendations

Although *Roth* is but one case and the privilege is a complicated issue, in light of *Roth*, management should keep the following points about the attorney-client privilege in mind while drafting SEC filings:

- Disclosures that involve legal judgments, discussions of pending litigation, and business matters that the company must disclose for compliance purposes should be fully vetted with both in-house and outside counsel;
- Though SEC filings eventually become part of the public domain, under the right circumstances, the attorney-client privilege may cover drafts of such filings.
- Despite the involvement of some non-legal staff in the drafting process, the privilege may extend to teams within the company that work with counsel to make legal decisions concerning disclosures.
- As a matter of best practices, company procedures should mandate that all drafts of SEC filings and communications concerning these filings that may implicate the attorney-client privilege be labeled "Draft" and "Attorney-Client Privileged."
- Internal communications seeking legal advice or opinion about disclosures should expressly state such intentions in the subject line or first sentence of an email.

Conclusion

Management should keep abreast of developments related to the attorney-client privilege and should work with counsel to utilize the full scope of this doctrine when drafting an SEC filing. In this way, a company can effectively safeguard against disclosure of critical information during discovery.

Endnotes

[1] ___ F.R.D. ___, No. 04-6835, 2009 WL 57501 (N.D. Ill. Jan. 8, 2009).

[2] *Id.* at *1. The company "clawed back" these items following its mistaken production. *Id.*

[3] *See id.* (noting draft and email concerned "Compensation for Services").

[4] *Id.* at *3-*4.

[5] *Id.* at *2 (citing 15 U.S.C. § 78m, 15 U.S.C. § 78o(d), and United States Securities and Exchange Commission, Form 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, General Instructions, SEC 1673 (02-08)).

[6] *Roth*, 2009 WL 57501, at *3.

[7] *Id.*

[8] *Id.*

[9] *See id.* at *2-*3 (finding attorney-client privilege applies to drafts in case-at-bar). The court recited the elements of the attorney-client privilege as follows: "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *Id.* at *2 (quoting *United States v. White*, 950 F.2d 426, 430

(7th Cir.1991)).

[10] *Roth*, 2009 WL 57501, at *3.

[11] *Id.* at *2.

[12] *Id.* at *4.

[13] *Id.*

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