Safeguarding the Attorney-Client Privilege for Legal and Business Advice

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When corporate officers seek the advice of in-house counsel on delicate matters, they frequently assume that the attorney-client privilege will ensure that sensitive information will not be disclosed in future litigation. It is true that the privilege protects from disclosure of confidential communications between an attorney and their client made for the purpose of giving or receiving legal advice to the client. Moreover, courts have repeatedly stated that the privilege applies to in-house, as well as outside counsel. But modern corporate counsel frequently wear many hats – negotiator, business strategist, lobbyist and investigator – in addition to serving as an attorney. And it is this multi-hat function of in-house lawyers that makes application of the privilege more complex and nuanced when applied to their communications with corporate officers.

It is quite clear that the attorney-client privilege applies to communications made for the purpose of obtaining or providing *legal* advice. Yet many highly sensitive issues require counsel to furnish advice that addresses both the legal and business dimensions of the particular problem. Accordingly, the question arises as to what steps may be taken by in-house counsel to prevent unnecessary disclosure of mixed-purpose communications.

The general rule is that an attorney-client communication will be protected if its "primary purpose" is to request or receive legal advice. But as courts have recognized, "legal advice is often intimately intertwined with and difficult to distinguish from business advice."[1] Accordingly, counsel should have an understanding of how the "primary purpose" of an attorney-client communication is to be determined. Although a recent appellate court opinion provides reason for cautious optimism that courts will interpret "primary purpose" broadly, to encompass all "significant" purposes of a communication, the law in this area is far from settled, and in-house counsel must continue to act carefully to preserve the privilege when providing advice that has both legal and business aspects.

"Significant Purpose" as "Primary Purpose?"

In June of this year, the U.S. Court of Appeals for the District of Columbia Circuit addressed the application of the attorney-client privilege to mixed-purpose communications in the case of *In re Kellogg Brown & Root* ("*In re KBR*").[2] In *In re KBR*, a former employee of KBR filed a False Claims Act complaint against KBR claiming that it defrauded the government by inflating costs and accepting kickbacks while administering military contracts in Iraq. During discovery, the former employee sought documents related to KBR's prior internal investigation into the alleged fraud, which had been conducted at the direction of the company's law department and pursuant to federal regulations requiring defense contractors to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing. The trial court ordered production of KBR's internal investigation files over KBR's attorney-client privilege and work product claims, finding that because the investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice," the primary purpose of the investigation and related communications was not to obtain legal advice.[3] This decision caused shockwaves across the business and legal communities. KBR's petition to the appellate court was therefore closely watched.

In its opinion, the D.C. Circuit stated that the primary purpose test "cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other," and acknowledged that "trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task."[4] The court adopted the formulation of the privilege for mixed-purpose communications found in the Reporter's Note to the Restatement (Third) of the Law Governing Lawyers, section 72, and concluded that as long as "one of the significant purposes" of the communication is to obtain or provide legal advice, the communication has the "primary purpose" of obtaining or providing such advice.[5] The court vacated the trial court's order, concluding that "there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice."[6]

In other words, in the D.C. Circuit's view, a communication can have more than one "primary purpose" – a result that may not be intuitive, but that makes good sense considering the myriad important objectives that motivate consultation with in-house counsel. This broad construction of the "primary purpose" test would appear to be welcome news for in-house counsel and their companies. In light of *In re KBR*, any communication that has legal advice as one of its significant purposes would likely be protected by the attorney-client privilege.

Unfortunately, the "significant purpose" test articulated by *In re KBR* is not the law in most jurisdictions. In fact, it appears that no other court has adopted this version of the test for mixed-purpose communications. Many courts take a far narrower view of the privilege. Until the more expansive position of *In re KBR* gains wider acceptance, counsel should proceed with great caution in this area.

Heightened Scrutiny for In-House Counsel

Despite the frequent refrain that in-house and outside counsel are on equal footing when it comes to the privilege, many courts apply a double standard when it comes to determining the primary purpose of attorney-client communications. The harsh reality is that in-house communications will be evaluated more rigorously to determine whether their primary purpose is in fact to provide legal advice. Some courts even start from a presumption, implicit or explicit, that communications with in-house counsel are for a business, not legal, purpose, and are therefore not privileged.[7] Outside counsel, meanwhile, are generally given the benefit of the doubt. Their communications are presumed to be a request for or provision of legal advice.

This strain of judicial reasoning can be traced back to another D.C. Circuit case, *In re Sealed Case*, decided in 1984.[8] *In re Sealed Case* stands for the proposition that the party asserting the privilege over an in-house communication must make "a clear showing" that in-house counsel's advice was given "in a professional legal capacity."[9] Courts continue to cite to *In re Sealed Case* for the proposition that an attorney's role as in-house counsel warrants heightened scrutiny.[10]

Courts that apply heightened scrutiny to communications with in-house counsel often opine that when the legal and business purposes of the communication are intertwined, the communication is privileged only if the legal purpose is "predominant" or "outweighs" the business purpose.[11] Some courts have adopted bright-line rules regarding permissible participants to an allegedly privileged communication, stating, for example, that an email listing an attorney and a non-attorney in the "to" field cannot be deemed privileged under the primary purpose test, because the simultaneous communication to legal and non-legal personnel necessarily "served both business and legal purposes."[12] And merely copying a non-lawyer in the company on an email to an in-house counsel may call into question "whether the primary purpose of the communication was for legal advice or assistance."[13]

Best Practices

In order to help ensure that communications regarding legal advice from in-house counsel will be deemed privileged under the primary purpose test, even in jurisdictions that apply heightened scrutiny, consider taking the following steps:

(1) Explicitly state in the body of the communication that legal advice is being sought or provided.
(2) Address emails seeking legal advice to attorneys only, and do not copy non-attorneys unless essential.
(3) Separate purely business communications from communications regarding legal advice.
(4) For in-house counsel who hold dual-role titles (e.g. Senior Vice President and General Counsel), use the legal title for legal communications, and state that advice is being sought or provided in the role specified by the legal title.
(5) Consider involving outside counsel in the communication as well as in-house counsel.

[1] Leonen v. Johns-Manville, 135 F.R.D. 94, 98-99 (D.N.J. 1990).
[2] *In re* Kellogg Brown & Root, Inc., No. 14-5055, 2014 WL 2895939 (D.C. Cir. June 27, 2014).
[3] *Id.* at *1.
[4] *Id.* at *5.
[5] *Id.*
[6] *Id.*
[7] *See, e.g.*, Lindley v. Life Investors Ins. Co. of Am., 267 F.R.D. 382, 389 (N.D. Okla. 2010).
[8] *In re* Sealed Case, 737 F.2d 94 (D.C. Cir. 1984).
[9] *Id.* at 99.
[10] *See, e.g.*, Craig v. Rite Aid Corp., No. 4:08-CV-2317, 2012 WL 426275, at *6-7 (M.D. Pa. Feb. 9, 2012); Oracle Am., Inc. v. Google, Inc., No. C-10-03561-WHA (DMR), 2011 WL 3794892, at *4 (N.D. Cal. Aug. 26, 2011).
[11] *Lindley*, 267 F.R.D. at 392 (citing Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co., 951 F. Supp. 679, 685-86 (W.D. Mich. 1996); Neuder v. Battelle Pac. Nw. Nat'l Lab., 194 F.R.D. 289, 292 (D.D.C. 2000)).
[12] United States *ex rel.* Baklid-Kunz v. Halifax Hosp. Med. Ctr. (*Halifax*), No. 6:09-CV-1002-ORL-31, 2012 WL 5415108, at *4 (M.D. Fla. Nov. 6, 2012); *see also In re* Seroquel Products Liab. Litig., No. 6:06-md-1769-ORL-22, 2008 WL 1995058, at *4 (M.D. Fla. May 7, 2008); *In re* Vioxx Prod. Liab. Litig., 501 F. Supp. 2d 789, at 805 (E.D. La. 2007).
[13] *Halifax*, 2012 WL 5415108, at *4 (quoting *In re Vioxx*, 501 F. Supp. 2d at 812).

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