WILMERHALE

Privilege Standing Committee Update

2007-11-13

District Court Finds that Internal E-mail Communications Sent Simultaneously to Lawyers and Non-Lawyers Are Usually Not Protected By the Attorney-Client Privilege

The district court handling the multi-district Vioxx product liability litigation recently settled a year-long discovery dispute regarding privilege claims with respect to communications involving in-house counsel. *See In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 789-90 (E.D. La. 2007). The court adopted, in part, the report of the court-appointed Special Master and held that communications (or draft documents) sent simultaneously to lawyers and non-lawyers were usually not protected by the attorney-client privilege because, absent evidence to the contrary, the primary purpose of these communications did not appear to be to obtain legal advice. *See id.* at 797-98, 815.

The court's ruling focused on whether the communications served the "primary purpose" of relaying or requesting legal advice. *See id.* at 796-813. The court noted the difficulty that arises in evaluating attorney-client privilege in the current corporate setting where "in-house legal counsel participates in and renders decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues." *Id*. at 797. The court further explained that "[t]he lawyer's role as a lawyer must be primary to her participation" and that "[a] communication could be to several lawyers and one non-lawyer and lose its primary legal purpose gloss if the non-lawyer were sent the communication for non-legal purposes." *Id*. at 798-99.

According to the court, when internal communications are sent simultaneously to lawyers and non-lawyers, the company "usually cannot claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes." *Id.* at 805. On the other hand, if, communications were circulated to the lawyers via blind copies or in

entirely separate e-mail messages, the court observed that the primary purpose of those particular communications would have been legal in nature and, therefore, privileged. Id. Similarly, the court held that the practice of in-house counsel in providing redline edits to attachments to mixed purpose communications did not have the effect of rendering the attachments non-discoverable. *Id.* at 806-07.

The court also rejected a "pervasive regulation" argument that the "primary purpose" requirement is met because the drug industry is so pervasively regulated that "virtually everything a member of the industry does carries potential legal problems." *Id.* at 800. The court responded that drug companies cannot "reasonably conclude from the fact of pervasive regulation that virtually everything sent to the legal department, or in which the legal department is involved, will automatically be protected by the attorney-client privilege." Id. at 800-01. As to draft documents, the court also rejected the argument that circulation of drafts to lawyers and non-lawyers was a collaborative effort to develop a "legally sufficient" draft that served a primarily legal purpose, and pointed out that this theory would essentially immunize all internal communications. *Id.* at 803.

The court also declined to adopt a "reverse engineering theory," *id.* at 804-05, pursuant to which draft documents would be protected from discovery because, if non-privileged drafts were produced, adversaries could compare the drafts with the final documents and glean what legal advice had been given regarding the drafts. *Id.* The court observed that changes could have been made without legal advice, that legal advice might not always be followed, that not all changes would necessarily be proposed in writing, and that if in-house counsel had the ability to mandate the acceptance of certain edits, he or she would have taken on the role of "corporate decision-maker" rather than legal advisor and such decisions could not be "immune from discovery." *Id.* at 804.

Finally, the court reiterated throughout the opinion that the party asserting privilege bears the burden of establishing privilege on a document-by-document basis. *See, e.g., id.* at 800, 801, 806-07.

District Court Holds that Sharing of Tax-Accrual Workpapers with Independent Auditors Does Not Waive Work-Product Protection

A company may share tax-accrual workpapers with its independent auditors without waiving work-product protection with respect to those papers, according to the U.S. District Court for Rhode Island. *United States v. Textron Inc.*, No. 06-198T, 2007 U.S. Dist. LEXIS 63921 (D. R.I. Aug. 29, 2007).

Textron Financial Corporation ("TFC"), a subsidiary of Textron, Inc. ("Textron"), relied on outside accountants, outside legal counsel, and Textron's in-house lawyers for tax advice and assistance. *Id.* at *2. TFC's workpapers were prepared by outside counsel and accountants in collaboration with internal accountants. *Id.* at *7-8. Moreover, in the course of an audit, Textron permitted its independent auditor, Ernst & Young ("E&Y"), to review the final workpapers, subject to an understanding that the information would remain confidential. *Id.* at *8. Between 1998 and 2001, the Internal Revenue Service ("IRS") issued more than 500 requests for information to Textron and its subsidiaries; Textron complied with all of the requests except for those that sought its "tax accrual workpapers." *Id.* at *3. In June 2005, the IRS issued an administrative summons requesting that

Textron provide "all of the Tax Accrual Workpapers" for the tax year 2001; Textron refused to comply, asserting, *inter alia*, that the workpapers were privileged. *Id.* at *3. The IRS then filed a petition seeking to enforce the summons. *Id.* at *1.

Textron argued that the workpapers were protected under 1) the attorney-client privilege; 2) the "tax practitioner privilege" created by 26 U.S.C. § 7525; and 3) the work-product doctrine. With respect to the work-product doctrine, Textron asserted that the workpapers were prepared "because of" litigation. Specifically, senior executives in Textron's tax department claimed that the workpapers had been prepared in order "to ensure that Textron was 'adequately reserved with respect to any potential disputes or litigation that would happen in the future'"). *Id.* at *7.

The court first determined that all three privileges applied. Next, the court considered IRS's argument that Textron had waived their protections by sharing the workpapers with E&Y. The court noted that the tax practitioner privilege "mirrors the attorney-client privilege," *id.* at *31, and therefore concluded that Textron's provision of the workpapers to E&Y had in fact waived both privileges. *Id.* at *32. However, the court then ruled that because "the disclosure of Textron's tax accrual workpapers to E&Y did not substantially increase the IRS's opportunity to obtain the information contained in them," Textron had not waived work-product protection. *Id.* at *36. The court denied the IRS's petition to enforce its summons. *Id.* at *42.

Massachusetts Supreme Judicial Court Recognizes Common Interest Privilege

In *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 449 Mass. 609 (2007), the Supreme Judicial Court of Massachusetts ("SJC") "formally recognize[d] the longstanding use and validity of joint defense agreements, an exception to waiver of the attorney-client privilege under the common interest doctrine." *Id.* at 610.

Plaintiff Hanover Insurance Company ("Hanover") alleged, *inter alia*, that the defendant insurance companies and executives had conspired to arrange the sale—which Hanover was statutorily required to accept—to a Hanover affiliate of "particularly high-risk motor vehicle insurance business." *Id.* During discovery, Hanover sought to compel all documents exchanged between defendant Arbella Mutual Insurance Company ("Arbella") and defendant Rapo & Jepsen Insurance Services ("Rapo") during the course of the alleged conspiracy, as well as all documents concerning Arbella's indemnification of Rapo. *Id.* at 610-11. The defendants objected, claiming that the documents sought were protected by the attorney-client privilege, and arguing that their joint defense agreement precluded waiver of the privilege by sharing documents. *Id.* at 611-12. The trial judge ordered Arbella to produce the documents, stating that the "joint defense privilege is not yet recognized in [Massachusetts]." *Id.* at 612. The defendants were granted leave to file an interlocutory appeal on the issue; discovery was stayed pending the outcome of that appeal. *Id.*

The SJC ruled for Arbella and recognized the common interest doctrine. *Id.* at 617. The Court emphasized that the attorney-client privilege protects "statements made to or shared with necessary agents of the attorney or the client," and concluded that "[t]here is no reason to treat confidential client communications differently when shared with an attorney representing a client having a common interest where the purpose for sharing is to provide a free flow of information essential to

providing the best available legal services to the client." *Id.* at 616. The Court further noted that although it had "not had occasion to consider the common interest doctrine or any of its components, there is no doubt that attorneys and their clients have relied on its implicit existence." *Id*.

Finally, the Court observed that lower state courts, as well as the First Circuit, had recognized the doctrine; that the ALI, the Restatement (Third) of the Law Governing Lawyers, and a Proposed Massachusetts Rule of Evidence had likewise approved the doctrine; and that the SJC itself, in the criminal context, had upheld a claim of privilege based on a joint defense agreement. *Id.* at 6616-17. The Court found that the documents at issue satisfied the requirements of the attorney-client privilege and reversed the trial court's order to compel discovery of the documents at issue. The SJC then remanded the matter for a determination as to whether or not Arbella and Rapo had in fact entered into a joint defense agreement that would provide sufficient basis for their invocation of the common interest doctrine. *Id.* at 617-20.

Practice Tip

The distribution list associated with a communication may affect whether the communication, on its face, can be said to be primarily for the purpose of seeking legal advice. As a result, non-lawyer corporate employees and representatives should be reminded periodically that it is prudent to exclude unnecessary non-lawyers from their privileged correspondence with in-house and outside counsel.