

LITIGATION ALERT

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Keeping In-House Attorney-Client Communications Privileged after *In re Vioxx*

The legal landscape for claims of attorney-client privilege for communications involving in-house lawyers may have changed after the recent decision by the Eastern District of Louisiana in the pending Vioxx litigation. In accepting the recommendations of a Special Master appointed to review claims of privilege over thousands of sample documents, the court set out standards by which assertions of privilege over communications with in-house counsel may be judged by courts across the country *In re Vioxx Prods. Liab. Litig.*, 501 F.Supp.2d 789 (E.D. La. 2007). In many cases, the court's rulings are not a sharp break with current practice. However, the court's analysis on issues such as mixed-purpose communications and e-mail carbon copies will likely create guidelines to be adopted by other courts.

To help you analyze these important issues, we first present the key holdings and conclusions of the *Vioxx* case, followed by a run down of the state of the law pre-*Vioxx* and finally, a list of "best practices" to help you preserve the privilege within your organization.

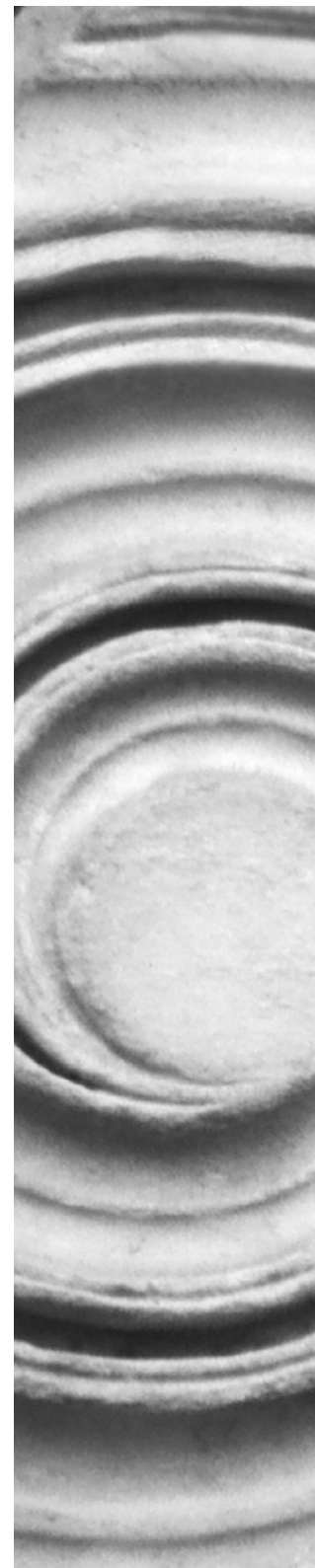
In re Vioxx

After the pain drug Vioxx was pulled from the market in 2004 due to concerns that it caused an increased risk of heart attacks and strokes, the drug's manufacturer, Merck, was flooded with lawsuits. In 2005, the various lawsuits were incorporated into a multi-district litigation proceeding in the Eastern District of Louisiana. The discovery dispute at issue in the recent ruling related to Merck's claim of privilege over approximately 500,000 pages of documents, primarily e-mails and attachments between Merck in-house attorneys and non-legal personnel. The court appointed Paul Rice, a law professor at American University and author of a leading attorney-client privilege treatise, as Special Master to review a representative sample of 2,000 documents withheld by Merck and to make recommendations on whether Merck's claims of privilege should be upheld.

Key Holdings and Conclusions Summarized

E-Mails and Other Communications

- For a communication to be privileged, its *primary purpose* must be a request for legal advice. The burden of persuasion on all elements of the privilege claim rests with the proponent.
- For e-mails "addressed to both lawyers and non-lawyers for review, comment, and approval," the Court said that the communication and any attachments are not privileged since the primary purpose of the request is "not to obtain legal assistance since the same [advice] was being sought from all."



- Such a communication could be considered a request for legal advice with a notification to the non-lawyer recipients of the advice sought, but the burden of establishing this is on the proponent of the privilege.
- Documents sent to an attorney for legal advice do not remain privileged if later circulated to other company personnel for non-legal purposes unless the purpose was to apprise them of the legal advice sought and received.
- Communications with outside counsel are presumed privileged.
- Memoranda sent only to a lawyer with limited circulation and an identifiable legal question raised are privileged.
- Attorney edits to a document sent to both lawyers and non-lawyers for both legal and non-legal purposes do not remain privileged but may be redacted. While lawyer comments on legal instruments are privileged, non-legal comments on non-legal documents are not privileged.
- Parties cannot claim an entire e-mail thread is privileged. They must prove that each thread is privileged unless the entirety of the e-mail chain is integrated into a communication made only to an attorney for legal advice.
- The attorney work product doctrine only protects communications that identify litigation is anticipated and for which the party can prove the communication was prepared for that litigation.
- An e-mail addressed to an attorney but copied to non-lawyers is presumed privileged because it was probably meant to inform recipients of the nature of the legal advice sought or received.

E-mail Attachments

- A communication written only to in-house attorneys with an attachment for examination, review, comment and approval is privileged, as is the attachment.
 - Attorney responses on traditional legal documents sent to them are privileged, even if the changes are not legal. Responses not related to legal advice to an attachment that is not a traditional legal document are not privileged.
 - The original e-mail message to which a traditional legal document is attached and sent to the in-house lawyer for review may not be privileged if the original messages were communications between non-lawyers for non-legal purposes.
 - “When lawyers make the same comments about technology, science, public relations, or marketing” that non-legal personnel make, the documents on which the attorneys comment are not privileged unless the company “demonstrates that those comments are primarily related to legal assistance.”
- If a non-lawyer distributes a privileged communication or attachment to other non-lawyers, it is no longer privileged absent a showing that the legal advice was forwarded to those within the corporate structure who need the advice to fulfill their corporate responsibilities. The court noted that “it is not acceptable for a corporation to take a document and

attachment that are privileged, because they were sent primarily to an attorney for legal advice, and then subsequently send the same document and attachment to other corporate personnel for non-legal purposes... and successfully claim that the document and attachment are privileged.”

- Privileged attachments remain so even if the e-mail to which they are attached contains no privileged communications and thus are not shielded from discovery.

Pervasive Regulation Not Justification For Broad Privilege

In the litigation Merck set forth, the court rejected a “pervasive regulation” theory. Merck had contended that, “because the drug industry is so heavily regulated by the FDA, virtually everything a member of the industry does carries potential legal problems vis-à-vis government regulators.” Under Merck’s framework, even material that might ordinarily not appear to be privileged (such as editing television ads) does, in fact, relate to legal advice and thus is shielded from discovery.

The court called this theory “unrealistic,” noting that “accepting such a theory would effectively immunize most of the industry’s communications because most drug companies are probably structured like Merck where virtually every communication leaving the company has to go through the legal department for review, comment, and approval.”

Reverse Engineering Theory Also Not A Basis For Privilege

The court similarly rejected Merck’s claim that unprivileged communications with attached documents (such as studies, abstracts, and proposals) should be protected as privileged because “adversaries can discern the content of the legal advice that was subsequently offered.” In so holding, the court noted that “[a]n attorney’s involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all the incidents of such a transaction.” In such circumstances, the court found, it is difficult to discern where an attorney is acting in a legal or business capacity.

Blind Carbon Copies Can Preserve Privilege

The court suggested the use of blind carbon copies on e-mail communications as a means by which privilege can be preserved for communications with in-house counsel. Since an e-mail to both legal and non-legal company personnel is not privileged because the primary purpose of the communication is not legal, a bcc to an in-house attorney can shield from discovery the fact that counsel received the e-mail.

Effect On Existing Law

While the *Vioxx* opinion presents a clear framework under which the attorney-client privilege can be analyzed, many of its pronouncements are far from radical changes in the current state of the law. For instance, many courts have already made clear that communications with lawyers that concern

business, rather than legal, advice are not privileged.¹ Courts have also noted the distinction between in-house lawyers as direct recipients of communications versus recipients of carbon copies in much the same way as the *Vioxx* court analyzed the issue.²

In contrast, other courts have taken a more forgiving approach to the inter-office distribution of privileged communications than the *Vioxx* court. For instance, in *Lambert v. Credit Lyonnais (Suisse)*, 160 F.R.D. 437 (S.D.N.Y. 1995), the court held that, since the decision-making power may be diffused among employees, circulating confidential communications among them does not waive the privilege over such documents.³

The persuasive value of the *Vioxx* opinion going forward may well rest more in the clear analytical approach the Court took to arrive at its analysis rather than in any particular legal holding. Thus, the Court's ruling may well influence other jurisdictions in reviewing these same issues.

Best Practices for Preserving Privilege

- Differentiate between counsel acting as in-house lawyers and acting as part of a business team. Don't mix general business discussion in with requests for legal advice.
- In-house counsel are often asked to comment on many documents that are not inherently legal documents (for example, press releases). The lawyer should separate his or her legal comments on the document from non-legal ones (such as style or business tone). When commenting on these non-legal documents, make it clear that the advice is legal in nature and not general business or management advice.

1. See, e.g., *Bell Microproducts, Inc. v. Relational Funding Corp.*, 2002 WL 31133195, at *3 (N.D. Ill. Sept. 25, 2002) (company cannot shield documents from discovery by sending all correspondence to attorney since no privilege applies unless legal advice is expressly sought and/or given); *Seibu v. KPMG LLP*, 2002 WL 87461, at *3 (N.D. Tex. Jan. 18, 2002) (“[t]he mere fact that the documents contain the impressions of a lawyer or were prepared for a lawyer is not dispositive... Unless the documents contain confidential communications made for the purpose of facilitating the rendition of legal services, there is not privilege.”); *United States Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 163 (E.D.N.Y. 1994) (finding that, where there is no indication that legal advice was provided, documents forwarded to attorneys, documents with attorney handwritten notes, and drafts edited by attorneys are not privileged); *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 633-34 (S.D.N.Y. 1987) (“[w]hen the ultimate corporate decision is based on both business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved.”); *United States v. Int'l Bus. Mach. Corp.*, 66 F.R.D. 206, 212-13 (S.D.N.Y. 1974) (holding that the inquiry is whether an element of legal advice predominates in the communication and that legal advice may not be privileged if incidental to business advice).

2. See, e.g., *Amway Corp. v. Procter & Gamble Co.*, 2001 WL 1818698, at *5 (W.D. Mich. Apr. 3, 2001) (“[w]here, as here, in-house counsel appears as one of many recipients of an otherwise business-related memo, the federal courts place a heavy burden on the proponent to make a clear showing that counsel is acting in a professional legal capacity and that the document reflects legal, as opposed to business, advice.”); *Phelps*, 852 F. Supp. at 163-64 (“[a] corporation cannot be permitted to insulate its files from discovery simply by sending a cc to in-house counsel.”).

3. See also *Santrade, Ltd. v. General Elec. Co.*, 150 F.R.D. 539, 545 (E.D.N.C. 1993) (“[a] document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds... In instances where the client is a corporation, documents subject to the privilege may be transmitted between non-attorneys to relay information requested by attorneys.”).

- If you are asking a lawyer for comments on a document that will also be circulated to non-legal personnel for comment send the lawyer a separate e-mail. Keep the two e-mail chains separate. You can keep counsel informed of non-legal comments by forwarding those e-mails to him or her separately or by a bcc.
- Treat privileged communications and documents carefully. Do not forward them around the company or to third-parties without considering the implication of the privilege waiver.
- The fact that a lawyer adds legal comments to a document does not make it and all subsequent drafts privileged. While you can withhold the lawyers actual comments, absent an independent basis for privilege, that document is not protected from disclosure.
- Be clear when seeking legal advice. When sending an e-mail or document to in-house counsel, state explicitly that you want legal advice or comments.
- Do not stamp everything “privileged” or “legal advice” in order to try and shoehorn it into the privileged category. Nothing will turn a court on you faster than signaling you don’t differentiate between what is and what is not truly privileged.

For more information about the matters discussed in this *Litigation Alert*, please contact the Hogan & Hartson LLP attorney with whom you work, or any of the attorneys below who contributed to this update.

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