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EXPERTS

In-house Attorney-Client Privilege and 'Lawyerly Things'

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Advice provided by in-house lawyers too often is at risk of being stripped of the protection of the attorney-client privilege. The recent case of *Exxon Mobil Corp. v. Hill (EMC)* illustrates those risks. C.A. No. 13-236, 2013 WL 3293496 (E.D. La. June 28, 2013), reversed, 751 F.3d 379 (5th Cir. 2014).

The document at issue in *EMC* was known as the “Stein Memorandum.” Exxon Mobil was in contract negotiations with another company—ITCO—to clean and store oilfield tubulars. Some of those tubulars were contaminated with radioactive material. ITCO claimed to have a device designed to contain the radioactive dust generated during the cleaning process. Exxon Mobil sent an industrial hygienist to test the device’s performance and efficacy. The hygienist generated a report that had four tables (Table I–Table IV) showing the results of her testing. She gave her report to John Guidry, an Exxon Mobil employee.

During the contract negotiations, ITCO asked Guidry for the

test results. Guidry turned to Rosemary Stein, an Exxon Mobil in-house attorney, for advice on responding to ITCO's request. Stein told Guidry only to reveal Table IV because that was the only information that ITCO specifically requested. Stein told Guidry to remove the "Table IV" caption "so as not to flag the existence of other tables." Stein also prepared a disclaimer as to the data's accuracy, to accompany Guidry's response to ITCO. Stein memorialized her advice in a memorandum—the Stein Memorandum.

Years later, Exxon Mobil and ITCO became the targets of multiple lawsuits from plaintiffs claiming to have been exposed to the radioactive materials. Exxon Mobil inadvertently produced the Stein Memorandum in one of the cases, and it was widely circulated among the plaintiffs' bar. Exxon Mobil brought an action for injunctive relief seeking to have the Stein Memorandum declared privileged and to preclude its use in any litigation.

The district court held in 2013 that the attorney-client privilege did not protect the Stein Memorandum. The court imposed a heightened burden on in-house lawyers to demonstrate the applicability of the privilege. While the court suggested that outside lawyers may be entitled to a presumption that the work they do is "for purposes of legal advice," the court held that in-house lawyers receive no such presumption. Instead, clients must make a "clear showing" that an in-house lawyer was providing legal advice and not unprotected business advice.

Remarkably, the district court held that the fact that Guidry consulted a lawyer while Exxon Mobil "was in the process of negotiating a contract with ITCO" was an indication that Exxon Mobil was seeking business advice, as opposed to legal advice, from Stein. The district court also stated that "it appears from the face of the document that the primary purpose of Stein's advice to Guidry was to help secure more favorable contract terms." For those reasons, the district court held that the Stein Memorandum was not privileged.

That bears repeating: a client consultation with in-house counsel during contract negotiations, and the in-house lawyer's efforts to secure better contract terms for her client,

indicated to the district court that the lawyer was not doing legal work and rendered unavailable the attorney-client privilege.

Fortunately, the Fifth Circuit reversed last year, holding that the attorney-client privilege protected the Stein Memorandum. According to the Fifth Circuit, once ITCO sought data from Exxon Mobil during contract negotiations, it was “no surprise that Exxon Mobil would seek advice from its attorney on how to respond.” The Fifth Circuit added that the context of the situation made it apparent that Exxon Mobil sought Stein’s advice “for just the sort of lawyerly thing one would expect of an in-house lawyer: advice on transactional matters.” The court found no indication that Stein “was providing business advice divorced from its legal implications.”

The district court’s decision betrayed a misapprehension that a business lawyer’s legal advice can or should somehow be neatly segregated from business advice. Stein undoubtedly was trying to “secure more favorable contract terms” for her client. But that is very nearly quintessential legal advice. A contract is, after all, a legal document with legal implications for the client. A good business lawyer should never “divorce” his or her legal advice from the business implications of that advice. The effective melding of counsel’s legal advice with the client’s business realities is what business clients rationally seek and expect from corporate counsel. A client fortunate enough to receive such advice from in-house (or outside) counsel should not forfeit the attorney-client privilege in the process.

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