

Ethics Corner: Privilege and Work Product in the Corporate Context.

Courts have been busy issuing opinions on the attorney-client privilege (“privilege”) and work product immunity (“work product”) that affect the work of business lawyers. Below we discuss several that are both recent and significant.

Waiver of Privilege by Special Committee of Board. One such recent opinion is Chancellor Chandler’s letter ruling at *Ryan v. Gifford*, No. 2213-CC, 2007 Del. Ch. LEXIS 168 (Del. Ch. Nov. 30, 2007). This is a shareholders’ derivative action alleging backdating of options by management of Maxim Integrated Products, Inc. (“Maxim”). While the letter contains a number of unremarkable discovery rulings, one that stands out is the court’s ruling on the communications between a special committee of the board of Maxim, appointed to investigate the backdating allegations, and the law firm representing the special committee (“Law Firm”). The court acknowledged that the special committee was a client of Law Firm for privilege purposes, but because Law Firm presented the report of its investigation to the full board of Maxim, that privilege was waived. The court said the scope of the waiver was broad and ordered that almost all material developed by Law Firm during the investigation be turned over to the plaintiffs.

Waiver by Sharing with Non-Lawyer Corporate Employees. *In re Vioxx Products Liab. Lit.*, 501 F. Supp. 2d 789 (E.D. La. 2007), is a multidistrict proceeding involving drug product liability claims. The opinion deals with manufacturers’ claims that approximately 30,000 documents sought in discovery were protected by privilege, work product, or both. The court appointed a special master, a law professor who is an expert in evidence and privilege/work product. The master issued a report, and in this opinion the court affirmed the master. Much of the master’s report dealt with memoranda and e-mails that were shared with in-house lawyers, outside lawyers, and significantly, with non-lawyer employees of the manufacturers. We will not set forth the master’s analyses of each type of communication, which are lengthy and quoted in the opinion. We do suggest that any lawyer concerned about the distribution of legal-related documents by, or to, non-lawyer employees will find this opinion educational.

Privilege, Work Product, and Corporate Families. Finally, we would be remiss if we did not refer you to *In re Teleglobe Communications Corp.*, 493 F.3d 345 (3d Cir. 2007). This is a thirty-three page “mini-treatise,” complete with Table of Contents, on the application of privilege and work product in the corporate family context, where members of the family fall out of alignment. Included are discussions of the co-client rule, the adverse litigation exception to that rule, the distinction between joint representation and common interest, and much more. It is easy to read and a must for corporate lawyers representing multiple corporate family members. A happy coincidence is that the author of the opinion is Judge Thomas L. Ambro of the Third Circuit. As most of you know, Tom is an active member of the Section of Business Law, and was its Chair in 2001-2002.