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Practice Group:
Health Care

Sending the Privilege Away: Attorney-Client E-Mails in the Corporate Setting

By **Mark A. Rush, Amy O. Garrigues, Bryan D. Rohm, Joseph A. Valenti**

In a pending False Claims Act (“FCA”) case involving allegations of noncompliance with the federal physician self-referral law (the “Stark Law”), 42 U.S.C. § 1395nn, the United States District Court for the Middle District of Florida has issued a recent order denying the protection of attorney-client privilege. Without an in-depth analysis of the work-product doctrine, the Court found that no attorney-client or work product protection existed over:

- E-Mails Involving In-House Counsel and the Finance Department: Finding that, because the content of the e-mails indicated that Halifax was about to be engaged in fraudulent conduct related to making certain payments to oncologists in contravention of the Stark Law, these communications were subject to the crime-fraud exception and were not protected;
- E-Mails Where an In-House Attorney Was Only Copied: Finding that, because in-house counsel was not in the “to” or “from” line, e-mail communications were not privileged (regardless of whether they were stamped with any privilege designations) but rather consisted of status updates or business discussions that merely were shared with an attorney;
- Communications That Did Not Exclusively Seek Legal Advice: Finding that, even when an attorney was in the “to” line of an e-mail communication, the communication was not privileged if other recipients were in the “to” line as well, as the simultaneous e-mailing of both lawyers and non-lawyers suggested that the primary purpose of the communication was not to seek legal advice but rather to serve both legal and business purposes;
- Compliance Documents: Findings that documents created by the corporate compliance department that the hospital alleged were for the purpose of obtaining compliance advice from in-house counsel were not privileged; and
- E-mail Strings Containing Non-Privileged Information: Finding that each separate e-mail of an e-mail string containing privileged communications must be separately and independently analyzed to determine whether each individual e-mail standing alone is privileged—and only permitting redaction of individual e-mails that, standing alone, would reveal privileged communications.

Although this case arose in the context of the FCA, it has general application to the attorney-client privilege in corporate settings. Though this decision does not bind other courts, it indicates that communications with in-house counsel may be subject to heightened *in camera* scrutiny and ultimately compulsory production. This case is particularly disturbing in a hospital setting, as it may create a chilling effect on the vigorous self-analysis, peer review, compliance, and hotline programs that are highly encouraged to constantly improve patient care by subjecting communications sent as part of those programs to discovery.

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Background: United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center

A whistleblower (Elin Baklid-Kunz, the defendant's former Director of Physician Services) filed a *qui tam* action against Halifax Hospital Medical Center alleging civil violations of the FCA, and the United States has intervened on behalf of the Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS").

The government alleges that compensation paid between 2000 and 2010 by Halifax Staffing, a wholly-owned subsidiary of Halifax Hospital that received reimbursement from the hospital for the costs of its employees, to three employed neurosurgeons and seven employed medical oncologists violated the Stark Law because the compensation was not commercially reasonable, exceeded FMV, and/or took into account the volume or value of referrals or other business generated for the hospital.

During discovery, the relator requested a judicial determination as to various categories of documents over which Halifax asserted attorney-client privilege.

A. The "crime-fraud" exception.

The relator alleged that Halifax violated the Stark Law by providing improper financial incentives to physicians not related to personally performed services—and used legal advice to manipulate its personnel into paying these payments. The party invoking the crime-fraud exception must establish: (i) a *prima facie* showing that the client was engaged in criminal or fraudulent conduct when the advice of counsel was sought and (ii) the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity.

Two of the documents in question were e-mails between a member of Halifax's legal department and a member of Halifax's finance department. Upon a review of the communications, the Court determined that both prongs of the crime-fraud exception applied because: (i) it appeared that Halifax was engaged, or about to be engaged, in fraudulent conduct when it sought legal advice and (ii) that advice was sought and obtained to allow the finance department to provide improper financial incentives to physicians. As a result, those documents were not entitled to the protection of the attorney-client privilege.

B. Documents and communications by departments other than the legal department related to audits and reviews are generally not privileged.

The relator sought a privilege determination for documents and communications created by various non-legal departments relating to audits and reviews. Halifax argued that these documents contained legal advice or were prepared for the purpose of obtaining legal advice. The Court found that, generally, those documents and communications were not privileged. The Court's analysis relied primarily on whether an attorney was included in either the "to" or "from" lines of each communication, regardless of whether the communication was stamped "Attorney-Client Work Product." Moreover, the Court reasoned, in cases where an attorney was listed in the "to" line along with many other recipients, "the corporation cannot claim that the primary purpose of the communication was for legal advice because the communication served both business and legal purposes."

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C. Compliance documents.

The relator requested that the Court determine whether Halifax's compliance logs were privileged. Halifax indicated that it created the logs to facilitate discussions with the legal department regarding risk and exposure from any reported incidents. Each entry in the logs contained an incident cover sheet addressed to the attention of Halifax's General Counsel, and all pages were stamped "Confidential Attorney-Client Privileged Information."

After *in camera* review of a representative sample of the entries from the logs, the Court determined that none of entries sought or reflected legal advice; therefore, they were not protected by the attorney-client privilege. Instead, the Court determined that the representative entries could only be characterized as a recordation of fact because: (i) they only dealt with communications between non-lawyers; (ii) the communications did not reflect prior legal advice being transmitted; and (iii) the communications did "not expressly reflect 'information being gathered by corporate employees for transmission to corporate counsel for the rendering of legal advice.'" The Court did not address work-product protection.

Similarly, the relator challenged the designation of attorney-client privilege by Halifax for the following general categories of documents: (i) those that "facilitate the provision of compliance advice"; (ii) those that "facilitate the rendering of compliance advice"; (iii) those "reflecting request for compliance advice"; (iv) those "for the purpose of obtaining compliance advice"; (v) those reflecting provision of compliance advice"; and (vi) those "request[s] for and provision[s] of compliance advice." Halifax argued that these documents were privileged because its organizational structure is such that the compliance department "operates under the supervision and oversight of the legal department."

In denying Halifax's assertion of attorney-client privilege, the Court noted that the organizational structure of Halifax is not a consideration in a privilege analysis. The Court then determined that Halifax failed to meet its burden to prove that the primary purpose of each document was to seek or give *legal* advice.

D. Each e-mail of an e-mail string must be separately and independently analyzed for privilege issues.

The relator sought a privilege determination as to all e-mail strings over which Halifax claimed a privilege. The Court chastised Halifax for not separating each e-mail of an e-mail string into a separate entry in its privilege log. Then, the Court conducted an *in camera* review, making a case-by-case determination for each individual e-mail. Thus, the Court found that each e-mail in the string should be separately evaluated.

Conclusion

This decision applies the attorney-client and work-product privileges in a very restricted manner. This outcome may be due to the ever-evolving and increased business responsibilities undertaken by many in-house lawyers in corporate settings. Given that the future decisions regarding the attorney-client privilege may focus on similar bright-line tests, such as who was in the "to" versus "cc" line in e-mails, companies should be aware of best practices and common pitfalls, as well as the potential discoverability of communications to in-house counsel. Significant compliance audits and reviews should be carefully structured under the direction of legal counsel when indicated to ensure that legal advice and work-product is afforded its proper protection.

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Authors:

Mark A. Rush

mark.rush@klgates.com
+1.412.355.8333

Amy O. Garrigues

amy.garrigues@klgates.com
+1.919.466.1275

Bryan D. Rohm

bryan.rohm@klgates.com
+1.412.355.8682

Joseph A. Valenti

joseph.valenti@klgates.com
+1.412.355.8398

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