NEWS ALERT

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PROTECTING FROM DISCOVERY AN IN-HOUSE COUNSEL'S INVESTIGATION

Not every company's communication with its in-house counsel is privileged. Only confidential communications which involve the requesting or giving of legal advice are privileged. Dartez v. Peters, No. 15-3255-EFM-GEB,2019 U.S. Dist. LEXIS 123178 *43, 2019 WL 3318185 (D. Kan. July 24, 2019). There must be a clear connection "between 'the subject of the communication and the rendering of legal advice' for the attorney-client privilege to shield the communication from disclosure." Id. Further, "legal advice must predominate for the communication to be protected. The privilege does not apply where the legal advice is merely incidental to business advice." Id.

There is no presumption "that a company's communications with counsel are privileged." EEOC v. BDO USA, L.L.P., 856 F.3d 356 (5th Cir. 2017), opinion withdrawn and superseded, 876 F.3d 690, 695-97 (5th Cir. 2017). The party asserting the attorney-client privilege and work-product protection, bears the burden to show that either the privilege or the protection, or both, apply. Dartez 2019 U.S. Dist. LEXIS 123178 *43.

For the attorney-client privilege to apply, Kansas courts require a "clear showing" that the attorney was acting in his or her professional legal capacity. Id. This starts with a "detailed and specific" showing in the privilege log. Id. at **43-44. But the mere conclusory assertion of an attorney-client privilege in the privilege log, "without more information, is insufficient." Id. at *49. The privilege's proponent must provide "sufficient information to enable the court to determine whether each element' of the asserted privilege is satisfied." Id. at 45. This burden can be met "only by an evidentiary showing based on competent evidence and cannot be discharged by mere conclusory assertions or blanket claims of privilege." Id. at *44. One court put the same notion this way: "[c]alling the lawyer's advice as 'legal' or 'business advice' does not help in reaching a conclusion; it is the conclusion." United States v. Chen, 99 F.3d 1495, 1502 (9th Cir. 1996).

In federal court, work product protection for the company's investigation materials depends on whether "(1) the materials sought to be protected are documents or tangible things; (2) they were prepared in anticipation of litigation or for trial; and (3) they were prepared by or for a party or a representative of that party." Fed. R. Civ. P. 26(b)(3).

Company materials prepared in the ordinary course of business or investigative work are not protected unless they were done under the supervision of an attorney in preparation "for the real and imminent threat of litigation or trial." Kannaday v. Ball, 292 F.R.D. 640, 648 (D. Kan. 2013). That means there must be a real and substantial probability that litigation will occur at the time the materials were prepared. Id. Also, courts look "to the primary motivating purpose behind the creation of the document to determine whether it constitutes work product. Materials assembled in the ordinary course of business or for other non-litigation purposes are not protected by the work-product doctrine." Id.

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In Dartez, a police brutality case, the plaintiff had issued a records subpoena to the Kansas Highway Patrol for an internal investigation of the Patrol's Special Response Team. The Patrol responded and logged a 98-page report written by the Patrol's outside counsel for the Patrol's Chief Legal Counsel, asserting it was done in anticipation of litigation. Dartez, at **37-38. After an in camera review the court decided the report's main purpose was to evaluate the Special Response Team's "operations to make recommendations for improvement and to ensure compliance with current law enforcement practice." Id. at **49-52. The court found one area in the report that "might come close to being legal advice." Nonetheless, the court decided it was "incidental to the overall business purpose of the Report." Id. at *50.

As for whether the report was protected by the work product doctrine, the court noted the Patrol failed to provide any details about anticipated litigation. The court decided, "there is no way to know whether the threat of litigation was 'real' and 'imminent' at the time the document was prepared." Id. at *47. The court ordered that the report be produced to the plaintiff.

An adversary's threats to sue can support a work product claim, but that is not always so. In Lawson v. Spirit Aerosystems, Inc., No. 6:18-cv-01100-EFM-ADM, 2019 U.S. Dist. LEXIS 176497 (D. Kan. Oct. 8, 2019), the court decided that "[w]here parties continue to resolve disagreements amicably, litigation is 'not a substantial and significant threat.'" 2019 U.S. Dist. LEXIS 176497 *22.

In sum, even when a company is negotiating to resolve a dispute amicably, to ensure that the attorney-client privilege and work product protection applies the company should internally document that its in-house counsel is conducting an investigation in anticipation of litigation and for the purposes of providing legal advice to the company. If the in-house counsel is providing business advice it should be documented separately from the attorney's legal advice. Putting business advice and legal advice in the same document risks that a redacted version will be produced in litigation during discovery.