By Janice MacAvoy and Philip A. Wellner

U.S. DISTRICT Judge Lewis A. Kaplan's decision in the KPMG case regarding a corporation's withholding of attorney's fees under pressure from the government, and the Department of Justice's recently issued McNulty memo on waiver of the attorney-client privilege in government investigations have both generated a lot of press. But in recent months, there have been several other decisions that have received less notice but could have a significant impact on the contours of the attorney-client and related privileges in federal court cases.

Fundamental to attorney-client privilege law is the principle that, in order for a communication between attorney and client to be protected by the privilege, the communication must have been made for the purpose of seeking legal advice. How to determine this purpose is where the U.S. Court of Appeals for the Second Circuit has not, until now, followed the other circuit courts. The majority approach is to require that the primary purpose of the communication must be to seek legal advice.

A year after the U.S. Supreme Court decided United States v. Upjohn, the Second Circuit suggested in dicta that legal advice must be the sole purpose of the communication. After 25 years, the Second Circuit recently addressed the question directly. In re County of Erie, 2007 U.S. App. LEXIS 26 (2d Cir.), involved a series of e-mails drafted by an assistant county attorney regarding prison inmate strip-search policies. In addition to legal advice, these documents contained policy recommendations made by the attorney. The Second Circuit addressed whether including policy advice in the e-mails changed the purpose of the communication to something other than legal advice, which could defeat the claim of privilege.

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The Second Circuit rejected its own prior dicta favoring the stricter sole purpose test, and found the documents in question to be privileged, holding that “So long as the predominant purpose of the communication is legal advice, [related] considerations and caveats are not other than legal advice or severable from it.” Some of these considerations include the attorney's explanations of “how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances.”

The court stated that the purpose of the communication must be analyzed in context, considering the type of advice being sought and the “relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer.” Though the holding in this case may not be groundbreaking, it should provide some peace of mind to attorneys and clients alike as they address the question of privilege, given the importance of Second Circuit law to commercial litigators.

**Individual Versus Entity**

A highly contentious issue that often arises in the context of internal investigations is which party has the right to assert the attorney-client privilege when more than one person or entity communicated with counsel. The privilege question addressed in *In re Bevill*, *Bresler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986). Courts have subsequently interpreted the second prong of this test as requiring that the advice sought by the employee involved “personal matters.”

*The attorney-client privilege continues to evolve in the federal courts in the shadow of proposed revisions to the Federal Rules of Evidence.*

Under the First and Tenth Circuit tests, the term “personal matters” typically does not involve communications made by a corporate officer in a corporate capacity; only communications with counsel that involve individual rights and liabilities distinguishable from those of the entity can give rise to an individual claim of privilege. If the communication was made in the employee’s corporate capacity but the employee’s individual concerns are distinct from those of the employer, the employee may be able to assert her own privilege. The Second Circuit has not explicitly defined what types of communications qualify as “personal matters,” and has even suggested that the employee may only claim privilege when the employer’s interests are not involved at all.

In *Stein*, Judge Kaplan ruled that under any formulation of the test, discussions with KPMG’s counsel regarding “events and conduct within the scope of [Ms. Warley’s] work as a partner at KPMG” did not focus at any point solely on her personal interests. Therefore, because her interests—as evidenced by the documents in question—were not segregable from those of the entity, the privilege belonged to the entity alone. While the ultimate meaning of “personal matters” in the Second Circuit is still unsettled, even if the strictest interpretation of “personal matters” is not ultimately adopted by the Second Circuit, this decision suggests that, at minimum, the employee’s legal interests must be distinct from those of the employer. Otherwise, the employer alone will control the privilege.

**Crime-Fraud Exception**

Another area of privilege law that has been recently tested by litigants, with interesting results, is the extent to which claims of attorney-client privilege can be defeated through the crime-fraud exception. *Tri-State Hospital* suggests that the scope of behavior that will trigger the crime-fraud exception may continue to expand well beyond its initial scope of criminal activity. The privilege ruling in *Tri-State Hospital Supply Corp. v. United States*, 238 F.R.D. 102 (D. D.C. 2006), arose from an abuse of process and malicious prosecution suit filed by plaintiff following a failed prosecution of *Tri-State* by the Department of Justice for fraud and negligence. During the course of discovery, *Tri-State* moved to compel the government to produce certain documents over which it had asserted the attorney-client and work product privileges. The crime-fraud exception has already been extended by numerous courts beyond behavior that is criminal or fraudulent. Cases like *Diamond v. Stratton*, 95 F.R.D. 503 (S.D.N.Y. 1982), and *In re Sealed Case*, 754 F.2d 395 (D.C. Cir. 1985), demonstrate that the exception can also be invoked where the communications with counsel are made in furtherance of certain intentional torts or other misconduct. *Tri-State* sought to stretch the exception’s reach one step further. The novel claim made by *Tri-State*, which makes this case noteworthy, is its argument that the court should extend the crime-fraud exception so that communications in furtherance of malicious prosecution and abuse of civil litigation process could not be shielded by the privilege.

Magistrate Judge John M. Facciola acknowledged that the crime-fraud exception has been expanded by courts beyond its original scope, and noted that *Tri-State* was not relying on any of the accepted categories of behavior to invoke the exception. Though the court did not cite any decisions where malicious prosecution or abuse of process have triggered the crime-fraud exception, *Tri-State*’s argument for extension of the exception was not rejected by the court on its face. The argument was sufficiently persuasive that the court agreed to review the documents in question in camera;
the motion was ultimately rejected after review of the documents because they did not contain any indications supporting Tri-State’s claim of malicious prosecution or abuse of process. In the absence of prima facie evidence that some wrongdoing had occurred, the court held that there was no basis from which the crime-fraud exception could be invoked. Nevertheless, the court’s decision teaches that the contours of the exception itself are still not completely settled.

Selective Waiver

The concept of selective waiver of the attorney-client privilege—in particular, by waiving with respect to the government but continuing to assert the privilege as to third parties—has received a good deal of attention recently, as debate swirls around proposed Rule of Evidence 502, which would permit such waivers. In the shadow of the controversy that the proposal has generated, federal courts have continued to reject the doctrine of selective waiver, leaving the U.S. Court of Appeals for the Eighth Circuit to stand as the lone circuit adopting the doctrine, with its decision in Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977).

While the adoption of selective waiver of the attorney-client privilege appears unlikely in the Second Circuit or much of the rest of the country absent adoption of Rule 502, selective waiver of the work product doctrine is a different matter entirely. The circumstances of a typical selective waiver—disclosure of documents to the Securities and Exchange Commission or U.S. Attorney’s Office after a corporation’s internal investigation of potential violations—existed precisely in the situation addressed by the court in In re Cardinal Health Inc. Securities Litigation, C2-04-575 (S.D.N.Y. Jan. 26, 2007).

In 2003, the SEC commenced an inquiry into the accounting practices of Cardinal Health, and as a result of this investigation, the company’s audit committee hired the law firm of Kramer Levin Naftalis & Frankel the following year to conduct an independent investigation. During the course of Kramer Levin’s investigation, it entered into a confidentiality agreement with the SEC and shared a large number of documents with both the SEC and the U.S. Attorney’s Office. Those documents included interview memoranda, presentation binders prepared for the audit committee, forensic accountants’ work papers, document compilations, and materials compiled by individual witnesses, all of which were found by the court to be initially protected by the work product doctrine. The issue, then, was whether that protection was waived when Kramer Levin disclosed the documents to the SEC and U.S. Attorney’s Office.

Perhaps the most interesting part of the court’s opinion is its holding that because Cardinal Health’s Audit Committee shared a common interest with the government in ensuring that “Cardinal’s financial and accounting practices be ‘clean as a hound’s tooth,’” waiver did not occur. The court relied on dicta from the Second Circuit’s decision in In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993), which indicated that in certain circumstances, a common interest or a confidentiality agreement between a party and the SEC could preclude waiver of work product protection for documents disclosed to the SEC.

The court found that a sufficient common interest existed between the audit committee and both the SEC and U.S. Attorney’s Office to preserve the work product protection for all of the documents that the committee sought to protect. The confidentiality agreement between the committee and the SEC contributed to this holding, but was not dispositive; the documents disclosed to the U.S. Attorney’s Office were not covered by any such agreement, yet the common interest still prevailed. While in principle Cardinal Health may not address the doctrine of selective waiver of the attorney-client privilege as such, in practice the decision results in a mechanism for attorney work product to be disclosed to the government without automatically waiving the protection.

Self-Critical Analysis Privilege

From a practice perspective, the entire panoply of privileges must be considered when evaluating whether a document must be turned over to an adversary or whether it can be withheld under a claim of privilege. The privilege at issue in Davis v. Kraft Foods North America, 2006 U.S. Dist. LEXIS 87140 (E.D. Pa. Nov. 30, 2006), is the “self-critical analysis privilege.” While it does not bear directly on communications between attorney and client or on attorney work product, this privilege is nevertheless important because of their influence on the discovery process and on the attorney-client relationship itself.

Conclusion

As the cases reviewed above suggest, the attorney-client privilege continues to evolve in the federal courts in the shadow of proposed revisions to the Federal Rules of Evidence. Though not revolutionary in their holdings, the subtle shifts evidenced by the decisions are nevertheless important because of their influence on the discovery process and on the attorney-client relationship itself.

3. Though the Ninth Circuit has also not yet expressly addressed the doctrine of selective waiver, see Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003), district court decisions on the issue in that circuit seem to align with Brady, though one decision did adopt selective waiver for attorney work product. See In re McKesson HBOC, Inc. Secs. Litig., 2005 U.S. Dist. LEXIS 7098 (N.D. Cal. 2005) (allowing selective waiver for attorney work product).
4. See, e.g., LaClair v. City of St. Paul, 187 F.3d 824 (8th Cir. 1999); FTC v. TRW, Inc., 628 F.2d 297 (D.C. Cir. 1980).