North Carolina Business Court Ruling Could Impact the Ability of Businesses to Assert Attorney-Client Privilege Over Communications During Internal Investigations

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A ruling issued by the North Carolina Business Court last month could have a significant impact on the ability of North Carolina companies and counsel to assert the attorney-client privilege over communications exchanged in the course of internal investigations.

In *Buckley LLP v. Series 1 of Oxford Insurance Company NC LLC*19 CVS 21128 (N.C. Super. Ct. Mecklenburg County), the court ruled on cross motions to compel in an insurance coverage dispute. There were two issues before the court. The first issue concerned whether communications between the plaintiff law firm, Buckley LLP, and its outside law firm, Latham & Watkins LLP, concerning an investigation into alleged misconduct by a former Buckley partner were protected from disclosure by the attorney-client privilege or work product doctrine. The second issue before the court was whether defendant Oxford Insurance Company's internal communications with its in-house general counsel concerning claims coverage were protected by the attorney-client privilege.

As to both issues, the court held that many of the communications were not protected by the attorney-client privilege.

The court began its analysis by focusing on the attorneys' roles in both scenarios. In each instance, the court focused on whether the attorneys were performing legal functions in the course of the communications, or whether the attorneys were engaged in regular business operations. Per the court, in determining whether a communication with an attorney

who also performs a business role is protected by the attorney-client privilege, the inquiry is "whether the attorney's performance depends principally on her knowledge of or application of legal requirements or principles, rather than her expertise in matters of commercial practice."

As to Oxford Insurance Company's general counsel, the court determined that with regard to the communications at issue, her "sole or primary role" was providing a business review of the claims denial; therefore, her communications were not privileged.

As for the plaintiff law firm's internal investigation conducted by Latham & Watkins, the court held that many of those communications were not protected by attorney-client privilege or the work product doctrine. The court relied heavily on two key facts: (1) the Buckley law firm's internal policy required an investigation of any report of harassment; and (2) the evidence before the court did not reflect that the Buckley firm or Latham & Watkins reasonably anticipated litigation. The former defeated the attorney-client privilege, because it signaled that the investigation was "initiated and pursued in the ordinary course of business"; "the fact that Buckley hired a prominent outside law firm to conduct the investigation does not change this fact." The latter defeated any work product assertion, although the court added for good measure that, even if litigation had been contemplated, nothing showed "that the investigation would have proceeded, or the Buckley Communications would have been made, differently in any respect . . . ."

Buckley recently appealed the ruling, so the North Carolina Supreme Court will provide the most definitive guidance on privilege. But regardless of what it may decide, this case is a good reminder to all that communications are not privileged just because a lawyer is copied. Several additional steps should be taken to protect the privilege, particularly in the context of internal investigations.

First, for in-house counsel, be careful to segregate business and operational communications from communications involving legal advice, and do not mix the two.

Second, when hiring an outside firm, specify the terms of the representation in the engagement letter. If necessary, prepare separate engagement letters for the different types of representation. If the engagement involves an investigation, make clear in the engagement letter that litigation is a possible and foreseeable result of the investigation.

Third, make sure that outside counsel performs the legal work specified in the engagement letter. Ask outside counsel to provide a written assessment, marked as privileged, of the legal risks and potential liabilities arising from the underlying conduct. That should include any civil or criminal exposure the company might face as a result of the employee's misconduct. Even if regulatory oversight is unlikely, any investigation worth doing could result in adverse employment action and thus discrimination, retaliation, or wrongful termination claims. Efforts to analyze and document the company's exposure will increase the force of later attorney work product protection claims.

Fourth, consider your internal policies and procedures, and evaluate whether they might create unintended consequences down the road. If internal policies require an investigation, make clear that the investigation is required for legal compliance, such as with Title VII, ADA, ADEA, and the like, and that the investigation involves a legal analysis to determine whether there is potential risk of exposure under these laws.

Fifth, wherever possible, plan for privilege disputes at the outset of litigation. Approaching discovery with a keen eye toward protecting privilege may have made a difference here.

If you have questions, please contact Daniel Adams, linked below.