

October 17, 2007

MEMORANDUM TO: Clients and Friends of the Firm

FROM: Daniel C. Zinman

RE: Attorney-Client Privilege

**Strategies For Addressing The Eroding Attorney-Client Privilege For In-House Counsel:
A Look At The Recent Multidistrict Vioxx Products Liability Litigation¹**

When emailing firm employees, in-house counsel should think twice before hitting the send key. A recent decision and order issued in the multidistrict *Vioxx Products Liability Litigation* by a District Court in the Eastern District of Louisiana - which rejected one party's assertion of privilege over numerous emails involving company counsel — could soon be followed by courts in other jurisdictions and may significantly alter the availability of the attorney-client privilege with respect to electronic and other communications involving internal lawyers.² Given that a European court also has recently issued a noteworthy ruling limiting the availability of the privilege for in-house attorneys,³ the *Vioxx* decision could foreshadow an important trend in this area.

Nature of dispute

In ruling on a discovery dispute involving Merck & Co.'s assertion of privilege over internal emails between its employees and in-house counsel, the court focused on the expanding role of Merck's attorneys into business and other non-legal areas. As the attorney-client privilege extends only to legal advice, the court made clear that attorney communications containing a mixture of legal and non-legal guidance are often not protected by the privilege. The court found that because many of the internal emails over which Merck had asserted privilege did not relate exclusively to legal issues, they were shielded from discovery only where Merck could demonstrate that counsel who participated in the communications had done so principally to provide legal advice. According to the court, "[t]he lawyer's role as a lawyer must be primary to her participation." *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d at 798.

¹ In some jurisdictions, this memorandum may constitute attorney advertising.

² *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789 (E.D. La. 2007). A copy of the court's Order can be found on the internet at <http://vioxx.laed.uscourts.gov/Orders/12023.pdf>.

³ See Joined Cases T-125/03 & T-253/03, *Akzo Nobel Chemicals Ltd. v. Commission* (Sept. 17, 2007), found on the internet at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0125:EN:HTML>, in which a Court of First Instance ruled that communications between in-house counsel and a company manager are not privileged.

Guidance by the *Vioxx* court

While the pharmaceutical industry in which Merck operates is highly regulated and has created a need for attorney involvement in several facets of the company's business, internal lawyers for companies in many other industries are increasingly serving as business consultants in addition to performing their traditional roles as legal advisors. For this reason, when drafting emails and other documents, or guiding employees on how to communicate with company counsel, in-house lawyers would be wise to take note of the following guidance offered by the *Vioxx* court.

- Communications with outside counsel are presumed to be privileged. Internal communications with in-house counsel, however, are not presumptively privileged because these lawyers typically do not render purely legal services.
- Emails sent simultaneously to internal attorneys and business people are generally not considered privileged: Because the same advice arguably is being sought from lawyers and non-lawyers, absent evidence to the contrary the primary purpose of these emails is presumed to be non-legal.
- As a logical corollary to this point, emails between only attorneys stand a greater likelihood of receiving privileged treatment.
- Emails addressed to lawyers, and cc'd to non-lawyers, are more likely to be considered privileged because the cc'd non-lawyers arguably are being informed of the legal advice being sought from the lawyers and not being asked to provide any advice themselves.
- Edits by lawyers to documents that are not obviously legal in nature (such as marketing, technical, business and other documents) are unlikely to be considered privileged absent proof that the primary purpose of the edits is to render legal advice.
- If an attachment is circulated to both lawyers and non-lawyers for comments, the attachment is likely discoverable. If, however, an attachment is sent only to internal counsel for comments, the attachment is likely privileged. Yet, if that attachment — which now contains the attorney's edits — is subsequently forwarded to non-lawyers, it is no longer privileged unless those non-lawyers require the lawyer's legal advice to fulfill their duties.
- Parties can not claim privilege over an entire email thread where only certain emails within the thread contain legal advice from internal counsel.

Four Key Strategies

With the ever-expanding roles of in-house lawyers, it is easy to see how many electronic and other communications presumed to be privileged actually could be discoverable. Company lawyers therefore should be thinking strategically about the manner in which they craft their emails. The following are a few key suggestions that lawyers should consider before finalizing their emails and hitting the send key.

- **Legal Purpose**

State up-front in the email that the primary purpose of the communication is to provide legal advice.

- **Content**

Ensure that the email actually contains substantive and identifiable legal advice.

If an email contains both legal and non-legal advice, divide the advice between two emails.

- **Addressees**

If an email is being sent to lawyers and non-lawyers, consider whether including the non-lawyers is necessary. If it is, cc the non-lawyers and make the lawyers the primary recipients.

Before forwarding attorney comments on draft documents to non-lawyers, make sure those employees have a clear and identifiable need to see the comments in order to carry out their corporate duties.

- **Legend**

If you believe the email is privileged, say so: use a privileged legend.

Contact Information

Even though compelling arguments exist for courts not to follow the reasoning of the *Vioxx* decision, companies would be well-served to develop and implement strategies to ensure that the attorney-client privilege is appropriately asserted and maintained. For more information about the issues presented in this memorandum, please contact the author, Daniel C. Zinman.⁴

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⁴ This memorandum was prepared as a service to clients and other friends of RK&O to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice.