Most Courts Focus on the Four Corners of Withheld Documents, Despite Barko: Part I

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In his August 13, 2014 “Privilege Points” release, Tom Spahn discusses whether courts will examine context under Barko or limit their review to four corners to evaluate privilege and work product claims:

The widely publicized Barko decision (In re Kellogg Brown & Root, Inc., No. 14-5055, 2014 U.S. App. LEXIS 12115 (D.C. Cir. June 27, 2014)) has encouraged corporations hoping to extend privilege protection to their internal corporate investigations. As explained in a previous Privilege Point, perhaps the most important aspect of Barko was the D.C. Circuit's willingness to examine the context of withheld communications — rather than focusing just on the documents' four corners.

However, many courts essentially limit their review to the withheld documents themselves in analyzing both privilege and work product claims. In Tecnomatic, S.P.A. v. Remy, Inc., the court examined withheld documents in camera, ultimately concluding that the attorney-client privilege protection applied — because "the communications withheld explicitly request, render, arrange for, or act in furtherance of rendering legal assistance." No. 1:11-cv-00991-SEB-MJD, 2014 U.S. Dist. LEXIS 75220, at *7 (S.D. Ind. June 3, 2014). Unfortunately, courts' assessment of withheld documents usually results in bad news. One week later, the Northern District of Illinois rejected a corporation's privilege claim for several emails, using phrases such as "[t]his email is not privileged as it does not ask for legal advice"; "the email does not seek legal advice and is not privileged"; and "[n]either the email nor the attached bill reveals any confidential communications or involves a request for legal advice." Lee v. Chi. Youth Ctrs., No. 12 C 9245, 2014 U.S. Dist. LEXIS 79868, at *24, *23, *26 (N.D. Ill. June 10, 2014). In an even more worrisome conclusion, the court rejected privilege claims for two emails a company employee sent the company's outside lawyer (1) asking for the lawyer's advice about "the preferred language" for finance committee minutes, and (2) inviting the lawyer "to make whatever changes she desires to [a] 'Reorganization Plan.'" Id. at *23, *25. The court held that the first email merely sought the outside lawyer's "editorial changes," and that the second email "does not seek legal advice and is not privileged." Id.

Despite the promise of Barko, most courts examining a privilege claim focus almost exclusively on withheld documents' four corners. Clients seeking legal advice should therefore explicitly ask for it in the body of their communications. And lawyers providing
legal advice should explain that they are doing so — especially if their legal advice takes the form of suggested language changes in client-prepared draft documents.