Another Court Follows the Troubling Vioxx Approach

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In his January 2, 2013 “Privilege Points” release, Tom Spahn discusses the “need to know” rule for protecting documents that have been distributed among non-lawyers in the corporate setting.

Previous Privilege Points have noted many courts' increasing insistence that a corporate litigant withholding privileged documents prove that every recipient of each document had a "need to know" the document's substance. Some courts take an even narrower view of the privilege in the corporate setting, usually relying on a 2007 decision in the multidistrict litigation against Merck. *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007).

In *United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center*, the court cited *Vioxx* and an earlier Middle District of Florida decision in holding that "when a communication is simultaneously emailed to a lawyer and a non-lawyer, the corporation 'cannot claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes.'" *Case No. 6:09-cv-1002-Orl-31TBS*, 2012 U.S. Dist. LEXIS 158944, at *11-12 (M.D. Fla. Nov. 6, 2012) (citation omitted). Later in the opinion, the court seemed to back off a bit, noting that the simultaneous transmission of an email to a non-lawyer "weighs against a privilege finding." *Id.* at *23 n.5. However, throughout the opinion the court took a restrictive view of the privilege in the corporate setting. Distinguishing legal advice from "'compliance advice,'" the court rejected a corporate litigant's argument that the privilege protected compliance department employees' communications because "'the compliance department operates under the supervision and oversight of [the] legal department.'" *Id.* at *23 (internal citation omitted). The court's response to that position was blunt: "Halifax's organizational structure is of no consequence." *Id.*

Although there may be essentially no way for most corporations' privilege to survive the nearly per se *Vioxx* approach, all corporations should try to restrict the internal distribution of emails to those with a "need to know."