District of Nevada Rejects the Narrow Vioxx Rule

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In his June 12, 2013 “Privilege Points” release, Tom Spahn discusses the “primary purpose” rule for protecting communications that include lawyers and nonlawyers and the outlying Vioxx approach:

In a troubling approach, some courts hold that almost by definition the privilege cannot protect intra-corporate communications directed to both a lawyer and a nonlawyer, because they are not primarily legal in nature. In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789 (E.D. La. 2007). For instance, late last year the Middle District of Florida bluntly held 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.'" United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr., Case No. 6:09-cv-1002-Orl-31TBS, 2012 U.S. Dist. LEXIS 158944, at *11-12 (M.D. Fla. Nov. 2, 2012) (citation omitted).

Fortunately for corporations, other courts take a less severe position. In Phillips v. C.R. Bard, Inc., No. 3:12-cv-00344-RCJ-WGC, 2013 U.S. Dist. LEXIS 45647, at *27 (D. Nev. Mar. 29, 2013), the court acknowledged that "some courts have held that a company cannot claim the 'primary purpose' of a communication was to solicit legal advice when it is sent to both the lawyers and non-lawyers for simultaneous review." The court explained that it "will not make a per se ruling in this regard" – but instead "will review each communication at issue" to decide "whether the 'primary purpose' was to solicit legal advice." Id.

It is refreshing to see that courts continue to push back against the Vioxx approach, which seems contrary to corporations' laudable desire for internal transparency.