

ALERT

Court Finds No Privilege Protections for Communications with Attorney Performing Quasi-Legal Role

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A recent decision out of the U.S. District Court for the Eastern District of Pennsylvania raises questions as to the privilege protections afforded to communications with attorneys performing non-traditional legal roles within a company. In *Casey v. Unitek Global Servs., Inc.*, an attorney with the roles of Director of Risk Management and Vice President of Risk and Safety brought sex discrimination and equal pay act claims against her former employer. The company claimed that because the plaintiff was an attorney, she was improperly using attorney-client communications in support of her claims.

The court disagreed with the company's arguments, however, finding that the communications were not privileged because although the plaintiff had a J.D., she was not functioning as the company's attorney. Instead, she worked in the company's risk management and safety departments, which did not report up to the company's General Counsel. Although the plaintiff worked in a function that evaluated the company's potential litigation risk arising from insurable claims, her job did not require "any legal knowledge, much less a juris doctor." The court reached this conclusion, despite the fact that the plaintiff retained outside counsel for the company, communicated with outside counsel and granted settlement authority, finding that her role was not legal in nature. That the plaintiff also attended periodic litigation update meetings similarly was not sufficient to transform the plaintiff's role from administrative to legal in nature.

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The court went on to find that even if the plaintiff had been functioning as in-house counsel, which the company had failed to demonstrate, the company had not identified any communications for which the company should be afforded privilege protections. In-house counsel wear two hats, the court reasoned, and communications by in-house counsel that function as business advice are not privileged. Because the court determined that the plaintiff's communications were not legal in nature, no privilege protections should be afforded to them.

Companies should be cautious that placing an attorney in a position outside of or ancillary to the company's legal department may not be viewed as extending the company's privilege protections to that individual or position. The precise reach of privilege protections within a company has recently been a hotly contested issue. As prior cases have suggested, including the D.C. Circuit's recent mandamus decision in *In re Kellogg Brown & Root*, whether a communication will be found privileged may often turn on whether a significant purpose of the communication is to provide legal advice. See *D.C. Circuit Reaffirms that Internal Investigations are Privileged*. Even in situations where the legal nature of a communication is established, however, there may be additional discovery disputes arising from the way a company protects its privileged communications. Subsequent to the mandamus ruling in *In re Kellogg Brown & Root*, for example, the district court determined that privileged communications could nonetheless be turned over due to an implied privilege waiver arising from the company's reliance on the communications as part of its defense. This ruling has also been appealed to the D.C. Circuit, and more fallout is likely in the coming months.

In short, companies should be vigilant to protect their internal privileged communications to the greatest extent possible. Where a company's employees are functioning in quasi-legal roles, their communications may be more susceptible to disclosure during discovery disputes as ordinary business communications if they are not clearly legal in nature. To minimize the risk of disclosure, companies should carefully evaluate their position descriptions and reporting structures to make clear if an employee will be expected to provide legal advice. As is always a good practice, companies should also take care to provide clear indicia when communications are privileged, including marking all communications with the appropriate privilege designation.