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RISK MANAGEMENT 2019-1

A PRACTITIONER'S PERSPECTIVE ON EMERGING LEGAL TRENDS

Giving Business Advice Versus Legal Advice—The Pitfalls

Lawyers must become accustomed to the risk of giving advice. A lawyer's role and duty is to give advice—advice that might not be well received, advice that when followed might not result in the best outcome, advice that even when objectively correct ends up placing the lawyer in a defensive posture. It is simply the cost of doing business, the business of law.

In fact, the risks associated with giving advice are inherent in all businesses. Your landscaper can advise you to plant a particular tree or shrub that dies, or your plumber can advise you to fix your leaky pipe with a "permanent seal" that ends up being not so permanent. Yet, lawyers are held to a very high standard and are viewed as having all the answers. Laypersons may not expect or understand that law is not a science and that there are no perfect solutions to any one legal problem. Moreover, clients may expect an attorney to give legal advice as well as general counsel. And, we regularly provide that general counsel without giving it a second thought.

What about business advice? Any difference? Business clients might expect the lawyer to provide business advice along with legal advice, without even understanding the difference. A client might ask about a certain business course of action that could lead to legal risk: "Should I do it?" Of course, the lawyer will explain the legal risks. Whether to take the course of action, however, is another matter.

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Beware of the Duty to Warn

In a recent legal malpractice trial, an attorney defendant testified that he did not have a duty to tell his client which business decision to make but only to provide the client with the legal risks associated with the available choices. The plaintiff's expert then testified that, of course, it was the lawyer's duty to advise the client as to which choice would be preferable. Who is correct? Or, is the answer somewhere in between the two positions? And, what additional areas of caution must be considered when answering this question?

In *Peterson v. Katten Muchin Rosenman LLP*,[1] the Seventh Circuit tells us that "[i]t is hard to see how any . . . bright line could exist" between business advice and legal advice.[2] Why not? Because a transactional lawyer's duty is to counsel the client about the various legal structures in business and the corresponding risks that go along with each structure. Then, it is the client who must choose the level of risk—it is not for the attorney to recommend a risk level but to create the appropriate device to protect the client based on the risk of their choice.[3]

So, what if the client comes to the attorney with the intent to move forward with a risky transaction? Is the attorney justified in crafting a transactional device in accordance with the client's choice without providing counsel as to less risky legal means? No. In *Peterson*, the Seventh Circuit reversed dismissal of a legal malpractice case where the attorney did not alert the client as to the high risk even though the attorney did exactly what the client asked.[4]

Does the decision in *Peterson* equate to an attorney's duty to warn? It certainly appears so. However, this result has been criticized as a simplification in that it will result in lawyers being asked to look beyond the transaction at issue and foresee anything that would or could go wrong such that the possibilities would be infinite.[5]

1 792 F.3d 789, 791 (7th Cir. 2015).
2 *Peterson*, 792 F.3d at 791.
3 *Id.*
4 *Id.*, at 793.
5 Robert E. Shapiro, *Risk Assessment*, Litigation, Winter 2016, at 58, 61 (2016).

Beware of Losing the Privilege

Just because advice flows from a lawyer to a client does not automatically place it under the umbrella of the attorney-client privilege. The attorney-client privilege is premised on the axiom that only a lawyer is qualified to advise on matters of the law. In order to do so, the attorney must know the details of the client's legal issue. This awareness can occur only if a client communicates the sensitive facts and circumstances surrounding the issue with complete candor.[6] Therefore, the evidentiary protections surrounding these communications are great, but attorneys tread on dangerous ground when providing advice outside of the scope of the law. "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining *legal* advice from the lawyer."[7] Consequently, if the advice sought is in the domain of *business policy or judgment*, rather than law, it will not necessarily be protected by the privilege, and the communications might be subject to discovery even though a lawyer is the source of the advice.

The burden to prove that the attorney-client privilege protects materials sought to be discovered is borne by the party seeking to invoke the privilege. "There is no presumption that a company's communications with counsel are privileged."[8] Therefore, if the attorney is heavily involved with issues involving both law and business interests and those issues are closely related, e.g., commercial transactions and corporate bankruptcy, bifurcating those communications would be a very difficult task. "[W]here business and legal advice can be easily segregated, the communication 'must be produced with the legal-related portions redacted.'"[9] So, in order to overcome the burden in a situation where the business and legal advice appear to be joined, the party seeking to assert the privilege will then be required to show that the predominant or primary purpose of the communication was to provide advice on an issue of law.

Defining the primary purpose has resulted in courts applying different tests to make a determination, including whether or not the communication was solely rendered for legal advice or if the communication would not have been made but for some legal purpose or prospect of litigation. More recently, however, the D.C. Circuit Court of Appeals held that the "but for" test unreasonably served to isolate disputed evidence for either a single business or legal purpose.[10] So, instead, the Court applied a more liberal "significant purposes" test, in which a holistic view of the document and surrounding circumstances would achieve the underlying goal of the privilege.

The broader application of the predominant/primary purpose test appears to be the most common standard applied by various jurisdictions. The Delaware Court of Chancery, a preeminent business court, has expressly adopted a position in favor of a party resisting discovery, stating "if it is too difficult to determine if the legal issues predominate in a given communication, the party asserting the privilege will be given the benefit of the doubt, and the communication will not be ordered produced."[11]

Accordingly, a lawyer should consider the purpose of the communication before making it, which is not an easy thing to do in client communications.

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6 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
7 *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (emphasis added).
8 *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 696 (5th Cir. 2017).
9 *Morris v. Spectra Energy Partners* (DE) GP, LP, 2018 Del. Ch. LEXIS 146, at *3-4 (Del. Ch. May 7, 2018) (quoting *Cephalon, Inc. v. Johns Hopkins Univ.*, 2009 Del. Ch. LEXIS 207, at *1 (Del. Ch. Dec. 4, 2009).
10 In re *Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014)
11 *Morris*, 2018 Del. Ch. LEXIS 146, at *4 (quoting *MPEG LA, L.L.C. v. Dell Global B.V.*, 2013 Del. Ch. LEXIS 299, at *5 (Del. Ch. Dec. 9, 2013)).

Beware of Losing Coverage

Migrating into the domain of advising on business interests can also affect a lawyer's professional liability coverage by falling into the business enterprise exclusion of the policy. This exclusion can apply where an attorney providing counsel has control or an interest in the business enterprise at issue or where the attorney represents both the corporation and the individual shareholder.[12]

Even if the attorney provides strictly legal advice, the business enterprise exclusion could apply where the attorney owns the business enterprise for which she serves as counsel.[13] In fact, the exclusion can even apply where the attorney is only a three percent limited partner of the entity for which she provided formation services.[14]

So, regardless of what a client might expect as to receiving business advice or even what a business in which the lawyer has an interest might expect as to receiving legal advice, lawyers must exercise caution when approaching these requests. The duties and privileges that lawyers hold dear must rise above any expectations of a client for business advice.

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12 *Minnesota Lawyers Mut. Ins. Co. v. Antonelli, Terry, Stout & Kraus*, LLP, 2010 WL 4853300, at *1 (E.D. Va. Nov. 18, 2010), *aff'd*, 472 Fed. Appx. 219 (4th Cir. 2012); *Cont'l Cas. Co. v. Smith*, 243 F. Supp. 2d 576, 578 (E.D. La. 2003).
13 *Senger v. Minnesota Lawyers Mut. Ins. Co.*, 415 N.W.2d 364, 369 (Minn. Ct. App. 1987).
14 *Cont'l Cas. Co. v. Flomenhoft*, 640 N.E.2d 290, 293 (Ill. App. Ct. 1994).

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