

Fifth Circuit Provides Guidance to GCs on Protecting Privilege

By David Coale
Contributing Writer to *The Texas Lawbook*

May 9, 2014 – Legal advice or a business discussion? This question is the key issue in most privilege disputes about in-house counsel.

The U.S. Court of Appeals for the Fifth Circuit addressed that question this week and offers practical guidance for in-house counsel in *Exxon Mobil Corp. v. Hill*.



David Coale

ExxonMobil intervened in a tort litigation to contend that the attorney-client privilege protected a short 1988 memo by an in-house lawyer. The lawyer created the memo during negotiations between Exxon Mobil and ITCO, a company that would store oil production equipment for it.

The memo recommended that Exxon Mobil, in response to an information request by ITCO, make a limited disclosure from a report it had about radioactivity associated with the equipment.

As the Fifth Circuit summarized: “Stein [the lawyer] suggested that Guidry [the client] disclose only Table IV [of the report], because it contained the only data that ITCO specifically had requested, and that Guidry remove the caption ‘Table IV’ so as not to flag the existence of other tables.”

The plaintiffs contended that the effect of this advice was to conceal information about dangerous levels of radiation.

The district court opinion rejected ExxonMobil’s position about privilege, reasoning that it had not shown that the “primary or predominant” purpose for consultation with the lawyer was for legal advice, “particularly in light of the fact that the [memo] itself does not contain any reference

to a legal justification for Stein’s advice, or legal concerns prompting Guidry to seek such advice.”

“It appears from the face of the document that the primary purpose of Stein’s advice to Guidry was to help secure more favorable contract terms”

The Fifth Circuit reversed, in an opinion written by Judge Jerry Smith and joined by Judges Jennifer Elrod and Leslie Southwick.

Stating that its conclusion would be the same under de novo or clear error review, the Court held:

“The manifest purpose of the draft [attached to the memo] was to deal with what would be the obvious reason Exxon Mobil would seek its lawyer’s advice in the first place, namely to deal with any legal liability that may stem from under-disclosure of data, hedged against any liability that may occur from any implied warranties during complex negotiations.”

This opinion offers practical guidance for maintaining privilege as to in-house counsel.

First, the memo is focused. Written in 1988, before long email chains became common, it presents a short exchange on a specific topic. Second, it has a specific audience — it is written to a specific person rather than a large group — or a “reply all.”

Finally, it is clear. The memo refers directly to legal concepts such as warranty liability and property interests. The memo’s focus, audience, and clarity appear to have been critical for the Court’s analysis and the preservation of Exxon Mobil’s privilege with its in-house counsel.

David Coale is a regular contributor to The Texas Lawbook on cases before the U.S. Court of Appeals for the Fifth Circuit. He is a partner at Lynn Tillotson Pinker & Cox and publishes the popular blog, 600Camp.

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