

CLIENT ADVISORY

March 25, 2020

Ethics Update | Work Product and Privilege

During this global pandemic, we are managing uncertain situations both personally and professionally. Many of us are making quick decisions and doing more with less resources. In these circumstances, attorneys must be even more careful to maintain privilege. With that in mind, we have highlighted two recent work product/privilege cases and their practical implications.

In re Signet Jewelers Ltd. Sec. Litig., 332 F.R.D. 131 (S.D.N.Y. 2019), *aff'd*, No. 16CIV6728CMSDA, 2019 WL 5558081 (S.D.N.Y. Oct. 23, 2019):

- The Public Employees' Retirement System of Mississippi alleges Defendant Signet Jewelers Limited ("Signet") and certain executives committed securities fraud.
- Signet formed a "strategic communications steering committee" consisting of public relations ("PR") firms, outside counsel, and members of Signet management to manage the negative media coverage. In response to the plaintiff's discovery requests, Signet withheld documents as privileged communications among counsel, the company, and counsel-retained PR firms.
- The court found that an email from an attorney conveying the thoughts of Signet's Chairman of the Board and then asking questions about social media strategy did not constitute legal advice even though it also contained a sentence regarding a legal issue and suggested Signet loop in outside counsel. While the Court acknowledged this sentence would typically be privileged, it noted that the sentence lost its privilege because it was shared in a communication with non-attorney outsiders (the PR firm) that was not made for the purpose of seeking legal advice.
- The Court even went so far as to accuse Signet of making a misrepresentation by insisting these communications related to Signet's legal disclosure obligations.
- Practical Tips: The Court gave the following specific advice: "If parties wish to retain the benefits of the attorney-client privilege, they should be equally careful to circumscribe communications that convey legal advice on disclosure obligation from communications with public relations firms that are consulted for the purpose of discharging those obligations in a manner most flattering to company interests."

U.S. v. Microsoft Corp., No. C15-102RSM, 2020 WL 263577 (W.D. Wash. Jan. 17, 2020):

- The IRS challenged Microsoft's cost sharing arrangements that transferred intellectual property between Microsoft and its foreign subsidiaries. The arrangements decreased Microsoft's federal income tax liability and enabled Microsoft to obtain more favorable foreign tax treatment.
- When the tax laws that were the basis for Microsoft's cost sharing arrangement changed, Microsoft's in-house lawyers consulted with KPMG tax advisors to create the cost sharing arrangements. Microsoft also hired Baker McKenzie to seek advice about these arrangements.
- Microsoft correctly predicted that the cost sharing arrangements would attract the IRS's attention, so it sought to work product privilege protection.

- In the privilege fight, the former head of Microsoft’s in-house tax department submitted a declaration to support a work-product claim. The in-house counsel said that Microsoft - not Baker McKenzie - retained KPMG because he recognized that the IRS “would challenge” the new tax strategy.
- KPMG prepared its materials at this lawyer’s request and “in anticipation of an administrative dispute or litigation with the IRS.”
- A KPMG tax partner, in a separate declaration confirmed that the Microsoft in-house lawyer hired KPMG to “help Microsoft prepare its defense to the IRS’s challenge.”
- The Court, however, determined that Microsoft anticipated litigation *because* of its aggressive tax strategy, which is different from defending against an existing legal dispute.
- The Court then explained that the crux of the case concerned the federally authorized tax practitioner (“FATP”) privilege, which applies to communications of tax advice between taxpayers and federally authorized tax practitioners if the communication would be considered privileged if it were between a taxpayer and an attorney.
- The FATP privilege has an exception, however, for written communications in connection with the promotion of participation in a tax shelter. A tax shelter is an arrangement made with a significant purpose to evade federal income tax. The Court concluded that a significant purpose, if not the sole purpose, of Microsoft’s transactions was to evade federal tax income, and all of KPMG documents promoted the transactions. As such, the FATP privilege did not apply because KPMG’s activities fell within the tax shelter exception.
- Practical Tips: Understand all the privileges at issue including their possible exceptions. When claiming the Work Product Privilege make sure that the legal strategy – not an alternative strategy – dominates. Using outside counsel to retain consultants may help make that point.

In addition to these ongoing work product and privilege updates, our firm has gathered state and local corona virus advisories being issued by the government. Here is a link to that webpage: <https://www.hwglaw.com/state-and-local-covid-19-orders/>.

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