HINSHAW
& CULBERTSON LLP

Health Law ALERT

Recent False Claims Act Case Illuminates Scary Issues for Health Care In-House Counsel

December 4, 2012

A federal magistrate's recent decision in *U.S., ex rel. Baklid-Kunz v. Halifax Hospital Medical Center*, a False Claims Act case pending in the U.S. District Court for the Middle District of Florida, Orlando Division, raises several troublesome issues. Although discovery disputes are oftentimes fact-specific, and a magistrate's decision does not carry great precedential weight, the court's analysis is instructive and should be a wake-up call to health care general counsel, compliance departments and outside counsel.

The magistrate addressed several discovery-related attorney-client privilege issues. At the outset, the court noted that when communications to and from in-house counsel are being analyzed, as opposed to communication between client and outside counsel, a different standard for determining privilege applies. The court pointed out that oftentimes in-house counsel wears multiple hats and therefore, unless the communication with in-house counsel was clearly and solely for the purpose of seeking or receiving legal advice, the privilege would not apply, no matter how the organization identified or treated the information.

The court's analysis was illuminating and should be instructive for health care providers and their legal and compliance departments. The court rejected the attorney-client privilege claim for several communications between in-house counsel and various compliance personnel because the communication either sought "compliance" evaluation or the email was not specifically addressed "to" or "from" legal counsel. The court found that compliance referral logs were not privileged because they were a mere recitation of fact and were not compiled for the purpose of receiving advice or advising on legal issues. Further, a number of the emails merely "kept an attorney in the loop" or cc'd an attorney on a compliance-related issue. The court found many of those correspondence and emails not specifically "to" or "from" legal counsel not to be privileged. If people who were not part of the legal department were cc'd for informational purposes, the court found that the privilege did not apply.

The court rejected privilege protection for several emails relating to audits and reviews conducted by the compliance and finance departments. Again, these emails were not specifically addressed "to" or "from" legal counsel and the court determined that they were not for the primary purpose of legal communication. The court also made clear that it was not going to review "strings of emails" as if they were one communication. The hospital had to justify each individual email in a string as being privileged.

This analysis is troublesome because characterizing something as compliance does not mean, as the court seems to imply, that it does not involve legal advice or counsel. Indeed, most compliance issues are related to matters that must be addressed by legal counsel. It appears that the lesson here is that loose language, an imprecise email or inclusion of people who are not attorneys on an email chain may destroy the privilege.

The government had intervened in this case and subpoenaed voluminous documents. Defendant medical center did not object to the documents produced to the government and did not provide a privilege log for several months. It attempted to provide a belated privilege log and the court found that there had been a waiver and that those documents were not protected.

White collar counsel often see documents produced to the government prior to their entry into a case. This initial stage is significant when an experienced white collar counsel can help the client understand what documents may be protected and how to properly review each document for privilege. One lesson to be learned with this case is that those who do not do that review at the initial stage will probably be deemed to have waived any such privilege. Those kinds of documents can be explosive in the false claims, fraud and abuse areas.

A final troublesome aspect of this case involved the court finding that certain documents were not protected because of the crime-fraud exception to the attorney-client privilege. The court found that the relator demonstrated a *prima facie* case that the hospital was engaged in, or about to be engaged in, fraudulent conduct when it sought counsel's advice. The case involved finance employees making payments to certain doctors in an alleged violation of the Stark law. Again, this scenario should be a wake-up call to health care providers. When dealing with Stark and anti-kickback evaluations and determinations, internal counsel should be cognizant of the advice he or she is giving and how this will appear to someone reviewing emails after the fact. In-house counsel should not be penny wise and dollar foolish by failing to enlist the aid of able white collar counsel at an early stage. This will avoid the possible appearance of impropriety as viewed by a skeptical prosecutor assuming that in-house counsel has participated in obstruction of justice. (See *U.S. v. Lauren Stevens,* 771 F. Supp. 2d 556 (D. Md. 2011) where a general counsel was indicted for her part in providing documents to the government in an U.S. Food and Drug Administration investigation.)

If you have any questions, please contact Daniel M. Purdom (630.505.4110), head of our National White Collar Crime Group, or your regular Hinshaw attorney.

Hinshaw & Culbertson LLP prepares this publication to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects if you contact an editor of this publication or the firm.

Copyright © 2012 Hinshaw & Culbertson LLP. All Rights Reserved. No articles may be reprinted without the written permission of Hinshaw & Culbertson LLP, except that permission is hereby granted to subscriber law firms or companies to photocopy solely for internal use by their attorneys and staff.

ATTORNEY ADVERTISING pursuant to New York RPC 7.1. The choice of a lawyer is an important decision and should not be based solely upon advertisements.