# In-House Counsel "Multi-Purpose" Communications Shielded from FTC Probe

By Lawrence S. Ebner

Does the attorney–client privilege protect communications between a company's employees and in-house counsel if they serve *both* legal and business purposes? The U.S. Court of Appeals for the D.C. Circuit recently answered this question affirmatively in *Federal Trade Commission v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 892 F.3d 1264 (D.C. Cir. 2018).

In a lucid opinion authored by Circuit Judge Brett M. Kavanaugh—subsequently nominated by President Trump to serve as an associate justice of the Supreme Court—the court of appeals emphasized that for the attorney–client privilege to apply, obtaining or providing legal advice must be *one* of the significant purposes of internal corporate communications. Circuit Judge Cornelia T.L. Pillard's concurring opinion highlights the demanding evidentiary standard needed to demonstrate such a significant purpose.

Both "communications in which an attorney gives legal advice," and "communications in which the client informs the attorney of facts that the attorney needs to understand the problem and provide legal advice," are covered by the attorney–client privilege. 892 F.3d at 1267. The Supreme Court long ago recognized "the importance of the attorney-client privilege in the business context." *Id.* at 1269 (citing *see Upjohn Co. v. United States*, 449 U.S. 383 (1981)). "In the corporate context, the attorney-client privilege applies to communications between corporate employees and a corporation's counsel made for the purpose of obtaining or providing legal advice. The privilege applies regardless of whether the attorney is in-house counsel or outside counsel." *Id.* at 1267.

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*Boehringer* involved documents subpoenaed in connection with a Federal Trade Commission (FTC) antitrust investigation of a "reverse payment" patent infringement settlement (*i.e.*, where the patent holder pays the alleged infringer). *See id.* at 1266. The patent holder, Boehringer, a drug manufacturer, claimed that the subpoenaed documents were created by employees at its in-house general counsel's request "to analyze and navigate the treacherous antitrust issues surrounding reverse payment settlements." *Id.* at 1267. After examining representative documents, the district court agreed. The court of appeals found no clear error with that finding of fact, and therefore affirmed. *Id.*

Judge Kavanaugh explained that the internal communications at issue had both "a legal purpose and a business purpose." *Id.* The legal purpose was "to help the company ensure compliance with the antitrust laws and negotiate a lawful settlement." *Id.* As for the business purpose, it was "to help the company negotiate a settlement on favorable financial terms." *Id.* If communications serve multiple purposes, courts apply a "primary purpose" test, which the D.C. Circuit previously has held requires a demonstration that "'obtaining or providing legal advice was *one* of the significant purposes of the attorney-client communication.'" *Id.* at 1267-68 (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 759 (D.C. Cir. 2014)). The court indicated that if "communications have overlapping purposes (one legal and one business, for example)," then "[a]ttempting 'to find *the* primary

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purpose' of a communication… 'can be an inherently impossible task.'" *Id.* at 1267. Thus, "what matters is whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communications." *Id.* at 1268. According to the court, this more liberal approach to the primary purpose test "helps to reduce uncertainty regarding the attorney-client privilege." *Id.*

Judge Pillard wrote a separate concurrence "to emphasize why the spare elegance of the court's opinion should not be mistaken for an expansion of the attorney-client privilege recognized in our prior precedents." *Id.* at 1269 (Pillard, J., concurring). More specifically, Judge Pillard indicated that "[w]here a privilege claimant has closely intertwined purposes—a legal purpose as well as a business purpose—it must still establish to a reasonable certainty that obtaining or providing legal advice was one of the significant purposes animating each communication withheld." *Id.* (internal citations and quotation marks omitted). Judge Pillard elaborated:

> Neither a general statement that the lawyer wore both lawyer and businessperson "hats" during the communications nor a blanket assertion of legal purpose is enough. Nor is it sufficient to offer as support privilege logs with bare, conclusory assertions that the listed communications were made for the purpose of securing legal advice.

*Id.* at 1270 (internal citations omitted).

As an additional caveat, Judge Pillard's concurrence, like Judge Kavanaugh's opinion, emphasizes that the attorney–client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Id.* at 1269 (quoting *Upjohn*, 449 U.S. at 395); *see also id.* at 1268. Thus, as Judge Kavanaugh explained, "[i]n this case… the attorney-client privilege did not and does not prevent the FTC's discovery of the underlying facts and data possessed by Boehringer and its employees. Nor did it prevent the FTC's discovery of pre-existing business documents." *Id.* at 1268.

In sum, multi-purpose communications to and from in-house counsel are protected under the attorney–client privilege—even from the scrutiny of a federal regulatory agency—if a company can meet its burden of presenting to a reviewing court sufficient facts to establish, for each communication at issue, that obtaining or providing legal advice was one significant purpose of the communication.