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being suffered by other workers," then it is hard to understand why the exception only applies to pre-existing non-competes and not to those entered into going forward. Certainly, these key workers are usually able to fend for themselves in an M&A transaction.

There are many other aspects of the final rule that could impact M&A transactions. For example, there is no exception for non-competes for highly trained or technical workers such as high-level software engineers that buyers often wish to tie up in connection with an acquisition. So although the final rule provides some welcome relief from the total non-compete ban, it remains to be seen how buyers adapt to the new landscape in negotiating M&A transactions that typically involve interlocking "bundled" consideration, including non-competes and other restrictive covenants.

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"What Happens in Privilege Stays in Privilege," a Refresher for Corporate Counsel on the Attorney-Client and Work-Product Doctrines in Florida.

By Jonathan K. Osborne, Gunster FTL Managing Shareholder

You may remember the scene from the "Lincoln Lawyer," where Mickey Haller, played by Matthew McConaughey, returns to his home office (brandishing a baseball bat) where he finds his client, Louis Roulet, played by Ryan Philippe, sitting at his desk holding a glass of Glenfiddich. Roulet, leaning back in the chair, casually confesses to a murder for which another of Haller's clients has already been wrongfully convicted, and then menacingly reminds Haller that everything they discuss is "confidential" and protected by "attorney-client privilege." And although Roulet's pronouncement of the law may be true in a criminal case where the attorney and client only have a relationship for purposes of handling a legal matter, the attorney-client privilege and work-product protection are more complicated for in-house lawyers who wear legal and business hats.

This article highlights lessons from a recent federal court decision criticizing what the court called a "ploy" by a major company to use a law firm to shield advice concerning business issues from civil discovery; provides a brief refresher on the differences between attorney-client and work product protections; and ends with simple questions that will guide you in evaluating whether internal company communications are indeed privileged under Florida law.

I. Don't "Ploy" Privilege Games.

In a case currently pending in federal court in the Eastern District of Pennsylvania, the court reviewed in-camera documents withheld from production by the defendant CVS Health Corporation based on claims of attorney-client privilege and work-product protection.[1] And although the court's opinion issued on August 15, 2024, is worth a full read—here are the highlights: (1) CVS used an outside law firm to hire a consultant; (2) according to the court, the consultant's ultimate purpose was to provide business advice to the company; (3) the law firm was used an "intermediary" on many, but not all communications between the company and the consultant; and (4) the court concluded that the law firm's role was a "ploy" to shield correspondence between CVS and the consultant from discovery. In rejecting CVS' privilege claims, the court found there were numerous communications between CVS and the consultant to which counsel was not a party and that, even where counsel was copied or used to transmit information, the communications were focused on business, not legal issues. The court further concluded—in reasoning that may be helpful to your business—that just because CVS operates in a highly regulated industry does not "transform every decision about [its business] into a legal question."[2] And relatedly, as it related to CVS' work product claim, the court disagreed with the company that its work with the consultant was done in anticipation of litigation where there was no "reference or allusion" in the communications to "specific regulatory inquiries or pending or possible litigation."[3] Thus, although there are many instances where your company can—and should—retain outside counsel to assist with legal matters that will also require consultant input, recognize that if disputed, your claims of privilege and work product as to those communications are subject to judicial review. Accordingly, your company should adopt and enforce

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procedures for handling sensitive, privileged communications involving nonlawyers, including consultants; and, once in litigation or a government investigation, designate carefully to avoid an adverse ruling or inadvertent waiver.

II. Attorney-Client Privilege and Work Product are Not the Same.

In the corporate context, this question arises often—and the rules may differ based on where your company does business. In Florida, the attorney-client privilege protects confidential communications to and from the lawyer made in the "rendition of legal services to the client."[4] The client, not the lawyer, controls the privilege and courts will consider confidentiality preserved as long as the communications are not shared to anyone besides those to whom disclosure is made in furtherance of the legal services, or others necessary for the transmission of the communication.[5] On a related front, the work product doctrine generally protects from discovery documents or tangible things prepared by or for an attorney in anticipation of litigation or government investigation. Work product can include documents prepared by the client, counsel, and even third parties; and such documents need not contain legal advice to warrant protection. Accordingly, some documents that are work product may not be attorney-client privileged and vice versa. And, particularly in-house, many of your communications may not be protected at all.

III. It is Not Safe to Assume Your Communications with Your Clients are Protected.

During the last two ACC conferences, our panel has discussed a 2022 4th DCA case where various questions arose about waivers of attorney-client privilege and, ultimately, who in a company controls the privilege.[6] There, the court explains that individual stockholders, directors and officers do not control the privilege and have no authority to waive or assert privilege over the wishes of the company's board, whereas, in closely held businesses, courts analyze the company's governing documents to evaluate where authority sits. So, when evaluating whether your corporate client will assert or waive a privilege, your first question should be "who" makes that decision? Next, in evaluating whether the attorney-client privilege applies to particular corporate communications, including emails and text messages with you, ask the following questions:

1. Would the communication have been made but-for the contemplation of legal services?
2. If not a control group person, is the employee making the communication doing so with direction from their superior?
3. Is the communication made as part of the company's effort to secure legal advice?
4. Is the content of the communication related to the legal services being rendered, and the subject matter within the scope of the employee's work duties?
5. Was dissemination of the communication limited to those with "a need to know?"

If the answer to each of these questions is "yes," plaintiffs will have an uphill battle to climb in compelling production.

On other hand, if the answer to some of these questions, particularly 3 and 4 is "no," "sort of," "yikes," or "maybe," the uphill battle is more likely yours. Call the "Lincoln Lawyer."

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[1] *United States of America, et al., ex rel. Stan Ellis v. CVS Health Corporation, et al.*, Case No. 16-1582.
[2] *Id.* at 4.
[3] *Id.* at 6.
[4] Fla. Stat. Sec. 90.502.
[5] There are various other exceptions to the attorney-client privilege defined by statute and in case law.
[6] Akerman LLP v. Cohen, 352 So.3d 331 (Fla. 4th DCA 2022)

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by our sponsors on September 26 and October 16, culminating in our annual Mini-MBA on October 25. We then officially shift to holiday mode, which includes holiday parties in Miami-Dade and Palm Beach in December. I hope to see you there!

In parallel, the national ACC will host its annual meeting in Nashville, Tennessee from October 6 – 9. Many of our members attend each year, and the chapter hosts a dinner for those who do. Please let us know if you plan to participate and we will include you.

Best wishes to some of you for the start of football, and to all of you for back to school and a very happy fall season.