NOTICE

201

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil No. 19-3333-BLS1

COMMONWEALTH OF MASSACHUSETTS
Plaintiff

vs.

EXXON MOBIL CORPORATION
Defendant

MEMORANDUM AND ORDER ON COMMONWEALTH'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY MCKINSEY & COMPANY

The Commonwealth has sued Exxon Mobil Corporation ("Exxon") under G.L. c. 93A, § 4, for alleged misrepresentations and omissions in many of its discussions about the risks of climate change and in its promotion of the environmental benefits of using certain of its products. The case is before me on the Commonwealth's motion to compel third party McKinsey & Company, Inc. United States ("McKinsey") to produce two documents relating to its business consulting work for Exxon. Exxon contends that the documents are protected from disclosure under the derivative attorney-client privilege doctrine. Because Exxon has not demonstrated that McKinsey's work, or the documents at issue, were necessary to the exchange of attorney-client communications, the attorney-client privilege does not apply.

BACKGROUND

Under a series of engagements over a number of years, McKinsey performed business consulting services for Exxon related to climate change, including engagements in December 2017 to assess Exxon's corporate risks ("the 2017 Engagement") and in February 2019 to assist Exxon in developing a corporate framework for sustainability (the 2019 Engagement").

In April 2023, as part of the parties' considerable discovery efforts in the case, the Commonwealth sought documents from McKinsey about its consulting work for Exxon. In response to the Commonwealth's subpoena, over the last two years McKinsey has collected documents, submitted them to Exxon for it to conduct a privilege review, and has reportedly produced over 15,000 responsive documents.

As is relevant here, Exxon has asserted the attorney-client privilege as a basis to withhold two documents, which are listed as Document Nos. 9 and 14 on Exxon's privilege log dated August 16, 2024.[1] Document No. 9 is a draft presentation by McKinsey that contains comments by one of Exxon's in-house attorneys. It was prepared in connection with the 2019 Engagement. Document No. 14 contains McKinsey's notes from its interviews with in-house Exxon attorneys about the regulatory environment in which Exxon operates and the risks Exxon faces. It was prepared in connection with the 2017 Engagement.

DISCUSSION

The attorney-client privilege provides:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Comm'r of Revenue v. Comcast Corp., 453 Mass. 293, 303 (2009) ("Comcast"), quoting Wigmore, J., Evidence § 2292 (McNaughton rev. ed. 1961). "Disclosing attorney-client communications to a third party, including an accountant, generally undermines the privilege."

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[1] McKinsey takes no position on the question of privilege, but defers to Exxon. Exxon originally asserted the attorney-client privilege to withhold 16 documents from the Commonwealth. During briefing of the instant motion, Exxon withdrew that assertion as to 14 of them.

Comcast, 453 Mass. at 306. "[T]he party asserting the privilege," – here, Exxon – "bears the burden of establishing that the attorney-client privilege applies" and "has not been waived." Id. at 304 (internal quotations and citation omitted).

In withholding the two documents at issue, Exxon invokes the derivative attorney-client privilege doctrine, also known as the Kovel doctrine. See United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) (Friendly, J.). The Kovel doctrine holds that the attorney-client privilege attaches to communications from, with, or in the presence of, a third party only if the third party's "presence is 'necessary' for the 'effective consultation' between client and attorney." Comcast, 453 Mass. at 307, quoting Kovel, 296 F.2d at 922. As the Supreme Judicial Court has applied the doctrine, "[t]he 'necessity' element means more than 'just useful and convenient.' . . . 'The involvement of the third party must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications.'" Comcast, 453 Mass. at 307, quoting Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002).

Massachusetts has narrowly construed the Kovel doctrine to "appl[y] only when the [third party] accountant's role is to clarify or facilitate communications between attorney and client." Comcast, 453 Mass. at 308. When "neither the company nor its attorneys needed [the third party] to facilitate communications between them," then "[t]hey could communicate competently on their own," and the derivative attorney-client privilege doctrine does not apply. Comcast, 453 Mass. at 310 (internal quotations and citation omitted).

The two documents at issue are not protected under the attorney-client privilege because McKinsey's business consulting work was not necessary to clarify or facilitate communications between Exxon and its counsel. The two documents were created during a business consulting arrangement in three parts. First, Exxon's in-house counsel provided certain legal analysis to

McKinsey. See Affidavit of Richard C. Vint ("Vint Aff.") ¶ 5 (Docket #187); Affidavit of Carol Lloyd ("Lloyd Aff.") ¶ 8 (Docket #185); Affidavit of Robin A. Schober ("Schober Aff.") ¶¶ 3, 4 (Docket #186). McKinsey then used that legal analysis to inform its own business advice that it provided to Exxon. See Schober Aff ¶ 5; Vint Aff. ¶ 7. And, finally, Exxon's attorneys took McKinsey's advice into consideration when providing legal advice to Exxon. Id. ¶ 8. The exchange of information between Exxon's counsel and McKinsey reflects two purposes: (1) to permit McKinsey to better provide business advice to Exxon, and (2) to permit Exxon's in-house counsel to better provide legal advice to Exxon.

The first purpose – McKinsey providing business advice to Exxon – had nothing to do with clarifying or facilitating attorney-client communications and was not necessary for such communications. See Comcast, 453 Mass. at 307-308. McKinsey certainly was not necessary to, and did not, interpret any attorney-client communications. See, e.g., Ace American Ins. Co. v. Riley Bros., Inc., 2012 WL 3124620 at * 3 (Mass. Super. July 28, 2012) (Leibensperger, J.) ("The privilege applies 'only to communications in which the third party plays an interpretive role.'"), quoting Banco do Brasil, S.A. v. 275 Washington Street Corp., 2012 WL 1247756 at * 8 (D. Mass. Apr. 12, 2012) (Dein, M.J.).

The archetypal example of an interpretive third party is a translator for conversation between an attorney and a client who do not speak the same language. See Kovel, 296 F.2d at 921-922. A translator's purpose is interpretive, not advisory; a translator would not conduct data analysis and make "proposals to [Exxon] . . . about potential changes to [Exxon's] risk management practices," as Exxon's in-house counsel describes McKinsey's role. Vint Aff. ¶ 7. The derivative privilege does not extend to third parties drawing upon their independent expertise to provide advisory services, as McKinsey did here. See Comcast, 453 Mass. at 308

("communications from [third parties] that constitute independent information and expertise for the attorney to use in representing his or her client are not protected by attorney-client privilege") (internal quotations omitted). See also, e.g., In re American Medical Collection Agency, Inc., Customer Data Security Breach Litig., 2023 WL 8595741 at ** 8-9 (D.N.J. Oct. 16, 2023) (Hammer, M.J.) (privilege did not apply to third party that performed "full-scale forensic analysis" and "assisted [client] in understanding how the breach occurred and its scope, and endeavored to develop improvements to [client]'s systems"), aff'd, 2024 WL 5344456 (D.N.J. July 17, 2024) (Arleo, J.).

The second purpose – to allow Exxon's counsel to provide Exxon with better legal advice – relates in some way to communications between Exxon and its counsel. But the derivative privilege does not apply where "counsel sought the advice of [the third party] to formulate his own legal views." Comcast, 453 Mass. at 309-10. That is true even where counsel "assert[s] . . . that it was impossible for [counsel] to advise [the company] without these further contacts with [the third party]," and "even though . . . counsel's communications with the [third party] significantly assisted the attorney in giving his client legal advice." Id. at 309, quoting United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999) (internal quotations omitted). Essentially, Exxon's in-house counsel disclosed its own legal analysis to McKinsey to seek their help in refining it. To apply the attorney-client privilege to such a case would be to hold that disclosure of legal advice does not destroy the attorney-client privilege so long as the party to which the legal advice is disclosed provides some feedback on it.

To be sure, McKinsey's services were by all accounts useful to Exxon. See Lloyd Aff. ¶ 5; Schober Aff. ¶ 4; Vint Aff. ¶ 7. But necessity, not utility, is the relevant standard in Massachusetts. In Comcast, the Supreme Judicial Court recognized that "courts have rejected

claims that the derivative privilege applies where an attorney's ability to represent a client is improved, even substantially, by the assistance" of the third party. 453 Mass. at 307-308. It is insufficient for Exxon to point to McKinsey "facilitat[ing] the provision of legal advice" or to assert that McKinsey was "highly useful." Memorandum of Exxon Mobil Corporation in Opposition to the Commonwealth's Motion to Compel the Production of Documents by McKinsey & Company ("Opp.") at 8 (Docket #183). Instead, Exxon must show that McKinsey's refinements to Exxon's in-house attorneys' legal analysis were necessary for communication between Exxon and its counsel. Exxon neither correctly identifies that standard, nor does it make an adequate factual showing to meet that standard.

Exxon argues that "[c]ourts routinely apply the Kovel doctrine to hold that the attorney-client privilege applies to documents reflecting analysis conducted by third-party consultants that facilitated the provision of legal advice." Id. In advancing this argument, Exxon cites three cases involving third parties "interpreting large quantities of data," Sampedro v. Silver Point Capital, L.P., 818 F. App'x 14, 19 (2d Cir. 2020) (internal quotations omitted), "provid[ing] data analysis informing . . . legal advice," Oliver v. American Express Co., 2022 WL 18998430 at * 6 (E.D.N.Y. Nov. 14, 2022), and "conduct[ing] complex quantitative analyses and extensive information-gathering." Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412, 420 (N.D. Ill. 2006). These cases were in courts, unlike Massachusetts, that "appl[y] the Kovel doctrine with less rigidity." Comcast, 453 Mass. at 308 n.20. See also M&C Holdings Delaware P'ship v. Great American Ins. Co., 2021 WL 4453636 at * 7 (S.D. Ohio Sept. 29, 2021) (collecting cases applying broader formulations of the Kovel doctrine). Moreover, in none of those cases did the "data" analyzed by the third party include the attorney's own legal advice as it does here.

Exxon cites Kovel for the proposition that "[w]hat is vital to the privilege is that the communication be *made in confidence* for the purpose of obtaining legal advice from the lawyer." Opp. at 12, quoting Kovel 296 F.2d at 922 (emphasis added by Exxon). But confidentiality is not sufficient to establish privilege; it is merely one of eight necessary factors. See, supra, at 2. Adding emphasis to one of the eight factors does not render it dispositive. For the foregoing reasons, I overrule Exxon's invocation of the derivative attorney-client privilege as a basis to withhold some or all of Document Nos. 9 and 14.[2]

ORDER

The Motion of the Commonwealth to Compel Production of Documents by McKinsey & Company (Docket #181) is **ALLOWED**. Within ten (10) days of the date of this Order, McKinsey shall produce the documents listed as Document Nos. 9 and 14 on Exxon's privilege log dated August 16, 2024.

Dated: April 9, 2025

Peter B. Krupp
Justice of the Superior Court

[2] If the two documents must be produced, Exxon asserts that McKinsey would be entitled to redact non-responsive information from the documents. I am ill-equipped to address this question because I have not seen the documents or McKinsey's proposed redactions, if any. It bears noting that the parties have agreed, and are subject, to a broad protective order that ensures that documents produced in discovery will only be used in this litigation. As a result, the parties should err on the side of disclosure. If a dispute about the propriety of redactions of unresponsive information arises and the court is asked by motion to resolve the issue, the court will almost surely have to review the unredacted documents *in camera*. In connection with such a motion, I would be inclined to award fees and costs to the prevailing party.