Court Condemns Law Firm's Privilege Claim as "Subterfuge": Part II

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In his April 15, 2015 “Privilege Points” release, Tom Spahn discusses the privilege as applied to outside compliance consultants:

Last week’s Privilege Point described an outside regulatory compliance consultant's work for a company which worried about its non-compliant billing practices and about possible litigation, that consultant's later agreement to work under outside lawyers' "direction," and the admitted lack of any such day-to-day direction. United States v. Neuroscience, Inc., No. 14-mc-003-slc, 2015 U.S. Dist. LEXIS 20572, at *7 (W.D. Wis. Feb. 10, 2015). The court first rejected Neuroscience's work product claim. The court held that the company hired the compliance auditor CodeMap for business purposes, and that lawyers' later involvement "was a tactic designed solely to cloak the audit documents" with some protection. Id. at *17. The court concluded that the outside lawyers "in fact provided no direction at all," and found no evidence that "CodeMap changed the focus of its audit or conducted it any differently after it was agreed that the Services Proposal should be routed through counsel." Id. at *18. Although outside lawyers used the audit's result, the court explained that "the focus is on the circumstances of the communication at the time it was made." Id. The court also rejected Neuroscience's privilege claim. The court noted that the company hired CodeMap "without any direction from counsel," and that CodeMap "conducted and completed [its] coding review and transmitted the results" to Neuroscience before any lawyer's involvement. Id. at *24. And after the lawyers' "post-hoc retention of CodeMap," there was no evidence that "the focus of CodeMap's audits changed." Id. at *25. The court therefore concluded that "there is no question that [the outside law firm's] retention of CodeMap was a subterfuge specifically designed to cloak the audits with privilege." Id. at *26.

This and other similar cases highlight the wisdom of involving lawyers at the first hint of a problem, and assuring their intense hands-on involvement in any consultants' work the company intends to withhold as privileged or as work product.