Court Offers Good Privilege News for Draft Form 10-K Filings

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In his April 29, 2015 “Privilege Points” release, Tom Spahn discusses the privilege for draft securities filings:

Courts disagree about the attorney-client privilege protection's applicability to draft documents whose final version will be publicly disclosed. Public companies naturally worry about this issue's impact on their draft securities filings.

In *Smith v. Unilife Corp.*, Civ. A. No. 13-5101, 2015 U.S. Dist. LEXIS 18755 (E.D. Pa. Feb. 13, 2015), a whistleblower plaintiff alleged that Unilife's 2011 Form 10-K report contained false and misleading statements. He sought discovery of Unilife's draft 10-Ks and company lawyers' communications to and from nonlawyer consultants "concerning the [drafts'] contents, style and 'wordsmithing.'" *Id.* at *5. The court first found that the consultants were the "functional equivalent" of employees — refreshingly acknowledging that "[a] trial judge is not in a good position to second-guess a corporate decision to rely on an independent consultant or an employee to accomplish a specific task." *Id.* at *7-8. The court then held that the draft 10-Ks deserved privilege protection — citing an earlier decision protecting 10-Ks that contained "legal advice and communications between a law firm and its client . . . even though the final version of the Form 10-K was publicly filed, because the drafts contained information not included in the final version." *Id.* at *9-10 (citing *In re U.S. Healthcare, Inc. Sec. Litig.*, Master File No. 88-0559, 1989 U.S. Dist. LEXIS 1043, at *12 (E.D. Pa. Feb. 8, 1989)).

Although many decisions seem hostile to corporations' privilege claims, some courts' analyses provide good news.