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

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In his April 8, 2015 “Privilege Points” release, Tom Spahn discusses rejection of privilege arguments for business-related investigations:

Some companies begin internal investigations or audits for business reasons, but later try to cloak related communications and documents with work product privilege protection. Although some companies successfully argue that a business-related investigation "morphed" into a privilege-protected investigation, most attempts fail.

In United States v. Neuroscience, Inc., No. 14-mc-003-slc, 2015 U.S. Dist. LEXIS 20572, at *5 (W.D. Wis. Feb. 10, 2015), Neuroscience retained a regulatory compliance company (CodeMap) to conduct a "full, flat-fee compliance audit" of its billing practices after its billing manager suddenly resigned. About a month later, CodeMap reported that Neuroscience had overbilled Medicare and some insurance companies. In the meantime, Neuroscience’s outside Minneapolis law firm learned that the ex-billing manager had accused the company of fraudulent billing practices. About ten days later, Neuroscience and its law firm agreed that the law firm “should supervise the remainder of CodeMap's audit activities.” Id. at *7. CodeMap sent a Services Proposal indicating that the law firm would now direct CodeMap's "baseline" compliance audit, and stating that related communications would deserve privilege and work product protection. Id. However, CodeMap later admitted that (1) "counsel really did not provide much internal 'direction' to CodeMap at all" (id. at *8); (2) lawyers were not present when CodeMap auditors met with Neuroscience employees; and (3) lawyers generally did not receive copies of email message traffic between CodeMap and company employees during the audit. CodeMap's chief auditor later acknowledged that "'[b]y the time Counsel was involved, CodeMap already knew the work to be done and how to do it, so the legal oversight, as [he] understood it, was to maintain privilege.'" Id. at *9-10 (internal citation omitted).

Next week's Privilege Point will describe the court's work product and attorney-client privilege analysis.