A Southern District of New York Decision Adopts Narrow Views of Privilege Protection for Independent Contractors and Lawyer-Retained Consultants: Part I

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In his February 11, 2015 “Privilege Points” release, Tom Spahn discusses a narrow view from the Southern District of New York for Independent Contractors and Lawyer-Retained Consultants:

Not all recent Southern District of New York decisions have favored privilege protection in the corporate setting. In Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH, No. 14-cv-585, 2014 U.S. Dist. LEXIS 175552 (S.D.N.Y. Dec. 19, 2014), the court dealt with two issues that frequently arise in the corporate context: (1) the "functional equivalent" doctrine, and (2) privilege protection for communications with outside consultants on whom lawyers rely in giving legal advice.

The "functional equivalent" doctrine treats as corporate employees for privilege purposes non-employees who are the "functional equivalent" of full-time employees. In this era of outsourcing, one can easily imagine the disruption corporations would face if the privilege did not protect communications with, or in the presence of, temporary secretaries or long-time outsourced contractors who report every day to the company just as employees do. Since first articulated by the Eighth Circuit in In re Bieter, 16 F.3d 929, 933-34 (8th Cir. 1994), the "functional equivalent" doctrine has spread throughout the country, and only a few courts have questioned it. However, the Church & Dwight decision noted that the Second Circuit has not adopted the doctrine, and "[b]ecause the Second Circuit has recognized very limited exceptions to privilege waiver, the Court has doubts as to whether it would endorse such an approach." 2014 U.S. Dist. LEXIS 175552, at *6.

Although the court justifiably concluded that the outside marketing consultant at issue would not have satisfied the generally accepted "functional equivalent" doctrine standard, its negative comments should worry those seeking privilege protection in the corporate setting. Next week's Privilege Point will address the standard for protecting communications with lawyer-retained consultants.