Narrow Views of Privilege Protection for Independent Contractors and Lawyer-Retained Consultants: Part II

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In his February 18, 2015 “Privilege Points” release, Tom Spahn discusses privilege protection for independent contractors and lawyer-retained consultants:

Last week's Privilege Point described the Southern District of New York's prediction that the Second Circuit might reject the widely-accepted "functional equivalent" doctrine. *Church & Dwight Co. Inc. 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 also assessed whether the defendant waived its privilege protection by sharing protected communications with an outside marketing consultant — ultimately rejecting defendant's argument that "in light of the complex regulatory scheme to which [its product] was subject, it was essential" to share such privileged communications with the consultant. *Id.* at *2.

The court noted that agents or consultants considered inside privilege protection were generally translators or similar consultants "necessary to improve comprehension of the communication between attorney and client." *Id.* at *4. That standard arose in the context of client agents, but many courts inexplicably apply the same approach to lawyer agents. Here, the court found a waiver, because the defendant "makes no showing as to how the outside marketing firm improved counsel's comprehension of [the client's] communications to counsel, or vice versa." *Id.* at *4-5. Later in the opinion, the court similarly held that lawyers sharing privileged communications with their agents or consultants must show that the agent or consultant "enabled counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice." *Id.* at *6.

Other courts apply the same narrow standard. Three weeks before the *Church & Dwight* opinion, another court explained that an accountant would have been inside privilege protection as a lawyer's agent only if the accountant was "included in the conversation at the behest of Plaintiff's attorney in order to help decipher the relationship." *Yoder v. Long (In re Long)*, Case No. 09-23473, Adv. No. 09-6172, 2014 Bankr. LEXIS 4879, at *50 (Bankr. D. Kan. Dec. 1, 2014). Applying the same translator/interpreter standard to client agents and lawyer agents can make it very difficult for lawyers to protect their communications with consultants upon whom they legitimately rely when giving their clients legal advice.