Circuit Courts Explain Privilege Issue Appellate Review Standards

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In his February 25, 2015 “Privilege Points” release, Tom Spahn discusses appellate review standards for privilege issues:

Attorney-client privilege issues frequently involve a complicated mixture of fact and law. Three circuit court decisions issued in a three-week period explain the basic approach that most courts take.

In United States v. Bey, 772 F.3d 1099, 1101 (7th Cir. 2014), the Seventh Circuit held that an appellate court "reviews de novo the scope of the attorney-client privilege." Nearly three weeks later, the Ninth Circuit applied essentially the same standard — explaining that privilege protection presents "a mixed question of law and fact which this court reviews independently and without deference to the district court." United States v. Quiel, Nos. 13-10503 & -10504, 2014 U.S. App. LEXIS 24049, at *3 (9th Cir. Dec. 19, 2014) (unpublished opinion) (internal quotations and citation omitted). Just three days after that, the Tenth Circuit focused on more subtle peripheral issues, holding that (1) "[w]e review district court decisions regarding waiver of attorney-client privilege and work-product protection for abuse of discretion"; and (2) "we review the district court's underlying factual findings for clear error and its rulings on purely legal questions de novo." Seneca Ins. Co. v. W. Claims, Inc., Nos. 13-6284 & 14-6002, 2014 U.S. App. LEXIS 24172, at *8 (10th Cir. Dec. 22, 2014).

At least at the federal level, appellate courts issue very few privilege rulings in the civil context (the first two decisions described above involved criminal cases). Still, lawyers should familiarize themselves with the applicable appellate review standards.