Southern District of New York Reiterates its Narrow View of Privilege Protection for Consultants Assisting Lawyers

Thomas E. Spahn (tspahn@mcguirewoods.com) is a partner with McGuireWoods LLP in Tysons Corner, Virginia. Tom practices as a commercial litigator and regularly advises clients on ethics issues including conflict of interest, confidentiality, and dealing with corporate wrongdoing. He is a frequent lecturer on legal ethics and privilege issues, and among numerous other publications is the author of The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner’s Guide published by the Virginia Law Foundation. Tom has spoken at more than 1,000 CLE programs throughout the United States and in several foreign countries, and has served on the ABA Standing Committee on Ethics & Professional Responsibility.

In his May 13, 2015 “Privilege Points” release, Tom Spahn discusses the privilege for consultants assisting lawyers:

Client agents/consultants normally fall outside privilege protection, unless they help facilitate communications between the client and lawyer. Recognizing this, some lawyers seek privilege protection by hiring the consultants themselves, arguing that the consultants are helping them provide legal advice.

In Scott v. Chipotle Mexican Grill, Inc., No. 12-CV-08333 (ALC) (SN), 2015 U.S. Dist. LEXIS 40176 (S.D.N.Y. Mar. 27, 2015), Judge Netburn continued a long line of Southern District of New York decisions taking a very narrow view of the privilege in that context. Chipotle received advice from its outside law firm about wage and hour issues. The law firm then retained a human resources consultant, who prepared a report for the law firm about Chipotle employees' classifications. The court first rejected Chipotle's argument that the report deserved protection because it went to its law firm — concluding that "this formalism is insufficient to establish that it is a privileged communication." Id. at *23. The court then explained that Chipotle could establish privilege protection only if it proved that its outside law firm "engaged [the consultant] as its agent for a specific type of information that it could not otherwise obtain." Id. at *28. The court concluded that "[i]t strains credulity to imagine that an attorney evaluating wage and hours laws would not be able to speak with employees or interpret those laws on his own." Id. at *29. The court ultimately rejected Chipotle's privilege claim — noting that the consultant's report did not "provide any specialized knowledge that [Chipotle’s outside lawyers] could not have acquired or understood on their own or directly through [their] clients." Id.

Lawyers should not assume that they can assure privilege protection merely by retaining a consultant to gather facts. Most courts require that consultants directly assist lawyers in giving legal advice — by gathering facts or providing other services the lawyers or the clients need, but could not undertake themselves.