Accountants Can be Either Inside or Outside Privilege Protection

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 20, 2015 “Privilege Points” release, Tom Spahn discusses the privilege where information is shared with accountants:

Lawyers and accountants have always had an uneasy relationship, and that tension extends to the attorney-client privilege context. Accountants can either be inside or outside privilege protection.

In Perino v. Edible Arrangements International, Inc., the court held that a lawyer had properly "engaged an outside forensic accounting firm to assist with the investigation" of plaintiff’s activities — meaning that related communications deserved privilege protection. Civ. No. 3:13CV1411 (JBA), 2015 U.S. Dist. LEXIS 39131, at *23 (D. Conn. Mar. 27, 2015). However, ten days earlier, another court addressed the implications of a trade association disclosing privileged communications to its accountant. Kan. Tag-Along Action Only Associated Wholesale Grocers, Inc. v. United Potato Growers of Am., Inc. (In re Fresh & Process Potatoes Antitrust Litig.), Case Nos. 4:10-md-2186-BLW-CWD & 4:13:cv-00251-BLW, 2015 U.S. Dist. LEXIS 33577 (D. Idaho Mar. 17, 2015). That court bluntly stated that the privileged “information was freely shared with [the association’s] accountants, and therefore the privilege was waived because it was shared with third parties.” Id. at *33.

Accountants normally fall outside privilege protection, unless they legitimately assist lawyers in providing legal advice. On the other hand, disclosing work product to an accountant normally does not waive that more robust protection. Ironically, even an accountant who is outside privilege protection normally can create protected work product — as a client "representative."