Courts Analyze Effect of Third Parties' Participation in Privileged Communications: Part I

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In his May 16, 2012 “Privilege Points” release, Tom provided Part I in a series on the effect of third party participation in privileged communications:

Courts frequently assess the attorney-client privilege implications of third parties participating in otherwise privileged communications. The participation of third parties acting on the client's behalf normally destroys privilege protection – unless the third party is necessary for the transmission of communications between the client and lawyer.

Some third parties meet this standard. A Maryland federal court recently held that the privilege protected communications between clients and their lawyers, despite the presence of the clients' translators – because the clients were not native English speakers. *Khoshmukhamedov v. Potomac Elec. Power Co.,* Civ. A. No. AW-11-449, 2012 U.S. Dist. LEXIS 53726 (D. Md. Apr. 17, 2012). Some third parties quickly fail the standard. On the same day, the Northern District of Alabama found that a union organizer's presence during otherwise privileged communications destroyed the privilege. Although one of the clients said that the union organizer acted as a "bridge" between the clients and their lawyer, the court concluded that "there is no evidence that the potential Plaintiffs needed such a messenger or intermediary nor that [the union organizer] was of such stature that he could act in such a capacity." *Giraldo v. Drummond Co.*, Case No. 2:09-CV-1041-RDP, 2012 U.S. Dist. LEXIS 53759, at *9 (N.D. Ala. Apr. 17, 2012). Some courts require more facts. In *Witte v. Witte*, No. 4D11-3520, 2012 Fla. App. LEXIS 5178 (Fla. Dist Ct. App. Apr. 4, 2012), a wife spoke with her divorce lawyer in the presence of her daughter and son-in-law. The court remanded for a factual determination of whether those third parties' presence "was reasonably necessary for the transmission of the communications." Id. at *7. The court noted that the wife was 74 years old and in poor health.

Most clients and many lawyers do not appreciate the difficulty of claiming privilege for communications in the presence of third parties who are acting on the client's behalf.