Can Denying that a Privileged Communication Took Place Ever Waive the Attorney-Client Privilege?

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 June 20, 2012 “Privilege Points” release, Tom addresses the fairness analysis that determines whether a client has waived the attorney-client privilege:

In most situations, a client's denial that an attorney-client communication occurred does not waive the client's privilege. Such a denial clearly does not disclose any privileged communications. And if such a denial waived the privilege, it is easy to envision a clever adversary creating mischief by asking deposition questions that would elicit denials.

However, a different rule applies if the client seeks some advantage by denying that a privileged communication occurred. In Adam Friedman Assocs. LLC v. MediaG3, Inc., No. 10 Civ. 5350 (JPO), 2012 U.S. Dist. LEXIS 62591 (S.D.N.Y. May 1, 2012), Judge Oetken dealt with a client's effort to vacate the court's earlier entry of summary judgment against it. The client argued that its previous lawyer had never advised it to oppose the summary judgment motion. The court found that the client had "directly put at issue the question [of] whether it received notice from its former attorney," so it would be "unfair" for the client to withhold the substance of otherwise privileged communications in which the former lawyer might have advised the client of its obligation to oppose the summary judgment motion. Id. at *11, *12.

Waiver issues often focus on fairness, and in situations such as this even the denial of a privileged communication can waive the privilege.