Federal and State Courts Analyze the Privilege Impact of Third Parties: Client Agents

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In his July 17, 2013 “Privilege Points” release, Tom Spahn discusses the narrow protection of privileged material shared with agents of the clients.

One of the greatest threats to the attorney-client privilege's creation and preservation involves the role of agents assisting clients or their lawyers. If such agents fall outside privilege protection, the client's or lawyer's communications with the agent will not be protected; the agent's presence during otherwise privileged communications will abort the privilege; and disclosure of preexisting privileged communications to the agent will waive the privilege.

Courts frequently assess the privilege implications of a client agent's involvement in otherwise privileged communications. Some courts take a broad view of client agents who are considered inside privilege protection. In Adler v. Greenfield, 2013 IL App (1st) 121066, an Illinois state court held that JP Morgan was within privilege protection when it acted as an elderly woman's agent. The court explained that "JP Morgan acted as Muriel's agent in communicating with [her lawyer] about Muriel's estate plan." Id. ¶ 54. Interestingly, the court also held that "under agency principles, the death of the principle terminates the authority of the agent" – meaning that the privilege protection evaporated upon the client's death. Id. Most courts take a much more restrictive view of client agents who are within privilege protection. In Jackson v. Deen, Case No. CV412-139, 2013 U.S. Dist. LEXIS 65814, at *42 (S.D. Ga. May 8, 2013), the court held that Paula Deen had waived her privilege protection by "includ[ing] in the communications loop" three of her assistants. Deen argued that these various business consultants and public relations advisors "are indistinguishable from my employees." Id. at *43 (internal citation omitted). The court rejected Deen's argument, holding that the privilege only covers third parties who are "nearly indispensable" in facilitating attorney-client communications. Id. at *46 (citation omitted). The court pointedly criticized Deen's affidavit, which "speaks only in general terms" – noting that "[n]othing approaching the 'nearly indispensable role' is described." Id. at *47 (citation omitted).

The narrow majority rule on privilege protection for client agents represents perhaps the most counterintuitive aspect of privilege law. Lawyers should warn their clients not to include such third parties in privileged communications or share privileged communications with them. Next week's Privilege Point will discuss lawyer agents.