Court Properly Analyzes the Different Meanings of a "Common Interest" in the Privilege and the Work Product Contexts

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 October 3, 2012 “Privilege Points” release, Tom Spahn discusses the common interest privilege and the “friendly third party”:

Several recent Privilege Points have described most courts' narrow interpretation of the "common interest" doctrine – which allows disclosure of privileged communications to a third party without triggering a waiver. Among other things, nearly every court requires the "common interest" to be legal, rather than financial or commercial.

Because the work product doctrine protection does not rest on confidentiality, most courts find that disclosing work product to a friendly third party does not waive that protection – even though the disclosure would waive the more fragile attorney-client privilege protection. Unfortunately, some courts use the phrase "common interest" in describing the type of friendly relationship that allows such safe sharing of work product. In *Resilient Floor Covering Pension Fund v. Michael's Floor Covering, Inc.*, Case No.: C11-5200 JSC, 2012 U.S. Dist. LEXIS 104398, at *18-19 (N.D. Cal. July 26, 2012), the court correctly noted that "[c]ommon interests in the work product realm are not construed so narrowly as to limit the exception only to co-parties. . . . The shared interest may be only financial or commercial in nature."

Although the court ultimately found that the disclosure triggered a waiver of both protections (because the third party was an adversary), it is refreshing to see a court recognize the very different "common interest" standards applicable in the privilege and work product contexts.