Colorado Supreme Court Explains the "Confidentiality" Component of Attorney-Client 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 September 18, 2013 “Privilege Points” release, Tom Spahn discusses the “confidentiality” requirement for attorney-client privilege protection:

Every court holds that the attorney-client privilege rests on confidentiality. However, that element focuses on client-lawyer communications, not on the subject matter about which they communicate.

In DCP Midstream, LP v. Anadarko Petroleum Corp., 303 P.3d 1187, 1190 (Colo. 2013), the trial court held that title opinions could never deserve privilege protection, "because they were based on public information." The Colorado Supreme Court rejected that conclusion – noting that it "would render the attorney-client privilege meaningless in many circumstances." Id. at 1199. The Court noted that lawyers "regularly base legal advice on public information," such as "statutes and case law that inform most legal advice" that are "publicly available at law libraries and on the Internet." Id. The Court emphasized that "[w]hat matters is that the legal advice is given in response to a confidential client communication, irrespective of whether that advice is informed by publicly available information." Id.

The Colorado Supreme Court properly recognized that the attorney-client privilege can protect confidential communications between clients and their lawyers, even if those communications involve publicly available information or non-confidential issues.