Courts Deny Privilege Protection for Compliance-Related Documents

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 December 18, 2013 “Privilege Points” release, Tom Spahn discusses privilege protection for compliance work:

Many corporate clients erroneously assume that the attorney-client privilege or the work product doctrine will protect their compliance-related communications. However, such communications face the same impediments to either protection as other internal corporate communications.

For instance, the attorney-client privilege only protects communication primarily motivated by clients' request for legal advice. In United States ex rel. Gale v. Omnicare, Inc., the court found that the privilege did not protect "Compliance Committee meetings and the documents drafted by [the company's CCO]," – because the company's previous agreement with the government required such meetings. Case No. 1:10-CV-00127, 2013 U.S. Dist. LEXIS 143831, at *4 (N.D. Ohio Oct. 4, 2013). The court concluded that "[t]he meetings and documents sought to comply with its contract with the United States, not to obtain legal advice." Id. The privilege also normally depends on lawyers' involvement. In Wultz v. Bank of China Ltd., No. 11 Civ. 1266 (SAS), 2013 U.S. Dist. LEXIS 154343 (S.D.N.Y. Oct. 24, 2013), Judge Scheindlin held that the privilege did not protect documents created during the Bank of China Chief Compliance Officer's investigation into the bank's possible dealings with terrorists. Judge Scheindlin noted that after the Bank's CCO received Plaintiff's demand letter, "he called outside counsel, then set about performing the investigation within the Compliance Department – without the involvement of any counsel." Id. at *35 (citation omitted). Judge Scheindlin cited an earlier case's blunt conclusion that "[p]rivilege does not apply to 'an internal corporate investigation . . . made by management itself.'" Id. at *36 (citation omitted).

Companies and their lawyers should not assume that the compliance function automatically, or even usually, deserves privilege protection.