Court Takes a Very Narrow View of Legal Advice in a Corporate Setting

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In his January 8, 2014 “Privilege Points” release, Tom Spahn discusses the line between privileged legal advice and non-privileged business advice.

Attorney-client privilege protection depends on content, and the key issue normally involves distinguishing between primarily legal and primarily business advice. Courts disagree about where to draw that line.

In Koumoulis v. Independent Financial Marketing Group, Inc., No. 10-CV-0887 (PKC) (VMS), 2013 U.S. Dist. LEXIS 157299 (E.D.N.Y. Nov. 1, 2013), the court examined communications between a Duane Morris lawyer and her corporate client's human resources employees. The court rejected privilege claims for most of the lawyer's communications. For instance, the court noted that the Duane Morris lawyer "sometimes told Human Resources employees exactly what questions to ask during interviews and what statements to make during meetings," and that "her advice would advance business goals, such as improving business relationships." Id. at *45. The court also noted that Duane Morris' "advice rarely involved 'the interpretation and application of legal principles to guide future conduct or to assess past conduct,' . . . and rarely explicitly considered future litigation." Id. at *45-46.

Not all courts would take this narrow view, but the decision provides a good lesson. Wise lawyers train their clients to explicitly explain in the four corners of their communications that they are seeking legal advice, that they are worried about litigation, etc. However, it is also important for lawyers to explicitly explain in their responses that they are providing legal advice (by mentioning legal principles, citing statutes or case law, etc.) and to mention litigation if the client reasonably anticipates it.