Who Conducts a Privilege Review When the Government Seizes Potentially Protected 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 October 10, 2012 “Privilege Points” release, Tom Spahn discusses the attorney-client privilege in criminal investigations:

Although the attorney-client privilege does not rest on constitutional principles, criminal defendants' right to counsel generally prevents the government from intruding into privileged communications. When the government seizes a collection of documents that might contain protected communications, who reviews them? Handing the documents back to a criminal defendant or her lawyer might invite mischief, but allowing prosecutors to review the documents might interfere with a defendant's right to counsel.

Most courts allow a privilege review by government lawyers who are screened from the prosecutors in that case. These lawyers have traditionally been called a "taint team." An Eastern District of Louisiana court called the lawyers a "clean team." Heebe v. United States, Civ. A. No. 10-3452 SECTION C, 2012 U.S. Dist. LEXIS 104795, at *3 (E.D. La. July 27, 2012). These lawyers withhold protected documents from the prosecutors, subject to the court's ultimate review.

Although some courts have compared such "taint" or "clean" teams to a fox guarding the hen house, most courts approve such a review process as an appropriate way to reconcile the government's interest in using non-protected seized documents and criminal defendants' right to withhold protected communications from the government.