Northern District of Illinois Questions the "Functional Equivalent" Doctrine

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In his October 2, 2013 “Privilege Points” release, Tom Spahn discusses the “functional equivalent” doctrine:

One of the notable recent privilege trends involves most courts' adoption of what is called the "functional equivalent" doctrine – which extends privilege protection to nonemployees who are the functional equivalent of corporate employees. The vast majority of courts recognize the functional equivalent doctrine, which greatly benefits corporations relying on temporary workers or outsourcing corporate functions such as tech support or even human resources support.

However, a few courts take a narrower approach. In *BSP Software, LLC v. Motio, Inc.*, No. 12 C 2100, 2013 U.S. Dist. LEXIS 95511, at *2 (N.D. Ill. July 9, 2013), the court addressed a functional equivalent argument by a company which did not have a formal board of directors, but which asserted privilege protection for communications to and from its "advisory board." The court rejected the company's privilege assertion, finding that the company waived its privilege protection by communicating with its advisory board. Ironically, the court expressed as its first worry the possibility that the functional equivalent doctrine would "increase the level of uncertainty" about the privilege's applicability. *Id.* at *7.

Although rejecting the functional equivalent doctrine might avoid legal uncertainty, it creates enormous factual uncertainty. Anyone communicating with or in the presence of even a long-term temp could unknowingly abort or waive privilege protection.