Courts Take an Expansive View of the “Functional Equivalent” Doctrine

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In his September 5, 2012 “Privilege Points” release, Tom Spahn discusses extension of the privilege to those beyond corporate personnel under the “functional equivalent” doctrine.

Under what is called the "functional equivalent" doctrine, courts sometimes treat independent contractors as if they are corporate employees when analyzing privilege protection. Most courts examine criteria such as the independent contractors' physical presence at the client's offices, etc. Courts taking an expansive view of the doctrine bump into the traditional principle that the only client agents/consultants within the privilege are those necessary for the transmission of communications with the client's lawyer.

In In re Flonase Antitrust Litigation, Civ. A. Nos. 08-CV-3149 & -3301, 2012 U.S. Dist. LEXIS 91155 (E.D. Pa. July 2, 2012), the Eastern District of Pennsylvania found that employees of a "national consulting firm that provides pharmaceutical consulting services" should be considered the "functional equivalent" of GlaxoSmithKline employees. Id. at *7. The court rejected what it called a "narrow construction" of the functional equivalent doctrine, finding it "too restrictive" to be realistic in today's marketplace, where businesses frequently hire contractors and still expect to be able to seek legal advice." Id. at *31 (citation omitted). The court found that the consulting firm "acted as an integrated member of the brand maturation team," and "played a crucial role in the team, assisting in an administrative, managerial, and analytic capacity." Id. at *22.

Most courts apply the "functional equivalent" doctrine on an individual basis, rather than extend privilege protection to an entire consulting firm. Such a broad approach to the doctrine provides an immensely valuable argument to companies which have involved outsiders in otherwise privileged communications.