Courts Examine Privilege Issues in Government and Association Contexts

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In his January 7, 2015 “Privilege Points” release, Tom Spahn discusses Privilege for the Government and Associations:

Most case law focuses on attorney-client privilege issues involving individual or corporate clients. Fewer decisions address that protection in other contexts.

In North Dakota v. United States, Case No. 1:12-CV-125, 2014 U.S. Dist. LEXIS 165900 (D.N.D. Nov. 25, 2014), the court dealt with the federal government’s privilege — recognizing both broader and narrower privilege aspects in that setting. Among other things, the court (1) applied “the broadest approach to claims of privilege by a governmental entity,” pointing to the "commonsense notion that governmental decisions based on sound legal advice advance the public interest" (id. at *63); but (2) acknowledged that the privilege does not apply to otherwise protected communications that "form the basis of federal policy" (although rejecting plaintiffs' argument that the withheld documents "represented the official Department of Agricultural policy") (id. at *64-65). A week earlier, another court dealt with the privilege in the association context. In In re Processed Egg Products Antitrust Litigation, MDL No. 2002 08-md-02002, 2014 U.S. Dist. LEXIS 160747 (E.D. Pa. Nov. 17, 2014), the court held that (1) the privilege could protect communications between trade association lawyers and association members if the communications involved the association lawyers' advice "within the scope of the member's role within the association and given for the sake of advising the association" (id. at *34); (2) the association would own that privilege; (3) other communications between trade association lawyers and association members might not be privileged at all if they did not meet that standard; and (4) if those other communications deserved privilege protection, the association members owned the privilege.

Corporations' lawyers who deal with the government and with associations should familiarize themselves with the unique privilege aspects applicable in those contexts.