The Attorney-Client Privilege Protection Applies in Unique Ways to Government Lawyers

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 July 31, 2013 “Privilege Points” release, Tom Spahn discusses privilege issues specific to government employees who receive legal advice from government lawyers (versus outside counsel).

Every court agrees that governments at all levels can enjoy privilege protection when government employees with the appropriate level of authority seek legal advice from government or outside lawyers. However, government lawyers face unique privilege principles.

In Hoffman v. City & County of San Francisco, Case No. 4:11-cv-4016 CW (KAW), 2013 U.S. Dist. LEXIS 77076 (N.D. Cal. May 31, 2013), the court applied the same privilege protection in the governmental context that would apply elsewhere. Among other things, the court rejected plaintiffs' argument that the privilege did not protect otherwise privileged documents sent to "members of the Civil Service Commission and the City's Human Resources department," explaining that "these individuals were the employees of the City that could have been seeking legal advice." Id. at *3. Several weeks earlier, another court applied one of the unique rules governing privilege claims in the governmental context. In Kearney Partners Fund, LLC v. United States, Case No. 2:10-cv-153-FtM-SPC, 2013 U.S. Dist. LEXIS 67797 (M.D. Fla. May 10, 2013), the court ordered disclosure of an IRS lawyer's legal opinion. The court acknowledged that the opinion deserved privilege protection, but ultimately concluded that "the attorney-client privilege may not be invoked to shield a document adopted as, or incorporated by reference into, an agency's policy." Id. at *30.

Lawyers challenging the IRS's and other governmental agencies' privilege claims should familiarize themselves with the unique rules governing privilege protection in that context.