Can the Privilege Protect Intracorporate Communications Sent Simultaneously to a Lawyer and a Nonlawyer?

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 November 6, 2013 “Privilege Points” release, Tom Spahn discusses intracorporate communications involving both lawyers and nonlawyers:


Not all courts take such a restrictive approach. In Surfcast, Inc. v. Microsoft Corp., Microsoft sought plaintiff’s internal communications, arguing that "the fact that [an] e-mail was directed to others in addition to [a lawyer] renders it unprivileged." No. 2:12-cv-333-JAW, 2013 U.S. Dist. LEXIS 111417, at *7 (D. Me. Aug. 7, 2013). The court disagreed, holding that "asking for legal advice in a covering e-mail when only one of the individuals to whom it was sent is an attorney demonstrates that [the sender] expected [the lawyer] to act as an attorney at the time." Id. at *6.

Although corporations should welcome this type of analysis, the court also noted that (1) the lawyer was a direct recipient of the email rather than a copy recipient, and (2) the email "requested legal advice." Id. at *5. Corporations and their lawyers should train employees to take such steps.