Courts Affirm Privilege Protection for Intracorporate Communications

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In his December 10, 2014 “Privilege Points” release, Tom Spahn discusses the attorney-client privilege and corporate employees:

In most states (Illinois being the main exception), attorney-client privilege protection extends to communications between a corporation's lawyers and (1) employees with facts the lawyers need, regardless of the employee's place in the hierarchy, and (2) employees with a "need to know" the lawyers' advice about those facts. Most courts also protect ancillary communications that support the corporation's request for and receipt of legal advice.

In Moffatt v. Wazana Brothers International, the court confirmed that the privilege protects "communications relaying legal advice provided by corporate counsel among nonattorney corporate employees who share responsibility for the subject matter underlying the consultation." Civ. A. No. 14-1881, 2014 U.S. Dist. LEXIS 151326, at *4 (E.D. Pa. Oct. 24, 2014) (citation omitted). Corporations frequently rely on this principle when their adversaries challenge privilege protection for documents whose privilege log entries do not show a lawyer as either the author or a recipient. One week later, the District of Delaware similarly held that the privilege could continue to protect privileged documents "shared within the corporate family, such as those sent to or from" the corporate defendant's French parent -- "[t]o the extent that . . . such involvement was essential to and in furtherance of the communications with the attorneys involved." United States v. Veolia Env’t N. Am. Operations, Inc., Civ. No. 13-mc-03-LPS, 2014 U.S. Dist. LEXIS 154717, at *22 (D. Del. Oct. 31, 2014).

Although these justifiable principles provide some comfort, company employees should be warned against intracorporate circulation of privileged communications beyond those with a "need to know."