Another Court Takes a Narrow View of Privilege Protection for a Lawyer's Agent/Consultant

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In his February 13, 2013 “Privilege Points” release, Tom Spahn discusses the application of the privilege to agents and consultants:

Nearly every court finds that client agents/consultants usually stand outside the privilege protection, unless they are necessary for the transmission of privileged communications. In contrast, most courts have been more willing to extend privilege protection to a lawyer's agent/consultant assisting the lawyer in providing legal advice.

However, some courts recognize only a limited number of such lawyer agents/consultants who are within the privilege. In Columbia Data Products v. Autonomy Corp., Civ. A. No. 11-12077-NMG, 2012 U.S. Dist. LEXIS 175920 (D. Mass. Dec. 12, 2012), plaintiff's law firm Greenberg Traurig retained PriceWaterhouse Coopers ("PWC") to conduct an audit of royalty payments defendant owed Greenberg's client. Greenberg Traurig's retainer letter indicated that "PWC agreed to perform services intended to assist counsel with its provision of legal advice" to the client. Id. at *45. The court nevertheless rejected plaintiff's privilege claim for communications relating to the audit – concluding that "neither the [retainer] letter nor any other evidence set forth in the record suggested that PWC 'was necessary, or at least highly useful, in facilitating the legal advice' or that Greenberg Traurig was relying on PWC to translate or interpret information between the lawyers" and the client. Id. (citation omitted). The court later reiterated that the client had not "presented any supporting evidence or pointed to any facts showing that PWC played an interpretive role between Greenberg Traurig" and the client. Id. at *46.

Cases taking such a narrow approach to privilege protection for lawyer agents/consultants represent a very troubling view – both because they ignore explicit retainer letters in which lawyers hire agents/consultants, and because they require that the agents/consultants essentially "interpret" raw data that the lawyers would not otherwise understand.