Federal and State Courts Analyze the Privilege Impact of Third Parties: Lawyer Agents

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In his July 24, 2013 “Privilege Points” release, Tom Spahn discusses the attorney client privilege where lawyers’ agents and consultants are part of otherwise privileged communications.

Last week's Privilege Point described the risk of involving client agents in privileged communications. The same danger arises when lawyers rely on agents and consultants.

As with client agents, some courts take a broad view. In Bank of New York Mellon, Index No. 651786/11, N.Y. Slip Op. 30996U (N.Y. Sup. Ct. May 6, 2013), the court held that a technology company was within the protection because it assisted the plaintiff's law firm Mayer Brown. The court quoted an earlier New York state court case, which explained that "[t]he scope of the privilege is not defined by the third parties' employment or function," but rather "depends on whether the client had an expectation of confidentiality under the circumstances." Id. at 5 (citation omitted). Just one day later, the Southern District of New York took its typically narrow view – allowing an adversary to depose plaintiff Chevron's investigative and risk management consultant Kroll. In Chevron Corp. v Donziger, the court acknowledged that some courts take a broad view of privilege protection for lawyer agents, but warned that other courts "have limited [privilege protection] to circumstances where communications with the agent are necessary to improve the comprehension of the communications between attorney and client." No. 11 Civ. 0691 (LAK) (JCF), 2013 U.S. Dist. LEXIS 65335, at *12 (S.D.N.Y. May 7, 2013).

Lawyers hoping to maintain privilege protection in this context should weigh the risks, and carefully document the rationale for involving their agents or consultants.