Courts Analyze Effect of Third Parties' Participation in Privileged Communications: Part II

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In his May 23, 2012 “Privilege Points” release, Tom provided the Kovel standard for preserving the privilege:

Last week's Privilege Point dealt with the attorney-client privilege implications of third parties' participation in privileged communications, when the third party is acting on the client's behalf. Third parties assisting lawyers also occasionally participate in otherwise privileged communications. Most courts apply what is called the Kovel standard, under which the privilege protects such communications only if the third party is necessary for the lawyer to fully understand the client's communications (not merely if the third party's involvement is useful to the lawyer).

In Ravenell v. Avis Budget Group, Inc., No. 08-CV-2113 (SLT), 2012 U.S. Dist. LEXIS 48658 (E.D.N.Y. Apr. 5, 2012), the Eastern District of New York found that the privilege did not protect in-house lawyers' communications with a consultant assisting the company in a Fair Labor Standards Act audit. The court noted that the consultant had preliminarily assessed whether employees were exempt or nonexempt, an analysis "that in-house counsel had the ability to make themselves." *Id.* at *15. The court concluded that the consultant's work "neither improve[d] the comprehension of the communications between attorney and client" nor "provided advice outside the general expertise of attorneys yet essential to the ability of defendants' lawyers to provide legal advice." *Id.* at *15-16 (citation omitted). Seven days later, another court reached the same conclusion about a leasing agent's participation in privileged communications – noting that "the mere fact that 'an attorney's ability to represent a client is improved, even substantially, by the assistance of [a third party]' is insufficient for the attorney-client privilege to apply." *Banco do Brasil, S.A. v. 275 Wash. St. Corp.,* Civ. A. No. 09-11343-NMG, 2012 U.S. Dist. LEXIS 51358, at *21 (D. Mass. Apr. 12, 2012) (citation omitted). That court also found that the leasing agent was not the "functional equivalent" of a corporate employee. *Id.* at *20-21.

Lawyers often have as difficult a time as clients in establishing that communications with or in the presence of third parties acting on their behalf deserve privilege protection. Next week's Privilege Point will deal with the "functional equivalent" doctrine, which also involves third parties.