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

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 May 30, 2012 “Privilege Points” release, Tom provided Part III in a series on the effect of third party participation in privileged communications:

The last two Privilege Points dealt with the attorney-client privilege implications of third parties participating in otherwise privileged communications – on the client's or the lawyer's behalf. In some situations, corporate litigants argue that a third party is really the "functional equivalent" of a corporate employee.

As indicated in last week's Privilege Point, a typical third-party consultant normally cannot meet this "functional equivalent" standard. However, some litigants have been more successful. In Gen-Probe Inc. v. Becton, Dickinson & Co., Civ. Nos. 09cv2319 & 10cv0602 BEN (NLS), 2012 U.S. Dist. LEXIS 49028, at *10 (S.D. Cal. Apr. 6, 2012), the court held that an independent contractor helping a company develop "an automated nucleic acid detection system" met the "functional equivalent" standard. Among other things, the independent contractor signed a typical employee confidentiality provision, assigned his intellectual property rights to the company, was listed on company documents as a "regular member" of the project team, and engaged in activities that were "equivalent to the type of work performed by actual . . . employees." Id. at *11.

None of this high-stakes characterization of third parties is necessary in the work product context. Any client "representative" can create, or participate in the creation of, work product. In one case, the Southern District of New York held that an investment banker could claim work product protection for notes she prepared while attending a board meeting – even though her presence at the board meeting destroyed the attorney-client privilege. Nat'l Educ. Training Grp., Inc. v. Skillsoft Corp., No. M8-85 (WHP), 1999 U.S. Dist. LEXIS 8680, at *18 (S.D.N.Y. June 9, 1999). This is yet another reason why corporations should always assess the possible applicability of both the attorney-client privilege and the work product protection.