It Can be Nearly Impossible to Satisfy Some Courts' Privilege Protection Standards:  
Part I

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In his December 17, 2014 “Privilege Points” release, Tom Spahn discusses the need to articulate “primary purpose” in achieving privilege protection for in house communications:

Although federal courts generally articulate the same basic attorney-client privilege principles, they can demonstrate enormous variation when applying those principles. In some situations, it might be nearly impossible for companies to successfully assert privilege protection.

In United States ex rel. Schaengold v. Memorial Health, Inc., No. 4:11-cv-58, 2014 U.S. Dist. LEXIS 156595 (S.D. Ga. Nov. 5, 2014), defendants sought to retrieve one document (out of 30,000 documents produced) that they claimed to have inadvertently produced to the government. They described the document as a draft sent to the company's lawyer, portions of which the client deleted at the lawyer's request before disclosing the final version to third parties. The court found that the document did not deserve privilege protection, because the lawyer's supporting affidavit "fails to show who exactly sent the Draft Document, whether the primary purpose of the communication was for legal advice, or whether the communication was indeed confidential."  Id. at *9. Turning to the inadvertent production issue, the court found defendants' "naked assertion of a privilege review" inadequate — because defendants did not describe "when [the] review occurred, how much time [Prior Counsel] took to review the documents, what ['certain'] documents were reviewed, and other basic details of the review process."  Id. at *17 (citation omitted; alterations in original).

The next Privilege Point will describe another federal court's similar decision issued seven days later.