Southern District of New York Judge Mentions the Danger of Granting Widespread "Access" to Privileged Communications in a Corporate Setting

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In his September 11, 2013 “Privilege Points” release, Tom Spahn cautions against the wide circulation of attorney-client privileged communications within the client corporation:

Corporations face several risks to their privilege protection if employees widely circulate privileged communications, even within the corporation. As noted in earlier Privilege Points, most courts require corporations to prove that every recipient of such a privileged communication has a "need to know." And, in a troublesome doctrine highlighted in the Vioxx MDL litigation, some courts point to widespread intra-corporate distribution as demonstrating such communications' primarily business rather than legal nature.

In Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950 (AT) (JCF), 2013 U.S. Dist. LEXIS 85630 (S.D.N.Y. June 18, 2013), Judge James Francis held that an employment database prepared by defendant Goldman Sachs generally deserved privilege protection because Goldman Sachs' lawyers used the database to give legal advice. However, he also acknowledged that plaintiffs were entitled "to test whether managers have access" to portions of the database – describing such access as "a fact that could militate in favor of finding that these fields are maintained for business purposes and would not be privileged." Id. at *18.

Such managers presumably have a "need to know" legal advice about employment issues. Thus, it is worrisome that a court would consider such managers' "access to" (not just use of) such a database to support the opposing party's argument that the database served primarily a business rather than a legal purpose.