In-House Lawyers Face a Greater Challenge than Outside Lawyers When Claiming Privilege Protection

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 November 19, 2014 “Privilege Points” release, Tom Spahn discusses extra scrutiny applied to claims of privilege by in-house attorneys.

The attorney-client privilege began in Roman times, and serves a grand societal purpose — encouraging clients to frankly disclose facts that their lawyers need, by assuring their communications' perpetual protection from third-party intrusion. However, the law has always disliked the privilege, because it hides the truth. Among other things, courts extend privilege protection only to communications whose "primary purpose" involves legal advice.

In the corporate context, clients and their lawyers must establish that their communications' "primary purpose" involved legal rather than business concerns. Nearly every court imposes a higher burden on in-house lawyers attempting to meet this standard. In Chandola v. Seattle Housing Authority, Case No. C13-557 RSM, 2014 U.S. Dist. LEXIS 132193 (W.D. Wash. Sept. 19, 2014), the court held that "[e]xtra scrutiny is required where in-house counsel is involved, as they often act in both a legal and non-legal business capacity." Id. at *5. The court warned that in-house lawyers must make a "'clear showing'" that their communications related primarily to legal rather than business concerns. Id. at *6 (citation omitted). The court ultimately decided to review withheld communications in camera.

Some courts take an even more hostile approach — presuming that in-house lawyers' communications do not meet the "primary purpose" standard. In-house lawyers should assure that communications they receive and send will help them make the commonly required "clear showing" that those communications primarily related to legal advice — keeping in mind that courts frequently review those communications in camera.