Articles + Publications | May 11, 2020

Protecting Privilege When Communicating With Contractors

WRITTEN BY

Donna L. Fisher | Matthew J. Hamilton

RELATED PROFESSIONALS

Donna L. Fisher | Matthew J. Hamilton

Published in the Expert Analysis section of Law360 on May 11, 2020.

As more businesses rely on independent contractors and specialists, the courts continue to define where those independent contractors fit for purposes of the attorney-client privilege. Here we discuss recent decisions weighing whether the third-party waiver exceptions, where a third party is either a functional employee[1] or essential for the provision of legal advice,[2] apply to other third parties, including industry specialists, certified public accountants, property managers or investigators.

What is clear is that the trend toward using contractors and specialists shows no signs of slowing, and so counsel and their clients should be mindful of what communications might be protected as privileged. Below we offer best practices to ensure that privileged communications with contractors can be protected.

Cases Holding Third-Party Consultants Were Not Within the Scope of the Attorney-Client Privilege

Recently, the court in *Digital Mentor Inc. v. Ovivo USA LLC*,[3] a trademark case, held that disclosure of privileged communications to a general adviser waived the attorney-client privilege. Ovivo sought communications among Digital Mentor Inc., DMI's counsel, and William Chastain, a third-party consultant.

Chastain joined DMI as an adviser in 2014, spent months learning about DMI's industry and its unique technological breakthrough product, and participated in many of the negotiations between DMI and Ovivo, including the execution of a nondisclosure agreement between the parties. Chastain was never employed by DMI and was never paid for his services. DMI claimed Chastain was its "functional employee" and, therefore, communications among DMI and DMI's attorney with Chastain were subject to attorney-client privilege.

Noting the lack of guidance from the Ninth Circuit, the court continued:

However, as one district court indicates, "the dispositive question is the consultant's relationship to the company and whether by virtue of that relationship [s]he possesses information about the company that would assist the company's attorneys in rendering legal advice." … When answered in the affirmative, the consultant is "in all relevant respects the functional equivalent of an employee" and communications between corporate counsel and

the consultant may be covered under attorney-client privilege.[4]

The court held that DMI had not shown that Chastain's involvement met this criterion insofar as there was no documentation of Chastain's duties with DMI or its corporate counsel, nor evidence that Chastain had specialized knowledge such that counsel would rely on him to facilitate legal advice for the company. Further, the court found "little to indicate that communications between Chastain and DMI's counsel were primarily of a legal, as opposed to a business, nature."[5]

The court in *In re: Lincoln National COI Litigation*[6] evaluated Lincoln National's claim that certain communications between its counsel and two consultants were privileged. Lincoln hired the consultants to help update its mortality assumptions and set new cost of insurance, or COI, rates and, taking the position that the reports themselves were not privileged, produced them. Lincoln however sought to withhold communications concerning legal advice provided by its outside counsel to its in-house lawyers.

The plaintiffs argued that, by producing the reports themselves, Lincoln had waived any privilege for the underlying documents. The special master deferred ruling on whether the reports themselves were privileged, and concluded that 10 such documents were not privileged.

Citing BouSamra v. Excela Health,[7] the special master reasoned that the privilege would not extend to communications with the consultants unless their presence was "indispensable to the lawyer giving legal advice or facilitated the lawyer's ability to give legal advice to the client." Since Lincoln had disclaimed that the consultants' services were necessary for the provision of legal advice, the documents were not privileged.

The court affirmed the special master's ruling, finding that Lincoln failed to show that the purpose of the communications between its in-house counsel and employees was to obtain a legal opinion. With regard to communications with the consultants, Lincoln could not prove that their presence was either indispensable to the lawyer's giving legal advice or facilitated the provision of that advice — nothing in the communications at issue addressed anything other than ordinary business activity.[8]

Finally, in *United States v. Fisher*,[9] Fisher argued that two government exhibits should be excluded because they were protected by the attorney-client privilege claimed by his corporation, PCP. The government argued that the privilege was waived when PCP disclosed the documents to Atkins, the corporation's CPA.

Fisher argued that the CPA's role was to provide tax and accounting advice to assist a law firm in provide the company and its control group with legal advice. The court, noting that Fisher's attorney's argument was unsupported by any evidence or the emails themselves, held the exception to the third-party disclosure rule adopted in *Kovel*[10] did not apply:

Fisher admits that PCP, not the lawyer, employed Atkins as an accountant. Moreover, it is not apparent from the emails that Atkins's advice was being sought for purposes of obtaining legal advice by either the lawyer or PCP. Instead, it appears he was copied on the emails possibly for his input regarding a business decision, which would not be covered by the attorney-client privilege.[11]

The court held that Fisher failed to meet his burden to establish the existence of the privilege.

Cases Holding Third-Party Consultants Were Within the Scope of the Attorney-Client Privilege

Consultants who have been specifically retained to assist in litigation, have an extensive history of working closely with a company, and have a unique set of skills have been found to be within the scope of the attorney-client privilege.

In *Dialysis Clinic Inc. v. Medley*,[12] Dialysis Clinic owned and leased various commercial properties to third parties separate from dialysis clinics. Dialysis Clinic did not have in-house knowledge about or experience in management of commercial rental properties so the company retained XMi to manage its commercial properties.

XMi acted as Dialysis Clinic's agent on an exclusive basis. XMi's scope of work included negotiating lease renewals, collecting rents and dues, canceling or terminating leases upon Dialysis Clinic's direction, and instituting, prosecuting and defending actions involving the properties. XMi handled all day-to-day operations and regularly communicated with Dialysis Clinic's in-house and outside counsel about the properties.

Dialysis Clinic filed unlawful detainer actions against the owners of several of its properties, and the defendants served a subpoena on XMi, a nonparty to the detainer action. When Dialysis Clinic withheld emails between counsel and XMi as privileged, Medley filed a motion to compel production of the documents, arguing that sharing the communications with XMi waived the privilege.

The court, in affirming the lower court's ruling that the privilege had not been waived, concluded that the functional equivalent analysis is a "sound approach" and that the following nonexclusive factors should be considered: (1) whether the nonemployee performs a specific role on behalf of the entity; (2) whether the nonemployee acts as a representative of the entity in interactions with other people or other entities; (3) whether, as a result of performing its role, the nonemployee possesses information no one else has; (4) whether the nonemployee is authorized by the entity to communicate with its attorneys on matters within the nonemployee's scope of work to facilitate the attorney's representation of the entity; and (5) whether the nonemployee's communications with the entity's attorneys are treated as confidential.

The court held that Dialysis Clinic had established that XMi was the functional equivalent of an employee and the privilege had not been waived.[13]

In *Gibson v. Reed*,[14] which involved multiple state law claims arising from an Equal Employment Opportunity, or EEO, investigation into defendant Hastings' complaint that Gibson sexually harassed her, defendant Snohomish County hired Reed to conduct an EEO investigation. The plaintiff sought to compel communications between Snohomish County officials and Reed related to Gibson.

The defendants argued that the communications involving Reed and the members of the Snohomish County Attorney's Office were privileged because Reed was "functionally equivalent" to an employee of the county and that she was offering legal advice to her client, the county, regarding the investigation. The court held that Reed was a functional equivalent to a county employee and her communications were protected by the attorney-client privilege:

Reed was performing the type of investigations that Defendant Snohomish County's regular EEO investigator

Stacy Allen would have normally handled. Reed's contract directed her to report to the Snohomish County Attorney's office regarding her findings for the purpose of providing information and legal advice regarding her ongoing and completed EEO investigations. Reed's contract explicitly explained that these communications were to be treated as confidential, and that both parties understood them to be privileged.[15]

Conclusion and Practice Pointers

As seen above, jurisdictions vary in their application of exceptions to waiver by third-party disclosure, so counsel should first determine what law might apply to a contract or anticipated dispute and plan their strategy accordingly. No matter whether a consultant is being retained to facilitate the provision of legal advice or will be working with counsel as the functional equivalent of an employee, counsel should initiate, document and manage the engagement.

In order to establish that a consultant is the functional equivalent of an employee, he or she must be authorized to act on the company's behalf, including attending meetings and conferring with attorneys on the company's behalf. Companies should document that fact in their engagement letters, as well as routine communications, particularly those with counsel.

If a consultant is being retained to assist counsel in providing legal advice, that fact should be made clear in the engagement letter, explaining the scope of the engagement and why the consultant's service will enable counsel to provide legal advice. If a consultant has an ongoing relationship with the company to provide his or her expertise, and is then retained to assist counsel on a legal matter, a separate engagement letter should be entered into for the discrete assignment with counsel.

Counsel should emphasize at the outset of each consultant engagement that all communications and documents generated in the engagement should be considered confidential and only shared with individuals within the company who have a need for the information — and never with a third party without approval of counsel.

Finally, be mindful of the overriding requirement that, to be privileged a communication must have been made for the primary purpose of obtaining legal advice. No matter how essential or unique a contractor may be to the organization, unless a communication was made for that purpose, it will not be protected as privileged.

Endnotes

[1] *See In re: Copper Mkt. Antitrust Litig*., 200 F.R.D. 213 (S.D.N.Y. 2001), where the court held that a public relations firm was the functional equivalent of the corporation's employee and, therefore, the attorney-client privilege was not waived when corporation's counsel shared communications with the public relations firm. In doing so, the court rejected the argument that third-party consultants came within the scope of the privilege only when acting as conduits or facilitators of attorney-client communications, the requirements of the original third-party waiver doctrine adopted in *United States v. Kovel*, 296 F.2d 918 (2nd Cir. 1961).

[2] *United States v. Kovel*, 296 F.2d 918 (2nd Cir. 1961). The Second Circuit held that the privilege could extend to communications between a client and a non-attorney third party if "the communication [is] made in confidence for the purpose of obtaining legal advice from the lawyer." *Id*. at 922. In applying this rule, the court found that the

privilege could reasonably extend to an accountant assisting a law firm in an investigation into an alleged federal income tax violation.

[3] *Digital Mentor, Inc. v. Ovivo USA, LLC*, No. 2:17-cv-01935, 2020 U.S. Dist. LEXIS 18527 (W.D. Wa. Feb. 4, 2020).

[4] *Id*. at *4 (citations omitted).

[5] *Id*. at 4-5.

[6] *In re: Lincoln National COI Litigation*, No. 16-cv-06605-GJP, 2020 U.S. Dist. LEXIS 40718 (E.D. Pa. Mar. 2020).

[7] *BouSamra v. Excela Health*, 210 A.3d 967 (Pa. 2019).

[8] The court rejected Lincoln's argument that the special master misread BouSamra as rejecting the functional equivalent doctrine as a straw man.

[9] *United States v. Fisher*, No. 3_19cr76-MCR, 2020 U.S. Dist. LEXIS 34328 (N.D. Fla. Feb. 28, 2020).

[10] *United States v. Kovel*, 296 F.2d 918 (2d. Cir. 1961).

[11] *U.S. v. Fisher*, at *2-3 (citations omitted).

[12] *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314 (Tenn. 2019).

[13] *Id*.

[14] *Gibson v. Reed*, No. C:18-0951, 2019 U.S. Dist. LEXIS 94305 (W.D. Wash. June 5, 2019).

[15] *Id*., at *2-3 (citations omitted); *see also Pipeline Product. v. Madison Co*., No. 15-4890-KHV, 2019 U.S. DIST Lexis 71601 (D. Kan., Ap. 29, 2019), in which the court found that a third-party PR consultant was the functional equivalent of an employee because they were the "right hand person" overseeing negotiating transactions and was authorized to communicate with counsel and others to act as the company's representative.

RELATED INDUSTRIES + PRACTICES

- Business Litigation
- Independent Contractor Misclassification + Compliance