

Attorney-Client Privilege Protections for Non-Employees

CRITERIA FOR THE FUNCTIONAL EQUIVALENT TEST

By Brian A. Zemil, Litigation News Associate Editor

Although federal courts recognize that the attorney-client privilege can protect communications between corporations and independent contractors who are the “functional equivalent” of employees, they disagree about the evidence required to meet the functional equivalent test. A federal district court in Pennsylvania recently joined the debate, adopting a “broad, practical approach” and rejecting the “stringent, multi-factor” tests used by some courts.

“The case law has not yet clearly established what the criteria for being deemed a ‘functional equivalent of an employee’ are so that privilege protection will attach to communications. It is an evolving area of the law,” says Edna S. Epstein, Chicago, author of *The Attorney-Client Privilege and the Work-Product Doctrine*.

THE GENESIS OF THE FUNCTIONAL EQUIVALENT DOCTRINE

The functional equivalent doctrine protects communications between organizations and non-employees who are the functional equivalent of employees. The doctrine emerged after *Upjohn Company v. United States*, in which the United States Supreme Court rejected the control group test, which had only protected communications with those who could control corporate action.

The Supreme Court held that the status of an employee is not a consideration for determining whether the attorney-client privilege applies, instead opting for a case-by-case analysis of the reasons for the communications. The Court did not address whether the privilege could apply to third-party contractors or consultants.

The U.S. Court of Appeals for the Eighth Circuit was the first federal appellate court to address whether communications between corporate counsel and a corporation’s independent consultant could fall within the scope of the attorney-client privilege. In *In re Bieter Company*, a party challenged a privilege claim on communications between counsel and a contractor hired to provide real estate advice. The court in *Bieter* stated, “when applying the attorney-client privilege to a corporation or partnership, it is inappropriate to distinguish between those on the client’s payroll and those who are instead and for whatever reason employed as independent contractors.”

According to the Eighth Circuit, communications may fall within the privilege as long as the independent consultant is the functional equivalent of an employee. The court found that the real estate consultant was intimately involved on a daily basis in the client’s business and “was in all relevant respects the functional equivalent of an employee.”

Since the *Bieter* decision, other federal courts have extended the functional equivalent doctrine to communications involving a wide variety of third-party independent contractors. The doctrine has been applied to financial consultants (*Export-Import Bank of the U.S. v. Asia Pulp & Paper Co.*); accountants (*RoDa Drilling Co. v. Siegal*); construction consultants (*American Manufacturers Mutual Insurance Co. v. Payton Lane Nursing Home Inc.*); independent credit counseling consultants (*In re e2 Communications, Inc.*); invention consultants (*Coorstek, Inc. v. Reiber*); insurance consultants (*United States v. Graf*); and public relations consultants (*Hadjih v. Evenflo Co.*).

“The case law regarding the functional equivalent test is following the economic reality that businesses regularly outsource work,” says Epstein. “Accordingly, the case law is sweeping into the category of ‘functional equivalent of an employee’ third parties that in the past would have been considered mere ‘consultants,’ whose participation in privileged communications would have been regarded as a waiver of the privilege,” she adds.

APPROACHES TO DETERMINING FUNCTIONAL EQUIVALENCE

Recently, the U.S. District Court for the Eastern District of Pennsylvania chose to follow those courts that apply a broad approach instead of the more narrow

multi-factor tests used by other courts. In *In Re Flonase*, purchasers of Flonase and a generic manufacturer filed an antitrust case alleging that Flonase's manufacturer, GlaxoSmithKline (GSK), engaged in anti-competitive conduct designed to delay the entry of cheaper, generic versions of the drug into the marketplace.

The parties disputed whether the attorney-client privilege attached to communications between GSK and its third-party consultant, Swiftwater Group. Their contract characterized Swiftwater as an independent contractor hired to work with GSK to develop the Flonase brand maturation plan. Swiftwater's projects included working with GSK's legal department and the FDA to obtain regulatory approval.

Both parties agreed that the attorney-client privilege would extend to Swiftwater if it acted as the functional equivalent of an employee at GSK. A special master initially issued a decision ruling that the Swiftwater documents were not privileged.

GSK moved for a de novo review of the special master's ruling. Finding in favor of GSK, the district court noted that the U.S. Court of Appeals for the Third Circuit had not adopted a definition for the functional equivalent test and that other federal courts do not agree on the necessary predicates for extending the attorney-client privilege to a corporation's independent contractors.

Some federal courts have developed somewhat stringent, multi-factor tests, which include the following factors identified in *In Re Bristol Myers Squibb Securities Litigation*:

[W]hether the consultants were incorporated in the staff to perform a corporate function which is necessary in the context of actual or anticipated litigation; possessed information needed by attorneys in rendering legal advice; possessed authority to make decisions on behalf of the company; and were hired because the company lacked sufficient internal resources and/or adequate prior experience within the consultant's field.

The district court rejected this definition, deeming it "narrow" and "too restrictive" for the modern workplace and concluding that it contained an authority requirement

WHAT EVIDENCE IS REQUIRED FOR THE FUNCTIONAL EQUIVALENT TEST?

COURTS APPLYING BROAD, PRACTICAL APPROACH

- *In Re Flonase Antitrust Litigation*, No. 08-CV-3149 (E.D. Pa. July 2, 2012).
- *Banco Do Brasil v. 275 Washington St. Corp.*, No. 09-11343-NMG, 2012 U.S. Dist. LEXIS 51358 (D. Mass. Apr. 12, 2012).
- *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010).
- *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203 (10th Cir. 2009).
- *Stafford Trading, Inc. v. Lovely*, No. 05-C-4868, 2007 U.S. Dist. LEXIS 13062 (N.D. Ill. Feb. 22, 2007).
- *MLC Auto, LLC v. Town of S. Pines*, No. 1:05-cv-1078, 2007 U.S. Dist. LEXIS 2841 (M.D.N.C. Jan. 11, 2007).
- *In re e2 Communications, Inc.*, No. 02-30574-BJH-11, 2006 Bankr. LEXIS 4575 (Bankr. N.D. Tex. June 15, 2006).
- *Neighborhood Dev. Collaborative v. Murphy, III*, 233 F.R.D. 436 (D. Md. 2005).
- *Western Res., Inc. v. Union Pac. R.R. Co.*, No. 00-2043-CM, 2002 U.S. Dist. LEXIS 1911 (D. Kan. Jan. 31, 2002).
- *Fed. Trade Comm'n v. Glaxosmithkline*, 294 F.3d 141 (D.C. Cir. 2002).
- *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213 (S.D.N.Y. 2001).
- *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994).

COURTS APPLYING STRINGENT, MULTI-FACTOR APPROACH

- *A.H. ex rel. Hadjih v. Evenflo Co., Inc.*, No. 10-cv-02435-RBJ-KMT (D. Colo. May 31, 2012).
- *Steinfeld v. IMS Health, Inc.*, No. 10-cv-3301, U.S. Dist. LEXIS 142288 (S.D.N.Y. Dec. 9, 2011).
- *LG Elec. v. Whirlpool Corp.*, 661 F. Supp. 2d 958 (N.D. Ill. 2009).
- *Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103 (S.D.N.Y. 2005).
- *In re Bristol-Myers Squibb Sec. Litig.*, 2003 U.S. Dist. LEXIS 26985 (D.N.J. June 25, 2003).

akin to the "control group" test rejected in *Upjohn*.

The district court analyzed other courts' decisions applying a broad, practical approach, which focuses on whether non-employees possess a significant relationship to the client and engage in transactions for which legal advice is necessary. The district court adopted this approach "based on the principles espoused in *Upjohn*, and the widespread use of independent consultants by corporations."

Applying the broad, practical approach, the court concluded that Swiftwater's representatives were the functional equivalents of employees of GSK, because Swiftwater actively created and implemented the Flonase maturation plan and delved into legal and regulatory issues that necessitated consultation with GSK's counsel.

PRACTICE TIPS

In cases in which a privilege challenge exists for a non-employee, "counsel will need to marshal the facts and make a detailed showing to establish that the independent contractor is the functional equivalent of an employee. Those facts should identify the specialized roles that the contractor performed for the company, demonstrate that those roles required working closely with employees and counsel, and demonstrate that those roles required communications that were treated confidentially," says John B.

Isbister, Baltimore, Publication and Content Officer of the ABA Section of Litigation.

"While no magic incantation exists to ensure a consultant is covered by the privilege, a party can improve the chances of maintaining the privilege if it includes in the consulting contract some explanation of how the consultant's work will assist the party with legal matters and why the work cannot be conducted in-house," says Ian H. Fisher, Chicago, cochair of the Section of Litigation's Trial Evidence Committee. "The contract should expressly recognize that the consultant will work with the party's attorneys and that the party expects the communications to be confidential," adds Fisher.

"A contractual provision with an independent contractor will not control the outcome of a privilege challenge, but it may help define the parameters of the relationship so that third parties can behave appropriately when handling legal matters for a client," says Joan K. Archer, Kansas City, MO, cochair of the Section's Pretrial Practice and Discovery Committee.

"Clients should also consider educating independent contractors regarding the proper way to communicate in writing with counsel by including references to confidentiality and stating the legal purpose for the communication," says Archer. Nevertheless, "much depends on how artfully counsel are able to make their case and how 'strict constructionist' on the privilege a particular court may be," cautions Epstein. **L**

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