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Keeping the Outside In: Preserving Privilege When Outsourcing Legal Work

by Laurie Uustal Mathews and Shannon Kelley Shaw

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Outsourcing is one of America's fastest-growing industries. Corporations increasingly outsource work previously performed by employees to a variety of outside consultants. However, with smart business decisions comes litigation risk. Outside consultants are often intimately involved in the corporation's daily business and possess information needed by attorneys to render competent legal advice to the corporation. Yet communications between corporate counsel and an outside consultant may not be protected by the attorney-client privilege.

The Functional Equivalent Doctrine

In *In re Bieter Co.*, the U.S. Court of Appeals for the Eighth Circuit was the first federal appellate court to address whether communications between corporate counsel and an outside consultant could fall within the attorney-client privilege. *Bieter* held that for privilege purposes there was no reason to distinguish between persons directly on the corporation's payroll and an outside consultant where the consultant "was in all relevant respects the functional equivalent of an employee" and possessed information needed by counsel to render competent advice to the corporation. Under this doctrine, a confidential communication shared with an outside consultant is protected by the attorney-client privilege where an outside consultant is the "functional equivalent" of an employee and the communication at issue would otherwise have been protected by the privilege.

Since *Bieter*, numerous courts have recognized that the growing use of outside consultants has generated the need to adopt the functional equivalent doctrine. While the U.S. Court of Appeals for the Ninth Circuit is the only other appellate court to expressly adopt *Bieter*, the D.C. Circuit used the functional equivalent doctrine to find that the attorney-client privilege protected documents that a corporation shared with its public relations and government affairs consultants. Many federal district courts, including a number of courts in the Second, Fourth and Ninth Circuits, also have applied this doctrine to determine whether communications between an outside consultant and corporate counsel are protected by the corporation's attorney-client privilege. Several district courts have, however, expressed doubt that their respective appellate courts would adopt the doctrine.

Whether an outside consultant is considered the "functional equivalent" of an employee for purposes of applying the attorney-client privilege depends on case-specific facts. Courts are more likely to find this is the case where the consultant performs a key corporate job that may not be otherwise performed in-house; is routinely present at the corporation's worksite; spends all or most of his time working on

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corporate business; acts as an integral part of the corporate team; has the authority to speak for or make decisions on the company's behalf; and has unique knowledge about the corporation's business that enables outside counsel to provide sound legal advice. Courts have applied the functional equivalent doctrine and protected communications between corporate counsel and outside consultants in various industries, including public relations, pharmaceutical consulting, financial advising, insurance broker services and movie production services.

Not surprisingly, courts are generally unwilling to protect communications between corporate counsel and an outside consultant who acts like a traditional third party contractor or professional, such as an employee of an auditing or accounting firm. Thus, an outside consultant who performs services for numerous clients and is not regularly onsite at corporate premises is less likely to be considered the functional equivalent of an employee. Additionally, if counsel could obtain information critical for legal strategy directly from corporate employees and need not rely upon an outside consultant for that information, then the outside consultant likely would not be considered a functional equivalent.

Practical Implications

Any corporation that outsources work will want to educate itself about the various approaches taken by courts applying the functional equivalent doctrine and should strongly consider implementing measures to ensure that its outside consultants are treated as the "functional equivalent" of employees for privilege purposes. In order to avoid a privilege challenge, corporations should be prepared to establish that an outside consultant fits this mold and to demonstrate that the outside consultant may be the only source of information integral to the company's litigation strategy. Likewise, corporate counsel may want to include language in an outside consultant's contract stating that the position requires taking responsibility for a key corporate job and communicating with counsel regarding legal matters.

In making these decisions, corporate counsel will need to weigh the benefits of adopting an outside consultant as the "functional equivalent" of an employee against other corporate consequences that may result from this strategy, including corporate benefits and labor implications. Regardless, in putting together litigation teams who are privy to confidential communications involving legal strategy, corporate counsel should carefully consider the implications of including outside consultants in such communications before those communications are shared with the outside consultants. Once those communications are shared with an outside consultant, the attorney-client privilege may be lost if that consultant is not the functional equivalent of an employee.

Laurie Uustal Mathews is a partner at Hunton & Williams LLP. She focuses on complex commercial and business litigation and corporate governance, including complex commercial and white collar criminal defense. She may be reached at (305) 810-2537 or lmathews@hunton.com. Shannon Shaw focuses her practice on complex commercial business litigation in federal and state court. She may be reached at (305) 810-2462 or sshaw@hunton.com.