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## Are Owner Communications with Design Professionals Privileged?

*by Patrick R. Kingsley, Esq.*

There is often a close relationship between an owner and its design professional on a construction project. Owners and design professionals frequently work together from project inception to design approval and then continue to work together in evaluating (and often opposing) the claims of the general contractor. It is not surprising, therefore, that owners often view their hired design professionals to be “part of the team.” Sometimes these communications can be unguarded and conversational. But are those communications protected from discovery? At least one court in Delaware has answered “no.”

In Town of Georgetown v. David A. Bramble, Inc., et al., 2016 WL 1019630 (D. Del. 2016), the town sought to protect its counsel’s communications with its hired, outside design consultant. The town argued that its design professional was its agent and, therefore, that it fell within the scope of the attorney-client privilege. In particular, the town argued that the contract with the design professional and the contract with the general contractor both indicated that the design professional would act as the owner’s “representative” in the field. The town also argued that the design professional had functioned as the hired engineering consultant for approximately two decades on other unrelated projects. With regard to the project at issue in the case, the town argued that without access to the design engineer’s engineering acumen and institutional knowledge of the project, the town could not properly prepare its case. The court found that these arguments were not sufficient to transform a consulting design professional into an agent of the town. For this reason, communications between the town’s lawyer and the town’s design professional were not privileged.

The Delaware court explained that, generally, an independent contractor is not an agent of its client. There is an exception to this general rule: If the client dominates the manner and means of the work performed by the independent contractor, that domination can establish an agency relationship. As the court explained, one of the defining features of an agency relationship is the agent’s “continuous subjugation to the will of the [principal]”. The court found that the town did not dominate the engineer. Indeed, as the town itself admitted, it did not have the wherewithal to control the engineer’s work. The town – as with many project owners – lacked sufficient engineering knowledge and acumen to design and manage the project on its own, which is precisely why it hired an outside design professional to begin with. Moreover, the contract with the design professional expressly disclaimed responsibility by the town for the technical accuracy of the design professional’s services. The court found this to be compelling evidence that the town did not exercise sufficient control over the design professional to elevate this independent contractor to the status of the town’s agent. Hence, its communications with the town’s lawyer were not privileged.

Owners and design professionals are now on notice that communication between them may be subject to disclosure in discovery. And it may not matter if the owner believes that it needs those communications to prepare its case.

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