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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Avoiding Inadvertent Disclosures of Privileged Information

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Difficult privilege issues often arise in litigation, including evaluating whether a party has impliedly waived privilege through its litigation conduct, and the extent to which a party can use a privileged document that has been inadvertently produced. Southern District Judge Nelson Roman and Magistrate Judge Henry Pitman recently addressed two such issues in *Barbini v. First Niagara Bank, N.A.*, 2019 WL 1922041 (April 29, 2019), and *In re Keurig Green Mountain Single Serve Coffee Antitrust Litigation*, 2019 WL 2003959 (May 7, 2019).

In *Barbini*, Judge Roman addressed whether a party had impliedly waived its attorney-client privilege by making statements during discovery that implicated its counsel's advice. In *Keurig*, Judge Pitman addressed whether a party to whom an allegedly privileged document was inadvertently produced could refer to the contents of the document for the limited purpose of challenging the claim of privilege. Roman found that a privilege waiver had occurred and Pitman found that the recipient of the allegedly privileged document could refer to its contents in challenging the claim of privilege.

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'Barbini'

In *Barbini*, the defendant bank (bank) conducted an internal investigation in response to complaints by two of its employees (plaintiffs) about sexual harassment by their manager (manager). The bank assigned a human resources representative (HR rep) to investigate the complaints. The HR rep ultimately decided that the bank should issue a "final written warning" to the manager, which it did. Shortly thereafter, the bank terminated the manager and both plaintiffs allegedly for violating the bank's notary policy. Plaintiffs subsequently sued the bank, claiming that it used the alleged violation of the notary policy as a pretext to terminate them for complaining about harassment.

During the litigation, plaintiffs deposed the HR rep about his decision to give the manager a final warning (rather than terminate him). The HR rep testified that he discussed what action to take against the manager with the manager's supervisor and the bank's in-house counsel. The HR rep further testified that he decided to issue a final warning to the manager based on those discussions. When plaintiffs attempted to inquire about in-house counsel's "advice" or "perspective" about issuing a final warning, the bank's litigation counsel instructed the HR rep not to answer the questions, invoking the attorney-client privilege. *Barbini*, 2019 WL 1922041, at *2.

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Prior to the HR rep's deposition, the bank asserted in its answer to plaintiffs' complaint that "it undertook good faith efforts to prevent and remedy any alleged discrimination or retaliation [by the manager] and that

plaintiffs unreasonably failed to avail themselves of [the bank's] internal procedures for remedying any such discrimination or retaliation." Id. at *6. The bank further asserted in the answer that "any employment actions taken by [it] towards plaintiffs [were] for reasons that were job-related and consistent with business necessity." Id.

After the HR rep's deposition, the bank moved for a protective order to preclude plaintiffs from obtaining discovery concerning any legal advice that the bank's in-house counsel provided to the HR rep in connection with the issuance of the warning letter. Plaintiffs, in turn, moved to reopen the depositions of the HR rep and another bank employee so they could question them about the in-house counsel's legal advice. The dispute was referred to Magistrate Judge Judith McCarthy.

On July 16, 2018, Judge McCarthy issued a memorandum and order denying the bank's motion for a protective order and granting plaintiffs' motion to reopen the depositions. McCarthy found that, through the HR rep's testimony and the bank's above-referenced assertions in its answer, the bank had impliedly waived any privilege that otherwise would have applied to the in-house counsel's advice relating to the warning letter. On July 31, 2018, the bank appealed the judge's decision.

Applicable Standards

Judge Roman first addressed the standard for reviewing Judge McCarthy's finding of an implied waiver, noting that, under Federal Rule of Civil Procedure 72(a), her decision should be reversed only if it was "clearly erroneous or [] contrary to law." Id. at *3 (citation omitted). As Roman explained, a decision is "'clearly erroneous' if the 'reviewing court…is left with the definite and firm conviction that a mistake has been committed,' and is 'contrary to law' if it 'fails to apply or misapplies relevant statutes, case law, or rules of procedure.'" Id. (citation omitted).

Judge Roman then identified the three circumstances in which courts will find an implied privilege waiver: "(1) when a client testifies concerning portions of the attorney-client communication; (2) when a client places the attorney-client relationship directly at issue; and (3) when a client asserts reliance on an attorney's advice as an element of a claim or defense." Id. at *4 (citation omitted). In addressing the rationale for finding an implied waiver in these circumstances, Roman explained that, as a matter of fairness, "[a] party cannot… affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party." Id. (citation omitted).

Roman also discussed the *Faragher/Ellerth* affirmative defense, which he noted, if raised, will result in a waiver of privilege. Id. He explained that this defense "allows an employer to escape liability [for workplace harassment] if it can show (1) [that it] exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided." Id.

An Implied Waiver of Privilege Occurred

At the outset of his analysis, Roman noted that the bank had not asserted an "advice of counsel" defense in its answer, and in a letter to the court, had "expressly disclaimed" any reliance on the advice of its counsel. Id. at *5. He nevertheless concluded that Judge McCarthy had not clearly erred in finding that the bank had impliedly waived its attorney-client privilege through both the HR rep's deposition testimony and the assertions in its answer. Id. at *6-7.

Turning first to the deposition testimony, Roman determined that a waiver had occurred because the HR rep's testimony did not contain "just generalized references to counsel's advice," but "went further" by stating that he decided to issue the warning letter after "thoroughly discuss[ing] it with…[i]n-[h]ouse [c]ounsel." Id. at *6 (citation omitted). He reasoned that "[t]he bank's defense that its reason for terminating plaintiffs was not discrimination or retaliation and was solely due to plaintiffs' violating the notary policy hinge[d] on the…investigations [into the alleged harassment and notary policy violations] being truly separate[, b]ut the only way to assess their separateness [was] by accepting [the HR rep's] testimony that he relied on [in-house counsel's] advice and handled the [harassment investigation] appropriately and independently of the [notary policy investigation]." Id.

"Although a close call," Roman concluded that the HR rep's testimony coupled with the bank's above-described defense impliedly waived the privilege, as "the bank indirectly assert[ed] reliance on [in-house counsel's] legal advice as a defense to plaintiffs' employment discrimination claims." Id.

Turning to the answer, Judge Roman found that it provided an independent ground for Judge McCarthy's finding of implied waiver. Specifically, he

concluded that the bank had raised the *Faragher/Ellerth* defense—and thus waived privilege—through the assertions in its answer that it "undertook good faith efforts to prevent and remedy any alleged discrimination or retaliation and that plaintiffs failed to avail themselves of a particular remedy." Id. (internal quotations omitted). He explained that, through those statements in its answer, the bank "[was] implying that the sexual harassment investigation was handled according to protocol and had nothing to do with [its] subsequently firing plaintiffs for violating the notary policy." Id. Under these circumstances, Roman concluded that there was "no way…to assess the veracity of [the bank's] defense if the…conversations related to both investigations are concealed." Id. at *7.

Accordingly, Judge Roman affirmed Judge McCarthy's decision to reopen discovery to allow additional deposition questioning of the HR rep and another bank employee regarding in-house counsel's input in the decision to give the manager a final warning and the later decision to terminate both the manager and plaintiffs.

'In re Keurig'

In *Keurig*, defendant inadvertently produced a privileged document to plaintiffs and then clawed it back pursuant to the protective order governing the case. Thereafter, plaintiffs sought to use the contents of the putatively privileged document for the limited purpose of challenging defendant's assertion of privilege. Citing a sentence in the protective order—which stated, "[i]f a party has inadvertently or mistakenly produced privileged material, and if the party makes a written request for [its] return…, the receiving party will also make no use of the information contained in the privileged material…regardless of whether the receiving party disputes the claim of privilege"—defendant claimed that the protective order precluded plaintiffs from using the contents of the inadvertently produced document to challenge the assertion of privilege. *Keurig*, 2019 WL 2003959, at *1.

In response, plaintiffs claimed that another sentence in the protective order—which stated, "[t]he receiving party may not use the privileged material…for any purpose whatsoever *other than moving the court for an order compelling production of the privileged material* until the court has determined that the material is not privileged"—took priority over the more general sentence cited by defendant and permitted them to use the contents of the document for the limited purpose of challenging the claim of privilege. Id. (emphasis added).

> In Keurig, Judge Pitman addressed whether a party to whom an allegedly privileged document was inadvertently produced could refer to the contents of the document for the limited purpose of challenging the claim of privilege.

In resolving the parties' dispute, Judge Pitman observed that in several prior Southern District cases, courts have allowed parties who reviewed inadvertently disclosed documents *before they were clawed back* to use what they learned prior to claw back to challenge the asserted claim of privilege. Id. at *2 (citations omitted). Pitman also noted that in a prior ethics opinion, the New York City Bar Association had concluded that although a lawyer is "ethically bound to return or destroy inadvertently disclosed documents, the non-disclosing lawyer is not ethically barred from using information gleaned *prior to knowing or having reason to know* that the communication contains information not intended for the non-disclosing lawyer." Id. at *3 (emphasis added) (citation omitted). By contrast, Pitman noted that, if a party reviews an inadvertently disclosed document *after receiving a claw back request*, that constitutes an ethical violation. Id. at *2.

Against this backdrop, and notwithstanding the tension between the above-quoted sentences in the protective order, Judge Pitman concluded that the protective order permitted plaintiffs to use the contents of the putatively privileged document to challenge defendant's claim of privilege, "to the extent that [plaintiffs] learned of the contents of the document…prior to the…assertion of privilege." Id. at *4.

Conclusion

Judge Roman's finding of an implied privilege waiver in *Barbini*, and Judge Pitman's finding in *Keurig* that a party can use an inadvertently-produced, allegedly-privileged document to challenge a claim of privilege over the document, serve as a reminder of the care that lawyers should exercise in making decisions that could implicate claims of privilege.