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No Work Product Privilege Among Potential Adversaries

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When parties with a common interest share attorney work product with each other in anticipation of litigation, the parties often expect that the work product will be immune from disclosure in the subsequent litigation. If, however, a party shares work product with another party with whom it has a common interest but also is a potential adversary, the work product may be discoverable by third parties, notwithstanding that the sharing parties had a common interest at the time they exchanged the work product.

U.S. Magistrate Judge Gabriel W. Gorenstein for the Southern District of New York recently addressed this exact issue in *Pilkington N. Am. v. Mitsui Sumitomo Ins. Co. of Am.*, 341 F.R.D. 10, 16 (S.D.N.Y. 2022). Prior to the litigation, the eventual plaintiff, Pilkington North America, exchanged attorney work product with its insurance broker, Aon Risk Services Central, with which it shared a common interest at the time, but which it later named as a defendant in the action. Notwithstanding the common interest, Judge Gorenstein held that the work product was discoverable by the other defendant in the action, Mitsui Sumitomo Insurance Company of America (MSI), because (1) when the documents were exchanged, Aon and Pilkington were foreseeable adversaries and (2) the work product concerned the subject matter of the potential dispute between the parties. The ruling bespeaks caution to parties considering sharing work product with a party who may later become an adversary.

'Pilkington v. MSI & Aon'

In 2009, plaintiff Pilkington purchased insurance from defendant MSI with the aid of Pilkington's insurance broker, defendant Aon. The insurance policy originally provided coverage of up to more than $300 million for damages caused by windstorms. In 2015, MSI sought certain changes to the insurance policy, one of which would cap the policy limit for damages caused by windstorms at $15 million. According to the complaint, Pilkington accepted the changes to the policy only after Aon advised Pilkington that the changes would not affect the windstorm limit.

In February 2017, a tornado struck Pilkington's Illinois factory, allegedly causing damages of up to $100 million. The day after the tornado, Pilkington sought coverage under its insurance policy with MSI. In response, Aon alerted Pilkington that the insurance policy limited windstorm losses to $15 million. Shortly thereafter, Pilkington retained Aon as a consultant to assist Pilkington in preparing an insurance claim to seek recovery from MSI. Pilkington's general counsel then contacted outside counsel for assistance in responding to MSI's coverage defenses and they discussed, among other things, Pilkington's retention of Aon and MSI's contention that the insurance policy's revised windstorm limit capped coverage at $15 million.

Pilkington and Aon's consulting agreement contemplated that Aon would assist in settling claims with MSI and that Aon would provide expert testimony. Pursuant to this consulting agreement, Pilkington's outside counsel communicated with Aon and sent Aon documents

containing outside counsel's work product.

In response to Pilkington's insurance claim, MSI ultimately indemnified Pilkington for only $15 million. Citing the revised windstorm limit, MSI denied coverage for any damages exceeding that amount.

Pilkington responded by filing suit against MSI and Aon, seeking additional relief from MSI under the insurance policy, and seeking damages from Aon based on its allegedly improper advice to Pilkington with respect to the 2015 changes to the policy that introduced the $15 million windstorm limit. After the defendants' motions to dismiss were denied, MSI filed a motion to compel Pilkington to produce certain documents that Pilkington had shared with Aon when Aon was acting as Pilkington's consultant and assisting Pilkington in preparing its insurance claim against MSI. Pilkington refused to produce the documents, claiming that the documents were protected from disclosure by the attorney work product doctrine.

Relevant Legal Principles

In resolving the motion to compel, Judge Gorenstein began by discussing the relevant law governing the work product doctrine. Judge Gorenstein observed that the doctrine generally protects from discovery "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." *Pilkington*, 341 F.R.D. at 13 (quoting Fed. R. Civ. P. 26(b)(3)). The doctrine's purpose is to provide a zone of privacy for attorneys to prepare for litigation free from unnecessary intrusion by adversaries. Id.

The party asserting work-product protection bears the burden of establishing that the protection applies. Id. To qualify for the protection, the withheld material must be "(1) a document or a tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by his representative." Id. (quoting *Allied Irish Banks, P.L.C. v. Bank of Am., N.A.*, 252 F.R.D. 163, 173 (S.D.N.Y. 2008)). To demonstrate that a document was prepared "[i]n anticipation of litigation," the withholding party must show that "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." Id. at 13-14 (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)). Therefore, documents that are created in the ordinary course of business are not protected, though documents created in anticipation of litigation are protected even if they also were intended to be used to aid in business dealings. Id. at 13.

Unlike with the attorney-client privilege, a party does not waive work-product protection merely by disclosing the work product to a third party. Id. at 14 (citing *Bank of Am., N.A. v. Terra Nova Ins. Co.*, 212 F.R.D. 166, 169 (S.D.N.Y. 2002)).

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The lack of an automatic waiver when work product is disclosed to a third party exists because "attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial." Id. at 13 (quoting *United States v. Nobles*, 422 U.S. 225, 238-39 (1975)).

Accordingly, a party can share work product with third parties without waiving privilege when "the disclosing party and the third party share a common interest." Id. at 16 (quoting *Merrill Lynch & Co. v. Allegheny Energy*, 229 F.R.D. 441, 446 (S.D.N.Y. 2004)). However, "[a] party waives the work product protection by taking actions inconsistent with … its purpose, such as disclosing work product to its adversary … ." Id. at 14 (quoting *N.Y. Times Co. v. U.S. Dep't of Justice*, 939 F.3d 479, 494 (2d Cir. 2019)).

Application of Relevant Legal Principles to 'Pilkington'

Applying the above-referenced principles, Judge Gorenstein held that even if the documents that Pilkington shared with Aon were created in anticipation of litigation, and thus constituted "work product," Pilkington waived work-

product protection by disclosing the documents to Aon, because (1) at the time of disclosure, Aon was foreseeably a potential adversary of Pilkington and (2) the documents concerned the subject matter of the potential dispute between them. Id. at 14-15.

Thus, in concluding that the shared documents were not entitled to work-product protection, Judge Gorenstein focused on both the relationship between Pilkington and Aon, and the nature of the documents they exchanged. Id. Had the shared documents related to a topic other than the foreseeable dispute between Pilkington and Aon, under Judge Gorenstein's analysis, the privilege would not have been destroyed. See id. But because Pilkington and Aon were potential adversaries and the shared documents concerned the parties' foreseeable dispute (they concerned the windstorm limit), Judge Gorenstein found that the sharing of the documents was inconsistent with the privilege's purpose (to allow a lawyer to shield his or her thought process from an adversary) and thus constituted a waiver of privilege. Id.

In concluding that Aon was a foreseeable adversary of Pilkington, Judge Gorenstein observed that, as Pilkington's insurance broker, Aon reviewed the 2015 proposed changes to the insurance policy and advised Pilkington concerning their impact. Id. at 15. Because Aon's role involved providing Pilkington advice with respect to the 2015 changes, Judge Gorenstein found that the potential plainly existed that Pilkington would claim the advice was legally deficient, and that Aon would become Pilkington's adversary. Id. Furthermore, Judge Gorenstein noted that Pilkington titled one of the withheld documents "PNA-MSI-Aon Litigation strategy," suggesting that Pilkington in fact viewed Aon as a potential adversary at the same time it shared the work product. Id. Judge Gorenstein further noted that Pilkington conspicuously failed to file an affidavit claiming that it did not view Aon as a potential adversary when it shared the work product with it. Id.

Judge Gorenstein next concluded that the fact that Pilkington and Aon shared a common interest at the time the documents were shared (i.e., "getting Pilkington out of the [$15 million] []limit claimed by MSI") was insufficient to avoid waiver. Id. at 16. Judge Gorenstein observed that "the common interest analysis in the context of work product waiver is a means to determine whether the party receiving work product should be conceived of as an adversary or a conduit to a potential adversary." Id. (quoting *Merrill Lynch*, 229 F.R.D. at 447). Here, however, Pilkington and Aon were potential adversaries, and therefore that the parties may have shared a common interest could not undo the waiver that occurred when Pilkington shared the documents with its potential adversary. Judge Gorenstein noted that a contrary conclusion would lead to the untenable result that "even today, during this litigation, Pilkington and Aon could freely share work product without waiver given that they share a common interest in eliminating the [$15 million] limit—at the same time Pilkington is suing Aon for tens of millions of dollars." Id.

Conclusion

Although parties may exchange attorney work product with third parties in anticipation of litigation without waiving privilege, such documents may be discoverable if, at the time of disclosure, that third party was foreseeably a potential adversary and the documents concerned the subject matter of their potential dispute.

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