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Expert Analysis

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

In Witness Preparation, Relationships Matter

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A well-prepared deposition witness understands the deposition process; testifies based on recollection, not speculation; and is forewarned as to possible areas of vulnerability. Preparing your client for a deposition is facilitated by the confidentiality protections afforded the attorney-client relationship. Witness preparation becomes far more complicated, however, when the witness is not your actual client. As several recent cases from the U.S. District Court for the Southern District of New York make clear, deposition preparation sessions with non-clients may not be afforded confidentiality protection.

Former Employees

Two recent cases explore the application of the attorney-client privilege and work-product doctrine to witness-preparation sessions with a former employee. In the first, *Gary Friedrich Enterprises v. Marvel Enterprises*,[1] Southern District Magistrate Judge James C. Francis IV upheld Marvel's assertion of attorney-client privilege to protect from disclosure its communications during a preparation session with a former employee of a predecessor entity. Marvel was defending against claims that it had misappropriated comic-book stories and characters that one of the plaintiffs claimed to have developed. At the deposition, plaintiffs asked the former employee about his communications with Marvel's attorneys. Marvel directed the witness not to answer, asserting the attorney-client privilege.

In upholding Marvel's claim of privilege, Judge Francis observed that "[v]irtually all courts hold that communications between company counsel and former company employees are privileged if they concern information obtained during the course of employment."[2] Citing a test articulated first in the District of Connecticut, and adopted in the Southern District of New York, Judge Francis explained that communications whose "nature and purpose" are to inform counsel of facts related to a legal action about which the former employee was aware as a result of his or her employment are privileged "regardless of when they occurred."[3]

> Two recent cases explore the application of the attorney-client privilege and work-product doctrine to witness-preparation sessions with a former employee.

Judge Francis noted that the test protecting communications with a former employee recognizes a "very narrow exception": The privilege does not apply where the former employee is separately represented and the corporate counsel's communications with the former employee bear on or could affect the witness' testimony, or go beyond activities within the course of the witness' former employment.[4] Significantly, Judge Francis also observed that to the extent deposition-preparation discussions with a former employee fall outside the attorney-client privilege, they may nevertheless be immune from disclosure under the work-product doctrine to the extent that they reveal the legal opinions and conclusions of counsel for the entity, or its legal strategy.[5]

Applying these principles, Judge Francis upheld Marvel's assertion of privilege and work-product protection over its witness-preparation discussions with its former employee. Specifically, he found that the witness was deposed in order to provide information obtained during the course of his employment about the origins of the comic-book material in question. Judge Francis relied both on the fact that the deposition was dominated by questions concerning Marvel's business practices during the witness' employment and the circumstances surrounding creation of the disputed work, and on a representation by Marvel's lawyers that their discussions with the witness covered only facts within the scope of his employment. Judge Francis held, additionally, that to the extent inquiry by plaintiffs into statements made to the witness or questions posed to him during witness preparation would reveal Marvel's counsel's legal analysis, that inquiry would be barred by the work-product doctrine.

The plaintiffs in the second case, *In re Refco Securities Litigation*,[6] tried unsuccessfully to rely on Judge Francis' decision in *Friedrich* to shield from inquiry their pre-deposition discussions with a witness. Plaintiffs—the joint official liquidators for a set of funds and their management company which had collapsed after suffering losses in connection with financial fraud at Refco Inc., brought claims against dozens of defendants allegedly involved in the fraud.[7] At the deposition of a non-party former director and employee of the defunct management company, the witness acknowledged meeting with plaintiffs' counsel beforehand to "discuss his recollection of the facts" of his employment. When defendants' counsel sought to explore the substance of those discussions, plaintiffs' counsel directed the witness not to answer.

Plaintiffs, asserting the defunct company's attorney-client privilege and work-product protections, contended that their counsel's communications with the former director and employee concerning information obtained during his employment were privileged. Southern District Judge Jed S. Rakoff rejected the plaintiffs' attempted reliance on *Friedrich*. He noted that the foundation for extension of the privilege to former employees rests on the U.S. Supreme Court's decision in *Upjohn v. United States*,[8] which held that a corporation's attorney-client privilege extends to conversations between its outside counsel and its employees during an internal investigation.

Observing that neither the Supreme Court

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nor the U.S. Court of Appeals for the Second Circuit has addressed whether this privilege extends to conversations with former employees, Judge Rakoff acknowledged that certain U.S. district courts in the Second Circuit (including *Friedrich*) have recognized a privilege with former employees so long as the communication relates to the former employee's conduct and knowledge gained during employment. He stressed, however, that even those courts have noted that "former employees should not be treated as if they were current employees" in determining whether the privilege applies, emphasizing that *Upjohn* extended the privilege to communications with employees "acting at the direction of corporate superiors." Here, Judge Rakoff concluded that the communication at issue "can in no way be said to be a conversation between a corporate attorney and an em-ployee 'client' at the direction of management."

First, Judge Rakoff found that although the plaintiff liquidators had been assigned the prior privilege rights of the defunct management company, counsel's conversations with the witness were not for the purpose of providing legal advice to that entity, but rather to support the liquidators' strategy of bringing claims on behalf of creditors of the defunct funds. Second, he found that the relationship between plaintiffs and the witness was adversarial because plaintiffs had potential claims against the witness as to which they had entered a tolling agreement. Third, he noted that the witness was represented by his own counsel at both the preparation meeting and at the deposition, and had testified that he was not represented by plaintiffs' attorneys. Judge Rakoff concluded that based on this arm's-length relationship, "a former director of a defunct entity who is potentially liable to the…plaintiffs [can in no sense] be considered a 'client' or agent of the… plaintiffs, such that the attorney-client privilege covers communications between him and the . . . plaintiffs' attorneys."

Citing the Second Circuit's decision in *In re Steinhardt Partners*,[9] Judge Rakoff further held that because the witness was not part of the plaintiffs' attorney-client relationship, plaintiffs could not invoke the work-product doctrine to protect aspects of their legal strategy shared with the witness: their disclosure to an adversary had waived the protection.

Common Legal Interest

Judge Rakoff also relied on *Steinhardt* to reject the government's claims of work-product protection over deposition-preparation sessions it conducted with a non-party witness in *Securities and Exchange Commission v. Gupta*.[10] The U.S. Securities and Exchange Commission had brought that civil-enforcement proceeding at the same time the U.S. Attorney's Office was prosecuting parallel criminal insider-trading charges. During depositions in the civil case, non-party witness Lloyd Blankfein, the CEO of Goldman Sachs, testified that he had met with attorneys from the SEC and the U.S. Attorney's Office, along with at least one FBI agent, in preparation for the deposition. When the defendants asked about the meetings, the SEC asserted work-product protection and directed the witness not to answer. In response to defendants' motion to compel, the government argued that their discussions with the non-party witness and the documents that they showed him were protected work product reflecting the legal opinions, thought processes, and strategy of the SEC and the U.S. Attorney's Office.

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Applying the Second Circuit's decisions in *Steinhardt* and *In re Grand Jury Proceedings*,[11] Judge Rakoff held that an attorney who discloses work product to prepare a non-party for a deposition, when the witness does not share a common legal interest with the attorney's client, waives any work-product protection.[12] In this case, he found that there was no "common interest" between Blankfein and the government because the witness was represented by his own attorneys, and neither the witness nor his employer took any position in the enforcement action. Judge Rakoff observed that Goldman Sachs was not pursuing its own claims against defendant Gupta, and was not coordinating with the SEC or U.S Attorney's Office in developing legal theories or analyzing information. Accordingly, he concluded that the disclosures of legal strategy to Blankfein during deposition-preparation discussions waived work-product protection.

Judge Rakoff further held that the waiver extended to documents shared with the non-party witness during the meetings, rejecting the SEC's attempted reliance on the selection-and-compilation doctrine. Under this doctrine, work-product protection may apply to a collection of documents that the attorney has so specifically selected and compiled in anticipation of litigation that their production would necessarily reveal the attorney's strategy.[13] Judge Rakoff held that even if the government's documents might have been covered by the selection-and-compilation doctrine, the government had waived work-product protection over that subset of documents by showing them to the witness.

In reaching this conclusion, Judge Rakoff distinguished his prior opinion in *Morales v. United States*,[14] where he upheld assertion of the work-product doctrine under similar circumstances also involving government pre-deposition meetings with non-party witnesses. In that case, the plaintiff had candidly acknowledged during oral argument that one aim of inquiring into the witness-preparation sessions was to learn the government's legal theories. Finding a material possibility that a response to the plaintiff's inquiry might reveal the government's strategy and thought processes, Judge Rakoff had upheld work-product protection for those sessions. He noted, by contrast, that in *Gupta* the questions defendant sought to put to Blankfein were aimed at testing Blankfein's credibility as a witness.[15]

Conclusion

The opportunity to meet with a non-party witness before that witness is deposed can be extremely valuable to a litigant. Lawyers contemplating such meetings must consider carefully, however, whether these communications may be subject to disclosure and take steps to avoid unnecessary revelation of strategically sensitive information.

1. 2011 WL 2020586 (S.D.N.Y. May 20, 2011) (Francis, M.J.).
2. Id. at *5 (citing *Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 112 (S.D.N.Y. 2005) (Francis, M.J.); *Gioe v. AT&T*, 2010 WL 3780701, at *1 (E.D.N.Y. Sept. 20, 2010) (Tomlinson, M.J.); *Surles v. Air France*, 2001 WL 815522, at *6 (S.D.N.Y. July 19, 2001) (Maas, M.J.), aff'd, 2001 WL 1142231 (S.D.N.Y. Sept. 27, 2001) (Berman, J.)) (internal quotations omitted).
3. Id. (citing *Nicholls v. Philips Semiconductor Mfg.*, 2009 WL 2277869, at *2 (S.D.N.Y. July 27, 2009) (Yanthis, J.) (quoting *Peralta v. Cendant*, 190 F.R.D. 38, 41–42 (D. Conn. 1999)) (internal quotations omitted).
4. Id. (citing *Wade Williams Distribution v. Am. Broad. Companies*, 2004 WL 1487702, at *1 (S.D.N.Y. June 30, 2004) (McKenna, J.); *Gioe*, 2010 WL 3780701, at *1) (internal quotations omitted).
5. Id. (citing *Gioe*, 2010 WL 3780701, at *1; *Nicholls*, 2009 WL 2277869, at *2; *Surles*, 2001 WL 815522, at *6) (internal quotations omitted).
6. 2012 WL 678139 (S.D.N.Y. Feb. 28, 2012) (Rakoff, J.).
7. One of the authors represents a defendant in the *Refco* multi-district litigation but was not involved in the dispute that led to the opinion discussed in this article.
8. 449 U.S. 383 (1981).
9. 9 F.3d 230, 234 (2d Cir. 1993).
10. 2012 WL 990779 (S.D.N.Y. March 26, 2012) (Rakoff, J.).
11. 219 F.3d 175 (2d Cir. 2000).
12. Cf. *Univ. Sports Publ'ns v. Playmakers Media*, 2011 WL 1143005 (S.D.N.Y. March 21, 2011) (Freeman, M.J.) (rejecting assertions of attorney-client privilege and work-product protection for interviews conducted in an internal investigation where there was no common legal, as opposed to a common business, interest).
13. *In re Grand Jury Subpoenas Dated March 19, 2002 & August 2, 2002*, 318 F.3d 379, 384–387 (2d Cir. 2003). See also, Edward M. Spiro and Judith L. Mogul, "Invoking the Selection and Compilation Doctrine," *New York Law Journal* (April 2, 2009).
14. 1997 WL 223080 (S.D.N.Y. May 5, 1997).
15. *Morales* did not address the issue of waiver. Judge Rakoff, citing the "shortcomings of the adversary system," noted that neither party had called his attention to *Steinhardt* and that had he considered that opinion he might well have arrived at a different conclusion in *Morales*.