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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Recurring Challenges to Privilege And Work Product Doctrine

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For the attorney-client privilege and the work product doctrine to provide the salutary benefits of encouraging clients to make full disclosure to their attorneys, and permitting attorneys a "zone of privacy" within which to develop their legal theories and strategies, knowing how to establish and preserve those protections is critical. Yet the frequency with which these doctrines are litigated shows that they are often misunderstood or misapplied. Three recent decisions by judges of the U.S. District Court for the Southern District of New York expose some common misconceptions regarding these doctrines and offer some valuable guidance for those litigating privilege and work product disputes.

Work Product Materials Need Not Be Prepared by or at the Direction of an Attorney. In a decision filed in *Wultz v. Bank of China*,[1] Southern District Magistrate Judge Gabriel W. Gorenstein addressed the threshold issue of whether the work product doctrine protects from disclosure materials that were prepared by or for someone other than an attorney. The materials at issue consisted of documents generated as a result of investigations conducted by the Bank of China upon receipt of a demand letter notifying the bank that plaintiffs, the victims of a terrorist attack in Israel, intended to file suit against the bank in connection with transactions it executed for a senior operative of the terrorist organization that carried out the attack.

Following receipt of that letter employees of the bank—none of them attorneys—conducted investigations in China and New York. The investigations were initiated and directed by bank employees rather than counsel. Plaintiffs sought discovery of the investigation materials, arguing in part that because this information was not prepared at the direction of an attorney, it was not entitled to work product protection.

Judge Gorenstein found that the absence of an attorney directing the investigation, did not remove the documents from the scope of the work product doctrine. Noting the common description of the doctrine as "intended to preserve a zone of privacy *in which a lawyer* can prepare and develop legal theories and strategy,"[2] he observed, nonetheless, that "it is not in fact necessary that the material be prepared by or at the direction of an attorney." Gorenstein relied principally on Federal Rule of Civil Procedure 26(b)(3)(A), which codifies the work product rule and extends that protection not only to materials prepared by or for an attorney, but to those prepared "by or for [a] party or its representative." He noted that the Advisory Committee Notes to that rule are explicit that the rule reflects the trend among courts to extend the protection beyond the preparatory work of an attorney.

Gorenstein also cited cases from other judicial districts affording protection to materials prepared without the involvement of an attorney.[3] Interestingly, he declined to follow a recent unpublished summary order from the U.S. Court of Appeals for the Second Circuit in *Bice v. Robb*,[4] which held that documents "not the work product of an individual acting as the [creator's] attorney" did not enjoy work product protection. Noting that Bice was a summary order lacking precedential authority, Gorenstein found that decision unpersuasive because it cited no case law regarding the treatment of non-attorney-generated work product and addressed neither the text of Rule 26(b)(3)(A) nor the Advisory Committee Notes.

Materials Must Have Been 'Prepared or Obtained Because of the Prospect of Litigation.' After ruling that the materials in *Wultz* were not deprived of work product protection simply by virtue of the fact that non-attorneys directed their preparation, Judge Gorenstein went on to find that the materials failed to satisfy the separate requirement for application

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of the work product doctrine: that they were prepared in anticipation of litigation. Citing *United States v. Adlman*,[5] he noted that the "'in anticipation of litigation' element requires a showing that 'the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" He explained that this requires the party asserting work product protection to show that documents would not have been prepared in essentially the same form without the threat of potential litigation.[6]

Gorenstein accepted Bank of China's contention that the demand letter triggered its investigations, but found that fact insufficient to establish that the bank would not have prepared the materials in similar form absent the potential for litigation. He held that the pertinent inquiry requires the difficult task of answering the hypothetical question of what the bank would have done if made aware of the operative facts, without the threat of litigation, rather than what the bank would have done had no one told it the accounts in question warranted scrutiny.

Noting that the bank bore the burden on this question, Gorenstein observed that the bank had provided "virtually no evidence" on this point, while the plaintiffs, who bore no burden of proof, had supplied or identified evidence suggesting that the bank would have conducted an essentially similar investigation had it learned of the allegations in some other way. He reasoned that the bank would have needed to evaluate whether to close the accounts or make a report to its regulators, and noted that in the report it did make to its regulators the bank listed a series of inquiries and steps it took to identify problems and implement countermeasures to minimize future risk.

Finding that this evidence suggested that the bank would have investigated the alleged improprieties absent the threat of litigation, he concluded the documents generated by those investigations were not prepared in anticipation of litigation, and not entitled to work product protection.

Southern District Judge Jesse M. Furman took a somewhat different approach to the same question in his recent decision in *In re General Motors LLC Ignition Switch Litigation*,[7] denying a motion to compel production of interview notes, summaries and memoranda (Interview Materials) generated in the course of an internal investigation into ignition switch defects and GM's delays in recalling affected vehicles.

In 'Wultz' Judge Gorenstein found that the absence of an attorney directing the investigation, did not remove the documents from the scope of the work product doctrine.

GM hired Jenner & Block's Anton Valukas to represent it in connection with government investigations and inquiries and anticipated civil litigation, and requested that Valukas conduct an internal investigation about the circumstances that led up to the recall and why it took so long for the recall to be announced. Jenner & Block conducted an extensive investigation, interviewing 230 witnesses, many of them current and former GM employees, in the course of 70 days. Valukas prepared and presented a 315 page document—the Valukas Report—to GM, which provided the report to Congress, the Department of Justice and the National Highway Traffic Safety Administration as well as to civil MDL plaintiffs.

GM resisted demands from the civil plaintiffs to produce the Interview Materials, invoking both the attorney-client privilege and the work product doctrine. After finding that the Interview Materials were privileged, Judge Furman went on to consider whether they were also covered by the work product doctrine. He found that the fact that the Valukas investigation may have had as one of its purposes to assist GM in making business decisions was not an impediment to work product protection, noting that the Second Circuit, in *Adlman*, has expressly rejected "a requirement that documents be produced primarily or exclusively to assist in litigation" in order to qualify for protection as work product.

Although he framed the inquiry exactly as Judge Gorenstein did in *Wultz*—whether the documents "would have been created in essentially the same form irrespective of litigation"—he approached answering that question quite differently. Rather than positing what GM would have done had it been made aware of all of the facts but without the specter of litigation, Judge Furman took the civil litigation and criminal investigation as an inevitable aspect of GM's situation, and concluded, without requiring any particularized showing from GM, that it could fairly be said that the "Interview Materials" would not have been prepared in essentially the same form in the absence of the litigation threat.

In support of that conclusion, Judge Furman cited with approval *In re Woolworth Corp. Sec. Class Action Litig.*[8] for the proposition that "when civil and criminal litigation are virtually certain," applying a distinction between anticipation of litigation and business purposes is "artificial [and] unrealistic" and the line between those two concepts is "essentially blurred to oblivion."[9] Bolstering his conclusion that the interviews were "shaped by the specter of litigation," Furman stressed that all witnesses were told that the purpose of their interview was to assist in providing legal advice to GM.

Waiver. A finding that documents are protected by the attorney-client privilege or work product doctrine frequently does not end the analysis. In many instances, litigants seeking protected documents assert that privilege or work product protections have been waived either through disclosure to third parties or through putting the otherwise protected information "at issue" in the litigation.

In *In re General Motors* Judge Furman briefly considered whether GM had waived either the attorney-client privilege or work product protection for the Interview Materials through a broad subject matter waiver by disclosing the Valukas Report to the government and the private plaintiffs. Although the parties briefed the issue under the common law, he noted that the waiver analysis was controlled by Federal Rule of Evidence 502(a) which provides that when disclosure is made in a federal proceeding or to a federal office or agency, "the waiver extends to an undisclosed communication or information… only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." Because GM had neither used the Valukas report offensively nor made selective or misleading use of the privileged materials it did disclose, Furman found no basis for a broader waiver.

Southern District Magistrate Judge Sarah Netburn considered application of the "at issue" waiver doctrine in her recent decision in *Scott v. Chipotle Mexican Grill*,[10] a class action asserting claims under the Fair Labor Standards Act by employees who were not paid overtime because they were classified as "apprentices" by the defendant restaurant chain.

Chipotle asserted 32 affirmative defenses, two of which the plaintiffs argued waived the attorney-client privilege by putting "at issue" legal advice the company had received. Specifically, Chipotle asserted statutory affirmative defenses permitting it to avoid liability because it had relied on administrative authority in classifying its employees as apprentices, and to avoid liquidated damages because it had not acted willfully. In asserting these defenses, Chipotle claimed to have relied on state and federal regulation, but expressly disavowed reliance on the advice of counsel.

Chipotle tried two avenues to avoid a finding that it had waived the attorney-client privilege by putting "at issue" legal advice it had received. First, it sought to assert these affirmative defenses without explicitly invoking the term "good faith," and second, it sought to assert those defenses separate and apart from any advice it received from its attorneys. Judge Netburn rejected this effort, finding that both of the asserted defenses had a good faith component and that Chipotle could not avoid an "at issue" waiver of the attorney-client privilege by basing those defenses on factors other than the advice of counsel. She cited a line of cases holding that a claim of good faith waives the privilege where it can only be scrutinized by examining the disputed communications.[11] In particular, she noted that courts have found a waiver when "legal advice that a party received may well demonstrate the falsity of its claim of good faith belief."[12]

> In 'General Motors,' Judge Furman found that the fact that the Valukas investigation may have had as one of its purposes to assist GM in making business decisions was not an impediment to work product protection.

Here, Chipotle's witnesses testified that they had consulted with counsel in making the decision to classify certain employees as apprentices, repeatedly objecting on the grounds of privilege to any inquiry into the substance of those communications. Noting the possibility that Chipotle had received and ignored legal advice on the issue of employee classification, she held that the advice Chipotle received might demonstrate the falsity of its good faith claim, and that plaintiffs were entitled to explore that possibility. Judge Netburn concluded that "[w]here the defendant has clearly benefited from the advice of counsel on the very issue on which it asserts good faith, it puts its relevant attorney-client communications at issue and thereby waives its privilege." Having put its state of mind at issue, Judge Netburn gave Chipotle the option of providing the plaintiff with its privileged documents or seeking to amend its answer to forgo its good faith defenses.[13]

Conclusion

As the foregoing cases make clear, any assertion of the attorney-client privilege and work-product doctrine is fraught with litigation potential. Particularly at the outset of an investigation, counsel must be sensitive to the risks associated with information-gathering and strategic in how the information is utilized.

1. 2015 WL 362667 (S.D.N.Y. Jan. 21, 2015), objection filed (Jan 30, 2015).
2. Id. at *12 (quoting *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998)) (emphasis added)).
3. Id. (citing *Goff v. Harrah's Operating Co.*, 240 F. R. D. 659 (D. Nev. 2007); *Szulik v. State Street Bank & Trust Co.*, 2014 WL 3942934 (D. Mass Aug. 11, 2014)).
4. 511 F. App'x 108 (2d Cir. 2013).
5. 134 F.3d 1194.
6. 2015 WL 362667, at **11-12 (quoting *United States v. Adlman*, 134 F.3d at 1196; *Allied Irish Banks v. Bank of Am.*, 240 F. R. D. 96 (S.D.N.Y. 2007) (Gorenstein, M.J.)).
7. 2015 WL 221057 (S.D.N.Y. Jan. 15, 2015).
8. 1996 WL 306576 (S.D.N.Y. June 7, 1996) (Owen, J.).
9. 2015 WL 221057, at *7 (citing *In re Woolworth,* 1996 WL 306576 at *3 (internal quotation marks omitted)).
10. 2014 WL 7236907 (S.D.N.Y. Dec. 18, 2014).
11. Id. at *3 (citing, inter alia, *In re County of Erie*, 546 F.3d 222 (2d Cir. 2008); *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991); *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012); *Arista Records v. Lime Grp.*, 2011 WL 1642434 (S.D.N.Y. April 20, 2011) (Wood, J.)).
12. Id. at *4 (quoting *Leviton Mfg. Co. v. Greenberg Traurig*, 2010 WL 4983183 (S.D.N.Y. Dec. 6, 2010) (Katz, M.J.)).
13. Id. at *9.