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Privilege Standing Committee Update

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- Tenth Circuit declines to adopt selective waiver rule.
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Employer's failure to enforce policy of monitoring employee email considered by court in determining whether employee waived privilege.

Employee Laura Curto, working at home, used a company-owned computer and her personal email account to communicate with her private attorney about an EEOC complaint and other claims against her employer, Medical World Communications, Inc. (MWC). In subsequent litigation of those claims, the Eastern District of New York addressed whether such use waived attorney-client privilege and work product immunity in the communications between Curto and her attorney. *Curto v. Medical World Communications, Inc.*, No. 03CV6327, 2006 U.S. Dist. LEXIS 29387 (E.D.N.Y. May 15, 2006).

Upon her termination, Curto erased the privileged files before returning the computer to MWC. MWC, however, recovered and then produced many of the files in discovery. *Id.* at *3-4. Curto claimed privilege and demanded that MWC return the files. *Id.* at *4. MWC, relying in part on a company policy stating that "[e]mployees expressly waive any right of privacy in anything they create, store, send, or receive" on company-owned computers, argued that Curto had waived any potentially applicable privilege. *Id.* at *2-3. In an underlying order, the magistrate judge disagreed, concluding that Curto had not waived privilege by inadvertent production of the files to MWC. *Id.* at *5-6. MWC objected to the order.

The district court (Hurley, J.) upheld the magistrate judge's decision. As the court explained, **the central question was whether Curto's conduct "was so careless as to suggest that [she] was not concerned with the [protection] of the asserted privilege."** *Id.* at *7 (quoting *SEC v. Cassano*,

189 F.R.D. 83, 85 (S.D.N.Y. 1999)). Courts within the Second Circuit generally apply four factors to determine whether a party has waived privilege: "[1] the reasonableness of the precautions taken by the producing party to prevent inadvertent disclosure of privileged documents; [2] the volume of discovery versus the extent of the specific disclosure at issue; [3] the length of time taken by the producing party to rectify the disclosure; and [4] the overarching issue of fairness." *Id.* at *7 (quoting *U.S. v. Rigas*, 281 F. Supp. 2d 733, 738 (S.D.N.Y. 2003)). Finding that the final three factors weighed in Curto's favor, the court focused on the first factor. *Id.* at *9-10. In deciding that Curto's precautions were reasonable despite the company's computer usage policy, **the court emphasized that MWC did not actively enforce its policy (in that it did not regularly monitor usage), thereby creating a "false sense of security which lulled employees into believing that the policy would not be enforced."***Id.* at *8, *13-15. In addition, numerous MWC employees, including the president of the company, accessed personal email accounts from their work computers. *Id.* at *10, n.2.

As MWC pointed out, a significant body of case law indicates that employees have no expectation of privacy with regard to workplace computer files where company policy explicitly informs them that no expectation of privacy exists. *Id.* at *15. **The court, however, distinguished such cases as applying only to right to privacy claims under the Fourth Amendment or under common law and not to the question of whether use of company computers waives attorney-client privilege or work product protection.***Id.* at *16-20. As the court pointed out, none of the cases discussed by MWC addressed privilege, and none of them involved an employee working from a home office, where an employer cannot easily monitor or search an employee's files without notice. *Id.* at *16-17. The court also noted that the company's policy, which stated that the company "*may* … monitor" (rather than "*will* … monitor") usage, created ambiguity as to whether the company would in fact perform audits or monitor usage *Id.* at *17-18. In part because of this ambiguity, the court held that the magistrate judge's decision that use of company computers did not automatically waive privilege was not clearly erroneous or contrary to law.

Tenth Circuit declines to adopt selective waiver rule.

The Tenth Circuit recently considered and rejected a so-called "selective waiver" approach to privileged materials voluntarily produced to government agencies during investigations. In *In re: Qwest Communications International, Inc. Securities Litigation*, 450 F.3d 1179 (10th Cir. 2006), the plaintiff shareholders sought an order that defendant Qwest turn over 220,000 pages of otherwise privileged material that it had produced to the SEC and the DOJ during investigations by those agencies. *Id.* at 1182. Prior to producing the documents, Qwest entered into confidentiality agreements with the agencies. Both the SEC and the DOJ agreed not to disclose the documents to third parties, except to the extent that those agencies determine that disclosure would be "otherwise required by law or would be in furtherance of the [agency's] discharge of its duties and responsibilities." *Id.* at 1181.

Qwest argued that the agreements with the government prevented waiver. Alternatively, Qwest argued that adoption of the "selective waiver" doctrine posited by the Eighth Circuit Court of Appeals in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977), was necessary in order to ensure that corporations cooperate with government investigations. *Id.* at 1193.

The Tenth Circuit Court of Appeals (Murphy, J.) rejected Qwest's arguments. Noting that every circuit court to address selective waiver (apart from the Eighth Circuit) had rejected it, the court held that: **1) a "selective waiver" rule was not necessary in order to ensure cooperation with the government** (as Qwest's own decision to produce 220,000 pages to the government despite adverse case law demonstrated, *id.* at 1193; **2) the confidentiality agreements granted the government "broad discretion" regarding further use of the documents by the agencies and thus "did not realistically control further dissemination,"***id.* at 1194, 1196; 3) a "selective waiver" rule would not serve the purposes behind the attorney-client privilege and work product doctrines, *id.* at 1195; and 4) refusal to adopt a "selective waiver" rule resulted in no unfairness to Qwest, since Qwest made a tactical decision regarding whether to disclose, *id.* at 1195-1196.

The court characterized "selective waiver" as essentially "the substantial equivalent of a new privilege." *Id.* at 1197. As the Supreme Court more often than not has "declined to recognize new privileges," such a tectonic shift in the law should derive, in the Tenth Circuit's view, from the legislature, not the courts. *Id.* at 1197-1199. Noting that the Advisory Committee on Evidence Rules had recently proposed a new Rule 502 providing for selective waiver, and that the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States intended to take up the issue at its June 2006 meeting, the Tenth Circuit encouraged the Committee and Congress to consider the existing common law of privilege when deciding whether and to what extent to create a "selective waiver" rule. *Id.* at 1197-1199.

Addressing the tactical nature of the waiver decision, the court noted that "[a]side from the anecdotal material serving as the foundation for the purported 'culture of waiver,' the record [was] silent regarding its existence, significance, and longevity. More specifically, the record [was] silent about Qwest's particular dealings with the agencies and whether it experienced the tactics deplored by amici." *Id.* at 1199. The court's interest in the specific tactics employed by the agencies suggests that a well-documented record of coercion may be important for parties seeking to claim that disclosure does not result in waiver.

Court looks to principles of subject-matter waiver to determine appropriateness of opposition's access to documents considered by non-testifying expert.

In a victory by WilmerHale lawyers, the U.S. District Court for the District of Massachusetts denied a motion to compel production of documents considered by an external investigator. *In re: PolyMedica Corporation Securities Litigation*, 235 F.R.D. 28 (D. Mass. Apr. 7, 2006) dealt with the applicability of the doctrine of subject matter waiver to documents considered by non-testifying experts. In anticipation of a pending SEC investigation, defendants PolyMedica Corp. and Liberty Medical Supply, Inc. (collectively, the corporate defendants), represented by WilmerHale, retained PricewaterhouseCoopers LLP (PWC) to conduct an investigation and issue a report. The corporate defendants later produced that report to the SEC. The plaintiffs in the related class-action suit requested all documents related to the same subject matter as the report.

The court (Young, J.) rejected the plaintiffs' motion to compel production of the related documents. Because the corporate defendants had designated PWC as a non-testifying expert, the plaintiffs' discovery request was governed by Federal Rule of Civil Procedure 26(b)(4)(B), which states that a

party may depose a non-testifying expert retained in anticipation of litigation "upon a showing of exceptional circumstances." *Id.* at *3. Noting that "the First Circuit has not ruled on subject matter waiver as it applies to a non-testifying expert," the court discussed by analogy subject matter waiver in regard to work product protection and attorney-client privilege. *Id.* at *11. First, the court held that, although the corporate defendants retained PWC in anticipation of possible litigation with the SEC, and not in anticipation of the already ongoing private litigation, **the protection afforded by Rule 26(b)(4)(B) (by analogy with the work product doctrine) applied where, as here, the actions were sufficiently related**. *Id.* at *9-10. Second, the court examined whether the protection of Rule 26(b)(4)(B) could be waived with respect to related subject matter, since the rule does not mention waiver at all. *Id.* at *10-11. **The court, noting that First Circuit cases dealing with attorney-client privilege typically found subject matter waiver only when parties attempted to use partial waiver to gain adversarial advantage in judicial proceedings (as opposed to extra-judicial contexts), declined to extend subject matter waiver to non-testifying experts.***Id.* at *11-12. Therefore, in order to access the documents on which the PWC report was based, the plaintiffs would have to demonstrate "exceptional circumstances under which it [was] impracticable for them to obtain the information by other means." *Id.* at *15.

Ninth Circuit holds that a prosecutor's work product is not discoverable under *Brady* absent underlying exculpatory facts.

The Ninth Circuit recently considered the intersection of *Brady* requirements and the work-product doctrine in *Morris v. Ylst*, 447 F.3d 735 (9th Cir. 2006). Morris, petitioning for habeas corpus, appealed the district court's decision that the prosecution's failure to turn over a particular status report prepared by its legal assistant did not constitute a *Brady* violation. *Id.* at 739-740. (In *Brady v. Maryland*, the Supreme Court held that the prosecution's failure to turn over material exculpatory evidence to the defendant upon request constituted a due process violation. 373 U.S. 83 (1963).) The status report noted suspected perjury on the part of a prosecution witness petitioner claimed was actually responsible for the crime. *Morris*, 447 F.3d at 739. The legal assistant who prepared the report stated that she obtained any information included in the report by reading documents relevant to the case and discussing them with the assigned attorney. *Id.* at 740.

In evaluating whether *Brady* required the prosecution to disclose this opinion work product, the Ninth Circuit Court of Appeals (Graber, J.) agreed with the Eleventh Circuit's treatment of the same question. *Id.* at 742. **The court stated, "[I]n general, a prosecutor's opinions and mental impressions of the case are not discoverable under *Brady* unless they contain underlying exculpatory facts."** *Id.* Because the status report was "best characterized as a statement of the prosecutor's opinion or a record of his thoughts about whether Barrett [the prosecution witness] testified truthfully enough to receive the benefit of her plea bargain," the court held that it was not *Brady* material. *Id.* at 742-743. The court went on to discuss why, even if the report had contained exculpatory facts and thereby qualified as *Brady* material, its nondisclosure had not prejudiced the petitioner. *Id.* at 743-746.

Practice Tip: If you discover that you have inadvertently disclosed a privileged document, to avoid a waiver, contact the recipient right away and ask him or her to return or destroy it. The promptness of

your effort to rectify the situation is among the factors courts may consider when determining whether you have waived privilege. For example, in *In re Copper Market Antitrust Litigation* , 200 F.R.D. 213 (S.D.N.Y. 2001), the court found no waiver, in part because the attorneys contacted opposing counsel less than a week after discovering that they had produced privileged documents. On the other hand, the Northern District of Illinois concluded that privilege was waived in one document inadvertently produced among 4,000 pages where the attorneys did not request return of the document for three months after discovering that it had been produced. *Central Die Casting and Mfg. Co., Inc. v. Tokheim Corp.* , 1994 U.S. Dist LEXIS 11411 (N.D. Ill. Aug. 15, 1994).