WILMERHALE

Privilege Standing Committee Update

2007-07-09

Fourth Circuit Holds that Work Product Shared with Testifying Experts Is Discoverable to Test Weight of Experts' Testimony

The Fourth Circuit (King, J.) recently rejected a work-product claim relating to draft reports provided to testifying experts by an attorney. *Elm Grove Coal Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 480 F.3d 278 (4th Cir. 2007). The Elm Grove Coal Company ("Elm Grove") appealed from an order that it award workers' compensation benefits to Ivan R. Blake ("Blake") for the pneumoconiosis (or Black Lung Disease) that he allegedly contracted in the course of his employment with Elm Grove. Successive Administrative Law Judges ("ALJ"s) relied on the work-product doctrine in rejecting Elm Grove's motion to compel the discovery of Blake's attorneys' drafts of Blake's physician experts' reports and communications from Blake's attorneys to the experts providing what they considered to be relevant materials. *Id.* at 286-87. On appeal, the Benefits Review Board ("BRB") affirmed the award of benefits and held that the ALJs had acted within their discretion in applying work-product protection to the attorney-expert communications and draft expert reports. *Id.* at 287. Elm Grove then appealed the BRB's award, as well as the work-product decision, to the Fourth Circuit.

On appeal, Elm Grove argued that

> materials provided by counsel to a testifying expert witness concerning the relevant facts and an expert's opinions and reports are discoverable . . . because '[w]hen an attorney interjects him or herself into the process by which a testifying expert forms the opinions to be testified to at a hearing, that action affects the weight which the expert's testimony deserves.'

Id. at 299 (quoting Petitioner's Br. at 26). The court agreed, holding that Elm Grove could not

"properly and fully cross-examine[]" Blake's experts without access to the materials that Elm Grove sought to discover. *Id.* at 301. The court observed that adequate cross-examination of an expert witness requires "that the adverse party be aware of the facts underlying the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him." *Id.*

The court opined that the draft reports did not implicate either of the fundamental rationales underlying the work-product doctrine. First, the substance of the reports was not intended to remain confidential and therefore did not comprise protected "opinion" work product. *Id.* at 302. Second, Elm Grove did not seek the materials in order to "benefit from opposing counsel's work product," *id.* at 302, but rather to "explore the trustworthiness and reliability of" the experts. *Id.* at 303.

Consequently, the court held, "draft expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explain the lawyer's concept of the underlying facts, or his view of the opinions expected from the experts," are not protected under the work-product doctrine. *Id.* Notably, the court expressly limited its holding to such materials provided to testifying experts. *Id.* n.25 ("Any such draft reports or attorney communications made or provided to non-testifying or consulting experts should be entitled to protection under the work product doctrine.").

District Court Rejects Broad Subject-Matter Waiver of Work-Product Protection

A federal court in California recently held that attorney work product that was never disclosed to the opposing party or the client is protected from discovery. *Schmidt v. Levi Strauss & Co.*, 2007 U.S. Dist. LEXIS 18787 (N.D. Cal. 2007). Plaintiffs sued their former employer, Levi Strauss ("LS") for defamation and wrongful termination, claiming that they were fired for filing complaints alleging tax and accounting fraud. *Id.* at *2-3. 1 LS denied the allegations of fraud and asserted that plaintiffs were terminated for insubordination and deficient work performance. *Id.* at *3. During discovery, plaintiffs subpoenaed Steven Todrys ("Todrys"), a tax attorney at Simpson, Thacher & Bartlett ("STB"), seeking both his testimony and all documents pertaining to an audit that LS had retained him to conduct in response to plaintiffs' state-court allegations of tax fraud. In response, Todrys produced all of those documents that he had either received from LS or disclosed to entities outside of STB and Ernst & Young ("E&Y") (whom STB had retained to assist in the audit). At the same time, Todrys withheld a number of documents that, in his view, constituted protected opinion work product.

Plaintiffs moved to compel production of the withheld documents, claiming that they were not protected work product and arguing, in the alternative, that plaintiffs' need for the documents was sufficient to overcome any work-product protection that might apply. The court (Lloyd, Mag. J.) denied plaintiffs' motion. The court held that Todrys' withheld documents, even though not shared with his client, were created in anticipation of litigation, noting that his "retention was precipitated by plaintiffs' state court lawsuit and . . . the primary purpose of the engagement was to aid [LS]'s Audit Committee in evaluating the issues raised in plaintiffs' complaint." *Id.* at *6-7.

The court rejected the plaintiffs' argument that Todrys could not invoke the work-product doctrine because LS had waived attorney-client and work-product protection. *Id.* at *9-11. The court held that

the work-product protection, unlike the attorney-client privilege, does not belong solely to the client, but also to the attorney; in support, the court cited the D.C. Circuit's holding that, "'To the extent that the interests do not conflict, attorneys should be entitled to claim [work-product protection] even if their clients have relinquished their claims.'" *Id.* at *12 (citing *In re Sealed Case*, 676 F.2d 793, 809 n.56 (D.C. Cir. 1982)).

The court also rejected the plaintiff's claims that Todrys had waived work product protection by producing related documents to several government agencies. *Id.* at *12-15. The court declined to find a subject matter waiver, holding that because Todrys had not provided the specific documents at issue to either the government or LS, he had not waived work-product protection with respect to them. *Id.*

The Second Circuit Clarifies Propriety of Attorney-Client Communication Regarding Defendant's Ongoing Trial Testimony

The Second Circuit recently clarified the law relating to communications between a defendant and his attorney during the defendant's ongoing trial testimony. In *U.S. v. Triumph Capital Group, Inc.*, the defendant-appellant alleged that the district court had violated his Sixth Amendment right to counsel when it ordered that his defense counsel not speak to him about his trial testimony during an overnight recess in the midst of the prosecution's cross-examination.

No. 05-2630-cr, 2007 U.S. App. LEXIS 12221, at *2-3 (2d Cir. May 25, 2007). The district court rescinded its order after three hours, and, the following morning, recessed before the day's testimony to provide the defendant and his counsel with sufficient time to confer prior to continuing the proceedings. *Id.* at *5-6. The district court also ordered that defendant and his counsel could not discuss defendant's testimony during daytime breaks in the cross-examination, including an hour-long lunch break. *Id.* at *6.

On appeal, the court (Calabresi, J.) explained that the situation under review fell between the Supreme Court's decisions in *Geders v. U.S.*, 425 U.S. 80 (1976), in which the Court ruled that a ban on all communications between a testifying defendant and his counsel overnight violated the Sixth Amendment, and *Perry v. Leeke*, 488 U.S. 272 (1989), in which the Court held that the prevention of all communications during a fifteen-minute recess in ongoing testimony was permissible. *Triumph Capital*, 2007 U.S. App. LEXIS 12221, at *2. "In this Circuit," the court noted, "we have emphasized that 'the difference between *Perry and Geders* is not the quantity of communication restrained but its constitutional quality.'" *Id.* at *12 (internal citation omitted). Addressing an issue of first impression in the Circuit, the court held that "a defendant's constitutional right to consult with his attorney on a variety of trial-related issues during a long break, such as an overnight recess, is inextricably intertwined with the ability to discuss his ongoing testimony. Thus, a ban on discussing testimony during a substantial recess does materially impede communication of a 'constitutional quality.'" *Id.* at *19. The court conducted a totality-of-the-circumstances evaluation and held that, "in the unusual circumstances presented by the instant case, we believe that the court's restriction was trivial and did not meaningfully interfere with the defendant's *Sixth Amendment* rights to effective assistance of counsel." *Id.* at *27.

The court, however, affirmed the ban on discussions during the trial day. Noting that a defendant does not have a constitutional right to discuss ongoing testimony with his attorney, the court considered the lunch-time ban on discussions of the testimony and ruled that such a ban "is likely to interfere only in minimal ways on any constitutionally protected communication. As a result, such a restriction will generally be sufficiently narrowly tailored to be constitutionally justifiable." *Id.* at *38.

Practice Tip

When communicating with clients and others via email, it is useful, where appropriate, to include the designation "Attorney-Client Privileged" or "Attorney Work Product" in the subject line of the email to aid in a subsequent privilege review.

1 Plaintiffs initially filed suit in state court, but the parties agreed to stay the case pending the federal courts' resolution of plaintiffs' defamation claims and their wrongful-termination claims under Sarbanes Oxley. *Id.* at * 3.