WILMERHALE

Privilege Standing Committee Update

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Selective Waiver Rejected—Privilege Waived by Law Firm's Oral Presentation to Government Agency

Legal counsel's oral summary of otherwise privileged documents to a government agency waives the attorney-client privilege, according to the Northern District of California. *U.S. v. Reyes*, 2006 U.S. Dist. LEXIS 94457 (N.D. Cal. Dec. 22, 2006). Defendants Reyes and Jensen were indicted for the backdating of stock options allegedly committed when they were officers of Brocade Communications Systems, Inc. ("Brocade"). *Id.* at *1-2. Reyes subpoenaed documents created by Morrison & Foerster ("MoFo") and Wilson Sonsini Goodrich & Rosati ("WSG&R"), outside counsel for Brocade, in connection with an internal investigation, including summaries of employee interviews and notes taken in connection with meetings with government agencies. *Id.* at *1. MoFo and WSG&R, in turn, moved to quash, claiming attorney-client privilege and work product protection. Id. at *2. Reyes argued that MoFo and WSG&R had waived both the privilege and work product protection by revealing the findings of their investigation to the Securities and Exchange Commission and the U.S. Department of Justice. MoFo and WSG&R countered that there was no waiver because they had secured confidentiality agreements with the SEC and the DOJ, had presented no written documents to the government, and had limited their presentations to oral briefings on their interviews and findings (in the case of MoFo) or a combination of oral briefings and a multimedia presentation (in the case of WSG&R). *Id.* at *3-5.

The Court (Breyer, J.) held that the privilege was waived and ordered production of all documents and notes related to the employee interviews and meetings with the government. *Id.* at *12, *38. Although noting that the Ninth Circuit had not yet ruled on the Question, the Court, "[i]n accord with

every appellate court that has considered the issue in the last twenty-five years," flatly rejected the concept of selective waiver. *Id.* at *24, *25. Further, the confidentiality agreements did not save the privilege (*id.* at *30) because they granted the SEC and the DOJ permission to share disclosed information "in furtherance of the agencies' discharge of their duties." *Id.* (internal quotation omitted). The Court also characterized as "specious" the distinction between delivering written material to the government and making oral reports based on that material. *Id.* at *32 ("It makes no difference whether a privilege holder copies a written text, reads from a written text, or describes a written text to an outside party. The purpose and effect is the same in all cases; the transmission of privileged information is what matters, not the medium through which it is conveyed.").

Second Circuit Finds "Predominant Purpose" of Communication from Government Attorney to County was to Convey Legal Advice, Although Policy Recommendations Were Included

Email communication between Erie County officials and an Assistant County Attorney ("County Attorney") regarding the county's policy of strip searching all correctional detainees is protected by attorney-client privilege, even though the emails also contain recommendations for alternative policies, according to the United States Court of Appeals for the Second Circuit. *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007). Plaintiffs brought a class-action suit against Erie County and several named county officials (collectively, "County") alleging that the mandatory and invasive strip search of all county prisoners, regardless of charge, violates the Fourth Amendment. During discovery, the County withheld as privileged emails between County officials and a County Attorney concerning current law on strip searching, recommendations for alternative search methods, and suggestions for monitoring for the implementation of a revised policy. After review *in camera* by the Magistrate Judge, the District Court for the Western District of New York ordered production of ten of the emails because "the communications go beyond rendering legal advice by proposing changes to existing policy." *Id.* at 416.

The County then petitioned the Second Circuit for a writ of mandamus directing the District Court to vacate its production order. The Court of Appeals' inquiry focused on whether the "predominant purpose" of the email exchange was to solicit and render legal advice. In applying the "predominant purpose" test, the Court acknowledged that although it had previously required the communication's "sole purpose" to be the provision of legal advice, it had now abandoned that heightened standard. *Id.* at 420. The Court found that the County had initiated communication with the County Attorney in order to assess whether its detention policies complied with its legal obligations related to search and seizure under the Fourth Amendment. Although the County Attorney also recommended policy alternatives and advised the County on compliance measures, the Court found that the predominant purpose was to assess whether the county's policies were currently within the bounds of Fourth Amendment law. As such, the County Attorney's advice was not "general policy or political advice," but was inherently legal in nature, and therefore protected from disclosure by the attorney-client privilege. Id. at 423 (internal citations omitted).

The Court emphasized that the "competing values" balanced by the doctrine of attorney-client privilege are cast in sharp relief when the privilege is asserted by the government: the public's interest in "open and accessible government" must be weighed against the equally compelling

interest in ensuring that public officials and policy makers have "access to candid legal advice." *Id.* at 418-19.

Case of First Impression in D.C. Circuit: Privilege Applies in Bankruptcy Context but Not to Draft Filings

Communications that embody confidential legal advice, or facts provided by a client in confidence, are protected by the attorney-client privilege in the context of a bankruptcy filing, according to the District Court for the District of Columbia. *U.S. v. Naegele*, 2007 U.S. Dist. LEXIS 124, *11 (D.D.C. Jan. 4, 2007). Noting that no court in the D.C. Circuit previously had addressed the attorney-client privilege in the bankruptcy context, the Court (Friedman, J.) relied upon cases in the tax context. *Id.* at *10. The Court stated that communication of facts intended for inclusion in bankruptcy filings and documents provided by the client revealing details underlying past or future filings are not communicated in confidence, and therefore are not privileged. *Id.* at *11. Similarly, draft filings themselves do not constitute confidential communications between a client and an attorney. *Id.* at *14. However, the attorney-client privilege does protect "any communications (or portions thereof) that embody an attorney's confidential legal advice – or any facts provided by the client in confidence, or Questions asked by the client, in seeking such advice," even in the context of a bankruptcy filing. *Id.* at *11. In addition, although billing records and retainer agreements typically fall outside the privilege, "correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided … fall within the privilege," in the bankruptcy context as elsewhere. *Id.* at *12-13 (internal quotations and citations omitted).

Passage of Time Does not Dilute Claim to Work Product Protection

A motion to compel by former Qwest Communications International executives, seeking production by the Securities and Exchange Commission of certain notes, emails, and internal memoranda the SEC claimed to have prepared in anticipation of litigation, was denied by the District of Colorado because the materials were protected work product. *Sec. & Exch. Comm'n v. Nacchio*, 2007 U.S. Dist. LEXIS 5435 (D. Colo. Jan. 25 2007). The Court (Shaffer, J.) held that although the SEC did not bring suit against the Defendants until March 2005, the SEC's Enforcement Division engaged in an investigation in February 2002, that "reflected a subjective belief that the litigation directed against Qwest . . . or Qwest employees was a real possibility," and, therefore, triggered work product protection. *Id.* at *22. The Court found that the "passage of time alone is not dispositive" of a work product claim, and the fact that the SEC's investigation "expanded over time" to include additional targets did not dilute its claim that older documents were prepared in anticipation of litigation. *Id.* at *25. Further, work product protection covered documents that were "not prepared in the course of on-going litigation against the specific party seeking [its] production." *Id.*

The Court further held that the SEC's privilege log, which did not list each document over which work product protection was asserted, was nevertheless sufficient because the Defendant's discovery requests sought the "wholesale production of documents that are ordinarily covered by the work product rule." *Id.* at *32. The Court found that the declaration of a chief SEC investigator was not merely a "bare assertion" of work product protection because it identified the time period

encompassed by the withheld documents, provided a list of the authors and intended recipients of the withheld documents, and represented that the withheld documents were prepared in anticipation of litigation. *Id.* at *33.

Practice tip

When reviewing documents for privilege, do not rely exclusively on whether the name of the sender or recipient appears on a list of outside or in house counsel prepared for the privilege review (so-called “attorney lists”). A document may be protected by the attorney-client privilege or work product doctrine even if an attorney’s name does not appear on the document. For example, a memo from a manager to employees conveying legal advice received from an attorney may be protected by the attorney-client privilege, even if no attorney is copied on the memo. Similarly, emails between executives discussing strategy for pending or anticipated litigation may be protected as work product, even if those emails are not sent to a lawyer. Moreover, “attorney lists” are sometimes incomplete and may not include “agents of the attorney,” including paralegals and consulting experts.

Conversely, a document is not always privileged simply because it contains a name on an “attorney list.” For example, emails concerning business decisions are not privileged merely because an attorney is copied. It is therefore important to evaluate each document to determine if it is protected by the attorney-client privilege or the work product doctrine, whether or not it contains a name from an “attorney list.”