WILMERHALE

Privilege Standing Committee Update

2009-03-01

Proposed Amendment to Fed. R. Civ. P. 26 Would Extend Work Product Protection for Attorney-Expert Communications and Draft Expert Reports

Two proposed amendments to Rule 26 of the Federal Rules of Civil Procedure would extend the attorney work product doctrine to cover attorney-expert communications and drafts of expert reports. Proposed Rule 26(b)(4)(B) modifies the work product doctrine, codified in Rules 26(b)(3)(A) and (B), to include protection for drafts of reports prepared by expert witnesses. Proposed Rule 26(b)(4)(C) similarly extends work product protection to all forms of attorney-expert communications, subject to three exceptions: communications that "(i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, or (iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed."

The current Rule 26 provides little shelter for an attorney's interaction with expert witnesses. Under the current rule, any testifying expert witness must disclose a written report stating the expert's opinions, along with "the data or other information considered by the witness in forming [the opinions the witness will express]." Fed. R. Civ. P. 26(a)(2)(B)(ii). According to the 1993 Advisory Committee Note, the phrase "other information considered" includes any information furnished to the expert witness by an attorney, and any data or information the expert considered, but did not rely on, in drafting the final expert report. See Fed. R. Civ. P. 26 (Advisory Comm. Note on 1993 amendments). As a result, discovery of draft expert reports and attorney-expert communications is routine in the majority of federal courts.

Proposed Rule 26 addresses two problems for litigators and their clients that exist under the current Rule. First, shielding draft expert reports from discovery could reduce litigation costs by eliminating the need for separate consulting and testifying experts to otherwise limit discovery obligations on the testifying expert. Second, the proposed protection of attorney-expert communications would promote experts and attorneys working closely to prepare expert opinions without the threat of "wholesale discovery." *See* Proposed Fed. R. Civ. P 26(b)(4) (Advisory Comm. Note).

District Court Applies New Fed. R. Evid. 502 and Finds No Waiver of the Privilege by Inadvertent Disclosure of Privileged Materials

Applying recently enacted Federal Rule of Evidence 502 and case law considering waiver by inadvertent disclosure, the Eastern District of Pennsylvania concluded that the plaintiff, Rhoads Industries, Inc., waived attorney-client privilege with respect to certain inadvertently produced documents for which a timely privilege log was not submitted, but did not waive the privilege with respect to other documents, which were properly logged. *Rhoads Indus., Inc. v. Building Materials Corp. of Am.*, 254 F.R.D. 216 (E.D. Pa. 2008).

Rhoads inadvertently produced over 800 privileged electronic documents. The defendants notified the plaintiff of the apparently privileged production. The plaintiff responded immediately by email, indicating that no privilege had been waived and that the production was inadvertent. About three weeks later, the plaintiff produced a new privilege log and invoked Fed. R. Civ. P. 26(b)(5)(B) to have the defendants sequester the documents. *Id.* at 222-23. Several months later, the plaintiff revealed that an additional 2000 privileged documents were never logged. The plaintiff produced a privilege log as to those documents about six months after the initial document production. *Id.* at 223. The defendants argued that the plaintiff waived its privilege claims because of carelessness in the document production, unreasonable delay in seeking return of the documents, and failure to produce a complete and accurate privilege log. *Id.* at 218.

After extensive briefing, an evidentiary hearing, and oral argument, the court concluded that the plaintiff waived its privilege with respect to documents that were not listed on any privilege log until six months after the initial production. *Id.* at 226. With respect to documents inadvertently produced but logged within a few weeks of discovering the mistake, although the case was pending when Rule 502 took effect, the court concluded that "it would be just and practicable to apply Rule 502 . . . because it sets a well defined standard, consistent with existing mainstream legal principles on the topic of inadvertent waiver." *Id.* at 218. The court turned to case law considering waiver by inadvertent disclosure to flesh out the standard. *Id.* at 219-21. It employed the five-factor test used in *Fid. & Deposit Co. of Maryland v. McCulloch*, 168 F.R.D. 516 (E.D. Pa. 1996). The five factors are: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving the party of its errors. *Id.* at 522.

Here, the court weighed the evidence on inadvertent waiver and made factual findings under each of

the five *Fidelity* factors. The court concluded that factors 1-4 favored the defendants. "The most significant factor," in the court's mind, was the plaintiff's failure "to prepare for the segregation and review of privileged documents sufficiently far in advance of the inevitable production of a large volume of documents. Once this lawsuit seeking millions of dollars in damages was filed, Rhoads was under an obligation to put adequate resources to the task of preparing the documents, which was completely within Rhoads's control. An understandable desire to minimize costs of litigation and to be frugal in spending a client's money cannot be an after-the-fact excuse for a failed screening of privileged documents . . . ." *Rhoads*, 254 F.R.D. at 226-27. Nevertheless, factor 5, the interests of justice, "strongly favor[ed]" the plaintiff. "Loss of the attorney-client privilege in a high-stakes, hard fought litigation is a severe sanction and can lead to serious prejudice." *Id.* This extreme prejudice, coupled with the fact that the defendants, as the moving party challenging the plaintiff's privilege assertion, had the burden of proof, led the court to deny the motion with respect to documents logged within a few weeks of the inadvertent production.

New York Court of Appeals Finds No Waiver of Privilege Despite Assistance to Law Enforcement and Testimony at Criminal Trial

The Court of Appeals of New York recently upheld a trial court's decision to quash a third-party subpoena served jointly by two criminal defendants because the materials sought were conditionally privileged trial preparation materials under New York law. The Court held that: (1) the defendants had not met their burden of establishing that they were unable, without undue hardship, to obtain the substantial equivalent of the materials by other means; and (2) the privilege-holder had not waived the trial preparation privilege. *People v. Kozlowski*, 2008 N.Y. Lexis 3202 (N.Y. Oct. 16, 2008) (pagination subject to change).

The defendants, L. Dennis Kozlowski and Mark H. Swartz, both former officers of Tyco International Ltd. ("Tyco"), were charged, and ultimately convicted of, over 20 state law counts of larceny, falsifying business records, conspiracy, and securities fraud. *Id.* at *5. In 2004, in preparation for their second trial (the first ended in a mistrial), they sought records from Boies, Schiller & Flexner LLP ("Boies Schiller"), a law firm Tyco had hired in 2002 to conduct an internal investigation into whether certain officers and directors, including the defendants, had executed improper transactions with company funds. According to Boies Schiller's engagement letter, the purpose of the investigation was to help Tyco prepare for potential litigation, particularly shareholder derivative suits. *Id.* at *13-14. During the investigation, Boies Schiller attorneys conducted interviews with Tyco employees and directors; some of these conversations covered issues that were central to the subsequent criminal prosecutions of Kozlowski and Swartz. *Id.* at *17-18, 39.

Kozlowski and Swartz sought the production from Boies Schiller of "[a]ll memoranda and notes of [the firm's] personnel (or forensic accountants working on their behalf) relating to interviews of employees, directors or auditors of Tyco." *Id.* at *18-19. Boies Schiller, on behalf of Tyco, moved to quash the defendants' subpoena, arguing that the requested materials were shielded by the attorney-client and work product privileges. The defendants acknowledged that the materials were privileged, but argued that Tyco had waived both privileges. *Id.* at *21-22, 25-26. The trial court disagreed, found that Tyco had not waived work product privilege, and quashed the subpoena. The

defendants were convicted; the Appellate Division affirmed the trial court's rulings; and the defendants appealed to the Court of Appeals. *Id.* at *26.

On appeal, neither party argued that the Boies Schiller interview notes and memoranda were protected by attorney-client privilege. Instead, the People argued that the materials were absolutely privileged work product. Kozlowski and Swartz argued that they were merely conditionally privileged trial preparation materials. *Id.* at *47. Because the defendants had limited their request to "facts reported to Boies Schiller in the interviews" and expressly agreed to let Boies Schiller redact its lawyers' opinions, impressions, etc., the court concluded that the requested material qualified for the conditional privilege only—in other words, that the material sought was not protected work product. Under New York law, "the mere fact that a narrative witness statement is transcribed by an attorney is not sufficient to render the statement 'work product.'" *Id.*

The defendants argued that Tyco had waived the conditional privilege. Under New York law, the privilege governing trial preparation materials "is waived upon disclosure to a third party where there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality." *Id.* at *51. First, Kozlowski and Swartz argued that Tyco waived the privilege when it gave the District Attorney many privileged documents that did not relate to the Boies Schiller investigation. These materials were prepared by Tyco's in-house counsel and were created for past proceedings, not for the criminal or civil proceedings at issue in this case. The court expressly declined to hold that "disclosure of historical privileged documents waives the privilege covering trial preparation materials created in a subsequent internal investigation." *Id.* at *55.

Second, the defendants argued that Tyco waived the conditional privilege when it cooperated with the District Attorney's investigation. The court held that "it is possible for attorneys to assist prosecutors without divulging their trial preparation materials," and without some proof that Boies Schiller attorneys revealed the substance of the interview notes and memoranda to the People, there was no waiver. *Id.* at *59.

Finally, Kozlowski and Swartz urged the court to find that testimonial waivers had occurred during the first trial when a Tyco employee and the Boies Schiller partner who led the Tyco investigation testified about some of the interviews Boies Schiller had conducted. The court held that although the testimony referenced communications between Tyco employees and Boies Schiller attorneys, none of the testimony impermissibly referred to or used privileged materials specifically, and thus did not constitute a waiver. *Id.* at *59-60.

District Court Finds Work Product Protection for Litigation Summaries Given to Independent Auditor

The Northern District of New York ruled, after in camera review, that communications between a party and its auditor were protected by the work product doctrine. *Vacco v. Harrah's Operating Co.*, No. 1:07-CV-0663, 2008 U.S. Dist. LEXIS 88158, at *20 (N.D.N.Y. Oct. 29, 2008). Additionally, the court found, again after *in camera review*, that communications between a party and a law firm that was alleged to be acting as a lobbyist were protected by the attorney-client privilege. *Id.* at *26.

Plaintiffs sought to compel disclosure of documents from defendant Harrah's Operating Company, Inc. ("Harrah's"), and also from Harrah's auditor Deloitte & Touche, LLP ("D&T"). *Id.* at *15. A limited privilege log showed the dates that Harrah's documents had been generated, and that they had been labeled "General Counsel Report to Audit Committee." *Id.* There was no such log relating to the documents held by the auditor. *Id.* These documents were litigation summaries, prepared by the corporate defendant at the request of its independent auditor, reporting generally on pending litigation. *Id.* at *1.

The court reviewed these documents in camera and found that they were protected from disclosure by the work product doctrine. *Id.* at *19. The court reached this decision by finding that the documents were prepared or obtained "because of" the prospect of litigation. *Id.* at *20. This formula had been set out by the Second Circuit in *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998).

Plaintiffs argued that even if the documents fell under work product protection, such protection had been waived by disclosure to D&T, an independent outside auditor in a potentially adversarial position. *Id.* at *20. Citing the policy reasons for the existence of the work product doctrine (to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent), the court found the protection in this case had not been destroyed. *Id.* at 21-22. "[W]ork product privilege is not automatically waived through disclosure to a third party absent a basis to conclude that disclosure is inconsistent with maintaining secrecy from possible adversaries." *Id.* at 21. (In reaching this decision, the court noted and dismissed *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113 (S.D.N.Y. 2002), which came to the opposite conclusion.)

The plaintiffs also sought to compel disclosure of communications between defendants' counsel and lawyers at the Washington DC law firm of Holland & Hart, LLP ("Holland"). *Vacco*, 2008 U.S. Dist. LEXIS 88158, at *22-23. Plaintiffs contended that the efforts of the Holland attorneys, by their nature, represented lobbying, and were therefore not covered by the attorney-client privilege. *Id.* at *23.

The court noted that the privilege analysis of communications between a client and an attorney who also engages in lobbying (or a lobbyist licensed as an attorney) is "entirely contextual and depends upon the nature of the services as illuminated by the contents of those communications and other relevant factors shedding light on the parties' relationship." *Id.* at *25.

After reviewing the documents in camera, the court found that they were related to advice relative to the prosecution of the current lawsuit as well as pending administrative proceedings before the Department of the Interior, and thus privileged. Id. The court came to this conclusion in part because of the existence of a retainer agreement entered into at the outset of Holland's engagement, and in part because of the actions taken by defendants' attorney subsequent to the communications with Holland: "[That the communications were related to legal advice] is exemplified by the fact that based upon information and advice received from those attorneys at [Holland], defendants' attorney . . . sent a letter . . . to the BIA setting forth the position of his clients concerning whether the Tribal Court which issued the original judgment in this case was properly constituted . . . ." *Id.* at *25-26.

Additionally, in this case, Harrah's sought to compel the disclosure of drafts of an agreement prepared by plaintiffs' attorneys and disclosed to a third party who shared a common litigation interest with plaintiffs. *Id.* at *26-27. After in camera review, the court found these items protected by attorney-client privilege via the common interest doctrine. *Id.* at 27-28. "When two or more parties share a common interest, legal advice provided with respect to that common interest is shielded by the attorney-client privilege, absent a basis to find a waiver." *Id.* The court noted that for this doctrine to be invoked there need not be an actual suit pending at the time of the communication, nor need there be a formal written common interest agreement. Id. It is enough that there is an oral understanding between the parties toward mutual cooperation. *Id.*

Practice Tip

Fed. R. Civ. P. 26(b)(5), as amended in 2006, imposes certain obligations upon a party receiving inadvertently produced documents where the producing party notifies the recipient of the purportedly privileged document, and explains the basis for its claim of privilege. Be sure to consult the full Rule to understand your obligations if you are informed by an opponent that it has inadvertently produced privileged material to you.