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Privilege Standing Committee Update

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Sixth Circuit Adopts "Because Of" Test in Determining Whether a Document Was Created "In Anticipation of Litigation"

The Sixth Circuit Court of Appeals recently clarified the law in that circuit regarding when a document is created "in anticipation of litigation" for purposes of establishing work-product protection. *United States v. Roxworthy*, No. 05-5776, 2006 U.S. App. LEXIS 20481 (6th Cir. Aug. 10, 2006). The defendant, Patrick Roxworthy, in his capacity as Vice President, Tax, of Yum! Brands, Inc., moved to quash an IRS subpoena to produce to the IRS two versions of a memorandum prepared at the defendant's request by KPMG, LLP, analyzing the tax consequences of certain transactions. *Id*. at *3. A magistrate judge ordered the defendant to produce the memoranda, holding that they were created not "in anticipation of litigation" but rather in order to assist in tax preparation. *Id*. The district court agreed with the magistrate judge's determination that the defendant had neither shown that the corporation subjectively believed that litigation was likely nor demonstrated that any reasonable grounds existed for such belief. *Id*. at *13-14.

The Sixth Circuit (Cole, C.J.) vacated the order of the magistrate judge and instructed the district court judge to grant the defendant's motion to quash. *Id*. at *30-31. Noting that the Sixth Circuit had yet to define the phrase "in anticipation of litigation," the court "adopted the standard first articulated in Wright and Miller's Federal Practice and Procedures [sic], asking whether a document was 'prepared or obtained because of the prospect of litigation.'" *Id*. at *6-7. As the court explained, this formulation allows a "dual-purpose" document to enjoy work-product protection unless that document "would have been prepared in substantially the same manner irrespective of the anticipated litigation." *Id*. at *8, *24.

According to the Sixth Circuit, the party claiming work-product protection must

demonstrate "subjective anticipation of litigation, as contrasted with an ordinary business purpose" (*id*. at *9) and that this anticipation of litigation was objectively reasonable (*id*. at *26). As the court explained, although the memoranda at issue in this case did not bear any work-product designation, the defendant met this subjective element by submitting affidavits indicating that the company "planned to claim a $112 million tax loss with no corresponding book loss," and that "KPMG had advised the company that the law in this regard was unsettled, and that the IRS had demonstrated an inclination to litigate in that area." *Id*. at *20. In regard to the objective element, the court rejected the magistrate judge's determination that "any possibility of litigation was too far removed to be concrete or significant," and argued that the "expected litigation" in this case was "quite concrete despite the absence of any overt indication from the IRS that it intend[ed] to pursue litigation against" the company. *Id*. at *26, *29 (internal quotations omitted). Because the company had "identified a specific transaction that could precipitate litigation, the specific legal controversy that would be at issue in the litigation, the opposing party's opportunity to discover the facts that would give rise to the litigation, and the opposing party's general inclination to pursue this sort of litigation," the company had sufficiently demonstrated that anticipation of litigation was reasonable under any of the formulations for determining objective reasonableness currently employed by various circuit courts applying the "because of" test. *Id*. at *29-30.

DC District Court Approves Use of Government "Filter Team" to Review Potentially Privileged Documents Confiscated from Guantanamo Prisoners

The United States District Court for the District of Columbia recently approved the government's proposed use of a "Filter Team" (a team of government attorneys not otherwise involved in any proceedings against the prisoners) to review potentially privileged documents confiscated in searches of prisoners' cells in Guantanamo Bay. *Khadar v. Bush*, No. 04-1136, 2006 U.S. Dist. LEXIS 65973 (D.D.C. Sept. 15, 2006) (combining 72 habeas cases). In the wake of apparently coordinated suicides by three Guantanamo Bay prisoners in June 2006, government officials conducted a widespread search and confiscation of documents in the possession of the deceased and other Guantanamo Bay prisoners. *Id*. at *6-7. The government's expressed objective was to ascertain the scope of the apparent suicide plot and prevent any further such occurrence. *Id*. at *7. Many of the confiscated documents, which were written in various languages, bore stamps claiming attorney-client privilege. *Id*. at *7-8. In several instances, prisoners had made notes potentially related to the suicides on documents sent from attorneys bearing such stamps. *Id*. at *6-7. In a procedure that the court (Robertson, J.) criticized as "scattershot and disorganized," the government sorted and stored these documents, setting aside those that might contain privileged information. *Id*. at *10. The government then petitioned the court to approve its proposal to have a Filter Team review and sort the impounded materials for relevance and privilege—with the understanding that any documents found to be both relevant and potentially privileged would be reviewed by the court. *Id*. at *12.

The court first examined whether, under the "Turner test" as delineated by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89 (1987), the government had "demonstrated a legitimate penological interest in seizing and reviewing documents that may contain privilege, using procedures that may be expected to result in some inadvertent exposure of privileged material." *Khadar*, 2006 U.S. Dist. LEXIS 65973 at *24 (internal citation omitted). Noting that "[c]ourts have long deferred to actions of prison officials that are

reasonably related to legitimate penological interests" (*id*. at *25 (internal citation omitted)), the court found that the government's proposed procedures were in fact "reasonably related to the legitimate penological interest in investigating the detainee suicides and thwarting future prison disruptions." *Id*. at *26-27.

The court then approved the government's proposed use of a Filter Team. *Id*. at *30. Although (as we reported in our September 20, 2006, issue of *The Privilege Report*), the Sixth Circuit Court of Appeals had recently expressed disfavor regarding the use of government "taint teams" because such teams "pose a serious risk to holders of privilege" (*In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, Nos. 05-2274 / 05-2275, 2006 U.S. App. LEXIS 17475, *10 (6th Cir. July 13, 2006)), the court in *Khadar* distinguished *In re Grand Jury Subpoenas*, on the grounds that the government in *Khadar* (unlike the grand jury in *In re Grand Jury Subpoenas*) was already in possession of the potentially privileged documents because of searches undertaken under exigent circumstances. *Id*. at *28. The court admitted that the Filter Team would likely make mistakes, and that the proposed plan could have some chilling effect on attorney-client communications. *Id*. at *28-30. However, "[n]o practical and effective alternative to the Filter Team has been proposed." *Id*. at *29. See also *id*. at *30 ("Some chill seems likely; the depth is debatable. It cannot be allowed, however, to trump the government's investigative requirements in this sensitive situation.")

Eastern District of Pennsylvania Rejects Attempted "End-Run" around Work-Product Doctrine by Use of 30(b)(6) Deposition

The United States District Court for the Eastern District of Pennsylvania recently rejected a plaintiff's attempt to require a Rule 30(b)(6) designee to testify as to facts within the knowledge of the defendant company's in-house counsel. *In re: Linerboard Antitrust Litigation*, MDL No. 1261, 2006 U.S. Dist. LEXIS 62919 (E.D. Pa. Sept. 5, 2006). During an investigation of the linerboard industry by the FTC, the defendant Temple-Inland, Inc. (Inland) conducted an internal investigation. *Id*. at *1. Inland's counsel, Mr. Householder, interviewed various employees but did not retain any memoranda or notes memorializing the company's findings during the investigation. *Id*. at *14. When the FTC launched its investigation, Inland voluntarily produced to the FTC 12 boxes of documents collected during Inland's internal investigation and a "white paper" in which Inland responded to seven FTC specifications. *Id*. at *6. After the plaintiffs filed their class action suit, Inland produced to the plaintiffs during discovery everything that they had produced to the FTC, including the twelve boxes of documents and the white paper. *Id*. at *9. Because the material that Inland produced apparently contained certain gaps, and because many of the witnesses deposed by the plaintiffs could no longer recall certain facts, the plaintiffs requested a 30(b)(6) witness who could discuss, among other things, "the documents Inland created as part of its internal investigation in response to the FTC inquiry." *Id*. at 1. Although the company's 30(b)(6) designee addressed most of the topics raised by the plaintiffs, he had not been prepared to answer (and was instructed not to answer) questions regarding what Householder, as Inland's in-house counsel, had meant in drafting certain phrases in the white paper, or the details of certain conversations that Householder held with witnesses during the investigation. *Id*. at *12. Plaintiffs therefore moved to compel Inland's designee to educate himself with all of the facts that Householder recalled from the internal investigation and to answer questions regarding the company's imputed knowledge of Householder's memories of the investigation. *Id*. at *13-14.

The court (DuBois, J.) denied the plaintiff's motion to compel "on the ground that plaintiff's request is an effort to circumvent the work-product doctrine through the mechanism of a Rule 30(b)(6) deposition." *Id*. at *2-3. Although the plaintiffs were entitled to a witness who could testify as to Inland's position on specific statements in the white paper (*id*. at *3), "requiring a Rule 30(b)(6) witness to educate himself by learning facts known by counsel is an extraordinary remedy not required under the circumstances of this case." *Id*. at *32. As the court noted, the plaintiff's request that the court require the corporation's designee to educate himself with all facts known to Householder constituted "the functional equivalent of a deposition of Householder covering information learned through his service as in-house counsel." *Id*. at *34. Because the court considered "Householder's recollection of any facts learned during his internal investigation to be so intertwined with mental impressions that it amounts to opinion work product," that information was not subject to discovery under the particular circumstances of the case, "in which there has been extensive discovery of the evidence accumulated in the internal investigation." *Id*. at *14, *39.

In the alternative, the plaintiffs argued that production of the white paper and other documents to the FTC resulted in waiver of any work-product protection that Householder's recollections might otherwise have enjoyed, insofar as those recollections were related to the subject matter of the documents produced to the FTC. *Id*. at *15-16, *46. The court rejected this claim of partial waiver. *Id*. at *49. Cases cited by the plaintiffs finding broad subject-matter waiver after limited disclosure of privileged information focused on "fairness," where partial disclosure could prejudice the opposing party in some way (such as by putting the partially disclosed material "at issue" in the litigation). *Id*. at *49-52. Because the plaintiffs had access to all of the available documents and had interviewed numerous current and former employees, "fairness d[id] not dictate the disclosure of Householder's recollection" in addition to the discovered information. *Id*. at *49-50. Furthermore, because the work product at issue was opinion work product (or was "commingled fact and opinion work product") any potential subject-matter waiver would not extend so far as to require disclosure of that opinion work-product. *Id*. at *52-53. While granting that the plaintiffs' attempt to use a Rule 30(b)(6) witness to discover facts within an attorney's knowledge without asking counsel directly was "certainly an inventive maneuver" (*id*. at *18), the court would "not allow plaintiffs to make such an end-run around the work-product doctrine under the circumstances presented." *Id*. at *55.

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