JENNER & BLOCK

Privilege Issues

Publications

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- **Jenner & Block Releases 2017 Edition of Privilege and Work Product Handbook.**

  Jenner & Block recently released the newly-revised, 2017 edition of its attorney-client privilege and work product doctrine guide, titled Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and The Work Product Doctrine. Authors of the guide include Partners David Greenwald and Michele Slachetka.

- **Pennsylvania Superior Court Compels Production Of Investigators' Notes In Paterno Matter.**

  In *Estate of Paterno v. National Collegiate Athletic Association*, No. 877 MDA 2015 (Pa. Super. Ct. July 25, 2017), applying Pennsylvania law, the court held that the Task Force appointed by the University, and not the University itself, could assert the attorney-client privilege, and that non-lawyer investigators' interview notes were not protected by Pennsylvania's work product rule. In this matter, the University of Pennsylvania created a Task Force to investigate allegations of criminal wrongdoing by former assistant football coach Jerry Sandusky. The first issue was who could assert the attorney-client privilege over the investigation. The trial court held that the Task Force, not the University, held the privilege, and the appellate court affirmed. The appellate court quoted the engagement letter at length, finding that the letter clearly identified the Task Force as the client, and the University as the party responsible for paying fees. That the Task Force was not a distinct legal entity did not prevent it from acting as the sole client. The second issue was whether interview notes taken by attorneys and non-lawyer investigators were protected work product. The trial court held that certain notes prepared by both attorneys and non-attorneys were discoverable. The appellate court held that only the investigators' notes were discoverable. The court explained that the Pennsylvania work product protection, found in Pa. R. C. P. 4003.3, is significantly different than the federal rule. Rule 4003.3 specifically protects memoranda and notes of an attorney, but also specifically provides that notes by non-attorneys are not protected unless they reveal "mental impressions, conclusions or opinions respecting the value or the merit of a claim or defense or respecting strategy or tactics."

- **Courts Disagree On Scope of Opinion Work Product Protection For Attorney Testimony.**

In *In re Grand Jury Subpoena v. United States*, 870 F.3d 312, (4th Cir. 2017), a divided panel of the Fourth Circuit applied an expansive view of opinion work product where an attorney was compelled to testify before a grand jury. In this case, the government discovered that documents used by defendant in a criminal trial were forged. The government subpoenaed defense counsel to testify regarding three questions: "(1) Who gave you the fraudulent documents? (2) How did they give them to you, specifically? (3) What did [your client] tell you?" The appellate court held that the third question, which requested the lawyer's recollection of an interview, sought protected opinion work product. The court explained that a lawyer's recollection of a witness interview, whether drawn from memory or from written notes, constitutes opinion work product. "[I]mperfect recitations from memory of what a witness said would inevitably reveal what the attorney deemed important enough to remember. Accordingly, we draw a line between asking an attorney to divulge facts . . . [and] asking an attorney to recall generally what was said in an interview."

The federal district court that ordered Paul Manafort's attorney to testify before a grand jury applied a narrower standard for opinion work product than the standard applied by the 4th Circuit. In *In re Grand Jury Investigation*, Misc. Action No. 17-2336 (BAH) (D.D.C. Oct. 2, 2017), the court held that the crime-fraud exception applied to the limited questions that the Special Counsel's Office (SCO) intended to ask Manafort's attorney. The attorney had submitted two letters on Manafort's behalf to the Foreign Agent Registration Act's (FARA) Registration Unit of the DOJ's National Security Division. The SCO sought eight categories of information: (1-2) Who were the sources of certain factual representations and documents? (3) Did Manafort or others approve the letters before they were submitted? (4) What did the source(s) say to the attorney regarding specific statements in the letters? (5) When and how did the attorney receive communications from her clients? (6) Did anyone question or correct statements in the letters? (7) Did the attorney memorialize the conversations? (8) Whether the attorney was careful with submitting the letters to the DOJ and whether it was the attorney's practice to review submissions with her clients before the attorney did so? One issue addressed by the court was whether the information sought was opinion work product, for which the SCO had not made a sufficient showing of extraordinary need to overcome the protection, or fact work product, which would be discoverable as the SCO had made a sufficient showing to overcome fact work product protection. Relying in part on the 4th Circuit decision discussed above, Manafort argued the information sought was opinion work product because the questions would elicit testimony regarding counsel's recollection of communications with her client, including her mental impressions of those statements. The court disagreed, finding that the D.C. Circuit had rejected "a virtually omnivorous view" of opinion work product and cautioning that not every item which may reveal some inkling of a lawyer's mental impressions is opinion work product. The court found that the dissenting opinion in the Fourth Circuit matter was more persuasive than the majority opinion because there are myriad reasons why an attorney might recall a conversation with a client, including reasons unrelated to the lawyer's mental impressions about the case. The

appellate court held that the first six questions regarding the attorney's present memory of a client's statement sought only fact work product because they at most would reveal "some inkling" of her mental impressions. However, the appellate court held that the seventh question sought opinion work product, because knowing whether the attorney considered the statements significant enough to memorialize would reveal her thought process.

- **2d Cir. Holds No Joint Defense Privilege Where Lawyer Did Not Participate in Communication.**

  In *United States v. Krug*, 868 F.3d 82 (2nd Cir. 2017), the court held that the joint defense privilege did not apply to a conversation between defendants covered by a joint defense agreement where no lawyer participated in the conversation. In this matter, three police officers were charged with depriving an individual of his constitutional rights while acting under color of law. All three defendants, who were represented by separate counsel, entered into a joint defense agreement. One defendant, Kwiatkowski, decided to cooperate with the government and was prepared to testify about a conversation with a second defendant, Wendel, which occurred before Kwaitkowski withdrew from the joint defense arrangement. The conversation at issue occurred in a hallway outside a meeting that included defense counsel; counsel was not present and was not within hearing distance of the hallway conversation. The district court granted the motion and the appellate court reversed. The appellate court explained that the Restatement (Third) of the Law Governing Lawyers § 76 cmt. d provides that the common interest rule applies to communications among the lawyer, agents of the client or of the lawyer "who facilitate communications between" the client and the lawyer, and the "agents of the lawyer who facilitate the representation." The court explained that the Second Circuit has stated that it is not "necessary for the attorney representing the communicating party to be present when the communication is made to the other party's attorney" under a common interest agreement, so long as the communication is made in confidence for the purpose of obtaining legal advice from the lawyer. Finding that the hallway discussion was not made for the purpose of obtaining legal advice, the court held that the common interest rule did not apply and the witness would be allowed to testify about the conversation.

- **"Quick Peek" Ordered In Deliberative Process and Bank Examination Privilege Dispute.**

  In *Fairholme Funds, Inc. v. United States,* No. 13-465C (Fed. Cl. Oct. 23, 2017), the government withheld 1,500 documents on the grounds of the deliberative process privilege and the bank examination privilege (but not based on the attorney-client privilege or the work product doctrine). Confronted with the likelihood that the parties would engage in additional briefing and demand the court to review the 1,500 document in camera, the court ordered the government to provide the documents to the plaintiff for a "quick peek," while protecting validly asserted privileges with an order entered pursuant to Federal Rule of Evidence 502(d). Pursuant to the quick peek, plaintiffs would be allowed to review all of the withheld documents; plaintiffs could

identify the documents they believed were relevant to the case; and the parties would then meet and confer and, only if agreement was not reached, plaintiff could file a motion to compel the limited number of disputed documents identified for production during the review. The court acknowledged that the only case law in which a quick peek had been ordered was as a sanction against a party that had failed to provide an adequate privilege log, and that The Sedona Conference Commentary on Protection of Privileged ESI, 17 Sedona Conf. J. 99, 140 (2016), clearly takes the position that "[FRE] 502(d) does not authorize a court to require parties to engage in 'quick peek' . . . productions and should not be used directly or indirectly to do so. . . . Rule 502 was designed to protect producing parties, not to be used as a weapon impeding producing parties' right to protect privileged material. Compelled disclosure of privileged information, even with a right to later claw back the information, forces a producing party to ring a bell that cannot by un-rung." The court distinguished the Commentary on the grounds that it was directed at the absolute protections of the attorney-client privilege rather than the qualified protections provided by the deliberative process and bank examination privileges before the court.

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