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Trials & TRIBULATIONS

Witness review of privileged documents: Perils and protections

Most depositions include an inquiry into what documents the witness has reviewed in preparation for her testimony. Yet this ubiquitous question can prove problematic, especially if the witness has reviewed privileged material. Likewise, the very compilation of documents for witness review can implicate the work product privilege. Understanding what is protected, and how to avoid waiving any applicable privilege, is an essential part of deposition preparation.

Witness review of privileged documents under New York law

New York state courts have wrestled with the question of whether the review of privileged documents by a witness in preparation for her deposition can waive an applicable privilege. Generally, the use of a privileged document to refresh a witness' recollection can potentially subject that document to disclosure, see *Stern v. Aetna Casualty & Surety Co.*, 159 A.D.2d 1013, 1013-1014 (4th Dept. 1990) ("We think it a sound rule that writings used prior to testifying for the purpose of refreshing the memory of a witness be made available to the adversary ...") (quoting *Doxlator v. Swarthout*, 38 A.D.2d 782 4th Dept. 1972).

However, although an unqualified privilege, such as the attorney work product privilege, can be waived, "it is not waived merely through the client's review of an attorney's memorandum in preparation for a deposition," *Fernekes v. Catskill Regional Med. Ctr.*, 75 A.D.3d 959, 961 (3d Dept. 2010).

So under what circumstances can a witness review a privileged document without subjecting the document to disclosure? The First Department attempted to answer this question in the recent case of *Beach v. Touradji Capital Mgt., LP*, 99 A.D.3d 167 (1st Dep't 2012).

In *Beach*, a forensic analyst reviewed a written report prior to his deposition testimony. The forensic examination at issue was somewhat unique. In lieu of allowing the defendants to examine the plaintiff's computers, the plaintiff retained an expert to conduct the same searches that would have been conducted by the

defendants.

During his testimony, the forensic analyst testified about his findings, but could not recall all of the details of his analysis. Under questioning, he disclosed that he had prepared written reports, and that he reviewed the reports prior to his testimony. The plaintiffs' counsel objected to the questioning and to the disclosure of the reports on privilege grounds.

In reviewing the propriety of disclosure, the First Department initially determined that the bulk of the report could not be attorney work product, since the analyst was retained to perform ostensibly the same tasks that the defendants would have performed if they had access to the computers. Despite the generally non-privileged nature of the reports, the court cautioned that the reports could contain the impressions or direction of counsel, which would indeed be subject to work product protection.

With respect to any waiver based upon the analyst's review of the report prior to his testimony, the court distinguished between material prepared for litigation, and attorney work product. With respect to the former, the court noted that "the conditional privilege that attaches to material prepared for litigation is waived when used by a witness to refresh a recollection prior to testimony," 99 A.D.3d at 171.

Attorney work product, however, is a different matter. In that case, portions of the reports containing attorney work product would be protected from disclosure, notwithstanding the analyst's pre-deposition review, *Id.*

To assure that this distinction was clear, the court revisited language in an earlier summary decision, *Herrmann v. General Tire & Rubber Co.*, 79 A.D.2d 955 (1st Dept. 1981). According to the court, its decision in *Herrmann* dealt with the review of a tape recording created by an insurance company, which constituted material prepared for litigation. The court clarified "inartful" language in *Herrmann*, which suggested that any privilege was waived by the witness's review, and it reiterated that work

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product privilege is not waived even if a privileged document is reviewed pre-deposition to refresh a witness's recollection.

The more limited protection afforded materials prepared for litigation is consistent with the CPLR. While "[p]rivileged matter" and an attorney's "work product" are not obtainable through disclosure, CPLR 3101(b) & (c), "materials prepared in anticipation of litigation or for trial" can be obtained upon a showing of substantial need and undue hardship, CPLR 3101(d)(2).

Even materials prepared in anticipation of litigation are subject to disclosure, the court must still protect attorney work product, *Id.* ("In ordering discovery of the materials ... the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of any attorney or other representative of a party concerning the litigation.")

Witness review of privileged documents – uncertainty in federal jurisdictions

In the federal context, Federal Rule of Evidence 612 specifically addresses writings used to refresh a witness' recollection. Where a witness uses a document to refresh her recollection before testifying, if justice so requires, "an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony," FRE 612(a)(2),(b).

This provision applies to both trial and deposition testimony, see FRCP 30(c)(1)("[t]he examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence ...").

While Rule 612 may require an inquiry into a witness' use of a particular writing, the rule itself does not explicitly require the production of the document. Instead, Rule 612, by its terms, requires the party seeking disclosure to meet three conditions: "1) the witness must use the writing to refresh his memory; 2) the witness must use the writing for the purpose of testifying; and 3) the court must determine that production is necessary in the interests of justice," *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985).

It is important to note that federal courts do not necessarily articulate the *Beach* court's distinction between protections afforded materials prepared in anticipation of litigation and the more concrete protections afforded privileged communications and work product. In fact, it has been suggested that if a privileged document is used to refresh a witness's recollection, that document should be produced, privilege notwithstanding, *Briese Lichttechnik Vertriebs GmbH v. Langton*, 272 F.R.D. 369, 376, n.6 (SDNY 2011).

Moreover, in a recent decision, U.S. District Judge Shira A. Scheindlin noted that the work product privilege was "not absolute and a party may be entitled to the documents containing the opposing attorney's work-product if it can show 'that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means,'" *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 79349 (SDNY June 5, 2012).

Interestingly, the MTBE case relies on FRCP 26 (b)(3)(A), which allows for the discovery of trial preparation materials, while protecting against the disclosure of an attorney's impressions and conclusions. As discussed above, trial preparation materials are subject to similar disclosure and protections under CPLR 3101(d)(2), while work product remains specifically protected under CPLR 3101(c).

While in many instances the distinction is academic, attorneys practicing in federal court must recognize that the definitive distinctions articulated by the First Department in *Beach* are not necessarily echoed in federal jurisprudence.

Privilege extended to the compilation of documents

Federal courts, relying in part on the *Sporck* case, have also carved out a limited exception to inquiries regarding a witness's review of documents compiled by counsel. During the deposition of defendant *Sporck*, opposing counsel asked him whether he reviewed any documents in preparation for his testimony. *Sporck* answered in the affirmative.

Opposing counsel asked *Sporck* to produce these documents, followed by a formal document demand seeking the production of all documents reviewed in preparation for his testimony. The defendant argued that all documents reviewed by the witness had been previously produced in the course of discovery, and claimed that the compilation of documents used to prepare the witness was protected by the attorney work product privilege. The district court disagreed, ordering production.

The Third Circuit reversed this determination, holding that "the selection process of defense counsel in grouping certain documents together out of the thousands produced in this litigation is work product entitled to protection," *Sporck*, 759 F.2d at 315. Importantly, the *Sporck* court did not hold that the work product privilege limited inquiry into documents reviewed by a witness. Instead, opposing counsel must, through questioning, determine whether a witness' answers were "informed" by documents reviewed, 759 F.2d at 318-319.

Although *Sporck* has been applied in the Second Circuit, counsel representing non-parties must be cautious. Where documents are in the possession of the requesting party, third-party counsel's compilation of documents may be protected, *Mercator Corp.*

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v. United States, 318 F.3d 379, 385-386 (2d Cir. 2002). In contrast, where the documents are unavailable to the requesting party, the court may be more disposed to require production, *Id.*

Conclusion

A witness's review of privileged documents does not automatically require disclosure of those documents. Indeed, state court practitioners can be reasonably assured that work product and other privileged materials will not be subject to disclosure, as

long as those materials do not constitute materials prepared in anticipation of litigation.

For the federal court practitioner, the line of demarcation is not as clear. Moreover, counsel's compilation of documents for witness review may be protected, provided that the documents reviewed have been previously produced and the disclosure of this compilation would reveal counsel's thought processes.

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