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LITIGATION REVIEW

Privilege Protections For Accountants

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While there is no New York statutory privilege that protects from disclosure communications between accountants and their clients, there are circumstances under which accountants will be encompassed within the attorney-client privilege and/or work product protection. Counsel who wish to shield communications to, from or involving accountants should, therefore, carefully consider the applicability of both the attorney-client privilege and work product protection before, during and after the communications occur.

A recent decision of the Nassau County Supreme Court, Commercial Division, provides useful guidance in determining the circumstances under which the attorney-client privilege may protect communications with accountants as well as differentiating between the attorney-client privilege and the work product doctrine as applied to accountants.

In *Delta Financial Corp. v. Morrison*, 2006 WL 2085469 (N.Y. Supp. July 26, 2006), Justice Ira B. Warshawsky was asked to decide whether communications involving a company's accountant were cloaked by the attorney-client privilege. In *Delta*, the corporate plaintiff sought to withhold from disclosure numerous e-mails and corresponding attachments between and among plaintiff's general counsel and senior vice president, its executive vice president and chief financial officer, its outside counsel, and its accountants. Defendants claimed that plaintiff was not permitted to withhold the communications under the attorney-client privilege because disclosing them to plaintiff's accountants constituted a waiver of the privilege. Plaintiff, on the other hand, argued that the privilege was not waived because the accountants were providing assistance to plaintiff's counsel in its rendering legal advice to plaintiff.

Justice Warshawsky first noted that the CPLR establishes three categories of protected materials – "privileged matter, which is afforded absolute immunity from discovery, CPLR 3101(b); attorneys' work product, which is also afforded absolute immunity, CPLR 3101(c); and trial preparation material, which is subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of materials by other means [CPLR 3101(d)(2)]."

The court then focused exclusively on the attorney-client communication privilege in determining the question before it.

It analyzed the circumstances under which the presence of a third party can destroy the attorney-client privilege: "As a general rule, disclosure of attorney-client communication to a third party or communications with an attorney in the presence of a third party, not an agent or employee of counsel, vitiates the confidentiality required for asserting the privilege."

The court continued that simply because the third party happened to be an accountant did not alter this general rule because communications with accountants are not afforded any special protection under New York law and are subject to full disclosure.

However, the court added that communications made to a person serving as a "translator or interpreter in order to facilitate communications between the lawyer and client" have been afforded protection under the attorney-client privilege. The court then relied upon several federal decisions extending the attorney-client privilege over communications with an accountant where the accountant is assisting the attorney's understanding of accounting concepts in order to provide legal advice to the client.

Thus, Justice Warshawsky relied on, among other cases, the leading decision in *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). In *Kovel*, the U.S. Court of Appeals for the Second Circuit held that insofar as accounting concepts are "a foreign language" to some lawyers, "the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the [attorney-client] privilege, any more than would that of [a] linguist" because the accountant "is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit."

Justice Warshawsky was careful to point out, however, that simply because an accountant assists an attorney in providing legal advice does not trigger the attorney-client privilege. Where, for example, the attorney is not relying upon the accountant to translate or interpret information given by the client,

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but rather only to provide information that was unknown or unavailable to the client, Justice Warshawsky observed that the privilege would not protect such a communication, citing the more recent Second Circuit decision in *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999).

Applying the law to the facts before the court, Justice Warshawsky determined that *Kovel* and its progeny did not support plaintiff's position that the communications were protected by the attorney-client privilege. Rather, the court found that "the majority of the communications in question consist of correspondence not between counsel and [the accountants] but rather between [plaintiff's CFO and vice president and various employees of the accountants]. " The court further observed that the accountant was employed as plaintiff's auditor, rather than in a legal capacity. Finally, it found that most of the communications were initiated directly by plaintiff's CFO and vice president — not plaintiff's attorney — seeking the accountants' input and advice on tax and accounting related issues — not legal advice.

Work Product Protection

Although it is not clear from the decision in *Delta*, plaintiff apparently did not argue that the communications involving the accountants were protected from disclosure under the work product doctrine.[1] This distinction may be important in other cases because while the attorney-client privilege may be lost when sharing information with an accountant, "[u]nlike the attorney-client privilege, where . . . privilege is lost if a privileged item is shared with a third party . . . work product protection is not necessarily waived by disclosures to third persons." *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 114-15 (S.D.N.Y. 2002). "In particular, sharing litigation strategy does not waive the privilege where experts, such as an accountant, are engaged to assist with some aspect of the litigation." *Tilberg v. Next Management Co.*, 2005 WL 3543701*1 (S.D.N.Y.) (citing *Medinol*).

In both state and federal court, the work product protection encompasses not only attorney work product, but material prepared in anticipation of or for litigation by the party itself or the party's representatives. See CPLR 3101(d)(2) ("materials . . . prepared in anticipation of litigation or for trial by or for another party, or by or for that party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent"); *Construction Industry Services Corp. v. The Hanover Insurance Co.*, 206 F.R.D. 43, 49 (E.D.N.Y. 2001) ("by the very language of [Fed. R. Civ. Proc. 26(b)(3), the work product doctrine includes] "'the . . . party's . . . consultant, surety, indemnitor, insurer or agent.'") (quoting Rule 26(b)(3)). In *Construction Industry Services*, Magistrate Judge William D. Wall of the U.S. District Court for the Eastern District of New York rendered an instructive decision distinguishing the attorney-client privilege from the work product doctrine as applied to communications with a corporation's outside accountant. In this case, the corporate plaintiff sought to shield from discovery documents created or reviewed by the company's outside accountant.

The court found that the documents revealed that the accountant "played a significant role in evaluating the strength of the claims against the defendants in this lawsuit and in advising [plaintiff] about the litigation."

Magistrate Judge Wall first determined that the communications in question were not protected by the attorney-client privilege because they were not between the lawyers and the outside accountant, but merely between the party and that party's outside accountant regarding the litigation.

For the same reasons stated by Justice Warshawsky in *Delta*, Magistrate Judge Wall rejected plaintiff's argument that the accountant's involvement was necessary to facilitate the communication between plaintiff and its attorney.

However, unlike in *Delta*, Magistrate Judge Wall went on to note in *Construction Industry Services* that "although these documents are not protected by the attorney-client privilege, all of them would have been protected by the work product privilege, if not for [the accountant's] designation as an expert."[2]. See also *International Design Concepts, Inc. v. Saks Inc.*, 2006 WL 1564684 (S.D.N.Y.) (attorney work product shared with company's outside auditor does not abrogate the work product protection) .

Magistrate Judge Wall found that the documents all addressed the present litigation, either before or after it commenced, and therefore qualified as being prepared because of litigation under the standard set forth by the Second Circuit in *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998). In *Adlman*, an accountant-lawyer was asked by his client to prepare a report assessing the likely result of an expected litigation. The district court held that the document was not eligible for work product protection apparently because the document was intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation.

The Second Circuit rejected the requirement imposed by a number of other cases that the documents be made "primarily or exclusively to assist in litigation." The court held, instead: "Nowhere does Rule 26(b)(3) state that a document must have been prepared to aid in the conduct of litigation in order to constitute work product, much less primarily or exclusively to aid in litigation. Preparing a document 'in anticipation of litigation' is sufficient."

The Second Circuit added: "Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision."

Conclusion

These cases show that communications with or involving accountants can be shielded from discovery, notwithstanding the absence of a special privilege covering accountants.

To be encompassed within the attorney-client privilege, the accountant must have assisted in the attorney's communication with the client in the rendering of legal advice. If the material was prepared in anticipation of litigation or in relation to existing litigation, it is likely to qualify for work product protection even if the attorney-client privilege is unavailable.

Endnotes:

1. It is possible that the communications in question were not rendered in anticipation of or for litigations required to invoke the work product protection — but that is not clear from the decision. See CPLR 3101(d)(2); *Central Buffalo Project Corp. v. Rainbow Salads, Inc.*, 140 A.D.2d 943, 530 N.Y.S.2d 346 (4th Dep't 1988).

2. Magistrate Judge Wall held that to the extent the accountant was designated as a testifying expert and reviewed the documents, the documents were discoverable under Federal Rule of Civil Procedure 26(a)(2)(B), requiring discovery over testifying experts.