Courts Address Claimed Protection for Communications or Documents the Client Plans to Use at Trial

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In his June 19, 2013 “Privilege Points” release, Tom Spahn discusses the use of otherwise privileged material as evidence at trial and the need for timely pretrial disclosure of such material:

Not surprisingly, most courts recognize that privilege and work product protections essentially "evaporate" when the client forms the intent to disclose the communication or document to a third party. A related rules-based principle requires litigants to disclose before trial any communications or documents they intend to use at trial.

The effect of these related principles depends on when the court addresses them. In Phillips v. C.R. Bard, Inc., the court explained that if defendant "determines that it wants to retain the right to offer these [protected] documents as evidence in support of its defenses, it must abandon the attorney-client privilege or work product doctrine and produce the documents to Plaintiff." No. 3:12-cv-00344-RCJ-WGC, 2013 U.S. Dist. LEXIS 45647, at *65 (D. Nev. Mar. 29, 2013). If the issue comes up during or on the eve of trial, the court might apply a more drastic approach. In In re Residential Capital, LLC, the court held that debtors' counsel Morrison & Foerster "purposely and consistently adopted the strategy of selective (and extremely limited) disclosure" of legal advice provided to a debtor's board – while continuing to assert attorney-client privilege to bar discovery of documents or deposition testimony on the same subject matter. Ch. 11 Case No. 12-12020 (MG), 2013 Bankr. LEXIS 1507, at *16-17 (Bankr. S.D.N.Y. Apr. 12, 2013). The court pointed to the firm's privilege objection during discovery as "now preclud[ing] [debtors] from offering any evidence of the legal advice provided to the Debtors' officers and directors" on the relevant subject. Id. at *17.

Lawyers asserting privilege or work product protection during discovery might find themselves unable to present important evidence at trial.