Decisions Highlight Wisdom of Considering Both Privilege and Work Product Protection

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In his July 31, 2012 “Privilege Points” release, Tom Spahn discusses the importance of two separate protections: attorney-client privilege and attorney work product:

When withholding documents or communications arguably protected by both the attorney-client privilege and the work product protection, wise litigants consider both. The privilege is absolute, but fragile. The work product doctrine provides only qualified protection, but can cover communications with third parties and survive disclosure to third parties.

In United States v. Ghavami, No. 10 Cr. 1217 (KMW) (JCF), 2012 U.S. Dist. LEXIS 80593 (S.D.N.Y. June 5, 2012), the government sought to use secret recordings taken by a government cooperator in a bid rigging case against several defendants. In some of the recordings, the defendants disclosed advice they had received from their company's lawyer. The court held that such disclosure to the government cooperator waived the company's attorney-client privilege. However, the lawyer's litigation-related advice also deserved work product protection. Because disclosing work product to an apparently friendly third party does not waive that protection, the defendants' disclosure to their supposed friend (secretly helping the government) did not waive that protection. Ten days later, a New York state court analyzed defendant Colgate-Palmolive's interview of a former employee, who was represented during the interview by his own lawyer. The state court found that the former employee's lawyer's presence aborted privilege protection for the interview, but not the separate work product protection. The court explained that the lawyer's presence did not "pose[] a danger of ultimate disclosure of [Colgate's lawyer's] mental impressions to Plaintiffs' counsel or to anyone else who might be considered Colgate's adversary." Bernard v. Brookfield Props. Corp., No. 107211/08, 2012 N.Y. Misc. LEXIS 2993, at *21 (N.Y. Sup. Ct. June 15, 2012) (unpublished opinion).

Because the privilege and the work product doctrine have separate strengths and weaknesses, litigants normally should consider both protections when the opportunity arises.