Court Applies the Peralta Standard for Company Lawyers’ Communications with Former Employees

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In his December 31, 2014 “Privilege Points” release, Tom Spahn discusses the “Peralta Standard” for protection of communications with former employees:

Although the attorney-client privilege generally protects company lawyers’ communications with former company employees, most courts follow the nuanced approach of Peralta v. Cendant Corp., 190 F.R.D. 38 (D. Conn. 1999). Under that standard, the privilege can protect communications relating to the former employee’s time at the company, but not since then.

In Winthrop Resources Corp. v. CommScope, Inc., Civ. A. No. 5:11-CV-172, 2014 U.S. Dist. LEXIS 158413 (W.D.N.C. Nov. 7, 2014), the court addressed plaintiff’s effort to compel deposition answers from defendant's former vice president and CIO Kap Kim. Applying the Peralta standard, the court upheld the magistrate judge's ruling that Kim must answer the following questions (among others): (1) "whether [defendant's] attorney Jeff Mayer had told, or if Kim had asked, Mayer's personal view on whether [plaintiff] Winthrop or [defendant] CommScope is correct in their interpretation of the lease language in the case," id. at *12 (internal citation omitted); (2) "whether Kim had asked any lawyer to determine whether CommScope's or Winthrop's interpretation of the lease was correct," id.; and (3) "the substance of conversations that occurred during a deposition break" — which the court held were "questions that directly relate[d] to deposition preparation" and thus "are squarely covered by the holding in Peralta." Id. at *10-11. Defendant also claimed work product protection for those communications, but the court held that the defendant waived that argument by not presenting it to the magistrate judge.

Company lawyers dealing with former employees should remember the Peralta standard's limitations. They should also weigh both work product and privilege protection possibilities, considering that in the former employee context, the work product doctrine may provide more promising protection than the attorney-client privilege.