Court Applies the von Bulow Doctrine

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In his December 12, 2012 “Privilege Points” release, Tom Spahn discusses “subject matter waiver” where privileged material is disclosed deliberately to gain an advantage in litigation:

In some situations, disclosure of a privileged communication can trigger what is called a "subject matter waiver" – requiring the disclosure of additional privileged communications on the same subject matter. Some jurisdictions traditionally applied such waivers so broadly that even the inadvertent disclosure of a privileged communication triggered a subject matter waiver.

Starting in 1987, the Second Circuit articulated what has become known as the von Bulow doctrine. In re von Bulow, 828 F.2d 94 (2d Cir. 1987). That doctrine applies a subject matter waiver only upon disclosure of privileged communications to gain some advantage in a judicial setting. The von Bulow doctrine has now spread to most courts. In O'Kinsky v. Perrone, Civ. A. No. 10-6075, 2012 U.S. Dist. LEXIS 146194 (E.D. Pa. Oct. 10, 2012), the defendant claimed that the plaintiff had triggered a subject matter waiver by disclosing a privileged communication months before the litigation began. Citing von Bulow, the court rejected that argument – finding that the plaintiff’s extrajudicial disclosure did not trigger a subject matter waiver, because the plaintiff was "not affirmatively using [the communication] in this litigation to his adversaries' prejudice." Id. at *6.

Federal Rule of Evidence 502 bolsters this von Bulow approach. Its legislative history explains that a subject matter waiver occurs "where privileged information is being intentionally used to mislead the fact finder to the disadvantage of the other party," 154 Cong. Rec. H7817, H7819 (daily ed. Sept. 8, 2008), such as when "a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner." Fed. R. Evid. 502 Explanatory Note, subdiv. (a) (revised Nov. 28, 2007). This diminishing risk of a subject matter waiver decreases the stakes in many waiver disputes.