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A Survey Of Recent Developments In The Law: Document Privilege

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IX. DOCUMENT PRIVILEGE

A. *Introduction*

Recent decisions in tobacco related lawsuits have forced the tobacco companies to divulge many of their deepest secrets. The purpose of this article is to examine four such decisions[1] to determine the courts' methodology and standards and to give practitioners a rudimentary compass to help navigate the turbulent waters of privilege issues.

B. *Tobacco Litigation*

1. American Tobacco Co. v. Florida

The State of Florida brought suit against various tobacco manufacturers to recover health care expenses paid by the State for treating smoking-related illnesses of Medicaid recipients.[2] The State's theory of the case revolved around the allegation that the tobacco companies had engaged in fraud by covering up the significant health risks of smoking.[3] To prove this fraud, the State sought discovery of documents under the crime-fraud exception to the attorney-client privilege.[4] The trial court appointed a special master to conduct hearings on and determine the issue.[5] On the recommendation of the special master, the trial court ordered

1. American Tobacco Co. v. State, 697 So. 2d 1249 (Fla. Dist. Ct. App. 1997); State v. American Tobacco Co., No. 96-2-15056-8 SEA, 1997 WL 728262 (Wash. Super. Ct. Nov. 21, 1997); Burton v. R.J. Reynolds Tobacco Co., 177 F.R.D. 491, 491 (D. Kan. 1997); State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, 1998 WL 257214 (Minn. Dist. Ct. Dec. 1, 1997).

2. *American Tobacco*, 697 So. 2d at 1251.

3. *See id.*

4. *See id.*

5. *See id.* at 1252. The State designated twenty documents for in camera review by the special master. *See id.* The tobacco companies withdrew privilege assertions to seven documents. *See id.* Of the remaining thirteen documents, the special master concluded that eight should be produced under the crime-fraud exception. *See id.*

production, and the tobacco companies appealed.[6]

The court of appeals affirmed the lower court's decision in this case of first impression.[7] In so doing, it established the standards for and a method of determining whether the crime-fraud exception applies in Florida.

To determine whether the crime-fraud exception applies, the court employed a three-step process. The first step requires that the court determine the issue of privilege.[8] Florida employs a policy of extra vigilance when it comes to claims of attorney-client privilege by corporations.[9] Because corporations can only act through their agents and because they tend to rely on their attorneys for business advice more than an individual person would, the court must "strike a balance between encouraging corporations to seek legal advice and preventing corporate attorneys from being used as shields to thwart discovery."[10] Thus, the tobacco companies not only had to show that the documents they sought to protect from discovery were privileged, but they had to do so under a "heightened level of scrutiny."[11]

Second, the party seeking discovery must make a prima facie showing that the exception applies.[12] The special master found in the in camera review that the State had presented evidence that, on its face, showed the defendants "hid from and misrepresented to the public the health risks of smoking . . . ."[13] This conduct constituted fraud in the eyes of the special master.[14] Further, the evidence presented by the State showed the defendants had used their counsel in carrying out their misrepresentations and in concealing research relating to the dangers of smoking.[15] Thus, the special master found prima facie evidence that the tobacco companies had committed fraud and had utilized their attorneys to perpetuate that

6. *See id.* The tobacco companies filed exceptions to the special master's report. *See id.* The trial court overruled the exceptions and confirmed the special master's report. *See id.*

7. *See id.* at 1256-57.

8. *See id.* at 1253.

9. *See id.*

10. *Id.* (citing Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994)).

11. *Id.* (citing Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994)).

12. *See id.* at 1254-55.

13. *Id.* at 1257.

14. *See id.*

15. *See id.*

fraud.[16]

Third, the parties engage in an adversarial proceeding in which the party opposing production must prove by a preponderance of the evidence that privilege should remain.[17] Using the model established by *Haines v. Liggett Group, Inc.*,[18] the trial court allowed the defendants to argue extensively and to present ex parte evidence to rebut the State's evidence.[19] If the trial court found the rebuttal evidence sufficient to overcome the State's prima facie evidence, it would have been obligated to uphold the claim of privilege.[20]

The special master found that the defendants had misrepresented the health risks of smoking to the public and had utilized their attorneys in carrying out their misrepresentations.[21] The State met its burden of establishing prima facie evidence of fraud. The defendants, however, did not explain or rebut the State's evidence to the court's satisfaction, and therefore they failed to meet their burden of proof.

2. Washington v. American Tobacco Co.

In the State of Washington's case against tobacco manufacturers to recover Medicaid expenses for smoking related illnesses, the American Tobacco Co. claimed attorney-client or work product privilege with respect to thirty-two documents produced earlier in the cases of *Burton v. R.J. Reynolds Tobacco Co.*[22] and *State ex rel. Humphrey v. Philip Morris Inc.*[23] The State challenged the privilege assertions, claiming that the documents were not privileged, and even if the court found privilege, the civil-fraud exception applied.[24] The

16. *See id.*

17. *See id.* at 1255-56. The court discussed the higher burdens of proof of clear and convincing evidence and evidence beyond a reasonable doubt. These were rejected in favor of the lesser standard. The court stated that "[w]hen a finder of facts 'weighs' evidence, we know of no lesser burden to apply to the proof than a preponderance of evidence . . . ." *Id.* at 1256.

18. 975 F.2d 81, 96-97 (3d Cir. 1992).

19. *See American Tobacco*, 697 So. 2d at 1252.

20. *See id.* at 1256.

21. *See id.* at 1257.

22. 177 F.R.D. 491, 494 (D. Kan. 1997).

23. No. C1-94-8565, 1998 WL 257214 (Minn. Dist. Ct. Dec. 1, 1997). Although the court was aware of the rulings in the *Burton* case, the State's assertions were reviewed de novo. *See* State v. American Tobacco Co., No. 96-2-15056-8 SEA, 1997 WL 728262 (Wash. Super. Ct. Nov. 21, 1997).

24. *See American Tobacco*, 1997 WL 728262, at *1.

court heard arguments, reviewed the documents in camera, and then allowed the parties to file supplementary briefs regarding the civil-fraud exception.[25] The court rendered a painstakingly detailed, document-by-document decision which ordered the full production of twenty-seven documents while upholding the claimed privilege on only six documents.[26]

The court gave five different reasons for overcoming claims of privilege on the various documents. First, documents disclosed without objection in other litigation cannot be withheld on the basis of privilege; the privilege is deemed waived.[27] R.J. Reynolds ("RJR") produced a document in the *Burton* litigation and did not claim privilege until it prepared its privilege log in the Minnesota litigation.[28] The court reasoned that although the inadvertent production of a privileged document can often be remedied by returning the document to the producing party without waiving the privilege, in this case RJR reviewed the document for the *Burton* litigation and chose not to redact a certain paragraph.[29] Having made that deliberate choice, all claims of privilege with respect to that paragraph were waived and could not be recovered by a subsequent claim of inadvertence.[30]

Second, a legitimate assertion of the attorney-client privilege must include a request for or provision of legal advice that requires the lawyer to act in his or her professional capacity and "not merely as a convenient conduit for information or funds."[31] The court ordered production where, although it relates to the activities of counsel, a document offers no indication that the attorney's involvement was the result of a specific legal question posed, or would result in legal analysis, or that legal advice would be rendered.[32] If the communications are not legal in nature, no privilege applies.[33]

Third, communications protected by the attorney-client privi-

25. *See id.* The court also reviewed the privilege logs from the *Burton* and *Philip Morris* cases. *See id.*

26. *See id.* at *20. The six documents on which claims of privilege were sustained were nevertheless ordered produced in redacted form. *See id.*

27. *See id.* at *1-*2.

28. *See id.*

29. *See id.* at *2.

30. *See id.*

31. *Id.* (citing R.A. Hanson Co. v. Magnuson, 903 P.2d 496, 499 (Wash. Ct. App. 1995)).

32. *See id.*

33. *See id.*

lege must be made and kept in confidence.[34] The court ruled that widely circulated documents cannot be protected from production because they were not created or kept in confidence.[35] Furthermore, documents not intended to be confidential cannot be shielded by attorney-client privilege.[36] The court ordered production where RJR offered no evidence that the document was intended to be confidential.[37]

Fourth, the work product privilege protects only documents prepared in anticipation of litigation.[38] Documents created for both legal and nonlegal purposes do not enjoy the protection of the work product privilege.[39] Ordering the production of several documents on which RJR asserted work product immunity, the court reasoned that where RJR created documents in the ordinary course of business, even though the document may have utility in defending pending or threatened litigation, work product immunity does not apply.[40] "Such immunity is, however, appropriate only where the primary motivating factor behind the creation of the documents was the anticipation of litigation."[41] Unless the document is created *because* of the litigation, it is not entitled to immunity.[42]

Fifth, documents that are, on their face, privileged will be subject to production if the party asserting the privilege attempts to use it to further fraudulent conduct.[43] In Washington, under *Escalante v. Sentry Insurance*,[44] the party seeking discovery under the civil-fraud exception must show a "foundation in fact" that (1) its opponent was engaged in or was planning a crime or fraud at the time the allegedly privileged communication was made; and (2) the communication was made in furtherance of the crime or fraud.[45] The court struggled with the *Escalante* standard and ultimately

34. *See id.* at *4.
35. *See id.*
36. *See id.* at *16. The court found that RJR offered no evidence that the documents were intended to be confidential. *See id.*
37. *See id.*
38. *See id.* at *10.
39. *See id.*
40. *See id.* at *10-*13, *15, *17-*19.
41. *Id.* at *12.
42. *See id.* at *19 (emphasis added).
43. *See id.* at *4.
44. 743 P.2d 832 (Wash. App. 1987), *review denied*, 109 Wash. 2d 1025 (1988).
45. *See id.* at 842-43. The *Escalante* court rejected the prima facie standard in favor of the more lenient foundation in fact standard. *See id.* at 843.

could not reconcile it with the importance of protecting confidential attorney-client communications.[46] It chose to use the higher prima facie standard instead.[47]

After the State made a prima facie showing of fraud, the court examined each document "to determine whether it provide[d] evidence that support[ed] the State's allegations that defendants engaged in fraud and conferred with their attorneys in furtherance thereof."[48] On six occasions the court found that the communication in question was not made in furtherance of fraud and upheld the claim of privilege.[49] The court ordered only one document to be produced solely because of the civil-fraud exception.[50] The court used the exception as "belt and suspenders," holding that the documents that were improperly withheld as privileged would have to be produced under the civil-fraud exception even if they were privileged.

3. Burton v. R.J. Reynolds Tobacco Co.

Plaintiff David Burton sought discovery of thirty-three documents[51] related to Council for Tobacco Research ("CTR") special projects withheld under attorney-client and work product privileges.[52] The court referred the matter to a magistrate judge, who ordered production of all but one document.[53] RJR moved the district court for review of the magistrate's decision.[54]

The court ruled that twenty-four documents withheld on the basis of privilege were not in fact privileged.[55] The court upheld

46. *See American Tobacco*, 1997 WL 728262, at *5.

47. *See id.* The court suggested that RJR could have rebutted the State's evidence if it had made an effort to explain or counteract the inferences of fraud drawn from the documents in question. *See id.* at *6 n.4. Since it did not, the court found that the State met even the preponderance of evidence standard that RJR had argued for in its subsequent filings. *See id.*

48. *Id.* at *5.

49. *See id.* at *6-*8, *14-*15. The court allowed communications to be redacted from five documents. *See id.*

50. *See id.* at *19.

51. *See* Burton v. R.J. Reynolds Tobacco Co., 177 F.R.D. 491, 494 (D. Kan. 1997). The documents sought were the same as those sought in the Washington litigation. *See supra* Part IX.B.2 and accompanying text.

52. *See Burton*, 177 F.R.D. at 494.

53. *See* Burton v. R.J. Reynolds Tobacco Co., 170 F.R.D. 481, 490 (D. Kan. 1997). RJR brought a motion for reconsideration, which was denied. *See* Burton v. R.J. Reynolds Tobacco Co., 175 F.R.D. 321, 328-29 (D. Kan. 1997).

54. *See Burton*, 177 F.R.D. at 494.

55. *See id.* at 498.

the magistrate's finding that the documents were not privileged because RJR failed to show "the necessary nexus to litigation or legal advice."[56] The court stressed that not all communications to or from counsel are privileged; they must relate to legal advice to be protected.[57] Thus, documents relating to scientific matters, general business matters, or public relations issues do not enjoy the privilege.[58]

The court also ordered the production of documents withheld by RJR as work product.[59] RJR argued unsuccessfully that documents created by the CTR's special projects generally were for the purpose of litigation and as such were privileged.[60] The court required RJR to link each document with some particular anticipated or current litigation.[61] The court noted that "RJR and the CTR are in the business of litigation. Accordingly, documents prepared in the ordinary course of business of litigation without a tie to specific litigation is not protected by work product immunity."[62]

Finally, the court applied the crime-fraud exception to the documents.[63] Under Kansas law, the party seeking disclosure must first establish a prima facie case that "legal service was sought or obtained in order to enable or aid the commission or planning of a crime or a tort."[64] Having previously decided that the plaintiff had established a prima facie case that RJR engaged in fraud concerning the addictive nature of nicotine, the court made a two-part inquiry: (1) the crime or fraud must be established; and (2) the communication must have been in furtherance of the crime or

56. *Id.* at 496. The documents were not protected due to their scientific nature. *See id.* The court also found that RJR had not shown the necessary nexus to litigation or legal advice for each of the documents. *See id.*

57. *See id.*

58. *See id.* at 496-98.

59. *See id.* at 499.

60. *See id.* at 498.

61. *See id.*

62. *Id.* The court cited to Fourth Circuit and Eighth Circuit decisions in support of its position. *See id. See also* National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992) (noting that the document must be prepared with the prospect of litigation); Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987) (holding that even though litigation is in prospect, documents produced in the ordinary course of business are not protected by the work product immunity).

63. *See Burton*, 177 F.R.D. at 501-03.

64. KAN. STAT. ANN. §60-426(b)(1) (1994). *See also* Wallace, Sanders, Austin, Brown & Enochs, Chtd. v. Louisburg Grain Co., 824 P.2d 933, 939 (Kan. 1992) (holding that "sufficient evidence" means prima facie evidence).

fraud.[65] The court found that thirty-one of the thirty-three documents did not contain evidence relating to the fraud.[66] Two documents, however, would have had to be produced under the crime-fraud exception even if they had been privileged.[67]

4. Minnesota *ex rel.* Humphrey v. Philip Morris Inc.

In *State ex rel. Humphrey v. Philip Morris Inc.*,[68] the district court reviewed the decision of the special master releasing more than 30,000 documents.[69] The court adopted the special master's report but added some clarifications and findings of fact.[70] Although similar to the cases discussed previously, the court added a punitive measure for the defendant's systematic mischaracterization of documents.[71]

The special master, with input from the parties, established a process by which to evaluate the vast quantities of documents withheld by the defendants.[72] Defendants were required to categorize the documents according to twelve categories.[73] The special master then generated a random list of documents from each category for in camera review.[74] The parties made presentations, both in open

65. *See Burton*, 177 F.R.D. at 501-02.
66. *See id.* at 503.
67. *See id.*
68. No. C1-94-8565, 1998 WL 257214 (Minn. Dist. Ct. Mar. 7, 1998).
69. *See id.* at *6.
70. *See id.* at *1. The additional findings were: (1) defense counsel could not unequivocally state that all documents were properly categorized; and (2) in many instances, defendants claimed privilege where none existed and blatantly abused the categorization process. *See id.* at *2-*3.
71. *See id.* at *4. The court admonished some of the defendants by writing:

> If the Special Master finds that mischaracterization is more than a statistical anomaly, privilege shall be waived as to all the documents listed in Exhibit 1; the Court will not tolerate a pattern of abuse of the categorization process.... The court notes ... that the substantial number of documents from which Defendants withdrew claims of privilege after the Special Master's initial review of Liggett documents suggests that claims of privilege were not always made in good faith.

Id. at *4-*5.
72. *See id.* at *6.
73. *See id.* at *5. The categories were: (1) Other Litigation; (2) No Attorney Identified; (3) Science; (4) Attorney-Related Involvement in Smoking and Health; (4a) Communications of Counsel; (4b) Special Projects; (4c) LS, Inc.; (5) Public Statements; (6) Additives; (7) Children; (8) Advertisements; (9) Discovery; (10) Government Regulations; (11) Patents/EPA; and (12) Other Documents. *See id.*
74. *See id.* at *6.

court and ex parte, regarding the randomly selected documents, and finally submitted proposed findings of fact and conclusions of law.[75] The special master recommended the release of all documents in four separate categories on two grounds: abuse of privilege and the crime-fraud exception to privilege.[76]

The court noted the defendants' abuse of privilege by citing examples where they violated the court's orders and claimed privilege for documents that obviously were not entitled to protection.[77] The court ruled that the abuse of privilege and violation of court rules were reason enough to order release of the documents, and the court advised that "[t]he intentional and repeated misuse of claims of privilege is intolerable in a court of law, and an appropriate sanction for such abuse is release of all documents for which privilege is improperly claimed." [78] Further, the court reasoned that, although documents within a category may contain privileged material, "abuse of the privilege claim with respect to even one document taints the category."[79] After the special master's spot-check of the documents revealed a pattern of abuse, the court expected that a thorough, document-by-document investigation would reveal even more abuses.[80] Thus the court allowed "the light of discovery to permeate" the categories of documents recommended by the special master.[81]

The court also held that certain defendants were required produce the documents because of the crime-fraud exception.[82] Minnesota law requires plaintiffs to make a prima facie case that the communication was made in furtherance of a crime or fraud and that it was closely related to the fraud.[83] The special master went beyond these requirements by conducting a two-prong inquiry: (1) whether the evidence showed by preponderance that the defendants were engaged in criminal or fraudulent conduct; and (2) whether the evidence showed, again by preponderance, that the involvement of defendants' attorneys was in furtherance or

75. *See id.*
76. *See id.* at *6-*7.
77. *See id.* at *7.
78. *Id.*
79. *Id.*
80. *See id.*
81. *Id.*
82. *See id.* at *8.
83. *See* Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. Ct. App. 1991).

closely related to the criminal or fraudulent conduct.[84] The court noted specifically that the standard applied by the special master, i.e., requiring proof by a preponderance of the evidence, exceeded that required by Minnesota law.[85]

The district court declined to analyze the reasons for finding the crime-fraud exception applied, instead relying on the special master's report.[86] Other courts, examining the same tobacco industry documents came to the same conclusion: the documents showed evidence of fraud and the role of counsel was in furtherance of that fraud.[87]

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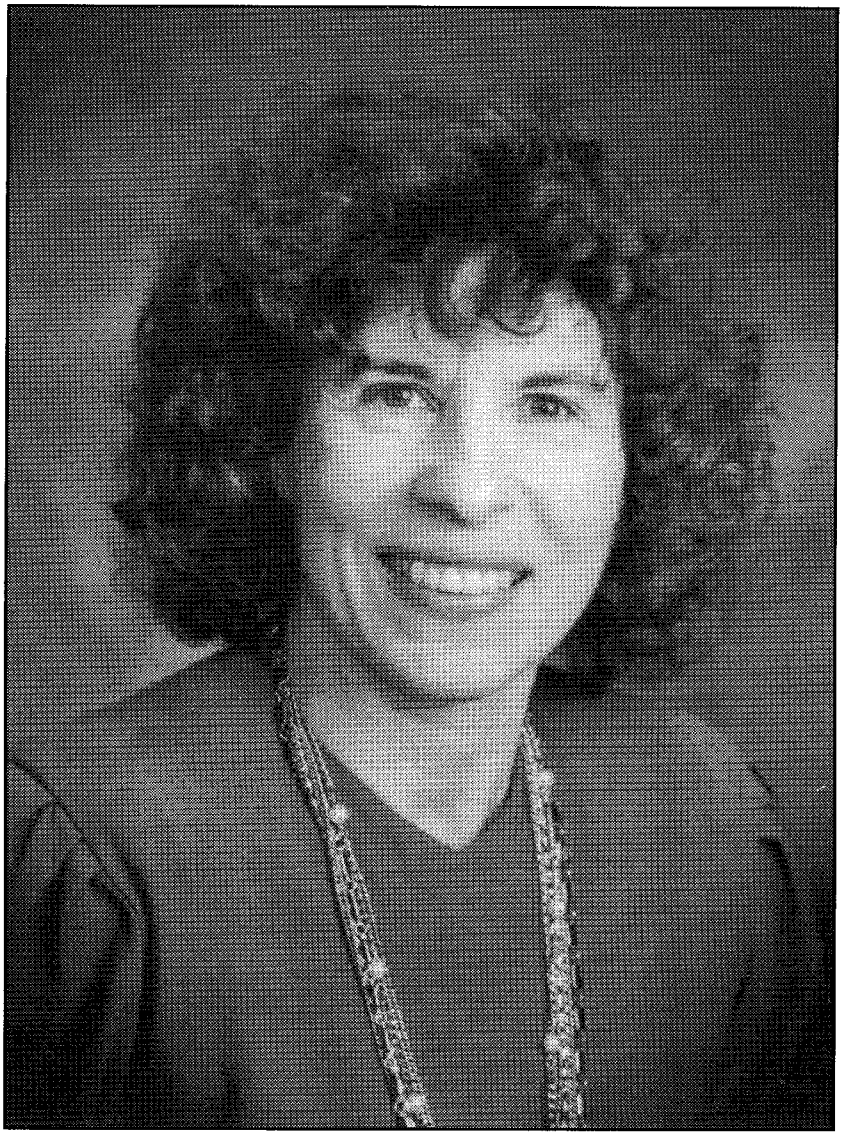
84. *See Philip Morris*, 1998 WL 257214, at *8. Included in the definition of "criminal or fraudulent conduct" are the failure to conduct appropriate research into the safety of the products and the failure to warn consumers if the research supported conclusions that the products were dangerous or addictive. *Id.*

85. *See id. See also Levin*, 469 N.W.2d at 515 (requiring only a prima facie showing for the crime-fraud exception).

86. *See Philip Morris*, 1998 WL 257214, at *8.

87. *See, e.g.*, Burton v. R.J. Reynolds Tobacco Co., 177 F.R.D. 491, 503 (finding documents withheld were in furtherance of the fraud of concealing the addictive nature of nicotine); State v. American Tobacco Co., No. 96-2-15056-8 SEA, 1997 WL 728262, at *8 (Wash. Super. Ct. Nov. 21, 1997) (finding that counsel's advice and legal conclusions relating to research projects purporting to find a relationship between smoking and adverse health consequences provided evidence of fraud); American Tobacco Co v. State, 697 So. 2d 1249, 1257 (Fla. Dist. Ct. App. 1997) (holding that tobacco companies concealed and misrepresented health risks from the public and used their attorneys to perpetuate this fraud). *See also generally* Geoffrey C. Hazard, *Tobacco Lawyers Shame the Entire Profession*, NAT'L L.J., May 18, 1998, at A22 (discussing the conduct of tobacco industry lawyers revealed by the Minnesota litigation); Edward J. Cleary, *The Use and Abuse of the Attorney-Client Privilege*, MINN. BENCH & B., Sept. 1998, at 18-19 (discussing ethical violations of tobacco industry lawyers).



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