

Federal Opinion Navigates Difficult Privilege and Work-Product Issues

On Nov. 7, U.S. District Judge for the Middle District of Pennsylvania Malachy E. Mannion issued a decision in *Lord v. Napa Management Services*, C.A. No. 3:13-2940 (M.D. Pa.). In that decision, Mannion skillfully handled attorney-client privilege and work-product doctrine issues that frequently flummox other courts and litigants.

By **Kevin P. Allen** | December 12, 2019



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Napa is a qui tam case where the relator, Lord, contends that the defendants (PMC) engaged in a scheme to defraud Medicare by submitting inflated claims for medical services. Lord sought written discovery from PMC. PMC withheld documents on the basis of both the attorney-client privilege and the work-product doctrine and filed a corresponding motion for a protective order.

Mannion's decision provides a useful and logical roadmap for addressing some frequently encountered and somewhat knotty privilege and work-product issues. In his decision largely granting PMC's motion, Mannion held:

- Purpose: The purpose of the privilege is to provide confidentiality in order to encourage full and frank communications between client and counsel. The purpose of the work-product doctrine is to "enable attorneys to prepare cases without fear that their work product will be used against their clients."
- Burden of proof: The initial burden of proof is on the proponent of the privilege and/or the work-product doctrine. However, the burden of proof of waiver of the privilege or the work-product doctrine is on the party seeking disclosure.
- Anticipation of litigation: Federal work-product protection under Rule 26 only applies when the proponent of the doctrine is in litigation or reasonably anticipates that litigation is on the horizon. Documents prepared in the regular course of business are not eligible for federal work-product protection. By contrast, Pennsylvania extends protection to attorney work product even if not prepared in anticipation of litigation, as in *BouSamra v. Excela Health*, 201 A.3d 967 (Pa. 2019).

- Facts v. communication of facts: Mannion accurately recognized that a party cannot shield relevant facts from discovery, but also appreciates that an opponent's entitlement to discover facts does not mean that the opponent is entitled to the production of privileged communications or work product that contain or recite facts. The inclusion of facts in a protected communication neither renders the communication discoverable nor inoculates the facts themselves from discovery. Instead, the proponent of the privilege/work product protection can continue to shield the entire confidential communication (email, letter, memo, text, etc.) from disclosure but must disclose facts if and when asked for them in some other form of discovery (depositions or interrogatories, for instance).
- Intra-corporate communications: When the client is a corporation, the attorney-client privilege can apply to communications between or among nonlawyers. If nonlawyer corporate employees communicate with each other to gather information to provide to counsel, those intra-corporate communications are eligible for privilege protection. Likewise, if nonlawyer corporate employees communicate with each other in order to disseminate advice separately received from corporate counsel, those downstream communications are also eligible for privilege protection.
- Work-product waiver: It is harder to waive the protection of the work-product doctrine than it is to waive the attorney-client privilege. An intentional disclosure of work-product will not necessarily result in a waiver if such disclosure does not substantially increase the likelihood of disclosure to an adversary.
- Advice of counsel waiver: A party waives the attorney-client privilege when the party affirmatively invokes an advice of counsel defense. However, merely defending an action and denying any deviations from legal obligations

does not amount to an invocation of an advice of counsel defense and should not result in a waiver.

These privilege and work-product issues sometimes have proven elusive for other courts and for litigants. *Napa* provides a reliable map around those hazards.

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