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# Recent Case Opinions by Magistrate Judge Facciola Regarding Attorney-Client Privilege and Work Product Doctrine

On two consecutive days in September 2012, Magistrate Judge Facciola rendered his findings with respect to the protection against the production of documents under claims of attorney-client and work product privileges, and he included discussion of the sufficiency of privilege log entries in asserting objection to production. The two opinions are summarized here.

## CHEVRON v. THE WEINBERG GROUP[1] [link to opinion]

In this protracted set of cases, the issue addressed by the court is whether documents were properly withheld under a claim of privilege.[2] The court first discussed the proper content of a privilege log for the purpose of asserting the attorney-client privilege. It held that entries in a privilege log that properly object to and, therefore, preserve the privilege are those that contain information showing that not only was the communication between attorney and client, but also that the communication was intended to be confidential and sought (or provided) legal advice.[3] The court stressed that not all communications between lawyer and client are privileged, noting that the intent to be confidential may not be present or the communication may not be made for the purpose of seeking or providing legal advice.[4]

The court expresses understanding in parties' desire to minimize costs involved in creating a privilege log in this era of "big data," yet takes issue with such privilege logs, stating, "I know that this opinion has made clear how tired I am of mechanically produced boilerplate privilege logs."[5] In commenting on the insufficiency of technology generated privilege logs, the court notes that the description required by the Federal Rules cannot be automatically generated by technology and requires human intervention.

The court ordered production of various document categories, which it grouped and described separately. The court held that the first category of documents must be produced because none of the participants in the communications are attorneys and, therefore, the communications cannot be protected by the attorney-client privilege.[6] For the second category, which includes invoices for the respondent's work, the court ordered their production because the invoices could not have been prepared "in anticipation of litigation or for trial" and, thus, cannot be protected by the work product

[1] Chevron v. The Weinberg Group, Misc. Action No. 11-409 (JMF), 2012 BL 250787 (D.D.C. Sept. 26, 2012) (J. Facciola).
[2] Id. at *2.
[3] Id. at *3.
[4] Id.
[5] Id. at *7.
[6] Id. at *5.

privilege.[7] The third category of documents included maps, articles and diagrams that the court determined to be within the scope of materials relied upon by the respondent in its expert report.[8] The court ordered their production, finding that they were improperly withheld and should have already been produced. For the fourth and final category of documents, the court ordered the respondent to review each log entry, redact all opinion work product from the corresponding document, and separately describe to the court and petitioner why a document (or the redacted part of a document) qualifies as opinion work product.[9]

The court emphasized that it will continue to hold counsel to the obligations imposed upon them by Rule 26(g) of the Federal Rules of Civil Procedure, quoting Judge Grimm in *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D.Md. 2008):

> Rule 26(g) charges those responsible for the success or failure of pretrial discovery – the trial judge and the lawyers for the adverse parties – with approaching the process properly: discovery must be initiated and responded to responsibly, in accordance with the letter and spirit of the discovery rules, to achieve a proper purpose … and be proportional to what is at issue in the litigation, and if it is not, the judge is expected to impose appropriate sanctions to punish and deter.[10]

The court vowed that whenever any imposed obligation is disobeyed within the context of this matter, it will hold that privilege is waived.

**FEDERAL TRADE COMMISSION v. BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.[11]** [link to opinion]

In 2008, the Federal Trade Commission ("FTC") issued a subpoena *duces tecum* to respondent, Boehringer Ingelheim Pharmaceuticals, Inc. ("BIPI") as a part of the FTC's investigation seeking to determine whether BIPI engaged in unfair trade practices by entering into a settlement agreement to end litigation against a third party.[12] The respondent certified in May 2010 that it had fully complied with the subpoena. However, the FTC filed a Petition of the Federal Trade Commission for an Order Enforcing a Subpoena *Duces Tecum* ("Petition"), requesting the court declare that the 631 documents withheld by BIPI are not privileged under the attorney-client privilege or work product doctrine.[13]

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[7] Id.
[8] Id. at *5-6.
[9] Id. at *6.
[10] Id. at *7.
[11] Federal Trade Commission v. Boehringer Ingelheim Pharmaceuticals, Inc., 2012 BL 249257 (D.D.C. Sept 27, 2012) (J. Facciola).
[12] Id. at pp. 1-4.
[13] The FTC also alleges that BIPI failed to preserve electronic records, and as a result, responsive emails exist only on backup tapes, which respondent refuses to search. The court indicated that it will publish its decision on this preservation issue in a subsequent opinion.

In its Petition, the FTC argued that four categories of documents are not privileged: (1) financial analyses of a co-promotion agreement;[14] (2) forecasting analyses and timelines to the settlement and co-promotion; (3) financial analyses of the business terms in the settlement agreement; and (4) documents that have no attorney as author or recipient (e.g., notes taken by business executives) or that merely include an attorney as part of a distribution to business executives. The FTC maintained that the withheld documents are not protected because either: (1) they are typical business forecasts not done by lawyers and, thus, are not work product, or (2) the documents contain no confidential communications between client and attorney and are not protected by the attorney-client privilege. In the alternative, the FTC claimed an overriding and compelling need for disclosure of the documents as an exception to the work product protection.[15]

In early 2011, the court ordered the parties to meet and confer on a sample set of the withheld documents to be presented to the court for an *in camera* review.[16] After review of BIPI's privilege log and the sample of documents, the court denied the Petition as to certain categories of documents and ordered the production of redacted privileged material for the remainder.[17]

Applying Federal Rule of Civil Procedure 26(b)(3)(A), the court denied the FTC's request for production of documents consisting of financial analyses of the co-promotion agreement and settlement proposals and the forecasting analyses. The court found that because these documents were requested by in-house counsel and created by BIPI employees for the specific purpose of evaluating the various options to settle the underlying litigation, the documents are protected by the work product doctrine, even though similar reports are created by the business for non-litigation purposes.[18] In denying the FTC's request, the court also held that these documents do not shed any light on whether unfair practices occurred, and, therefore, the FTC is not entitled to an exemption to the work product doctrine.[19]

The court stressed that where factual and opinion work product are so intertwined in a document that it is impossible to segregate and disclose the purely factual part, any disclosure would violate the protections afforded by the work product doctrine. As such, the court determined that any emails transmitting the financial analyses must be produced if all attorney opinion contained in the emails is able to be excised from additional factual work product.[20]

With respect to the FTC's request for internal BIPI communications discussing the different settlement options, the court held that they are protected from disclosure by the work product doctrine in as much

[14] The co-promotion agreement is collateral to the settlement agreement that is the subject of the FTC's investigation.
[15] Id. at p. 5.
[16] Id. at pp. 2-3.
[17] Id. at p. 1.
[18] Id. at pp. 9-11.
[19] Id. at p. 13
[20] Id.

as they contain the mental impressions and opinions of BIPI attorneys and their consultants and were made at the direction of counsel or discussed legal advice. In extending the protection of the attorney-client privilege to internal communications that do not involve an in-house lawyer, the court held that "communications among employees of a client are still afforded the protection of the privilege, so long as the communications concern legal advice sought or received that was intended to be confidential."[21] For those communications circulated between BIPI executives, the court determined that the documents themselves indicate that they were intended to be confidential and actually contain confidential discussions between BIPI, its attorneys, and in-house counsel. As such, the court denied the FTC's request for the communications.[22]

The court ordered production of all documents that convey factual information that can be excised from the privileged legal opinion/communication, with redaction of the privileged material. The court stressed that it would sanction BIPI if any extraneous, non-privileged words are redacted. It also stated it would impose sanctions against the FTC if it demands production of a document or redaction that does not advance the investigation into unfair practices.[23] Ultimately, the court stressed that "the parties be reasonable and devote only that amount of time to this controversy that is truly proportionate to what is now at stake."[24]

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[21] Id. at p. 16 (citing Long v. Anderson Univ., 204 F.R.D. 129 (S.D. Ind. 2001) and Johnson v. Sea-Land Serv., No 99-civ-9161, 2001 WL 897185, at *2 (S.D. N.Y. Aug. 9, 2011).
[22] Id. at p. 14.
[23] Id. at 17.
[24] Id.