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Expert Analysis

Roger Clemens Strikes Out On Privilege Arguments

By **Michael Cardello III**

And **Stephen J. Ginsberg**

Roger Clemens didn't get up to bat very often in his baseball career but when he did in federal court in the Eastern District recently, he struck out! Plaintiff, Brian McNamee, a former athletic trainer for the New York Yankees, commenced a lawsuit for defamation against defendant, Roger Clemens, one of the greatest and most feared Major League Baseball pitchers of all time. According to the complaint, McNamee alleges that Clemens waged a defamatory public relations campaign against McNamee in order to ruin McNamee's reputation and brand McNamee a liar, in retaliation for testimony given by McNamee to Congress that McNamee had injected Clemens with performance enhancing drugs (PEDs).

As it turns out, Clemens is just as aggressive in litigation as he was on the pitcher's mound. During the discovery phase of the matter, McNamee served a discovery demand on Clemens in which McNamee requested the production of all communications Clemens had with his public relations strategist, Joe Householder, and Householder's firm, Public Strategies. McNamee also demanded from Clemens all communications Clemens had with Randal Hendricks and Hendricks Sports Management. Clemens refused to produce the requested information, claiming that it was subject to the attorney-client privilege and/or constituted work product.

In support of his claim that communications with Public Strategies were shielded from discovery, Clemens argued that Householder was "a full-fledged, yet non-attorney, member of the [Clemens'] legal team" (decision, p. 2). Public Strategies had been hired by Clemens shortly after Senator George Mitchell released the "Mitchell Report," which included statements by McNamee that McNamee had injected Clemens with PEDs. Clemens claimed that documents and correspondence with Public Strategies were privileged, because Public Strategies was hired to assist Clemens' legal team in devising legal strategy. In addition, Clemens argued that Hendricks was hired as a legal advisor in 1983 and acted as "the equivalent of in-house counsel… and [was] an active member of the team of attorneys representing Clemens [in this action]" (decision, p. 3). Because Clemens refused to produce the requested documents, or even produce a privilege log, McNamee filed a motion to compel.

A decision analyzes which types of communications involving a public relations firm and a licensed attorney performing business services will be afforded protection from discovery.

On Sept. 17, 2013, Magistrate Judge Cheryl Pollak, in *McNamee v. Clemens*, (09-cv-01649 (SJ)(CLP) Sept. 17, 2013), issued a decision granting, in large part, McNamee's motion to compel. The decision is significant for a number of reasons. First, it highlights the severe penalties that can result from a party's failure to properly produce a privilege log under Federal Rule of Civil Procedure (FRCP) 26(b)(5)(A) and Rule 26.2(c) of the Local Rules of the U.S. District Courts for the Southern and Eastern districts of New York. Additionally, the decision analyzes which types of communications involving a public relations firm and a licensed attorney performing business services will be afforded protection from discovery pursuant to the attorney-client privilege and/or under the attorney work-product doctrine.

Privilege Logs

FRCP 26(b)(5)(A) and Local Rule 26.2(b) govern privilege logs. Pursuant to these rules, a party seeking to withhold documents under the attorney-client privilege and/or work-product protection must produce a privilege log that "describe[s] the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." FRCP 26(b)(5)(A). The U.S. Court of Appeals for the Second Circuit has refused to uphold a claim of privilege where the entries in a privilege log have been deemed inadequate or no privilege log was produced at all. See *OneBeacon Ins. v. Forman Int'l*, No. 04 CV 2271, 2006 WL 3771010 (S.D.N.Y. 2006); *United States v. Constr. Products Research*, 73 F.3d 464, 473 (2d Cir. 1996); *Allied Irish Banks v. Bank of Am., N.A.*, 252 F.RD. 163, 167 (S.D.N.Y. 2008); and *FG Hemisphere Associates v. Republique Du Congo*, No. 01 CV 8700, 2005 U.S. Dist. LEXIS 3523 (S.D.N.Y. 2005).

Citing Local Rule 26.2(b), Pollak held that Clemens' failure to timely produce a privilege log resulted in a waiver of privilege and work-product protection. Significantly, prior to issuing the decision, the court ordered Clemens to produce the documents which Clemens claimed were non-discoverable for in camera review, which Clemens did. At the same time, Clemens also produced a privilege log. Upon review of Clemens' privilege log, the court found that it was deficient, because it failed to comply with the requirements under Local Rule 26.2(b). The court stated that while a party may, in certain instances, be permitted to identify purportedly privileged documents by category, broad classes of documents with

MICHAEL CARDELLO III *is a partner at Moritt Hock & Hamroff.* STEPHEN J. GINSBERG *is an associate at the firm.*

exceedingly general and unhelpful descriptions will not be sufficient to comply with Local Rule 26.2(b).

The court went on to state that the privilege log that was ultimately produced to the court (though late), along with documents for the in camera review, lists each document individually and provides each document's date, author, recipient, and subject. However, the subject lines which described the withheld documents contained, in many instances, exceedingly unhelpful descriptions, such as single word descriptions, "tomorrow," "Media," "My info," "statement," "Costs," "Letter," "notes," "Inquiry," and "Discussion" (decision, p. 7). The court held that "these types of descriptions clearly do not provide sufficient information as to the content of the documents to enable plaintiff or the court to evaluate whether each of the withheld documents is privileged and [as such], the court's in camera examination of the records has been seriously impeded."

One of the important points to distill from the decision is that a party in a federal action, who believes he or she does not need to serve a privilege log with respect to documents withheld pursuant to attorney-client privilege and/or as work-product, or fails to strictly comply with the requirements set forth in FRCP 26(b)(5)(A) and/or Local Rule 26.2(b) (if the action is pending in the Southern or Eastern districts of New York), does so at his or her own peril.

Attorney-Client Privilege

Despite the fact that the court held that Clemens waived his right to invoke the attorney-client privilege by failing to timely and adequately propound a privilege log, the court nevertheless went through the arduous task of conducting an in camera review of more than 900 documents that Clemens sought to protect from discovery.

The court began its analysis by recognizing that the attorney-client privilege is one of the oldest recognized privileges and is intended to encourage full and frank communication between attorneys and their clients. *Collins v. City of New York*, No. 11 CV 766, 2012 WL 3011028, at *3 (E.D.N.Y. 2012); *D'Alessio v. Gilberg*, 205 A.D.2d 8, 10, 617 N.Y.S.2d 484, 485 (2d Dept. 1994). The court then stated that "[t]he attorney-client privilege protects (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007); *Assured Guar. Mun. v. UBS Real Estate*, No. 12 CV 1579, 2013 WL 1195545, at *9 (S.D.N.Y. 2013).

However, the court acknowledged that an exception applies to those assisting a lawyer in representing a client, such as public relations firms and agents. *Haugh v. Schroder Inv. Mgmt. N. Am.*, No. 02 CV 7955, 2003 WL 21998674, at *3 (S.D.N.Y. 2003); *In re Grand Jury Subpoenas Dated March 24, 2003 Directed (A) Grand Jury Witness Firm & (B) Grand Jury Witness*, 265 F.Supp.2d 321, 325 (S.D.N.Y. 2003). In order for the communication to be protected between an attorney and non-attorney under the attorney-client privilege, the "critical inquiry" is "whether the communication with the person assisting the lawyer was made in confidence and for the purpose of obtaining legal advice." *Allied Irish Banks v. Bank of Am., N.A.,* 252 F.R.D. at 168; *Haugh v. Schroder Inv. Mgmt. N. Am.,* No. 02 CV 7955, 2003 WL 21998674, at *3; *In re Grand Jury Subpoenas Dated March 24, 2003 Directed (A) Grand Jury Witness Firm & (B) Grand Jury Witness*, 265 F.Supp.2d at 325.

Even though the court had already held that Clemens had waived his right to invoke the attorney-client privilege, the court went the extra step and nevertheless found that almost all of the documents Clemens sought to protect were not of a legal character and, thus, undeserving of protection.

The court acknowledged that in specific instances communications between an attorney and a public relations' firm could be shielded from disclosure (citing *In re Grand Jury Proceedings*, 219 F.3d 175 (2d Cir. 2000), holding that communications with a PR firm were protected from disclosure where the PR firm was hired to advise on how to reduce public pressure on prosecutors to bring charges). However, according to the court, that was not the case here. In the instant matter, the court found that the vast majority of documents revealed in camera demonstrated that Householder, Public Strategies and Hendricks did not perform anything other than standard public relations or agent services for Clemens to assist in the formulation of a public relations campaign and media strategy aimed at protecting Clemens' public image and reputation in the face of allegations that Clemens used PEDs.

The court also found that the communications with Householder and Hendricks were not necessary so that Clemens' counsel could provide Clemens with legal advice (decision, p. 11). Thus, even though the court had already held that Clemens had waived his right to invoke the attorney-client privilege, the court went the extra step and nevertheless found that almost all of the documents Clemens sought to protect were not of a legal character and, thus, undeserving of protection.

Work-Product Protection

The court also determined whether the documents sought to be withheld by Clemens were protected under the work-product doctrine. The court began its analysis with the basic premise that "[t]o invoke the work-product doctrine, the party withholding discovery must show that the withheld material is: 1) a document or tangible thing; 2) that was prepared in anticipation of litigation; and 3) was prepared by or for a party, or by his representative." *Allied Irish Banks v. Bank of Am., N.A.*, 252 F.R.D. at 173; *OneBeacon Ins. v. Forman Int'l*, 2006 WL 3771010, at *4. The court then noted that the protection would not be available for documents "created in essentially the same form irrespective of litigation." *Allied Irish Banks v. Bank of Am., N.A.,* 252 F.R.D. at 173.

Based upon its in camera review, the court held that the documents that Clemens sought to protect as work-product rarely involved litigation strategy. In the rare instances where litigation strategy was mentioned, those communications focused on public relations and media strategy. The court acknowledged that the communications may have "played an important role" in Clemens' litigation strategy, but refused to cloak them with the work-product protection, because: "as a general matter public relations advice, even if it bears on anticipated litigation, falls outside the ambit of protection of the so-called 'work product' doctrine….That is because the purpose of the rule is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally." *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. at 55; *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, at *12.

It appears that, based upon the court's holding in the decision, in certain instances, communications between a law firm and a public relations firm can be shielded from production under the attorney-client privilege or work-product doctrine. However, the communications have to be made strictly in connection with legal advice—not the impact litigation will have on a client's business and/or reputation.

McNamee may have won this game in the series, however, as Yogi Berra famously said "it ain't over till it's over."