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IN PRACTICE

## COMPLEX LITIGATION

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### Document Indices and the Attorney Work-Product Doctrine

While there is no case on point, logic dictates that document indices should be protected under the attorney work product doctrine

**Y**ou represent a business entity in a complex commercial action involving the production of thousands of pages of documents. In light of the many documents produced, you decide to use a litigation database to summarize, organize and index the documents.

You or your paralegal enter the relevant information about each document into the database; for example, the date of the document, the Bates number assigned to it, the author and recipients of the document, and a summary of the contents of the document. The database and its index will be valuable tools to prepare for depositions and trial because they allow you to quickly and easily search for documents by date, author, Bates number, etc.

During discovery, your adversary requests the production of your docu-

ment index. Is she entitled to it?

You object on the grounds that the index is protected from disclosure by the attorney work product doctrine. Notwithstanding your objection, your adversary contends that she is entitled to your document index and advises that she will seek its disclosure by court order if you fail to produce it.

The state court has not addressed this issue. It has, however, addressed somewhat analogous situations where one party has sought the disclosure of another party's attorney work product. Examination of this case law leads to the conclusion that a document index is entitled to protection under the attorney work product doctrine.

#### The Court Rule

Our court rules allow the discovery of attorney work-product materials only under certain circumstances:

Subject to the provisions of R. 4:10-2(d), a party may obtain discovery of documents and tangible things otherwise discoverable under R. 4:10-2(a)

and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representatives (including an attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking the discovery has substantial need of the materials in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

R. 4:10-2(c) (emphasis added).

Therefore, in order to obtain attorney work product materials, your adversary must establish (1) a substantial need for the materials in preparation of her case and (2) that she is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.

#### 'Substantial Need'

Your adversary must prove that she

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has a "substantial need" for your work-product materials in order to prepare her case. The court has determined that a substantial need arises where one party uses the attorney work-product materials at trial and, as a result of the use of the materials, the other party would be unfairly surprised or unduly prejudiced or would require a delay of the trial.

In *Jenkins v. Rainner*, 69 N.J. 50 (1976), the plaintiff in a personal injury action sought to obtain a motion picture film taken of her by the defendants. The Court held that it would be "plainly unfair" for the defendants to use the motion picture film at trial without affording the plaintiff an opportunity to review the film before the trial.

In addition, the Court held that in order to prepare properly for trial, the plaintiff had a substantial need to view the film, which would obviously include an explanation of the plaintiff's activities depicted on the film.

In *Wagi v. Silver Ridge Park*, 243 N.J. Super. 547 (Law Div. 1989), the plaintiffs sought discovery of written witness statements obtained by the defendants. The court determined that a substantial need arises when the written witness statements will be used at trial.

The court explained that the plaintiffs would be unfairly prejudiced, if the statements were used at trial, by not knowing what was contained in the statements. Further, the plaintiffs would also be unfairly prejudiced if they had to request an adjournment in order to test the contents of the statements by, for example, deposing the witness. This would result in an unacceptable delay in the trial.

Likewise, in *Medford v. Duggan*, 323 N.J. Super. 127, 137-38 (App. Div. 1999), the plaintiff sought the disclosure of written witness statements obtained by the defendant. The court determined that the plaintiff established a substantial need for the written statement of one witness because the witness was not able to recall factual events during her deposition.

*Jenkins* involved a motion picture film, and *Wagi* and *Medford* involved written witness statements. These materials are attorney work product, but they are also evidence that could be used at trial.

As a result, under those circum-

stances, the courts determined that the materials should be disclosed to avoid a delay of the trial and unfair surprise or undue prejudice at trial.

However, the same cannot be said about a document index because it would not be used as evidence at trial.

Rather, a document index is a litigation tool, much like an outline used by counsel at trial. In this light, it is questionable whether your adversary would be able to establish a "substantial need" for your document index.

#### 'Substantial Equivalent'

Assuming that your adversary is able to convince the court that she has a substantial need for your document index, then she must establish that she is unable, without undue hardship, to obtain a substantial equivalent of your document index by other means.

In *Jenkins*, the Supreme Court found that the motion picture film in the defendants' possession was unique and could not be recreated by the plaintiff. As a result, the Court held that the plaintiff established that he could not obtain a substantial equivalent of the motion picture film.

In *Medford*, the plaintiff sought the disclosure of the written witness statements obtained by the defendant. The court determined that the plaintiff was only entitled to obtain the written statement of a witness who could not recall factual events during her deposition.

Under these facts, the plaintiff demonstrated that he was unable to obtain a substantial equivalent of the written witness statement by other means, namely, at the deposition of the witness.

In *Wagi*, the court also identified situations where a party could not obtain the substantial equivalent of written witness statements.

In *Hannan v. St. Joseph's Hospital*, 318 N.J. Super. 22, 33 (App. Div. 1999), the defendant sought disclosure of the plaintiff's notes relating to the care that he received during his medical treatment. The court upheld the denial of the disclosure of the plaintiff's notes on the grounds that the information sought by the defendant was recorded in various medical records.

Moreover, the court held that the

facts contained in the medical records were the best evidence of the care received by the plaintiff during his medical treatment and were at least the substantial equivalent of the plaintiff's notes.

In *Jenkins* and *Wagi*, the plaintiffs simply could not obtain the substantial equivalent of the attorney work product materials (a motion picture film and written witness statements). In *Hannan*, the defendant could obtain the substantial equivalent of the attorney work product materials (a party's notes).

However, a document index is not evidence and, therefore, should not be compared to a motion picture film or a witness statement.

Rather, a document index is more akin to a party's notes. Your adversary can obtain the same documents in the case and create her own document index—the substantial equivalent of your document index.

#### 'Undue Hardship'

Your adversary may argue that she cannot obtain a substantial equivalent of your document index without "undue hardship." In *Jenkins*, the Supreme Court noted that the hardship in obtaining a substantial equivalent of something as unique as a motion picture film "seems manifest."

Likewise, in *Medford*, the plaintiff could not obtain the facts through a deposition of the witness because of the witness's inability to recall events. Therefore, obtaining the substantial equivalent of the witness statement was impossible and the "undue hardship" requirement was satisfied.

As noted, your adversary can obtain the same documents that were exchanged in the case and create her own document index. On this point she may argue that, even though she may be able to create a substantially equivalent document index, that she can not do so without "undue hardship."

However, you must keep in mind that the time and expense of obtaining the substantial equivalent of attorney work-product materials does not constitute an "undue hardship." In *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1262-63 (3d Cir. 1993), the court stated that inconvenience does not

constitute undue hardship. Also, in *Colonial Gas Co. v. Aetna Casualty & Surety Co.*, 144 F.R.D. 600, 605 (D. Mass. 1992), the court similarly stated that inconvenience or expense does not constitute undue hardship.

#### **'Mental Impressions'**

Based on the foregoing, it appears that a document index is entitled to protection under the attorney work-product

doctrine.

However, if a court has ruled against you and has determined that your adversary is entitled to your document index, you should be concerned about your "mental impressions."

You must persuade the court to protect against the disclosure of your "mental impressions, conclusions, opinions, or legal theories" that are contained in your document index, before it is produced to your adversary. See R.

4:10-2(c).

The objective information in your document index, such as the dates and Bates numbers of the documents, may be disclosed to your adversary.

However, any mental impressions, conclusions, opinions, legal theories or similar subjective information contained in the document index, such as your summary of the contents of the documents, must not be disclosed to your adversary. ■