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How FINRA Encroaches On Attorney Work Product

Law360, New York (December 07, 2011, 1:23 PM ET) -- The Financial Industry Regulatory Authority has long taken the position that the Federal Rules of Evidence do not govern the manner by which they conduct their investigations. Not allowing objections from counsel, asking questions that have been asked and answered, and asking argumentative and leading questions are just a few of the ways in which FINRA, in the interest of expedience and control, does not apply the Federal Rules of Evidence.

In one important area of protection for witnesses and defense counsel, however — namely the ability to inquire about documents reviewed in preparation for testimony — FINRA sometimes takes a different approach. Here, some members of the staff argue that Rule 612 of the Federal Rules of Evidence permits them to question witnesses about materials shown to them by counsel in preparation for testimony.

This selective application of the Federal Rules is arbitrary and unfair and is inconsistent with the more principled position adopted by the U.S. Securities and Exchange Commission.[1] Moreover, exacerbating matters is the FINRA staff's imbalanced application of Rule 612, which often stretches the rule to its breaking point.

Rule 612 provides that if, during testimony, a witness uses a writing to refresh his or her memory for the purpose of testifying, an adverse party is entitled to have the writing produced at the hearing and to examine it. The same rule applies to documents reviewed by the witness prior to testifying, should the court deem it necessary in the interests of justice. Rule 612 is made applicable to depositions, to which FINRA testimony is most analogous, by Rule 30(c) of the Federal Rules of Civil Procedure. See Sporck v. Peil, 759 F.2d 312, 317 (3d Cir. 1985).

But Rule 612 does not exist in isolation. It exists in conjunction with Rule 26(b)(3) of the Federal Rules of Civil Procedure, which codifies the attorney work product doctrine. The relevant portion of Rule 26(b)(3) provides:

> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including another party's attorney, consultant, surety, indemnitor, insurer or agent). But, subject to Rule 26(b)(4) [relating to experts], those materials may be discovered if:

(i) they are otherwise discoverable under 26(b)(1) [establishing scope of discoverable materials]; and

(ii) the party shows it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representatives concerning the litigation.

There is a considerable amount of case law applying both attorney client privilege and the protection of Federal Rule of Civil Procedure 26(b)(3) to the culling and selection of documents by an attorney for review by a client.

In Sporck v. Peil, 759 F.2d 312, the Third Circuit held that the selection of a sub-group of documents from those produced in discovery and then used during witness preparation was protected attorney work product.[2] See also Gould Inc. v. Mitsui Mining & Smelting Co., 825 F.2d 676, 679-80 (2d Cir. 1987); Collins, 256 F.R.D. at 408 ("The Second Circuit has recognized that the selection and compilation of documents may fall within the protection accorded to attorney work product"); SEC v. Strauss, 2009 WL 3459204, *9 (S.D.N.Y. 2009); United States v. Pepper's Steel Alloys Inc., 132 F.R.D. 695, 698 (S.D. Fla. 1990) ("opinion work product may be reflected in something as subtle as the act of selecting or ordering documents because this may reflect an attorney's opinion as to the significance of those documents in the preparation of his case").

In Sporck, the defendant-witness (Sporck) reviewed documents culled down from thousands into a single folder by his attorney. Sporck, 759 F.2d at 313. At the deposition, plaintiff's counsel asked whether he had examined any documents in preparation for testimony. Plaintiff's attorney then requested identification of "all documents examined, reviewed or referred to by Charles Sporck in preparation for the session of his deposition." Id. at 314.

Sporck's counsel refused, arguing that the documents had been produced during discovery and that the grouping of the documents for review by Sporck was attorney work product protected from discovery by Rule 26. Id. "The threshold issue in this case," wrote the majority, "is whether the selection process of defense counsel in grouping certain documents together out of the tens of thousands produced in this litigation is work product entitled to protection under Fed. R. Civ. P. 26(b)(3) and the principles of Hickman v. Taylor." Id. at 315.

"We believe that the selection and compilation of documents by counsel in this case in preparation for pre-trial discovery falls within the highly-protected category of opinion work product," the Third Circuit held. Id. at 316. "As the court succinctly stated in James Julian v.

Raytheon Co, 'in selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case.

Indeed, in a case such as this, involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research. There can be no doubt that at least in the first instance the binders were entitled to protection as work product." Id. (internal citations omitted). Addressing Rule 612, the court wrote that "[a]lthough applicable to depositions, Rule 612 is a rule of evidence not a rule of discovery." Id. at 317.

The Sporck court interpreted Rule 612 to set out a three-part test for determining whether the documents reviewed prior to testifying were nonetheless subject to disclosure. Id. at 317. First, the witness must use the writing to refresh his or her memory. Second, the witness must use the writing for the purpose of testifying. Third, the court must determine that production is necessary in the interests of justice. Id. at 317-18.

The court observed that the respondent had not elicited whether the petitioner relied upon the documents when testifying or that the documents influenced his testimony. Instead he had simply called for the production of all documents the witness reviewed. Without doing the former, there was no basis for attempting to do the latter. Id. at 318.

Not every court has adopted Sporck. In a number of cases, courts have held that attorney work product protection is waived when a document is used to prepare a witness for testimony, see James Julian v. Raytheon Co., 93 F.R.D. 138, 146 (D.C. Del. 1982); Marshall v. U.S. Postal Service, 88 F.R.D. 348, 350 (D.C.D.C. 1980); Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs. Inc., 81 F.R.D. 8, 9-10 (N.D. Ill. 1978), or that the protection is very narrow and is aimed only at protecting a real, nonspeculative risk of disclosure in response to requests made with "the precise goal of learning what the opposing attorney's thinking or strategy may be." Collins, 256 F.R.D. at 408; see also Strauss (citing Gould Inc. 825 F.2d at 679-80); Pepper's Steel, 132 F.R.D. at 698. The majority of these cases either predate Sporck or are distinguishable on their facts.

Still, acknowledging the applicability of attorney work product doctrine to the process of marshalling and sifting a large set of documents into a subset of those that are of particular significance reflects the correct interpretation of the law. This is especially true in the context of FINRA testimony, where the staff, as opposing counsel had in Sporck, typically has the larger set of documents from which the selection is made, and its blanket inquiry into those reviewed with counsel prior to testimony can only serve the purpose "of learning what the opposing attorney's thinking or strategy may be." Collins, 256 F.R.D. at 408.

Rather than encroach upon attorney work product every time the staff deems it expedient, it should apply Sporck's well-reasoned three-step inquiry. The Sporck inquiry avoids the possibility of exposing the attorney's work product while still allowing documents to be identified by the staff. It is a compromise that fairly balances both parties' interests.

FINRA's arbitrary and incomplete application of Rule 612 leads to just the kind of unfairness that Sporck prohibits. This is especially true since — just as the plaintiff in Sporck already had possession of the larger set of documents from which the documents reviewed by Sporck were culled — the staff typically has the larger set in its possession (or defense counsel often represents that is the case).

Its practice of asking the witness to identify documents that counsel selected for pre-testimony review allows the staff to identify the documents counsel believes to be critical to the case without doing the heavy lifting of reviewing them for itself and identifying particularly relevant areas of questioning. If the FINRA staff insists on invoking Rule 612, they should at least invoke it in its entirety. Anything else is simply unfair.

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[1] In SEC. v. Collins & Aikman Corp. 256 F.R.D. 403, 410 (S.D.N.Y. 2009), the SEC unsuccessfully took the position that all documents reviewed by an attorney are subject to "core" attorney work product protection, the highest order of protection possible.

[2] Despite Sporck having been decided over 25 years ago, it remains a leading case in this area and has not been overruled. See Collins, 256 F.R.D. at 409; In re Fedex Ground Package Systems Inc., Employment Practices Litigation (N.D. Ind. 2007); Boyce & Isley PLLC v. Cooper, 195 N.C.App. 625, 641 (2009).