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WORK PRODUCT DISCOVERY

by Ted Babbitt

In the recent case of Gabriel v. Northern Trust Bank of Florida, N.A., 890 So. 2d 517 (Fla. 4th DCA 2005), the Fourth District had another opportunity to review the limitations on discovery which touch upon counsel's mental impressions. That was a securities case in which the Defendant asked the Plaintiff to produce "all documents that relate to or otherwise support" the allegations of plaintiff's complaint. The trial court overruled objections based upon work product and the plaintiff sought a writ of certiorari.

In granting the writ, the Fourth District reviewed the litigation history that resulted in the Supreme Court's decision of Northup v. Acken, 865 So. 2d 1267 (Fla. 2004). In that case, the Supreme Court concluded that a party does not have to disclose which documents the attorney for that party believes constitutes documents to be utilized for pretrial purposes and those to be used for trial unless and until a decision is made that the evidence will be expected or intended to be used at trial. The time for making that decision would normally be at the time the Court requires the listing of exhibits pursuant to a pretrial conference order.

In the Northup case, the Supreme Court specifically disapproved a statement by the Fourth District in Gardner v. Manor Care of Boca Raton, Inc., 831 So. 2d 676 (Fla. 4th DCA 2002) by requiring an attorney to review a category of documents and reveal those which were relevant to the issues in the case.

The Supreme Court concluded that such a requirement potentially invades counsel's strategy and is, therefore, violative of the work product rule. In Northup at Page 518, the Supreme Court held:

The district court's approval in *Gardner* of an order requiring "counsel to 'cull' through various surveys and personnel files to determine which ones are relevant," *Gardner*, 831 So. 2d at 678, an action which the court admitted "may indicate counsel's strategy," *id.*, goes entirely too far. The overriding touchstone in this area of civil discovery is that an attorney may not be compelled to disclose the mental impressions resulting from his or her investigations, labor, or legal analysis unless the product of such investigation itself is reasonably expected or intended to be presented to the court or before the jury at trial. Only at such time as the attorney should reasonably ascertain in good faith that the material may be used or disclosed at trial is he or she expected to reveal it to the opposing party.

In the Gabriel case, the Fourth District concluded that requiring an attorney to provide documents which "relate" to specific allegations in the complaint is just as improper as the conclusion reached in Gardner which was rejected by the Supreme Court. For an attorney to divine what is or isn't relevant or "relates to" the claim in question comes perilously close to revealing counsel's strategy in the conduct of a case. For that reason, the Fourth District granted the petition for certiorari and overruled the trial court's order compelling the response to a request for production that required the party to produce all documents that relate or otherwise support the allegations in the complaint. This opinion further

amplifies the limitations on discovery which may invade counsel's thought processes and, thus, violate the work product discovery exception.

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