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Bingham Sanctions Case Exposes Dangers Of Privilege Tactics

By **Erin Coe**

Law360, San Diego (June 10, 2014, 11:13 PM ET) -- A Massachusetts appeals court's revival Friday of sanctions efforts claiming Bingham McCutchen LLP improperly relied on the work-product doctrine to conceal evidence from an opponent serves as a stark reminder that lawyers need to play it safe and seek outside guidance when privilege protections are questionable, and avoid attacking an opponent for failing to present evidence that has been withheld.

The appellate panel on Friday held a lower court had **erred by dismissing the sanctions motion** by a group of investors against Bingham McCutchen, which had defended Merrill Lynch Pierce Fenner & Smith Inc. in the investors' case alleging they had lost more than $8 million as a result of wrongdoing by the bank while investing their funds.

The appeals court found that the global law firm had been wrong to hide evidence that Merrill Lynch employees had viewed a website for Benistar Property Exchange Trust Co. Inc. describing the company as an "intermediary for third-party funds," and that it had been wrong to then present a defense to the contrary.

The panel ruled that the lower court had used an improper standard of review when it found former Bingham attorney John Snyder had not acted in bad faith when he withheld the documents because he believed they were protected by the work-product doctrine, which protects materials prepared in anticipation of a lawsuit from discovery by opposing counsel.

The case highlights what can be a difficult balancing act for lawyers between their obligations to zealously represent their client in litigation and their disclosure duties to the court, according to Shari Klevens, a partner at McKenna Long & Aldridge LLP.

"Sometimes these obligations overlap, and sometimes they are different," she said. "That creates challenges for lawyers."

When lawyers want to withhold certain documents to protect their client, but it's ambiguous whether the work-product doctrine or the attorney-client privilege applies, they may be better off alerting the court to the existence of those documents so that it can make the determination, she says.

"There will often be situations where the appropriate course of action is to disclose a questionable document to allow the court to weigh in," she said. "If lawyers don't, they are going to have to live with the consequences if it's later determined the document was withheld inappropriately."

Attorneys also should make sure that they document when they are withholding documents because of an ethical obligation to their client in order to put them in a better position if a bad faith case later arises, according to Klevens.

"If attorneys are found to have withheld documents without disclosing their existence, it will be harder to argue that they didn't act in bad faith," she said. "If attorneys fail to disclose they are withholding documents and the existence of those documents comes to light later, the other side could argue that it had been deprived the right under the evidentiary rules to test whether the documents were privileged."

If attorneys find themselves facing conflicting duties between representing their client and disclosing evidence to the court, they shouldn't navigate the issue on their own, according to experts. They should consult with a legal ethics hotline, contact their state or local bar association, or reach out to an ethics expert, according to David Cameron Carr, an ethics lawyer in San Diego.

"No one wants to face a sanction that they may have to report to the state bar, depending on the size of the sanction," he said. "Getting advice can help avoid the situation where they have to defend themselves."

Klevens says it's not uncommon for lawyers to withhold documents and not disclose their existence if created as part of attorneys' litigation strategy.

"If a client engages me and I do a certain amount of work on a matter and create documents, I don't want all those documents disclosed to the court and the other side as part of my representation," she said. "Otherwise, I would be giving a window to the other side in how I'm preparing my case."

But she said lawyers have to look carefully at whether the documents are truly related to litigation strategy or whether they have evidentiary value. For instance, if a lawyer is interviewing a witness who says a car is red, not green as suggested by other evidence in the case, the color of the car is not information based on an attorney's mental impression, opinion or legal theory that would otherwise be protected under the work-product doctrine.

"If an attorney learns from an interview with a witness that the car is red, that is a fact that potentially has evidentiary value," she said. "Even though it may have come out through an interview with a lawyer, the underlying fact might not be privileged and may need to be disclosed."

The appellate panel on Friday took issue with Snyder's defense in the case that no Merrill Lynch employee was aware that money in Benistar accounts belonged to third parties before placing restrictions on the company's trading activity, given that Snyder had evidence suggesting otherwise.

During discovery, an in-house attorney provided him with documents indicating that at least one employee had visited Benistar's website, which described its dealings with third-party funds. Snyder ultimately decided that the materials were protected and withheld them, even after a judge ordered him to produce any evidence of visits to the site by Merrill Lynch employees, the ruling said.

According to the appeals court, Merrill repeatedly highlighted the investors' failure to provide such evidence as a fatal flaw in their case. Therefore, the disclosure of the evidence would have revealed facts that would have contradicted the observations of the trial judge, the appellate court and the Supreme Judicial Court that there was insufficient evidence in the 2002 trial that Merrill knew of the nature of Benistar's business, according to the ruling.

The ruling indicates that if attorneys withhold evidence, they shouldn't then be able to turn around and argue that an opponent's failure to present such evidence jeopardizes its case, according to Carr.

"This is one aspect of the case that adds insult to injury," he said. "If attorneys know evidence exists, they shouldn't argue that the other side's failure to introduce such evidence demonstrates a case is weak. I think attorneys have a duty of candor to the fact finder that makes those arguments improper."

--Additional reporting by Dan Ivers. Editing by Kat Laskowski.