Bankruptcy Court Addresses Discoverability of Documents Prepared for Mediation

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Recently, in *Burtch v. Luminescent Systems (In re AE Liquidation)*, No. 10-55460 (Bankr. D. Del. Dec. 11, 2012), the U.S. Bankruptcy Court for the District of Delaware was faced with a motion to protect from discovery documents drafted in preparation for mediation. While the court ultimately granted the motion for protective order, the decision should serve as a reminder to practitioners of the potential for discovery of documents prepared for mediation.

In *AE Liquidation,* the Chapter 7 trustee commenced preference actions against defendants Luminescent Systems Inc. and Astronics Advanced Electronic Systems Corp. The parties were directed to participate in mediation, which ultimately proved unsuccessful. In preparation for mediation, the defendants interviewed and prepared affidavits of two former employees. However, the affidavits were not used in connection with the mediation. Following mediation, the parties engaged in discovery. The defendants included the two affidavits on their privilege log as protected by the attorney work-product doctrine and the mediation privilege. The trustee disputed the designation and the defendants filed a motion for protective order, arguing that the affidavits were protected under Federal Rule 16(c) and Local Bankruptcy Rule 9019-5, Federal Rule 26(c), the attorney work-product doctrine and the mediation privilege. The trustee opposed the motion.

The bankruptcy court granted the motion for protective order on the basis that the affidavits were protected by the attorney work-product doctrine under Federal Rule 26(b)(3). The attorney work-product doctrine provides an exception to liberal discovery rules for attorney work product prepared in anticipation of litigation. Once a court determines that evidence was prepared in anticipation of litigation, it must then determine whether the work product is opinion or ordinary work product. Next, the court must determine whether the party seeking discovery has overcome the attorney work-product protection based on the type of work product. Opinion work product requires a "heightened showing of extraordinary circumstances" to overcome the protection, while ordinary work product requires a showing of "substantial need" for the evidence that cannot be otherwise obtained without "undue hardship." In *AE Liquidation,* the bankruptcy court found that affidavits were clearly prepared in advance of litigation because they were created in preparation for mediation ordered in connection with the litigation. The bankruptcy court found that the affidavits were ordinary, fact-based work product, as they were affidavits of third-party witnesses and did not include attorney opinion. However, the trustee's stated need for the documents for impeachment purposes was not sufficient to demonstrate substantial need.

The bankruptcy court's rejection of the defendants' other arguments in support of the motion is also significant because the court declined to provide a blanket exclusion from discovery of documents prepared for the purpose of mediation.

The bankruptcy court rejected the defendants' arguments that the affidavits were protected from discovery by Federal Rule 16(c) and Local Bankruptcy Rule 9019-5. Federal Rule 16(c) allows the court to use special procedures authorized by statute or local rule to assist in resolving disputes. The defendants argued that Local Bankruptcy Rule 9019-5, which provides that evidence pertaining to any aspect of the mediation effort, including documents prepared for the purpose of mediation, are not admissible as evidence, prohibited the discovery of the affidavits. The bankruptcy court held that Local Bankruptcy Rule 9019-5 does not protect any documents from discovery, noting that evidence may be discoverable even if it is not admissible at trial if it is otherwise relevant and could lead to other relevant, admissible evidence.

Additionally, the bankruptcy court declined to address whether a mediation privilege exists. Essentially, a mediation privilege would prohibit discovery of any document, discussion or statement made for purposes of mediation. The court stated that it was unnecessary to address the existence of a mediation privilege because the documents were protected pursuant to another rule. Nearly all of the states have adopted a mediation privilege. In addition, certain federal courts have recognized a mediation privilege. Courts recognizing a mediation privilege have done so on the basis that confidentiality is essential to mediation and encourages openness in mediation that will increase the likelihood of settlement.

Without a blanket protection of documents prepared in the context of mediation, practitioners preparing for mediation will be forced to consider and weigh the potential discoverability of documents prepared for the purpose of the mediation against the utility of the documents to the mediation. Proponents of a federal mediation privilege assert that the possibility of discovery of such evidence may result in parties conducting themselves in a more cautious and adversarial manner and therefore limit the effectiveness of mediation.

Parties preparing for mediation should exercise caution when preparing documents for use in mediation. While the defendants in *AE Liquidation* were successful in protecting the affidavits prepared for mediation, the bankruptcy court's decision leaves open the possibility for discovery of documents prepared for mediation.

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