

BUSINESS LITIGATION ALERT

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Warning: Attorney-Client Privilege Does Not Extend to Photograph of Pathology Slide Prepared at Instruction of Counsel

A trial judge in New York ruled recently that the attorney-client privilege and/or the attorney work-product doctrine does not shield a photograph of a pathology slide prepared at the instruction of a defense attorney, or statements made at a deposition by the defendant doctor, who after reviewing the photograph of the pathology slide changed his earlier diagnosis of a biopsy from benign to malignant, a change of opinion that the defendant doctor then testified to at his deposition over his attorney's objections.

In *Klossner v. Goldsmith*, 2010-2530 (Sept. 26, 2012), the defendant doctor read the pathology slides of a biopsy of a mole removed from the back of plaintiff and opined that the lesion was benign. A year later, the lesion reappeared and was diagnosed as malignant. Plaintiff died a few months thereafter and her husband filed a medical malpractice action against the defendant doctor, the medical center, and others for the earlier incorrect diagnosis.

At a deposition before trial, the defendant doctor testified that when he first examined the pathology slide, he did not believe the biopsy was malignant. He then volunteered, unprompted by plaintiff's attorney, that he changed his mind after his attorney showed him a photograph of the pathology slide. His attorney sought to strike the statement, citing attorney-client privilege, and opposed a demand by plaintiff's attorney for the photograph of the pathology slide, asserting that it constituted attorney work-product. The Court rejected both arguments.

The trial judge determined that the attorney-client privilege did not apply because the defendant doctor was never asked to divulge communications he had with his attorney. Rather, he volunteered that his opinion had changed and "[t]he mere fact that [he] was shown a photograph, without more, does not rise to the level of a confidential communication wherein the attorney-client privilege would apply." The trial judge also found that under New York law, attorney work-product is restricted to material prepared by a lawyer in a professional capacity. More specifically, it protects the attorney's analysis and trial strategy, neither of which were present on the photograph of the pathology slide shown to the defendant doctor. Accordingly, the work-product doctrine could not shield a photograph obtained from a third-party.

In light of this case, litigants should be aware that materials, including photographs and other litigation aids, developed or obtained in the course of litigation from pathology slides or other materials or samples taken from a plaintiff could be discoverable. Further, any change in opinion that results from a review of such litigation-related materials is not necessarily protected by the attorney-client privilege.

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