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CASE COMMENT

The Attorney-Client Privilege and the Work Product Doctrine in the Context of an Internal Investigation

Attorney General v. Facebook, Inc., 487 Mass. 109 (2021)

When do the attorney-client privilege and the work product doctrine allow an entity to shield information gathered in the course of the entity's attorney-led internal investigation from discovery? In *Attorney General v. Facebook, Inc.*,¹ authored by Justice Scott Kafker, the Supreme Judicial Court (SJC) carefully analyzed this question in the context of a civil investigative demand initiated by the Massachusetts Attorney General's Office. This comment will discuss the underlying facts and procedural history of the case, present an overview of the attorney-client privilege and work product doctrine, review and analyze the decision, and examine its practical implications for practitioners.

FACTS AND PROCEDURAL HISTORY

The case arose out of a civil investigation by the Massachusetts attorney general under Massachusetts General Laws (G.L.) chapter 93A into Facebook, Inc.'s (Facebook) alleged misuse of user data through third-party applications.²

Facebook had hired a law firm to conduct an internal investigation into the alleged "misuse of Facebook user data by third-party applications (apps)."³ "Around the same time, the attorney general opened an investigation into Facebook under G.L. c. 93A, focusing on whether Facebook misrepresented the extent to which it

protected or misused user data."⁴ As part of its investigation, the attorney general issued several civil investigative demands for the production of documents, including documents that had been developed in the course of the law firm's internal investigation.⁵ Facebook objected to six of the requests, claiming that the responsive documents were protected by the attorney-client privilege and the work product doctrine.⁶ Five of those requests sought "the identity of all the apps described in the requests."⁷ In addition, for some apps, the attorney general sought additional factual information.⁸ The sixth request sought "[a]ll of Facebook's internal communications and internal correspondence concerning the apps that 'had access to large amounts of Facebook data before the 2014 changes to [Facebook's] Platform took effect,' and/or for which Facebook has conducted an 'in-depth review,' a 'Background Information Investigation' or a 'Technical Investigation.'"⁹

The attorney general filed a petition to enforce its investigative demand in the Business Litigation Session of the Superior Court.¹⁰ A justice of the Superior Court (Davis, J.) granted the petition in part, ruling that "most of the information is neither privileged nor work product, as it was not prepared in anticipation of litigation, and that even if it was prepared in anticipation of litigation, it is all factual information."¹¹

1. *Attorney General v. Facebook, Inc.*, 487 Mass. 109 (2021).

2. The attorney general is authorized to conduct civil investigations into alleged violations of chapter 93A. MASS. GEN. LAWS. c. 93A, § 6. The attorney general has broad powers under the statute to compel the production of documents and the testimony of witnesses under oath. *Id.* The recipient of a civil investigative demand has 21 days within which to file a motion in court objecting to the demand. *Id.* "[T]he court may, upon motion for good cause shown, extend such reporting date or modify or set aside such demand or grant a protective order in accordance with the standards set forth in Rule 26(c) of the Massachusetts Rules of Civil Procedure." *Id.* Given the broad reach of chapter 93A — "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" — those investigations can be lengthy and far-reaching and can lead to a formal civil action by the attorney general against the subject of the investigation. MASS. GEN. LAWS. c. 93A, § 2

and 4.

3. *Att'y Gen. v. Facebook, Inc.*, 487 Mass. 109, 110 (2021).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 116.

8. *Id.*

9. *Att'y Gen. v. Facebook, Inc.*, 487 Mass. 109, 116 (2021).

10. MASS. GEN. LAWS c. 93A, § 7; *Att'y Gen. v. Facebook, Inc.*, No. 1984CV02597BLS1, 2020 WL 742136 (Mass. Super. Jan. 17, 2020), *aff'd* in part, *rev'd* in part, 487 Mass. 109 (2021).

11. *Facebook*, 487 Mass. at 112.

Facebook filed an appeal from the court's order and the SJC granted an application for direct appellate review.¹² The court ruled that:

the Attorney General's targeted requests allow Facebook to tailor its responses to the first five of the six requests to avoid disclosure of communications protected by the attorney-client privilege. We also conclude, however, that the documents sought by the first five requests were prepared in anticipation of litigation and therefore are covered by the work product doctrine. We further conclude that a remand is required to separate "opinion" work product from "fact" work product for at least some of these documents. To the extent the work product is fact work product, we conclude that the Attorney General has satisfied the heavy burden of demonstrating a substantial need for the information. Finally, as for the sixth request, seeking internal communications about the apps, we have determined that this request encompasses both privileged and nonprivileged communications, and therefore requires preparation of a privilege log and further review as determined by the judge.^{13,14}

AN OVERVIEW OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

"One of the oldest," if not "the oldest of the privileges for confidential communications known to the common law,"¹⁵ "[t]he attorney-client privilege protects 'all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice.'"¹⁶ Key points of the privilege are that:

- It applies only to communications, not the underlying facts themselves.¹⁷

- It covers communications from a client to an attorney as well as communications from an attorney to a client.¹⁸
- The privilege applies to legal entities.¹⁹
- The party asserting the privilege "bears the burden of proving that" it applies.²⁰
- There is a strong societal purpose for the privilege in that it encourages clients "to make full disclosure to legal counsel of all relevant facts... so that counsel may 'render fully informed legal advice,' with the goal of 'promot[ing] broader public interests in the observance of laws and administration of justice'"²¹
- "[T]he privilege is to be construed narrowly."²²

The work product doctrine is both narrower and broader in scope than the attorney-client privilege. Unlike the attorney-client privilege, which applies to *all* confidential attorney-client communications made for the purpose of seeking legal advice, the work product doctrine only protects "documents and tangible things" prepared by a party or its representative (typically its attorneys) "in anticipation of litigation or for trial."²³ At the same time, the doctrine is not just limited to communications; its goal "is to establish a 'zone of privacy for strategic litigation planning ... to prevent one party from piggybacking on the adversary's preparation.'"²⁴

Work product is broken down into two separate categories: opinion work product and fact work product.²⁵ Opinion work product is "work product that conveys the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.'"²⁶ Fact work product is all other work product.²⁷ "Opinion work product is only discoverable, if at all, in 'rare' or 'extremely unusual' circumstances."²⁸ "In contrast, all

12. *Id.* at 120. The lower court's ruling was treated as an appealable order and was reviewed under a *de novo* standard. *Id.* As an initial matter, the SJC rejected the attorney general's claim that Facebook had waived its right to object to the demands because it had not filed an objection within 21 days of service of the demands as required by G.L. c. 93, § 6 (7). *Id.* at 120-21; MASS. GEN. LAWS c. 93A, § 6 (7). It noted that Facebook had not simply rejected the attorney general's demands but had worked with it to try to resolve the dispute. *Facebook*, 487 Mass. at 121. The court added that "finding waiver here could discourage cooperation with the Attorney General and result in increased litigation whenever the Attorney General serves a demand." *Id.*

While Facebook was able to avoid the waiver claim, other litigants may not be so fortunate. It is incumbent upon counsel for respondents to civil investigative demands to carefully follow the requirements of the statute. If negotiations are ongoing as to a response (a common occurrence), then the better practice is to execute a written agreement with the Attorney General's Office to extend or toll any deadlines for objections.

13. *Id.* at 110-11. The court's opinion contains a thorough discussion of Facebook's "Platform," the alleged misuses of the Platform, the underlying incident involving a company called Cambridge Analytica in which the company accessed and collected data of approximately 87 million users worldwide, the internal investigation that Facebook conducted in the wake of that incident, and the attorney general's investigation of Facebook. *Id.* at 111-19.

14. Having a privilege log will allow the attorney general to challenge specific

privilege claims.

15. Marc Laredo, "The Attorney-Client Privilege in the Business Context in Massachusetts," 87 MASS. LAW REVIEW 143 (Spring 2003) (quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) and *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

16. *Att'y Gen. v. Facebook, Inc.*, 487 Mass. 109, 121 (2021) (quoting *Suffolk Constr. Co. v. Division of Capital Asset Mgt.*, 449 Mass. 444, 448 (2007)).

17. *Id.* at 123.

18. *Id.* at 121.

19. *Id.* at 121 n. 12.

20. *Id.* at 121.

21. *Id.* at 121-22.

22. *Att'y Gen. v. Facebook, Inc.*, 487 Mass. 109, 122 (2021).

23. *Id.* at 126.

24. *Id.* at 127 (citation omitted).

25. *Id.* at 127-28.

26. *Id.* at 127 (quoting Mass. R. Civ. P. 26 (b)(3)).

27. *Id.* at 128.

28. *Att'y Gen. v. Facebook, Inc.*, 487 Mass. 109, 128 (2021) (quoting *Comm'r of Revenue v. Comcast Corp.*, 453 Mass. 293, 315 (2009)).

other work product is discoverable ‘upon a showing that the party seeking discovery has substantial need of the materials ... and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.’”²⁹

The *Facebook* court recognized that “[t]he line between fact work product and opinion work product is not always clear.”³⁰ Thus, even requesting a particular document in the course of an investigation can be considered opinion work product.³¹ At the same time, it must reveal “the attorney’s thought process in some ‘meaningful way’” in order to be considered opinion work product.³² Furthermore, “a court may still order its production if the opinion portions can be redacted or removed.”³³

THE DECISION

The *Facebook* court ruled that none of the information sought in the first five requests was protected by the attorney-client privilege. In so ruling, the SJC held that:

the Attorney General is not requiring the production of documents or communications that were exchanged between Facebook (including its employees) and its attorneys, and the requests permit Facebook to comply without disclosing any such communications. Therefore, Facebook cannot rely on the attorney-client privilege as a basis for refusing to comply with these requests.³⁴

In contrast, the sixth request did call for the production of potentially privileged information because it sought “[a]ll of Facebook’s internal communications and internal correspondence concerning several categories of apps sought in the other requests.”³⁵ The court agreed with the Superior Court’s ruling on this last category, and held that Facebook had “to prepare a detailed privilege log so that the Attorney General can challenge any assertions of privilege.”³⁶

Turning to the work product issues, the SJC first ruled that the materials sought had been prepared “in anticipation of litigation” and so were properly considered to be work product.³⁷ The court

rejected the attorney general’s assertion that the internal investigation was no more than an extension of Facebook’s ongoing internal compliance or enforcement program.³⁸ Instead, the court held that, “[g]iven the focus ... structure and design, and its litigation purposes,” the investigation was conducted (and materials gathered and created) “in anticipation of litigation.”³⁹

Having dealt with the initial question of whether the work product doctrine was applicable, the court then addressed the more difficult issue of how to distinguish between opinion work product (“only discoverable in extreme circumstances”) and fact work product (discoverable under the more lenient standard of demonstrating “a substantial need” for the information and “undue hardship” if it is not produced).⁴⁰ The court began by noting that “underlying factual information” itself is not work product and “[h]ad Facebook not informed the Attorney General how it conducted its own factual investigation, the Attorney General would have been free to perform her own thorough investigation of all the underlying factual information...”⁴¹ The court then concluded that the record was not sufficiently complete to determine “whether some of the factual information about the apps that Facebook is required to produce will reveal any meaningful previously undisclosed attorney thoughts or strategies.”⁴² It held that the lower court must “compare[] the specific requests, particularly those identified in this opinion as problematic, the previous public disclosures, and what the particular information requested would reveal.”⁴³

As for the remaining fact work product, the SJC held that the attorney general had met her burden of demonstrating “substantial need” for the information and “undue hardship” in obtaining it by other means.⁴⁴ The substantial need was based on a showing that: (a) the information was “relevant” and “the requesting party cannot reasonably obtain the information or its substantial equivalent elsewhere”; (b) the information was “central to the Attorney General’s investigation”; (c) there was “a strong public interest in disclosure”; (d) the attorney general would have “great difficulty in obtaining this information”; and (e) there was an inability to get

29. *Id.* (quoting Mass. R. Civ. P. 26(b)(3)).

30. *Id.*

31. *Id.* at 128.

32. *Id.* at 128-29 (citation omitted).

33. *Id.*

34. *Att’y Gen. v. Facebook, Inc.*, 487 Mass. 109, 125 (2021).

35. *Id.*

36. *Id.* at 125-26.

37. *Id.* at 129-31. However, “[a]nticipation of litigation does not have to be the primary purpose or motivation.” *Id.* at 127.

38. *Id.* at 130.

39. *Att’y Gen. v. Facebook, Inc.*, 487 Mass. 109, 130-31 (2021).

40. *Id.* at 131-35.

41. *Id.* at 131.

42. *Id.* at 135.

43. *Id.* Here, Facebook had previously disclosed certain information about the internal investigation process. Having relied on this information “to assert the propriety of its actions,” it could not claim confidentiality for that publicly shared information but only for the portion of the process that remained confidential. *Id.* at 133 (citation omitted).

44. *Att’y Gen. v. Facebook, Inc.*, 487 Mass. 109, 135-39 (2021). Essentially, allowing discovery of fact work product is an exception to the normal civil litigation rule that each party prepares its own case without fear that this work will be turned over to its adversary. Here, disclosure was required because “the Attorney General would have to expend an exorbitant amount of public resources and conduct a multiyear investigation to obtain information that Facebook already had in its possession. Such effort and expense is sufficient to demonstrate undue hardship.” *Id.* at 138-39.

“the substantial equivalent of ... this information, even with extraordinary efforts.”⁴⁵ These same reasons led the SJC to conclude that the undue hardship test was met.⁴⁶

PRACTICAL IMPLICATIONS

The *Facebook* opinion will serve as an important guide to attorneys and their clients as they plan for and conduct internal investigations. While its context was unusual — a lengthy government investigation of one of the most well-known companies in the world coupled with a complex internal investigation by that target company — its teachings are not.

One overarching lesson: planning is critical. When conducting an internal investigation, an entity (and the attorneys representing it) must carefully consider: (a) the scope of the investigation; (b) what information will be gathered; (c) what will be contained in the documents and other materials that are prepared; and (d) how (and to whom) information will be communicated.

A second lesson to be gleaned from *Facebook* is the importance of carefully and narrowly crafted requests for information. Here, the Attorney General’s Office thoughtfully prepared tailored requests (with one exception) that provided a means for Facebook to comply with the demand in a manner that limited unnecessary disclosure, including allowing Facebook to produce a spreadsheet of the relevant information sought without having to produce the actual underlying documents developed in the course of the investigation.⁴⁷

Third, issues of privilege and work product extend far beyond responding to a government investigation. The attorney-client privilege is an important concept for all legal practitioners, not just litigators, to understand. While privilege issues typically arise in litigation, communications that later give rise to attorney-client privilege claims may occur well before litigation is even contemplated. Thus, all attorneys must give thought to maintaining the confidentiality of their communications with their clients.⁴⁸ Moreover, work product concerns arise when litigation is “anticipated” — timing that may not be altogether clear — and apply to any type of litigation.

Fourth, determining the contours of the attorney-client privilege and work product is a fact-specific inquiry. The lines between opinion and fact work product are especially difficult to draw because opinion often is intertwined with fact. Again, in conducting any internal investigation, outside counsel must give careful thought as to how their internal notes and communications within their law firm are structured.

Going forward, we can expect the trial courts to use the *Facebook* decision as a guide to resolving these issues on a case-by-case basis. Much of the case law in this area is likely to be developed by these lower courts as they address the specifics of each individual situation.

— Marc C. Laredo

45. *Id.* at 135-39.

46. *Id.* In its ruling, the court discussed the difficulty of getting the information as part of its substantial need analysis and then held that that same difficulty also led to the conclusion that there was a sufficient showing of undue hardship. *Id.*

47. “The first five requests required Facebook to produce documents sufficient to identify the apps and facts concerning them (app information)” as well as some additional factual information for some of the apps. *Id.* at 116.

48. *See generally*, Marc Laredo, “The Attorney-Client Privilege in the Business Context in Massachusetts,” 87 MASS. LAW REVIEW 143 (Spring 2003).