

DaRosa Makes Life Easier For Massachusetts Gov't Lawyers

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The Massachusetts Supreme Judicial Court (SJC) fixed a problem of its own creation in *DaRosa v. City of New Bedford*, decided May 15, 2015. The problem stemmed from the SJC's 1999 decision in *General Electric Co. v. Department of Environmental Protection*, which held that the work product of government attorneys is subject to disclosure under the Massachusetts public records statute. The SJC reversed field in *DaRosa*, now holding that a statutory exemption covers most work product prepared in anticipation of litigation, so that these materials are protected from disclosure. M.G.L.C. 4, § 7, Twenty-sixth (d).

The *DaRosa* decision will make life easier for government lawyers in Massachusetts, and for private lawyers who work with them. In the same decision, however, the SJC confirmed that there is only a narrow scope for the attorney-client privilege in Kovel arrangements with experts. The Kovel doctrine, as applied by the courts in Massachusetts, is more narrow than many practitioners think it should be.



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Fixing the Work Product Problem

Government lawyers in Massachusetts have performed their work under a microscope since 1999, when *General Electric* was decided. Opposing parties were able to obtain their work product by making a request under the Massachusetts Public Records Act (MPRA). Unlike the federal Freedom of Information Act, the MPRA does not contain an express exemption for work product. In *General Electric* the SJC held that it could not read an implied exemption into the statute. From 1999 through 2015, therefore, even when litigants could not obtain work product documents in discovery, they could obtain the very same documents through a public records request.

There were several attempts to amend the MPRA after *General Electric*, but none were successful. *General Electric* began to unravel in 2007, when the SJC decided *Suffolk Construction Co. v. Division of Capital Asset Management*. The 2007 decision held that government entities could assert the attorney-client privilege in response to document requests made pursuant to the MPRA. The court reasoned that the legislature did not intend to reject a "fundamental and longstanding" privilege when it enacted the MPRA.

DaRosa finished the process that Suffolk started. The MPRA exempts records pertaining to “policy deliberation.” The court indicated that in most instances work product will qualify for protection under the “policy deliberation” exemption.

Work Product as “Policy Deliberations”

DaRosa involved a contamination dispute in the city of New Bedford. The construction of a new school led to the discovery of contaminated soil. Various property owners sued the city. The city solicitor hired a consultant to prepare an “evaluation report.” The report analyzed the property owner’s claims and identified potential third-party defendants. After they were joined in the litigation, these third parties sought to discover the report. The trial judge, relying on *General Electric*, ordered disclosure.

The SJC reversed. The court examined the “policy deliberation” exemption of the MPRA. The word “policy,” the court reasoned, should be defined broadly to further the “protection of open, frank, inter-agency deliberations regarding government decisions.” Moreover, “[w]here an agency ... is engaged in litigation, decisions regarding litigation strategy and case preparation fall within the rubric of ‘policy deliberation.’” Consequently, the court remanded the case to the lower court to determine whether the environmental consultant’s “evaluation report” was protected, in whole or in part, from disclosure under this exemption.

DaRosa noted that the MPRA exemption applies more forcefully to “opinion” work product, as opposed to “fact” work product. “Opinion” work product refers to “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” One example might be a memorandum examining the risk of class action litigation in connection with a corporate transaction. By contrast, “fact” work product relates to the actual facts gathered by an attorney or party representative.

Chief Justice Ralph Gants wrote that “opinion work product ... prepared in anticipation of litigation or for trial by or for a party or party representative is protected from discovery [under the MPRA] to the [same] extent provided under [the Massachusetts Rules of Civil Procedure].” “Fact” work product, by contrast, is not protected from disclosure if it is contained within a “reasonably completed factual study or report on which the development of such policy positions has been or may be based.” Sometimes the “fact” work product in a report is “interwoven with opinions or with analysis leading to opinions,” and in that case the “purely factual” section of the report “might” be discoverable, but a “discussion or analysis section interwoven with facts would be protected from disclosure.” Massachusetts will need to revisit these issues at a later date, as *DaRosa* “left for another day the question whether opinion work product might no longer be protected once the litigation is concluded.” 471 Mass. at 459 n.16.

In sum, the *DaRosa* decision harmonizes the scope of work product protection and the scope of the Massachusetts public records statute. Parties litigating against government agencies can no longer circumvent the protection for work product simply by obtaining documents through a public records request in Massachusetts.

Other States

Other states have taken various approaches. The Florida Supreme Court, in its 1979 decision in *Wait v. Florida Power & Light Co.*, adopted essentially the same reasoning used by Massachusetts in *General Electric*, holding that Florida’s public records statute contained no implied exemptions. In 1983, the

Florida Legislature responded by passing an exemption for opinion work product. § 119.071, Fla. Stat. This exemption is narrow, however. It applies only when the litigation or adversarial proceeding is “imminent,” and the exemption ends when the litigation concludes.

The Washington Supreme Court, in its 2009 decision in *Morgan v. City of Federal Way*, reviewed an investigative report on allegations that a municipal judge created a hostile work environment. This report was a “public record” under Washington’s statute, the court held. The report was not prepared in anticipation of litigation, and therefore it did not qualify for work product protection.

Kovel Doctrine Still Too Narrow

Although *DaRosa* solved the problem of work product protection for government lawyers in Massachusetts, *DaRosa* did not improve the situation for “Kovel” arrangements. Under the Kovel doctrine, the attorney-client privilege can be used, in certain circumstances, to shield communications between an attorney and third parties as though they were made between the attorney and the client. Kovel arrangements are important to practitioners in many fields. For example, in the Second Circuit’s landmark 1961 decision in *United States v. Kovel*, an attorney consulted with an accountant in order to understand the client’s financial information. In *DaRosa*, the city of New Bedford tried, but failed, to employ the doctrine to cover the “evaluation report” about contaminated soil.

Some courts have set strict requirements for Kovel arrangements. The First Circuit, in its 2002 decision in *Cavallaro v. United States*, noted that in order for the attorney-client privilege to apply, the third party “must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications.” The Massachusetts SJC adopted this precept in its 2009 decision in *Commissioner of Revenue v. Comcast Corp.* It is not enough, the SJC explained, that “an attorney’s ability to represent a client is improved, even substantially, by the assistance” of an expert. Rather, the attorney-client privilege applies only when the expert is “nearly indispensable or serve[s] some specialized purpose,” Comcast held.

DaRosa stands as a further warning that the Kovel doctrine “is sharply limited in scope.” A third party’s communications with an attorney, the court said, will be privileged only when they “translate” for counsel a client’s confidential communications. Chief Justice Gants emphasized that the environmental report in *DaRosa* examined public data. Thus it did not “interpret” confidential communications. As a result, it did not meet Kovel requirements, the court held. Practitioners should be warned that common Kovel arrangements may not be sufficient in Massachusetts, and thus an expert’s communications may be open to disclosure.

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