

Court breaks down privileges of closed meeting

Today's column involves the interplay between privileges under the federal common law and state law in a Section 1983 civil rights claim by a former firefighter-paramedic, charging that he was wrongfully terminated by the Fire Protection District employing him.

The firefighter sought production of the audiotape of a closed-session meeting of Fire District officials and the district's attorney. The district claimed the audiotape was privileged by virtue of the Illinois Open Meetings Act (5 ILCS 120/1) and the common law attorney-client privilege.

Kodish v. Oakbrook Terrace Fire Protection District, 235 F.R.D. 447 (N.D.Ill. 2006).

Brian Kodish, a firefighter-paramedic, sued the Oakbrook Terrace Fire Protection District pursuant to 42 U.S.C. § 1983, claiming he was wrongfully terminated without due process and also made claims for wrongful termination and defamation under state law. He was fired on Aug. 12, 2004. On Aug. 11, 2004, the Fire Protection District held a closed-session meeting attended by the fire chief, Gregory Sebesta, the district's trustees and the district's attorney, among others. This closed meeting was audiotaped.

Upon the district's refusal to produce the audiotape during discovery, Kodish brought a Rule 37 motion to compel production. The Fire Protection District claimed that the audiotape was not discoverable because it contained privileged matters protected under the Open Meetings Act and attorney-client privilege.

The U.S. district court, Magistrate Judge Morton Denlow presiding, granted in part and denied in part Kodish's motion to compel.

Denlow began consideration of the motion to compel, setting forth the three issues to be decided:

"In its consideration of plaintiff's motion, the court must decide the following issues: (1) whether federal or state law governs the privilege questions; (2) whether the Act protects discussions held in a closed-session meeting; and (3) whether the attorney-client privilege protects discussions held in a closed-session meeting."

Considering whether federal common law privilege rules applied and finding that they did, Denlow explained:

"Federal Rule of Evidence 501 states that '[t]he privilege of witness, person, government, State, or political



Federal Courts

By Jay S. Judge

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subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege ... shall be determined in accordance with state law.' Fed.R.Evid. 501. However, in cases where the principal claim in federal court arises under federal law, with pendent jurisdiction over a state claim, the federal common law of privileges apply. *Memorial Hospital For McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981). In *Memorial Hospital*, the plaintiff alleged violations of both federal and state antitrust laws. In declining to apply the Illinois privilege provided under the Illinois Medical Studies Act, the [7th U.S. Circuit Court of Appeals] reasoned that the principal claim arose under federal law and 'because the state law does not supply the rule of decision as to this claim, the district court was not required to apply state law in determining whether the material sought ... is privileged.' The *Memorial Hospital* court held that 'the question of whether the privilege asserted ... should be recognized' is governed by federal common law.

"The principal claim in this case is brought pursuant to 42 U.S.C. § 1983 of the Civil Rights Act of 1964. Plaintiff brings his wrongful termination and defamation claims under the doctrine of pendent jurisdiction. Because the principal claim in this case arises under federal law, this court is not required to apply state law privileges. Thus, the court must look to privileges recognized by federal common law."

Finding that no federal common law privilege exempted closed-door meetings from discovery, the court next considered whether the federal common law of privileges should be expanded to include the state law Open Meetings Act:

"In *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), the Supreme Court set forth the principles a court must consider in determining when 'Rule 501 of the Federal Rules of Evidence authorized federal courts to define new privileges by interpreting "common law privileges ... in the light of reason and experience."' The court started with the basic rule that 'there is a general duty to give what testimony one is capable of giving, and that any exemptions ... are distinctly exceptional' and 'disfavored.' The court then stated that for any privilege to be added to the federal common law, the privilege must 'promote ... sufficiently important interests to outweigh the need for probative evidence.' The analysis must be made on a case-by-case basis, and take into account both the public and private interests that the privilege serves, as well as the evidentiary benefit that would result if the privilege was denied.

"In *Memorial Hospital*, the 7th Circuit relied upon an analysis similar to that of the Supreme Court in *Jaffee* to determine whether a state law privilege should be recognized under Federal Rule of Evidence 501: 'First, because evidentiary privileges operate to exclude relevant evidence and thereby block the judicial fact-finding function, they are not favored and, where recognized, must be narrowly construed. Second, in deciding whether the privilege asserted should be recognized, it is important to take into account the particular factual circumstances of the case in which the issue arises. The court should 'weigh the need for truth against the importance of the relationship or policy sought to be furthered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship in the factual setting of the case.'"

Denlow explained that a balancing test was to be applied, weighing the need for disclosure of relevant evidence against the purpose of the claimed privilege:

"In this case, there is a substantial need for the disclosure of relevant evidence. The court recognizes that the Act expressly provides that 'unless the

public body has made a determination that the verbatim recording no longer requires confidential treatment or otherwise consents to disclosure, the recording shall not be open for public inspection or subject to discovery in any judicial proceeding other than one brought to enforce this Act.' 5 ILCS 120/2.06(e). However, in balancing the need for truth against the privilege asserted, the court finds that the privilege should not prevent disclosure necessary to the legal inquiry.

"Here, plaintiff's principal claim is a federal civil rights claim. In *Hinsdale v. City of Liberal, Kansas*, 961 F.Supp. 1490 (D.Kan. 1997), aff'd, 981 F.Supp. 1378 (D.Kan. 1997), the court declined to recognize the Kansas Open Meetings Act in a federal civil rights case. The court stated that 'caution should be especially taken in recognizing a privilege in a federal civil rights action, where any assertion of privilege must overcome the fundamental importance of a law meant to protect citizens from unconstitutional state action.' The court reasoned that 'if state law controlled, the state authorities could effectively insulate themselves from constitutional norms simply by developing privilege doctrines that made it virtually impossible for plaintiffs to develop the kind of information they need to prosecute their federal claims.'"

Resolving the balancing test in favor of discovery because of Kodish's need to learn both the motive and the basis for his firing, the court explained that the federal common law privileges would not be extended to state Open Meetings Act privileges:

"In the instant case, in order for plaintiff to pursue his § 1983 civil rights claim, he must attempt to ascertain the motive and basis for the Fire District's decision to terminate him. The audiotape recorded during the Aug. 11, 2004, closed-session meeting will likely aid in uncovering the facts relied upon by the Board of Trustees to terminate plaintiff. At the Aug. 11 meeting, the defendants discussed whether to terminate plaintiff, and the day after the meeting plaintiff learned of the Fire District's decision to terminate him. Furthermore, there is no compelling policy interest to justify protecting all communications in the closed-session meeting. As discussed below, the attorney-client privilege provides adequate protection. The interests served by the open-meeting privilege are overcome by the need for probative evidence and are adequately protected

by the attorney-client privilege. Thus, this court refuses to extend federal common law to encompass the open meetings privilege."

Finding that the Open Meetings Act privilege was inapplicable, Denlow next considered the attorney-client privilege as to matters on the audiotape of the closed session, beginning with the elements of the attorney-client privilege:

"Federal common law recognizes the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). The purpose of the privilege is 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' 'The privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.' The privilege recognizes that sound legal advice depends upon the lawyer's being fully informed by the client.

"The 7th Circuit has 'long embraced the articulation of the attorney-client privilege, first set forth by Dean Wigmore' in 1904. *United States v. Evans*, 113 F.3d 1457 (7th Cir. 1997). The essential general principles governing the privilege are as follows: '(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.'

"Therefore, the court must decide to what extent to attorney-client privilege protects from discovery the statements made by board members during the closed-session meeting with their attorney present."

The court explained, having reviewed in camera a transcript of the audiotape, that certain factual matters in the closed session did not involve communications or legal advice:

"The attorney-client privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.

"In this case, defendants' attorney attended the closed-session meeting where they discussed the decision to terminate plaintiff. However, the mere attendance of an attorney at a meeting does not render everything said or done at that meeting privileged. *Larson v.*

Harrington, 11 F.Supp.2d 1198 (E.D.Cal. 1998). In *Larson*, the plaintiff moved to compel the deposition testimony of county board members regarding discussions held in closed session. The defendant objected to questions pertaining to the closed session on the ground that the county counsel was present at the meetings and at each meeting 'provided legal advice and counseling' to the board. The court found that even if confidential communications within the purview of the attorney-client privilege were made at the closed meetings, such communications would not 'cloak the entire proceeding in secrecy.' Discussions which did not implicate legal advice relating to pending or anticipated litigations are not privileged from discovery.

"In this case, the attorney-client privilege does not provide blanket protection from discovery. Although the defendants' attorney was present at all times during the closed-door meeting, his presence does not render all communications privileged. The discussions by members of the Fire District's board of trustees regarding plaintiff's work history, Sebesta's reasons for moving to terminate plaintiff, and Sebesta's discussion of what is desirable from an employee are examples of the type of information that is discoverable."

However, Denlow found those discussions that took place in the closed session and which sought legal advice or imparted legal advice were, in fact, protected by the attorney-client privilege:

"Communications from an attorney to a client are privileged if the statements reveal, directly or indirectly, the substance of a confidential communication by the client. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21 (N.D.Ill. 1980). The privilege extends to situations where an attorney is giving advice concerning the legal implications of conduct. For communications at such meetings to be privileged, they must have related to the acquisition or rendition of professional legal services. The party seeking to assert the privilege must show that the particular communication was part of a request for advice or part of the advice, and that the communication was intended to be and was kept confidential.

"Similarly, '[a] privileged communication does not lose its status as such when an executive relays legal advice to another who shares responsibility for the subject matter underlying the consultation.

Privilege

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Management personnel should be able to discuss the legal advice rendered to them as agents of the corporation.' *Weeks v. Samsung Heavy Ind. Co., Ltd.*, 1996 WL 341537 (N.D.Ill. June 20, 1996). In *Weeks*, an executive employee summarized legal advice given by counsel regarding legal obligations and potential litigation risks regarding the suit at hand and relayed the information to his superior. The summary memo was held to be protected from discovery under the attorney-client privilege.

Granting in part and denying in part,

Kodish's motion to compel, Denlow ruled:

"In the instant case, conversations among the board members discussing their attorney's legal advice, and conversations among the board members and their attorney about potential litigation risk and legal strategy are privileged under the attorney-client privilege. Therefore, only portions of the audiotape pertaining to factual information must be produced. Any information involving counsel's legal advice is privileged."