In-House Decisions
Counsel’s Recollection of Internal Investigation Held Nondiscoverable

By Stephen J. Siegel

It is said that a party may not accomplish indirectly what it is forbidden to do directly. This maxim recently helped lead a federal district court to deny a motion to compel discovery concerning an in-house counsel’s recollection of an internal corporate investigation he had conducted. In In re Linerboard Antitrust Litigation, the district court denied a motion to compel defendant Temple-Inland, Inc. (Inland), to produce a corporate representative for deposition about its in-house counsel’s recollection of an internal investigation.

The dispute arose in private antitrust litigation against Inland and other manufacturers and sellers of linerboard and related products. Before the suit was filed, the Federal Trade Commission (FTC) had investigated the linerboard industry. In response to FTC inquiries, Inland submitted a “White Paper” and produced documents. The White Paper asserted, among other things, that the reason Inland had taken more “downtime” during 1993 than it required to simply maintain and repair its equipment was “to reduce Inland’s ‘excessive inventories.’”

In a subsequent private antitrust suit, plaintiffs obtained voluminous discovery from Inland relating to the FTC investigation, including the White Paper and all documents Inland shared with the FTC. Inland also produced another 150,000 pages of documents, responded to seven sets of interrogatories, and produced 10 current or former employees for deposition. Among those deponents were all five individuals named in the White Paper’s discussion of Inland’s decision to take the additional “downtime.”

Nonetheless, plaintiffs sought to compel Inland to produce a corporate representative to testify under Fed. R. Civ. P. 30(b)(6) concerning facts learned by its General Counsel, Steven L. Householder (Householder), in an internal investigation that he had conducted at or around the time of the FTC investigation. Plaintiffs argued that they needed the deposition for several reasons, including (a) because other Inland witnesses could not recall certain information that Householder might remember and (b) to impeach the testimony of Inland’s witnesses. Inland objected to the requested deposition on various grounds, including that the deposition sought its counsel’s work product and, in effect, its counsel’s testimony.

The district court denied the motion to compel. The court acknowledged that (a) relevant facts are discoverable even if communicated to counsel and (b) facts learned by corporate counsel during an internal investigation are part of the corporation’s knowledge. Nevertheless, the court held that Householder had conducted his investigation in anticipation of litigation and his recollection of facts learned in that investigation was protected work product. More specifically, although Householder’s investigation was intended to learn the facts, the court deemed his recollection of that investigation to constitute “opinion” or “core” work product because it reflected his mental impressions. Thus, Householder’s recollection was discoverable only upon a showing of “rare and exceptional circumstances.” By contrast, “fact” work product is more readily discoverable, upon a showing of “substantial need” and that the “substantial equivalent” of the information cannot be obtained without “undue hardship.”

The Linerboard court distinguished decisions in In re Vitamins Antitrust Litigation in which a district court ordered corporate defendants to produce for deposition Rule 30(b)(6) witnesses who had been educated about facts gathered by their counsel in preparing governmental submissions. The In re Vitamins court had ordered the depositions “regardless of whether such facts are memorialized in work product protected documents or reside in the minds of counsel.” The Linerboard court distinguished the two In re Vitamins decisions on several grounds, including that Inland’s corporate representative had been well-prepared for the deposition in other respects and that the Linerboard plaintiffs had available to them extensive nonprivileged sources of the information they sought from Householder. Ultimately, however, these distinctions do not fully explain the different outcomes in Linerboard and the two In re Vitamins decisions. It appears that, at bottom, the Linerboard court disagreed with the In re Vitamins decisions. As the Linerboard court noted, the In re Vitamins court did not “provide any comment on the merits of the work product arguments” raised by the corporate defendants in that case.

The Linerboard court also rejected plaintiffs’ stated justifications for the deposition—to fill gaps in other witnesses’ recollections and to impeach other witnesses’ testimony—as insufficient to warrant what it deemed to be the “functional equivalent of a deposition of Householder covering information learned through his service as in-house counsel.” Because the court deemed the requested deposition to be equivalent to deposing Householder directly, it applied a test under which opposing counsel may be deposed only if (i) no other means exist to obtain the information . . . ; (ii) the information sought is relevant, non-privileged; and (iii) the information sought is crucial to the preparation of the case.” The court found that plaintiffs had not satisfied this test principally because they had not demonstrated that the information Householder might recall, and which other Inland witnesses could not recall,
was, in fact, “crucial” to plaintiffs’ case.16

Finally, the court rejected plaintiffs’ contention that by providing the White Paper to the FTC, Inland had waived work product protection for Householder’s recollection of his internal investigation. The court reasoned that Inland had not affirmatively relied upon the White Paper in the private antitrust suit, nor asserted that its internal investigation foreclosed antitrust liability. Moreover, the court held that the doctrine of “subject matter” waiver did not extend to “opinion” work product. Accordingly, Inland had effected no broad waiver of work product protection by its disclosures to the FTC.17

Thus, the court protected Inland against disclosure in a Rule 30(b)(6) deposition of its counsel’s recollection of facts he had learned in his internal investigation. As explained above, at least three factors appear to have been decisive to the court’s decision. First, Inland provided plaintiffs with voluminous other written and deposition discovery. Second, plaintiffs failed to show that Householder was likely to know crucial facts at the heart of the parties’ dispute and that other Inland witnesses could not recall such facts. Third, Inland did not affirmatively rely upon Householder’s investigation or recollection as grounds to defeat the private antitrust claims it faced and, thus, Inland was not trying to “have it both ways.”

Corporations that face requests to discover, directly or indirectly, their counsel’s recollection of relevant facts should try to establish that such extraordinary discovery is unwarranted based on grounds similar to those the Linerboard court accepted and relied upon—namely, by showing that the corporation has provided ample other discovery, the information sought is not essential and/or is available from other sources, and the corporation itself has not asserted that its counsel’s recollection or advice defeats the suit. ■

Endnotes
2. Id. at 390.
3. Id. at 376-77.
4. Id. at 378.
5. Id. at 379-80, 384.
6. Id. at 380.
7. Id. at 385-86.
8. Id. (citing Fed. R. Civ. P. 26(b)(3)).
9. Id. at 382 (citation omitted).
10. Id. (quoting Rule 26(b)(3)).
13. Id. at 383.
15. Id. at 384.
17. Id. at 389.

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