Unpacking the Work Product Doctrine in Civil Cases in New Hampshire

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I. Introduction

The work product doctrine is at the heart of many discovery disputes across the country. In ***civil*** cases in New Hampshire, Superior Court Rule 21(e)(1) governs what documents and information are privileged from disclosure. Yet, in a recent medical malpractice case ("Case A"), defense counsel cited the common law work product doctrine and its application in ***criminal*** cases, as articulated in Riddle Spring Realty Co. v. State[2] and State v. Chagnon,[3] respectively, in an attempt to circumvent the protection of 21(e)(1).

In Case A, defense counsel demanded that the plaintiff produce a statement she prepared in the days following her husband's death, even though plaintiff's counsel had already produced an edited version of the statement. In denying the defendants' motion to compel, Judge O'Neill affirmed that Rule 21(e)(1) provided the appropriate framework to determine whether the unedited statement should be afforded protection.[4] This article will discuss the circumstances of this recent discovery dispute and explain the governing law as affirmed in Judge O'Neill's order.

II. Relevant Facts

In Case A, the plaintiff filed a medical malpractice action against an emergency room physician who treated her husband, alleging that the defendants failed to timely diagnose an infection which led to his death. Within the first week after her husband's death, the plaintiff typed a statement on her computer about what happened because she believed her husband's death was preventable and was planning to speak with a lawyer about litigation. The plaintiff kept her notes confidential until she ultimately provided them to her attorney. In preparing the plaintiff's interrogatory answers, plaintiff's counsel edited the statement by correcting minor typographical errors and deleting information that was not pertinent to the plaintiff's claims, including various editorial comments reflecting the plaintiff's frustrations. The edited statement was produced to the defense with the plaintiff's interrogatory answers.

When the plaintiff was deposed, she acknowledged that she had typed a statement that she provided to her attorney. She explained that she had not yet

retained an attorney when she created the statement, but she was not asked whether she was planning to speak with an attorney or whether she was considering litigation when she created the statement. Defense counsel learned about the unedited statement at the beginning of the deposition and proceeded to question the plaintiff for the next three hours. Defense counsel went over the edited statement with the plaintiff and took the opportunity to fully probe her involvement in and knowledge of the events that led to her husband's death.

III. Relevant Law

In the 1966 case of Riddle Spring Realty Co. v. State,[5] our Supreme Court articulated the common law work product doctrine, adopting the definition supplied by the United States Supreme Court in Hickman v. Taylor[6].[7] In Riddle Spring, the court explained that work product is "the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation."[8] In order to constitute work product, the "lawyer's work must have formed an essential step in the procurement of the data" sought by the opponent and the lawyer "must have performed duties normally attended to by attorneys."[9] Thus, under New Hampshire's common law, an attorney's work product consists of the attorney's "mental impressions, conclusions, opinions or legal theories" and may also include correspondence, memoranda, and reports.[10]

Our Supreme Court further addressed the work product doctrine and its application in *criminal* cases in State v. Chagnon.[11] In Chagnon, the defendant was convicted of attempted murder and appealed, arguing that the Superior Court violated the work product doctrine by granting the State's motion to compel the contents of an investigative file.[12] Before the trial, the State requested that the defendant provide copies of all statements of any witnesses taken by the defendant's counsel, his private investigator, or anyone acting on the defendant's behalf.[13] The defendant produced a redacted copy of the victim's statement and argued that disclosing the redacted sections would reveal his defense theory.[14] The judge conducted an *in camera* review of the unredacted statement and granted the motion, finding the statement contained only factual information and did not include the investigator's comments or any theory or defense.[15] In concluding that the trial court did not err in granting the State's motion, the Supreme Court held that "[w]itness statements that contain purely factual information should not be considered work product."[16]

When Riddle Spring was decided in 1966, the court did not have the benefit of a governing court rule. Since then, the court enacted Superior Court Rule 21(e)(1), applicable in *civil* cases, which states as follows:

> A party may obtain discovery of documents, electronically stored information and tangible things otherwise discoverable and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his or her attorney, non-attorney representative, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the material in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

IV. The Parties' Arguments

Defense counsel raised a number of arguments, in Case A,in support of their position that the statement prepared by the plaintiff in the week after her husband's death could not be regarded as work product. First, they argued that the work product protection did not apply because litigation was not pending or even anticipated when the document was created.[17] Next, citing Riddle Spring and Chagnon, they contended that the statement did not constitute work product because it did not contain any mental impressions, conclusions opinions, or legal theories of the plaintiff's attorney; rather, it was simply a recitation of facts and a description of the days leading to the death of the plaintiff's husband. Lastly, defense counsel argued that they were entitled to the statement—even if it was work product—because they had a substantial need for the statement as it would provide invaluable information about the decedent's final days and it would provide a more complete, and more accurate, picture of what happened to the decedent. In this respect, defense counsel also claimed that they were unable to obtain the substantial equivalent of the statement through other means because the plaintiff was unable to identify what information was deleted from the statement produced in discovery.[18]

We countered that Riddle Spring had no bearing on Case A. With a duly-enacted court rule now in place, Riddle Spring's articulation of the common law work product doctrine was expressly abrogated along with all common law privileges in favor of those expressly set forth in the constitutions, statutes, and court rules.[19] Thus, a New Hampshire Superior Court judge presiding over a civil case in 2018 must apply the plain language of Rule 21(e)(1), which does not limit protection to the mental impressions of an attorney or withdraw protection from purely factual information. In fact, it says nothing at all about either of those things. Instead, the rule promulgated by our Supreme Court for application in civil cases creates a blanket—yet conditional—protection for all documents and information prepared in anticipation of litigation or trial by or for an opposing party.

Similarly, we argued that the Chagnon decision, which created a bright-line distinction between an attorney's mental impressions and purely factual information, was inapplicable as well. We pointed out that the court in Chagnon was not interpreting Rule 21(e)(1), but was instead applying an entirely different rule applicable to criminal cases. In fact, Chagnon was careful to explain that "the work product doctrine was intended to be applied differently in criminal and civil cases."[20] It even emphasized that the civil rule is not applicable to criminal cases, which are governed by a rule establishing a broad presumption of reciprocal discovery. The court recognized that "nothing in [the criminal rule] suggests that the civil standard…applies to criminal cases."[21]

We noted that, in Holley v. Exeter Hosptial, Inc., et al.[22], Judge McHugh declined to apply Chagnon in a civil case. Judge McHugh explained that Rule 21(e)(1) was enacted in 2013 as a part of the comprehensive Rules of the Superior Court of the State of New Hampshire Applicable in Civil Actions.[23] Despite the fact that Chagnon had been decided eighteen years earlier, Rule 21(e)(1) carried forward the same language as its precursor. Judge McHugh found this significant because "the recent overhaul of the civil rules gave its drafters an opportunity to change the criteria for discovery and broaden the language to parallel the reciprocal discovery required in criminal cases and yet no such change was made."[24] With this in mind, Judge McHugh concluded that despite Chagnon:

> the criteria for discovery in civil cases under the work product rule is not simply production of all requested documents minus the mental impressions or litigation strategies of an attorney. Rather, those documents that have in fact been prepared in anticipation of litigation require the requesting party to satisfy the two prongs set fort in [Rule 21(e)(1), to wit, the fact that it has a substantial need for the materials requested and further that it is unable without undue hardship to obtain the substantial equivalent of those materials by other means.[25]

Having dealt with Riddle Spring and Chagnon, we argued that the plaintiff's unedited statement qualified for protection under Rule 21(e)(1) because it was a document prepared in anticipation of litigation by a party. To establish the necessary factual predicate, we provided the Court with an affidavit from the plaintiff confirming that she wrote the statement to document her concerns because she planned to provide them to an attorney for the purpose of learning her legal rights.

The defense contended that the plaintiff's typed statement could not qualify as work product because the plaintiff had not yet retained a lawyer when she created the document. However, Rule 21(e)(1) does not even hint at

such a requirement. The only question is whether the document was created "in anticipation of litigation or for trial."[26]

While our Supreme Court has never commented on the meaning of "in anticipation of litigation," Judge McNamara recently examined the issue in Coutu v. State[27] and explained:

> It has long been settled that no litigation need be pending to satisfy the "in anticipation of litigation" requirement. The work product doctrine applies to material prepared when litigation is merely a contingency. Courts have begun to take the view that the appropriate criterion is that if the document would have been prepared regardless of whether there was any anticipation of litigation, it should not be deemed protected work product protected.[28]

Employing this view, or any other reasonable interpretation of the words in Rule 21(e)(1), we argued that the plaintiff's typed statement was created in anticipation of litigation. According to her sworn affidavit, the plaintiff prepared the document for the express purpose of facilitating her discussions with an attorney about litigation. Thus, litigation was a contingency when the plaintiff wrote the statement and she would not have created it if she were not anticipating litigation. We pointed out that, if Rule 21(e)(1) required the document to have been created after the party retained an attorney, it would explicitly say so.

Of course, the protection of Rule 21(e)(1) is not absolute; even if the unedited statement was prepared in anticipation of litigation, the defense was entitled to a copy if it could prove two things: First, that it had a substantial need for the unedited statement in the preparation of its case; and second, that it was unable without undue hardship to obtain the substantial equivalent of the statement by other means.

It was our position that the defense could not meet its burden on either prong because it had the plaintiff's *edited* statement and it had a full opportunity to depose her about the facts set forth in the statement and any other relevant information she had. In the absence of a particularized showing that the document contained otherwise unavailable information, we contended that Rule 21(e)(1) flatly prohibited the compelled production of the unedited statement.

V. Judge O'Neill Correctly Denied the Defendants' Motion to Compel the Plaintiff's Unedited Statement

In its decision, the Court first considered whether the unedited statement was protected under Superior Court Rule 21, implicitly recognizing that Superior Court Rule 21(e)(1) governed the issue.[29] Finding the defendants'

argument that Rule 21(e)(1) only applied to a lawyer's work product unpersuasive, the Court explained it was "notable that the plain language of Rule 21(e)(1) is not limited to the work product of a party's lawyer, as contemplated by the common law definition set forth in Riddle Spring."[30] Moreover, the Court held that the protection provided by Rule 21(e)(1) was not limited to documents containing mental impressions, conclusions, opinions or legal theories of an attorney because Rule 21(e)(1) does not specifically reference the work product doctrine and "instead focuses generally on evidence 'prepared in anticipation of litigation.'"[31]

Accordingly, the Court next determined whether the unedited statement was prepared in anticipation of litigation and therefore warranted the protection of Rule 21(e)(1). The Court, persuaded by Judge McNamara's reasoning in Coutu, rejected the defense's contention that the statement could not qualify as work product because it had been created before the plaintiff had retained an attorney or pursued litigation regarding her husband's death.[32] Rather, the Court held that the "phrase 'in anticipation of litigation' necessarily implies that litigation has not yet been initiated, but is expected by the party creating the document."[33] In light of the plaintiff's attestation that she created the document to facilitate discussions with an attorney, the Court was satisfied that the statement was created in anticipation of litigation and was therefore entitled to protection under Rule 21(e)(1).[34]

Finally, the Court concluded that the "defendants failed to provide an adequate showing to warrant disclosure of the [s]tatement pursuant to Rule 21(e)(1)."[35] Though the defendants claimed that the statement was vital to the defense of the case because of the invaluable information it would provide, the Court was unconvinced because the defendants had an opportunity to depose the plaintiff regarding any information they sought from the statement.[36] Despite this opportunity to depose the plaintiff, the defendants did not claim that the plaintiff was unwilling or unable to answer their questions or that they did not have enough time to finish their questioning.[37] The Court emphasized that though the plaintiff could not identify what was edited from the statement, this alone did not establish substantial need because the statement was not the only evidence of the decedent's last days.[38] Furthermore, because the plaintiff drafted the statement, her testimony "clearly demonstrate[d] the substantial equivalent of the information sought by the defendants."[39]

VI. Conclusion

New Hampshire Superior Court Rule 21(e)(1) governs whether documents or information created in anticipation of litigation warrant protection in civil cases. To be privileged from disclosure under Rule 21(e)(1), the documents or information sought need not be the mental impressions, statements,

conclusions, opinions or legal theories of an attorney. Rather, 21(e)(1) protects all documents or information so long as they were prepared in anticipation of litigation or for trial by or for another party. At least two New Hampshire Superior Court Judges have now recognized that "prepared in anticipation of litigation" necessarily implies that litigation, while expected, need not have been initiated.[40] Accordingly, any documents created by a party in anticipation of litigation are protected unless the party seeking the documents can prove a substantial need and an inability to obtain its substantial equivalent without undue hardship.

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[2] 107 N.H. 271 (1966) (defining work product).
[3] 139 N.H. 671 (1995) (suggesting factual statements are discoverable in criminal cases).
[4] *See* Lucy et al. v. LRGH Healthcare & Sandra Maruszak, M.D., Belknap Cty. Super. Ct., No. 211-2017-CV-167 (July 11, 2018) (denying defendant's motion to compel production of plaintiff's statement).
[5] 107 N.H. 271 (1966).
[6] *Riddle Spring*, 107 N.H. at 274 (recognizing while some information and documents may not be protected by the attorney client privilege, they may still be privileged under the work product doctrine).
[7] 329 U.S. 495, 510-11 (1947) (identifying as work product a lawyer's mental impressions, statements, beliefs, correspondence, memoranda, among others).
[8] *Riddle Spring*, 107 N.H. at 274.
[9] *Id.*
[10] *Id.*
[11] 139 N.H. 671 (1995).
[12] *See id.* at 672.
[13] *See id.*
[14] *See id.*
[15] *Chagnon*, 139 N.H. at 672.
[16] *Id.* at 676.
[17] Defense counsel claimed that litigation was neither pending nor anticipated at the time the statement was made, but did not even ask the plaintiff whether she was considering litigation during her deposition or in her interrogatories.
[18] *See* New Hampshire Superior Court Rule 21(e)(1).
[19] *See* N.H. Evid. R. 501.03. "Rule 501 Limits the sources of present rules of privilege to the federal and state constitutions, federal and state statutes and these Rules of Evidence and other rules of court. The existing common law is thus no longer a source of evidentiary privilege doctrine…" *Id.*
[20] *Chagnon*, 139 N.H. at 677.
[21] *Chagnon*, 139 N.H. at 677.
[22] Rockingham Cty. Super. Ct., No. 2012-CV-783 (Sept. 25, 2013).
[23] *Id.*
[24] Rockingham Cty. Super. Ct., No. 2012-CV-783 Order on Exeter Hospital's Motion for Clarification (Oct. 18, 2013).
[25] *Id.* at 3-4.
[26] New Hampshire Superior Court Rule 21(e)(1).

[27] No. 2015-CV-488, 2017 N.H. Super. LEXIS 7 (Super. Ct. 2017).
[28] *Id.* (Citations omitted).
[29] Lucy et al. v. LRGH Healthcare & Sandra Maruszak, M.D., Belknap Cty. Super. Ct., No. 211-2017-CV-167 (July 11, 2018).
[30] *Id.* at 3.
[31] *Id.*
[32] *Id.* at 3-4.
[33] *Lucy*, at 4.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Lucy*, at 5.
[38] *Id.*
[39] *Id.*
[40] *See* Lucy et al. v. LRGH Healthcare & Sandra Maruszak, M.D., Belknap Cty. Super. Ct., No. 211-2017-CV-167 (July 11, 2018); Holley v. Exeter Hosptial, Inc., et al., Rockingham Cty. Super. Ct., No. 2012-CV-783 (Oct. 18, 2013).