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DEPARTMENT OF ADMINISTRATION
POSITION PAPER ON SB 552
MAY 22, 1984

SB 552 would permit a judge to order that an attorney's work product be turned over to an adverse party. The bill may present problems to the extent that it would erode the policy of encouraging a lawyer to fully investigate the facts of the matter which he or she is handling. If an adversary were free to inspect the contents of an attorney's file, including correspondence, memoranda, reports, exhibits, drafts of proposed pleadings or briefs, plans for presentation of proofs, and investigators' notes of witness interviews, an attorney's present freedom and ability to collect for study all available data, favorable and unfavorable, would be greatly hindered.

The Code of Professional Responsibility, which governs the conduct of attorneys, provides that a lawyer should preserve the confidences and secrets of a client. This professional canon has two purposes. First, it encourages a client to feel free to discuss whatever he wishes with his lawyer. Second, it guarantees that a lawyer may be equally free to obtain information beyond that volunteered by his or her client. It is this goal of encouraging a lawyer to be fully informed of all of the facts of a case which underlines this ethical canon as well as the judicial policy of protecting an attorney's work product.

The policy statement of this bill is consistent with the goals of the professional canons of ethics and the work product privilege. However, since the bill would permit disclosure of work product under rather subjectively defined circumstances, an attorney may be chilled from fully investigating the case based on the fear that opposing counsel will be granted the right to inspect the product of that investigation.

In summary, although the policy statement of the bill is admirable the bill's substance may encourage courts to allow disclosure of attorney work product. This would hamper the ability of attorneys to fully investigate all facts of their cases, favorable and unfavorable, in order to realistically appraise the strength of a case and to fully advise their clients.

BY: *Dana Fabe*
Dana Fabe, Public Defender
Public Defender Agency

DATE: 5/22/84

BY: *Lisa Rudd*
Commissioner Lisa Rudd
Department of Administration

DATE: 5/23/84

FILE WITH SB 552

Alaska State Legislature

SENATOR
ROBERT H. ZIEGLER, SR.
307 BAWDEN STREET
KETCHIKAN, ALASKA 99901

While in Juneau
PO BOX V
JUNEAU, ALASKA 99811



Senate

VICE CHAIRMAN
SENATE RESOURCES COMMITTEE
MEMBER
SENATE JUDICIARY COMMITTEE
WESTERN STATES LEGISLATIVE
FORESTRY TASK FORCE
WESTERN CONFERENCE COUNCIL
OF STATE GOVERNMENTS

May 18, 1984

Senator Bill Ray, Chairman
Senate Judiciary Committee
Alaska State Legislature
Juneau, Alaska

Re: SB 552

Dear Bill:

Let me take you down memory lane a moment. When I was active in the practice of law, discovery procedures used to be the bane of my legal existence. Motions to produce, interrogatories and depositions involved a tremendous amount of time and a lazy attorney, who had perhaps spent a couple of hours in the preparation of his case could have access to my work product which might have taken me 100 hours to prepare and/or to accumulate.

Our courts have uniformly bent over backward to allow counsel seeking discovery total access to opposing counsel's work product, which I don't think and never have thought, was fair.

In other words, I favor the legislation.

In support of this assertion, I attach miscellaneous memoranda and correspondence.

Very truly yours,

Robert H. Ziegler, Sr .

RHZ:1k

Attachments

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 7, 1984

SUBJECT: Discovery of attorneys'
trial preparation efforts
(Work Order No. 13-2241)

TO: Senator Jay Kerttula
Senate President

FROM: Keith B. Levy *KBL*
Legislative Counsel

Enclosed is a draft of a bill you requested, creating a privilege from pre-trial discovery of certain work product materials prepared in anticipation of trial by attorneys. Rule 26 of the Alaska Rules of Civil Procedure deals with this issue. As you know, if a bill has the effect of amending a court rule, the bill must indicate so expressly and requires a two-thirds majority to pass. It is my opinion that your bill does not actually amend the court rule, and therefore these requirements need not be met. But you should be aware that an argument could be made that the bill does amend the rule.

Rule 26(b) of the Alaska Rules of Civil Procedure provides that certain work product materials that are not privileged may be discovered if the party seeking discovery makes a showing of "undue hardship." Rule 26(b)(3) specifically provides:

In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Thus, the rule provides protections for attorney work product similar to the privilege created in your bill, although the language of the rule is not as strong as the language used in the bill. The bill merely requires the court to

Senator Jay Kerttula

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"protect against disclosure," while the bill forbids disclosure under any circumstances. The argument could be made that the bill amends the rule by prohibiting discovery of certain materials that are now discoverable under the terms of Rule 26. However, this argument is rebutted by subsection (b)(1) of the rule which provides, in part,

Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action. . . (Emphasis added.)

Accordingly, the rule only applies to materials that are not privileged, either by statute or common law. Since your bill creates a statutory privilege with respect to attorney work product, it has the effect of removing it from the terms of the rule. The result, in my opinion, is that the bill does not amend the rule since it simply makes the work product material privileged, and therefore not subject to the rule.

If I may be of further assistance, please feel free to contact me.

KBL:ojb
J7/031