FOR THE RECORD

BY CRAIG SANDBERG

Work-Product Protection Applied to Attorney-Led Investigation into Sexual Molestation Charges

On March 30th, Circuit Judge Diane S. Sykes, writing on behalf of a unanimous three-judge panel of the U.S. Court of Appeals for the Seventh Circuit (*Sandra T.E. v. South Berwyn School District 100 and Sidley Austin LLP*; No. 08-3344), reversed the district court's order compelling Sidley to produce the contents of Sidley's investigation into alleged sexual abuse by a music teacher of the school district. The Court of Appeals held the attorney-client privilege protects notes and memorandums that Sidley wrote while investigating alleged sexual abuse by a music teacher.

In January 2005 police arrested Robert Sperlik, an elementary-school band teacher employed by District 100, on charges that he had repeatedly sexually abused numerous female students. The abuse began in 1998 and continued until Sperlik's arrest in early 2005. Sperlik eventually confessed to the crimes and was convicted and sentenced to 20 years in prison. Some of Sperlik's victims told police they had reported the abuse to the school principal after it occurred, but the principal failed to take appropriate action against Sperlik. Shortly after Sperlik's arrest, some of the victims and their families filed this civil lawsuit against District 100 and the school principal who was alleged to have been deliberately indifferent to the ongoing sexual abuse; they asserted claims under Title IX of the Education Amendments of 1972, and various state laws.

As news of Sperlik's arrest became known, the School Board retained Sidley to conduct an internal investigation. The engagement letter between Sidley and the School Board stated that Sidley was to "investigate the response of the school administration to allegations of sexual abuse of students" and to "provide legal services in connection with" the investigation.

As the investigation proceeded, the attorneys took notes of the witnesses' answers and later preparing written memoranda memorializing the interviews for future use in Sidley's legal advice to the Board. These notes and memoranda were the subject of the discovery dispute.

The plaintiffs sought disclosure of the contents of Sidley's investigation. After a series of hearings, the district court ordered the School Board to disclose any documents relating to Sidley's investigation that it had in *its* possession. The judge concluded Sidley was hired to investigate, not as legal counsel, and therefore the attorney-client privilege did not apply. When it became clear that Sidley, not the School Board, had the documents the plaintiffs wanted, the plaintiffs turned their attention back to Sidley. They served a second subpoena, essentially a duplicate of the first. After a hearing, the district court ordered the firm to produce the documents. Sidley and District 100 appealed.

Judge Sykes wrote that both the U.S. Supreme Court and other circuits have "concluded that when an attorney conducts a factual investigation in connection with the provision of legal services, any notes or memoranda documenting client interviews or other client communications in the course of the investigation are fully protected by the attorney-client privilege." The Court also stated that the engagement letter between the law firm and the school district that "spell[ed] out that the Board retained Sidley to provide legal services in connection with developing the School Board's response" to the sexual abuse allegations.

Court Denies Defendant's Use of Boilerplate Language to Respond to Requests to Admit

On March 30th, Justice Karnezis writing on behalf of the Appellate Court of Illinois, First District (*Oelze v. Score Sports Venture, LLC*; Docket No. 1-09-14776) reversed the circuit court's denial of the plaintiff's motion to deem the facts admitted. The

plaintiff served a request to admit, pursuant to Supreme Court Rule 216, asking defendant to admit that plaintiff incurred particular medical expenses as a result of the accident, that the expenses were for reasonable and necessary treatments and the expenses were reasonable and fair charges.

The defendant, by its general manager, responded to each itemized request by stating that, having "made reasonable inquiry and the information known or readily available within the Defendant's control [being] insufficient to admit or deny," and not being a physician or nurse, having no training in medical billing and practice rates or treatments described in plaintiff's bills reasonable and necessary medical diagnosis, care or treatment, she could not admit or deny the request to admit. Plaintiff filed a motion to deem admitted her request to admit, asserting that defendant's responses were deficient because it did not set forth a good faith detailed reason why certain requests could not be admitted.

The Court stated that "[t]he necessity and reasonableness of the medical services a plaintiff received to treat her injuries and the reasonable cost of those medical services are facts that are proper subjects for a Rule 216 request to admit." Citing *Szczeblewski v. Gossett*, 342 Ill. App. 3d 344, 795 N.E.2d 368 (5th Dist. 2003), the Court stated that "Rule 216 provides that a 'party has a good-faith obligation to make a reasonable effort to secure answers to requests to admit from persons or documents within the responding party's reasonable control,' including from the party's attorney and insurance company investigators or representatives. "However, Rule 216 also provides that a responding party may, in lieu of answering all or part of the request, serve 'written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper." If the proper framework of Rule 216 is not followed, an incontrovertible judicial admission results and the fact is withdrawn from contention."

In accessing the quality of the responses, the Court found the defendant's responses to plaintiff's request to admit were boilerplate responses. But, while it found those responses followed verbatim language from the *Szczeblewski* opinion, the Court stated that "a party is not just supposed to make a formulaic assertion quoting the *Szczeblewski* language. The responding party must explain why its resources are lacking to such an extent that it cannot answer the requests and the defendant did not do so." Accordingly, the lack of a detailed answer resulted in admission of the requested facts. ■