

# New Jersey Business Litigation: Attorney-Client Privilege Only Extends So Far

by Robert Levy on May 4, 2012

In *Marshall v. JPMorgan Chase Bank*, A-1405-11, the Appellate Division of the Superior Court of New Jersey reminded litigants that the attorney-client privilege only extends so far. The court ruled that a plaintiff in a New Jersey sexual discrimination lawsuit had to turn over a summary she drafted because it was created *before* she hired her attorney.

## *The Facts of the Case*

As detailed in the opinion, Plaintiff Doreen Marshall appealed an order that required her to turn over in discovery a handwritten summary she prepared to assist her in keeping an accurate record of the hostile work environment that eventually became the subject of a sexual discrimination lawsuit alleging a violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.

The three or four page summary describes in some detail the claimed offensive conduct of her supervisor, defendant Gregory Mezzacapo, and the branch manager, defendant Mohamed Fouda. The summary, which plaintiff showed to her present attorney before she retained him, was not prepared at his direction or under his supervision.

## *The Court's Decision*

The court ruled that the summary was not protected under attorney-client privilege because it was not prepared at the request of counsel or under his supervision. As the court noted, "Documents not otherwise protected by the attorney-client privilege do not become cloaked with the lawyer-client privilege merely by the fact of their being passed from client to lawyer." *Tractenberg v. Twp. of W. Orange*, 416 N.J. Super. 354, 376 (App. Div. 2010)

While a summary, or chronology of events, prepared by a plaintiff at his or her attorney's request, and then turned over to the attorney, is protected by the attorney-client privilege, in this case, "neither the original notes created by plaintiff nor the consolidated summary were prepared at the request of counsel." As the court specifically pointed out, the plaintiff testified that she created the summary so she would have a more organized version of her original notes to show to her prospective attorney when she first met with him.

Finally, the court mentioned that privilege might have applied if the document was created to prepare for litigation; however, that argument was not raised on appeal. Nonetheless, there was no evidence concerning whether the notes were written with a suit in mind or for purposes of complaining to human resources, the court stated.

As this case highlights, it is important to understand that the attorney-client privilege does have its limitations and many documents related to your New York business lawsuit or New Jersey business lawsuit will have to be disclosed to the other party during discovery.