Arkansas Association of Defense Counsel

December 14th 2015

Disclosure of Attorney Litigation Files Under FOIA- The "Murky" Middle Ground

By Cody Kees

The attorney-client privilege and work-product doctrine are sacrosanct in the practice of trial lawyers. Hardly is discovery answered where these objections are not raised. However, private practice defense attorneys representing government agencies on the taxpayer dime, from the local water board to the Attorney General's Office, should know that in most instances neither legal doctrine is available in Arkansas pursuant to our state's liberally construed Freedom of Information Act (FOIA). Every state—except Arkansas—exempts records that will violate the attorney-client privilege from public disclosure through open records laws.[1] However, Arkansas courts have found no such exemption exists under the Arkansas FOIA. Consequently, this does not merely permit, but requires disclosure of an attorney's litigation file when the file is requested under FOIA and the attorney is paid by and representing a public entity.

Fayetteville v. Edmark is the landmark case on this topic, holding that a private lawyer retained by a state or local agency/entity cannot use his status as a private lawyer to avoid disclosure of his client file under FOIA. 304 Ark. 179, 801 S.W.2d 275, 282 (1990). If the private lawyer is performing the function of a government lawyer, he is under the purview of FOIA and must potentially disclose his entire litigation file if requested. Of course, any exemption codified in Arkansas FOIA is also available to the private lawyer, but his role as a private lawyer, in and of itself, is not a shield to disclosure. For instance, FOIA exempts from disclosure documents which would give an "advantage to competitors," arguably a valid reason for nondisclosure in litigation. Not according to *Edmark*, which held, "[c]ategorizing members of the public who may wish to learn of, and/or disagree with, actions of public officials, even to the point of litigation, does not make such a person or entity a 'competitor' as envisioned by the FOIA. … [t]o interpret 'competitors' to include those seeking information, such as the media, or even adverse parties in litigation, would be to create an exemption not provided by the legislature." *Id.* at 190.

Edmark seems to create a prism that has two well-established ends, but a murky middle. On one end, Arkansas FOIA does not apply to private lawyers performing legal work for private parties. *See* Nabholtz v. Contractors, 371 Ark. 411, 26 S.W. 3d 689 (2007). On the other end, Arkansas FOIA clearly applies to government lawyers performing government functions (subject to codified exceptions). So, what is the murky middle ground? Private lawyers, retained and paid by private insurance companies, but essentially performing the work of government lawyers by defending public entities/agents in their public capacity.

Thanks to Mariam Hopkins of Anderson Murphy Hopkins, L.L.P., this "murky" middle is clearer following her favorable FOIA ruling against Luther Sutter in 2012. *See* Harrill & Sutter, PLLC v. Farrar, 2012 Ark. 180 (Ark. 2012). ***[Editors note: Mariam Hopkins is an AADC member as is the attorney who represented her firm, Robert (Skip) Henry]*** Mr. Sutter sued Mrs. Hopkins and her firm, directly, along with the physician defendants she represented, for her attorney litigation file in her representation of the three physicians employed by UAMS, a state-operated entity. Relying on *Edmark*, Sutter argued the litigation file of a private attorney representing public agencies and/or public agents was subject to FOIA disclosure. The Saline County

[1] Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 89 (1996).

Circuit Court disagreed, and the Arkansas Supreme Court affirmed, holding that while the medical malpractice lawsuit named the doctors in their official capacities as state agents, the suit was really a claim against their private insurance carriers. Notably, the doctors were named policy holders (although UAMS paid the premiums), the insurance company retained Mrs. Hopkins' firm directly, Mrs. Hopkins' firm reported to the insurance company, and the litigation file was created in the course of her representation of the doctors, not in the course of public business. *See* Harrill & Sutter, PLLC, 402 S.W.3d 511, 516.

The Court's finding from Sutter's appeal does leave open some questions, the "murky" middle. What if the private attorney is first retained by the government entity under a self-retention provision of its insurance policy and coverage is only available after the entity has first met its deductible pursuant to its policy? In such an instance, the government entity is initially footing the legal bill, similar to the City of Fayetteville in *Edmark* when it paid private attorneys with public funds. What if the government agency has private insurance coverage which is footing the private attorney's legal fees, but the government agency has a clause in its insurance policy allowing it to choose its counsel and/or consent or collaborate in major litigation decisions? What if the representation of the public agent is truly in his or her role as a public agent performing public business? In all of these scenarios the litigation files could arguably be subject to FOIA despite the existence of private insurance coverage.

In conclusion, when representing government entities or agents, whether in a transaction or litigation, be aware that your attorney file is not absolutely protected from discovery by FOIA, and, as a matter of law, the existence of insurance coverage is not an automatic protection from disclosure.

The thanks of the AADC go out to Cody Kees of the Munson Rowlett Moore & Boone Law Firm for writing this article.

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