2017 WL 2879696
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United States District Court, S.D. New York.

IN RE : Ex parte Application of FINANCIALRIGHT GMBH, Katharina Prinzessin zu Hohenlohe, Hartmut Baumer and Walter Weiss, Applicants, For an Order Pursuant to 28 U.S.C. § 1782 Granting Leave to Obtain Discovery from Jones Day for Use in Foreign Proceedings.

17-mc-105 (DAB)
|
Filed 06/22/2017
|
Signed June 23, 2017

Attorneys and Law Firms

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MEMORANDUM & ORDER

Deborah A. Batts, United States District Judge

***1** On April 3, 2017, financialright GmbH, Katharina Prinzessin zu Hohenlohe, Hartmut Baumer, and Walter Weiss (collectively, "Applicants") filed an Application for an Order Pursuant to 28 U.S.C. § 1782 Granting Leave to Obtain Discovery from Jones Day for Use in Foreign Proceedings in suits they plan to file against Volkswagen AG ("Volkswagen" or "VW") in Germany related to that company's well-known emissions scandal.[1] They seek a report and documents related to an investigation conducted by Jones Day for Volkswagen related to the emissions scandal. In response, Jones Day filed the instant Motion to Dismiss, which Applicants oppose. For the following reasons, the Court declines to grant the Application for an Order pursuant to 28 U.S.C. § 1782 at this time because the proposed subpoena is too broad, but also DENIES Jones Day's Motion to Dismiss in its entirety. Applicants may submit a renewed Application pursuant to 28 U.S.C. § 17 82 upon a narrowing of the document requests. See Mees v. Buiter, 793 F.3d 291, 302 (2d Cir. 2015).

I. BACKGROUND

Applicants are current or potential litigants seeking relief in German Courts in connection with Volkswagen's emissions scandal. (Rother Decl. ¶¶ 3-4.)[2] In short, Applicants and similarly situated litigants allege that they purchased vehicles equipped with "defeat devices," which altered the emissions readings from Volkswagen and Audi cars. (Id.) Here, they seek various documents related to Jones Day's investigation of the emissions scandal. (App. Ex. B.)[3]

Volkswagen retained multiple law firms in connection with the emissions scandal, including Jones Day. After VW received notice of investigations by the Environmental Protection Agency ("EPA") and Department of Justice ("DOJ") on September 18, 2015, Jones Day lawyers provided "legal advice as to the potential civil and criminal legal implications of these matters under U.S. law, including the risk of litigation" beginning on September 22, 2015 at Volkswagen headquarters in Wolfsburg, Germany. (Romatowski Decl. ¶¶ 3-4.) Jones Day says that its "extensive investigation of the facts ... was necessary, foremost among several purposes, to enable [it] to give sound and informed legal advice to [Volkswagen]." (Id. ¶ 5.)

Pursuant to an agreement entitled "Agreement on the commissioning of legal services between [Volkswagen] and Jones Day," dated September 27, 2015, Volkswagen retained Jones Day. The agreement provides:

> ***2** The international law firm Jones Day is hereby instructed to advise in relation to certain issues in connection with the irregularities that have become known regarding diesel engines. Under supervision of and with ongoing information to the chairman of the supervisory board and its legal advisor, Jones Day shall particularly perform a clarification of the facts that underlie the irregularities. In this connection, Jones Day shall represent Volkswagen AG vis-á-vis U.S. authorities.

(Perlitt Supp. Decl. ¶ 4.)[4] It further states: "Powers of attorney that authorize Jones Day to represent Volkswagen AG vis-á-vis courts, public prosecutors, arbitration bodies or authorities, will be granted, if necessary, separately." (Id.)

Jones Day conducted an extensive investigation of the issues, analyzing millions of documents and interviewing hundreds of VW employees. (Perlitt Decl. ¶ 5.) Jones Day attorneys "memorialized their thoughts and impressions of those documents and those interviews in innumerable internal memoranda." (Id.; see id. ¶ 9.) Applicants contend that Jones Day produced a report on its investigation for Volkswagen, but Jones Day says it has provided no such report to VW.[5] (Id. ¶ 8.)

One issue here is whether Volkswagen waived any privilege covering the documents in question. Jones Day says that it "has never submitted its interview notes to VW or to the DoJ, or shared the content with the public, and it has not even commented publicly on its representation of [Volkswagen]." (Perlitt Decl. ¶ 10.) In the course of cooperating with the DOJ criminal investigation, Jones Day entered into an agreement with the DOJ "to preserve VW's claims of attorney-client privilege and work product protection for information disclosed to DOJ in the course of that cooperation." (Romatowski Decl. ¶ 7.) The agreement states that "VW, through its counsel Jones Day, intends to provide DOJ oral briefings regarding its investigation, and may furnish additional documents or other information to DOJ in connection with such oral briefings." (Romatowski Decl. Ex. A, at 1.) The agreement further says that "to the extent any [privileged materials] are provided to DOJ pursuant to this agreement, VW does not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege." (Id.) Under the agreement, DOJ was to keep any privileged materials confidential "except to the extent that [it] determine[d] in its sole discretion that disclosure would be in furtherance of [its] discharge of its duties and responsibilities or is otherwise required by law." (Id. at 1-2.) Applicants point to a press release which states that the Volkswagen "Supervisory Board directed the law firm Jones Day to share all findings of its independent investigation of the diesel matter with the DOJ. The Statement of Facts draws upon Jones Day's extensive work, as well as on evidence developed by the DOJ." (Applicants' Opp. Ex. D, at 1-2.)[6]

***3** In the instant Part I matter, Applicants filed an Ex Parte Application for an Order Pursuant to 28 U.S.C. § 1782 Granting Leave to Obtain Discovery for Use in Foreign Proceedings on April 3, 2017. Specifically, Applicants seek a subpoena with four document requests to Jones Day:

1) "All Documents and Communications concerning [Jones Day's] external investigations of Volkswagen including but not limited to reports and drafts of report."

2) "All Documents that [Jones Day] received, found, or took from Volkswagen concerning [its] external investigation."

3) "All Documents [Jones Day] relied on in drafting [its] report of [its] external investigation of Volkswagen."

4) "All Documents and Communications that [Jones Day] created, wrote, drafted, recorded, or videotaped concerning [its] external investigation of Volkswagen."

Jones Day filed a Motion to Dismiss the Application on May 2, 2017, with an Opposition from Applicants, Reply from Jones Day, and Sur-Reply from Applicants following.[7]

II. Discussion

A. Statutory Requirements under 17 U.S.C. § 1782

To prevail under 17 U.S.C. § 1782, Applicants must first satisfy three statutory requirements: "(1) that the person from whom discovery is sought reside (or be found) in the district of the district court to which the application is made, (2) that the discovery be for use in a proceeding before a foreign tribunal, and (3) that the application be made by a foreign or international tribunal or 'any interested person.' " In re Application of Esses, 101 F.3d 873, 875 (2d Cir. 1996). The statute also contains a privilege exception, providing: "A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." 28 U.S.C. § 1782(a).

Jones Day concedes that the first three statutory requirements are met: it resides or is found in New York, the documents in question would be used in the pending or potential German litigation, and the Applicants are interested persons. Jones Day argues, however, that the documents sought by Applicants are protected by the attorney-client and work-product privileges under United States law and attorney-client privilege under German law.

B. Choice of Law Regarding Privilege

The parties discuss both United States federal common law and German law with respect to whether attorney-client privilege applies here. In determining what law to apply with respect to attorney-client privilege, this Court considers the country with which the allegedly privileged communications "touch base." Anwar v. Fairfield Greenwich Ltd., 982 F. Supp. 2d 260, 263-6 (S.D.N.Y. 2013). Using this test, the Court "appl[ies] the law of the country that has the predominant or the most direct and compelling interest in whether [the] communications should remain confidential, unless that foreign law is contrary to the public policy of this forum." Id. at 264 (quoting Astra Aktiebolag v. Andrx Pharms., Inc., 208 F.R.D. 92, 98 (S.D.N.Y. 2002)). "The jurisdiction with the predominant interest is either the place where the allegedly privileged relationship was entered into or the place in which that relationship was centered at the time the communication was sent." Id. (quoting Astra Aktiebolag, 208 F.R.D. at 98). "Communications concerning legal proceedings in the United States or advice regarding United States law are typically governed by United States privilege law, while communications relating to foreign legal proceedings or foreign law are generally governed by foreign privilege law." Id.

***4** In this case, the attorney-client relationship was entered into in Germany involving both American and German attorneys. Many of the relevant interviews were conducted in Germany and in German, and many documents allegedly in Jones Day's possession came from Germany. However, in addition to having a presence in Germany, Jones Day is principally an American law firm, and American lawyers are working on the Volkswagen case. While Jones Day's investigation pertains to the whole of the emissions scandal, including in Germany, it was retained specifically to represent Volkswagen vis-à-vis American authorities. Furthermore, Jones Day has in fact represented Volkswagen before American authorities, specifically the Justice Department, in a proceeding involving U.S. law. Accordingly, the Court holds that United States law applies with respect to attorney-client privilege and the work-product doctrine as to this Application. See In re Berlamont, No. 14-MC-00190 (JSR), 2014 WL 3893953, at *2 (S.D.N.Y. Aug. 4, 2014), aff'd sub nom. In re Application for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proceedings, 773 F.3d 456 (2d Cir. 2014) (holding that U.S., not Swiss, privilege law applied where the documents in question were "located in New York, were created and produced in the context of a case pending in New York, and [were] being sought from United States lawyers in a court in New York pursuant to a United States statute").

Moreover, although the parties have submitted declarations regarding German privilege law, such law is beyond the scope of this Court's expertise and the purview of 28 U.S.C. § 1782. See Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1099 (2d Cir. 1995).

C. Applicable Law Governing Attorney-Client Privilege

"A party invoking the attorney-client privilege must show (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." In re County of Erie, 473 F.3d 413, 419 (2d Cir. 2007). This privilege extends "to communications between corporate counsel and a corporation's employees, made 'at the direction of corporate superiors in order to secure legal advice from counsel.' " In re Gen. Motors LLC Ignition Switch Litig., 80 F.Supp.3d 521, 527 (S.D.N.Y. 2015) (quoting Upjohn Co. v. United States, 449 U.S. 383, 394 (1981)). The attorney-client privilege, however, must be construed "narrowly because it renders relevant information undiscoverable," so this Court applies it "only where necessary to achieve its purpose." Erie, 473 F.3d at 418 (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)).

Despite the narrow construction of the attorney-client privilege, it may also encompass fact investigations. The Supreme Court has noted that "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." Upjohn, 449 U.S. at 390-91; see also United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996) (stating that Upjohn made "clear that fact-finding which pertains to legal advice counts as 'professional legal service' " (citing In re Woolworth Corp. Sec. Class Action Litig., No. 94-CIV-2217 (RO), 1996 WL 306576 (S.D.N.Y. June 7, 1996))). Thus, the Court observed: "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." Upjohn,

449 U.S. at 390. Accordingly, this Court "consider[s] whether the predominant purpose of the communication is to render or solicit legal advice." Erie, 473 F.3d at 420.

1. Application of Attorney-Client Privilege

Applicants challenge that Jones Day did not represent Volkswagen for the purpose of providing legal advice. Applicants' selective reading of public statements does not change the fact that Jones Day was retained by Volkswagen to conduct a fact investigation for the purpose of facilitating legal advice.

The title ("Agreement on the commissioning of legal services between [Volkswagen] and Jones Day") and text of the retainer agreement establish that there was an attorney-client relationship between VW and Jones Day. (Perlitt Supp. Decl. ¶ 4.) While the retainer agreement states that Jones Day would clarify "facts" related to the emissions scandal, it also states that the firm would represent VW before United States authorities. (Id.) Moreover, the text of the retainer should be read in conjunction with the tile of the agreement: while the excerpt does not specifically say that Jones Day would provide legal representation before U.S. authorities, it is obvious that such representation would be legal given the title of the agreement.

***5** Statements by Jones Day attorneys make the existence of an attorney-client relationship clear. (See Perlitt Decl. ¶ 4; Romatowski Decl. ¶¶ 3-5 (explaining that Jones Day's "extensive investigation of the facts ... was necessary, foremost among several purposes, to enable [it] to give sound and informed legal advice to [Volkswagen].").)

The Court next attempts to address whether attorney-client privilege applies to the document requests at issue here. In tension here are the fact that Applicants' request is beyond broad and that Jones Day's assertion of privilege is also all encompassing. Ordinarily, the party asserting privilege has the burden of proving that privilege. Erie, 473 F.3d at 419; Local Rule 26.2. However in this case, Applicants request practically a universe of documents, making it next to impossible for Jones Day to assert privilege with any particularity. At this time, it is impossible for the Court to determine whether particular communications are covered by attorney-client privilege. The Court does hold, however, that there is an attorney-client relationship between Volkswagen and Jones Day.

D. Applicable Law Regarding Work-Product Protection

In Hickman v. Taylor, 329 U.S. 495 (1947), the Supreme Court held that, under the work-product doctrine, written material and mental impressions prepared or formed by an attorney in the course of performing legal duties on behalf of a client are protected from discovery in the absence of undue prejudice or hardship to the party seeking discovery. Adopting this approach, Rule 26(b)(3) provides that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative" unless "they are otherwise discoverable under Rule 26(b)(1)" and "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed R. Civ. P 26(b)(3).

The Second Circuit has held that, to be protected work product, a document need not be prepared exclusively for the purpose of litigation:

> We hold that a document created because of anticipated litigation, which tends to reveal mental impressions, conclusions, opinions or theories concerning the litigation, does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation. Where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3).

United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998).

1. Application of Work-Product Doctrine

***6** Volkswagen retained Jones Day in anticipation of proceedings before United States authorities. Accordingly, the work-product doctrine may be applicable here. However, as with attorney-client privilege, the document requests and the assertions of privilege are both overly broad. To the extent that documents requested contain the mental impressions of Jones Day attorneys, they would be covered by the work-product document. Jones Day will need to assert more specifically such protection upon a narrowing of the document requests.

Under Rule 26(b)(3), this is not the end of the inquiry. Rule 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonprivileged matter...." Fed R. Civ. P 26(b)(1). Based on the discussion of privilege above, it is not clear that the requests covered by the work-product doctrine are "nonprivileged" and thus "otherwise discoverable under Rule 26(b)(1)." Fed R. Civ. P 26(b)(3). Moreover, in response to any assertion of work-product protection by Jones Day, Applicants will need to show their "substantial need for the materials to prepare [their] case and [that they] cannot, without undue hardship, obtain [the documents'] substantial equivalent by other means." Id.

E. Waiver of Privileges

Applicants argue that, even if the attorney-client privilege and work-product doctrine applied, Volkswagen and/or Jones Day waived those privileges through disclosure.

"Once a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears.... The waiver doctrine provides that voluntary disclosure of work product to an adversary waives the privilege as to other parties." In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993).

The Second Circuit, however, has declined to adopt a "rigid rule" in "situations in which [a government agency] and the disclosing party have entered into an explicit agreement that the [agency] will maintain the confidentiality of the disclosed materials." Courts in this Circuit have varied in their approaches to such a situation and have held that waiver should be determined on a case-by-case basis. Compare Police & Fire Ret. Sys. of Detroit v. SafeNet, Inc., No. 06 Civ. 5797 (PAC), 2010 WL 935317, at *2 (S.D.N.Y. Mar. 12, 2010); In re Nat. Gas Commodities Litig., 232 F.R.D. 208, 211 (S.D.N.Y. 2005); and In re Symbol Techs., Inc. Secs. Litig., 05-CV-3923, 2016 WL 8377036, at *15 (E.D.N.Y. Sept 30, 2016) with Alaska Electrical Pension Fund v. Bank of Am. Corp., 14-CV-7126 (JMF), 2017 WL 280816, at *3 (S.D.N.Y. Jan. 20, 2017); Gruss v. Swirn, No. 09 Civ. 6441 (PGG) (MHD), 2013 WL 3481350, at *13 (S.D.N.Y. July 10, 2013); S.E.C. v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 310, 313-14 (S.D.N.Y. 2011); and In re Initial Pub. Offering Secs. Litig., 249 F.R.D. 457, 467 (S.D.N.Y. 2008). [8]

1. Application of Waiver

Jones Day, in assisting Volkswagen's cooperation with authorities, entered into a non-waiver agreement regarding privileged documents. The agreement states that while Jones Day will provide oral briefings and additional documents in connection with its VW investigation, "to the extent any [privileged materials] are provided to DOJ pursuant to this agreement, VW does not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege." (Romatowski Decl. Ex. A, at 1.)

***7** The Court here is swayed by the cases holding that disclosures made pursuant to non-waiver agreements do not waive the protections of the work-product doctrine or attorney-client privilege, recognizing, among other factors the "strong public interest in encouraging disclosure and cooperation with law enforcement agencies; [and that] violating a cooperating party's confidentiality expectations jeopardizes this public interest." Police & Fire Ret. Sys., 2010 WL 935317, at *2.

Applicants point to the provision stating that DOJ was to keep any privileged materials confidential "except to the extent that [it] determine[d] in its sole discretion that disclosure would be in furtherance of [its] discharge of its duties and responsibilities or is otherwise required by law." (Romatowski Decl. Ex. A, at 1-2.) That the DOJ has such discretion does not change the Court's determination. While the agreement gives DOJ discretion, that discretion is cabined by the requirement that any disclosure would be in furtherance of it duties or otherwise required by law. Furthermore, courts making a selective-waiver determination have still held that there was no waiver when nearly identical discretionary provisions were at issue. E.g., In re Symbol Techs., 2016 WL 8377036, at *14.

Applicants also contend that Jones Day has shared its work product with Deloitte, but Jones Day denies this claim, and Applicants cannot adequately counter that denial. (Perlitt Supp. Decl. ¶ 6.)

Accordingly, the Court holds that, as set forth at this time, Jones Day has adequately asserted that the DOJ agreement did not waive any applicable privilege. However, to the extent that Applicants narrow their document requests, they may assert with greater specificity that privilege was waived with respect to particular documents. [9]

Because the documents requested by Applicants may be covered by either attorney-client privilege or the work-product doctrine or both, and because those privileges have not been waived, Applicants cannot meet the statutory requirements for 28 U.S.C. § 1782 at this time. The parties are advised to consult with one another to narrow the document requests and the assertions of privilege. They are advised to consult this Memorandum & Order as well as Local Rule 26.2 in narrowing the scope of issues in any future Applications.

Because the Court cannot sufficiently address the statutory requirements at this point, it need not address the discretionary factors under Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004). [10] However, in the background of the Court's analysis is its assessment that the document requests are unduly intrusive and burdensome. They are unduly intrusive in that they seek to obtain documents that potentially go to the core of Jones Day's legal representation of Volkswagen. Furthermore, the documents requests are both intrusive and burdensome in that they seek to shortcut any normal discovery process by simply relying on all of Jones Day's work. Lastly, the requests are burdensome in that they are beyond broad. While this Court is familiar with cases involving massive amounts of electronic discovery and recognizes that computer systems make it possible to sift through terabytes upon terabytes of information, Jones Day should not have to do so here based on an overly broad subpoena.

III. CONCLUSION

***8** For the foregoing reasons, the Court both declines to grant the Application and DENIES Jones Day's Opposition to the Application. Should the parties narrow the document requests and the assertions of privilege, future Applications should be submitted to this Court pursuant to Local Rule for the Division of Business Among District Judges 3(b)(iv). [11] Cf. Mees v. Buiter, 793 F.3d 291, 302 (2d Cir. 2015).

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 2879696

Footnotes

1 Russell Hotten, Volkswagen: The Scandal Explained, BBC News (Dec. 10, 2015), http://www.bbc.com/news/business-34324772.

2 Applicants' suits are among many related to the scandal. Notably, in the United States, North District of California Judge Charles R. Breyer approved a record-setting civil settlement, and, in the Eastern District of Michigan, Volkswagen pleaded guilty to criminal charges.

3 Applicants have previously tried, unsuccessfully, to obtain such documents from German authorities and from Volkswagen itself. (Rother Decl. ¶¶ 5-6.)

4 Applicants point to other references to fact investigations in support of their contention that Jones Day's investigation did not incorporate legal counsel. (See Applicants' Opp. Ex. B, at 12 (“Clarification of Facts”); Ex. C, at 1 (“clarify the facts and responsibilities”).)

5 Jones Day more than likely did “report” to VW, but it is unclear whether that report was reduced to writing and therefore a “document” capable of being produced in discovery.

6 Jones Day also contends that it has not shared its work product with Deloitte. (Perlitt Supp. Decl. ¶ 6.)

7 It is unclear to the Court why Jones Day filed a Motion to Dismiss rather than simply opposing the Application. Based on the Court's review of similar cases, the Court construes Jones Day's Motion to Dismiss as an Opposition to the Application.

8 See also Fed. R. Evid. 502(a) ("when [a] disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.").

9 Because the Court holds that the document requests are too broad, it declines to address Applicants' request in their Sur-Reply to only encompass the Statement of Facts submitted to the Department of Justice at this time.

10 The Supreme Court held that even when an applicant meets the statutory requirements of § 1782, it has discretion in determining whether to grant the application. It set forth four factors relevant to that determination:

> (1) Whether the documents or testimony sought are within the foreign tribunal's jurisdictional reach, and thus accessible absent § 1782 aid;
>
> (2) The nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance;
>
> (3) Whether the § 1782 request conceals a[n] attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and
>
> (4) Whether the subpoena contains unduly intrusive or burdensome requests.

In re Microsoft Corp., 428 F. Supp. 2d 188, 192-93 (S.D.N.Y. 2006) (citing Intel, 542 U.S. at 264-65).

11 "When a modification or further action on a Part I determination is sought, it shall be referred in the first instance to the judge who made the original determination even though that judge is no longer sitting in Part I."

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740 Fed.Appx. 243
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1.
United States Court of Appeals, Fourth Circuit.

IN RE: GRAND JURY 16-3817 (16-4)
United States of America, Plaintiff-Appellee,
v.
Under Seal 1, Intervenor-Appellant.

No. 17-4183
|
Argued: January 25, 2018
|
Decided: June 27, 2018

Synopsis

Background: As part of grand jury investigation into whether corporation and its subsidiaries violated certain federal laws, government subpoenaed the former general counsel of a subsidiary of the corporation to testify before grand jury about statements the general counsel had made during prior interview by government. Corporation moved to intervene on ground that the subpoena sought privileged or protected information. After intervention was granted, corporation moved for a protective order to quash the subpoena. The United States District Court for the Eastern District of Virginia, No. 1:16-dm-00062-70, Liam O'Grady, J., denied motion. Corporation appealed.

[Holding:] The Court of Appeals, Gregory, Chief Judge, held that written agreement between government and corporation preserved corporation's attorney-client privilege and work-product protection for information that general counsel disclosed during the prior interview.

Vacated and remanded.

Niemeyer, Circuit Judge, filed opinion concurring in judgment.

Procedural Posture(s): Preliminary Hearing or Grand Jury Proceeding Motion or Objection.

West Headnotes (2)

[1] **Federal Courts** Preliminary proceedings; depositions and discovery

Under *Perlman* doctrine, 38 S.Ct. 417, district court's order denying corporation's motion for protective order to quash grand jury subpoena issued by government to former general counsel of corporation's subsidiary, in connection with government's investigation into whether corporation and its subsidiaries had violated federal laws, was immediately appealable; the general counsel, who was directed to testify about allegedly privileged information before the grand jury, was a disinterested third party who no longer worked for the corporation or its subsidiary and would likely not risk being found in contempt for refusing compliance with subpoena. 28 U.S.C.A. § 1291.

1 Cases that cite this headnote

[2] **Grand Jury** Privilege

Written agreement between government and corporation, which was entered into as part of grand jury investigation into whether corporation and its subsidiaries violated federal laws, and which allowed government to interview former general counsel of subsidiary of the corporation, preserved corporation's attorney-client privilege and work-product protection for information that general counsel disclosed during interview, and thus corporation could assert attorney-client privilege and work-product protection to prevent general counsel from testifying before grand jury in response to government's subpoena, though one clause in agreement allowed government to disclose information in furtherance of its duties; another clause stated that corporation did not intend to waive privilege and preserved corporation's privileges as to government, and third clause preserved corporation's privileges for other related information.

2 Cases that cite this headnote

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, District Judge. (1:16-dm-00062-70)

Attorneys and Law Firms

ARGUED: Peter John Romatowski, JONES DAY, Washington, D.C., for Appellant. John Alexander Romano, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Karen P. Hewitt, San Diego, California, Meir Feder, New York, New York, Kerri L. Ruttenberg, Washington, D.C., Daniel E. Reidy, JONES DAY, Chicago, Illinois; David N. Kelley, DECHERT LLP, New York, New York; Brockton B. Bosson, CAHILL GORDON & REINDEL LLP, New York, New York, for Appellant. Dana J. Boente, United States Attorney, Jamar K. Walker, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia; Tarek Helou, Assistant Chief, Lorinda I. Laryea, Trial Attorney, Katherine A. Raut, Trial Attorney, Fraud Section, Kenneth A. Blanco, Acting Assistant Attorney General, Trevor N. McFadden, Deputy Assistant Attorney General, Criminal Division, Appellate Section, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Before GREGORY, Chief Judge, NIEMEYER, and AGEE, Circuit Judges.

Opinion

Vacated and remanded by unpublished opinion. Chief Judge Gregory wrote the opinion, in which Judge Agee joined. Judge Niemeyer wrote a separate opinion concurring in the judgment.

Unpublished opinions are not binding precedent in this circuit.

GREGORY, Chief Judge:

***244** Appellant corporation ("X Corp.")[1] and the Government dispute whether a written agreement between them preserved X Corp.'s attorney-client privilege and work-product protection for information that the General Counsel of an X Corp. subsidiary disclosed to the Government. We hold that it does.

I.

Several years ago, the U.S. Attorney's Office for the Eastern District of Virginia and the Fraud Section of the U.S. Department of Justice (collectively the "Government") opened a grand jury investigation into whether X Corp. and its subsidiaries violated certain federal laws. To facilitate the investigation, X Corp. entered into a series of written agreements with the Government, permitting employees of X Corp. and its subsidiaries to share with the Government information protected by attorney-client privilege and work-product protection. The Department of Justice (DOJ) drafted the agreements, all of which are materially the same. Under these agreements, the Government obtained documents and interviewed eighteen current and former employees.

One such agreement (the "Agreement"), at issue here, specifically allowed the Government to interview the former General Counsel ("Doe") of an X Corp. subsidiary. The Agreement acknowledged that during the interview, Doe "might disclose privileged or protected information ... defined herein as 'Protected Information.' " J.A. 39. The Agreement's three operative paragraphs read as follows:

> Please be advised that, to the extent any Protected Information is provided to the Fraud Section or EDVa pursuant to this agreement, [X Corp. and its directors] do not intend to waive the protection of ***245** the attorney work product doctrine, attorney-client privilege, or any other privilege.
>
> The Fraud Section and EDVa will maintain the confidentiality of any Protected Information provided to the Fraud Section and EDVa pursuant to this agreement and will not disclose such information to any third party, except to the extent that the Fraud Section or EDVa determines in its sole discretion that disclosure would be in furtherance of the Fraud Section's or EDVa's discharge of its duties and responsibilities or is otherwise required by law.
>
> The Fraud Section and EDVa each agree that it will not assert that the disclosure of any Protected Information by [Doe] provides the Fraud Section or EDVa with additional grounds to subpoena other privileged materials from [X Corp. and its directors] or [Doe] although any grounds that

> exist apart from such disclosure shall remain unaffected by this agreement.

J.A. 39-40. (We will refer to these paragraphs as "First Clause," "Second Clause," and "Third Clause" respectively.) Attached to the Agreement was a list of topics of "Protected Information" that Doe might disclose. The Government interviewed Doe pursuant to this Agreement, and Doe indeed disclosed privileged and protected information.

Years later, the Government subpoenaed Doe to testify before a grand jury about the same statements Doe made during the interview.[2] X Corp. moved to intervene on the ground that the subpoena seeks privileged or protected information. The district court granted the intervention. X Corp. then moved for a protective order to quash the subpoena. Finding that the Agreement waived attorney-client privilege and work-product protection for Doe's interview statements, the district court denied X Corp.'s motion. X Corp. timely appealed.

II.

[1] We have jurisdiction under 28 U.S.C. § 1291 and the *Perlman* doctrine to review the district court's order denying X Corp.'s motion to quash. *See* *Perlman v. United States*, 247 U.S. 7, 13, 38 S.Ct. 417, 62 L.Ed. 950 (1918); *In re Grand Jury Subpoena*, 836 F.2d 1468, 1470 n.2 (4th Cir. 1988). The *Perlman* doctrine provides that a disclosure order, such as the one here, "directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992); *accord* *In re Naranjo*, 768 F.3d 332, 346 (4th Cir. 2014) (holding that *Perlman* doctrine applies "when there exists a real possibility the third party will not risk being found in contempt" (internal quotation marks omitted)). Here, Doe—the party directed to testify to allegedly privileged information—is a disinterested third party because Doe no longer works for X Corp. or its subsidiary.

III.

The merits of this case turn on whether the Agreement preserved X Corp.'s attorney-client privilege and work-product protection such that X Corp. may prevent Doe from testifying before the grand jury. Interpretation of the Agreement presents a ***246** question of law that we review de novo. *See* *United States v. Lopez*, 219 F.3d 343, 346 (4th Cir. 2000).

The parties agree on several important points: (1) The information that Doe provided in the interview—and that the Government now seeks to elicit before the grand jury—was protected by attorney-client privilege and work-product doctrine before Doe disclosed it. (2) Any voluntary disclosure of privileged or protected information typically waives both attorney-client privilege and work-product protection. *See* *In re Martin Marietta Corp.*, 856 F.2d 619, 622-23 (4th Cir. 1988). And (3) parties may contract to limit the effect of such a disclosure on the disclosing party's right to assert privilege in future proceedings. *See, e.g.*, Fed. R. Evid. 502(e) (providing that agreement to limit effect of waiver by disclosure is binding on parties to it); *United States v. Deloitte LLP*, 610 F.3d 129, 141 (D.C. Cir. 2010) (indicating that confidentiality agreement between disclosing party and recipient may prevent waiver of work-product protection); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1427 (3d Cir. 1991) (noting that disclosure agreement between company and DOJ preserved company's right to invoke attorney-client privilege against DOJ).

[2] The sole question is whether the Agreement here limited the effect that Doe's disclosure otherwise would have had on X Corp.'s right to assert privilege against the Government, the other contracting party. To answer that question, we apply standard principles of contract interpretation. *See* *United States v. Gillion*, 704 F.3d 284, 292 (4th Cir. 2012).

A.

When interpreting a contract, we look at the agreement's language to determine the parties' intent. *Quesenberry v. Volvo Trucks N. Am. Retiree Healthcare Benefit Plan*, 651 F.3d 437, 440 (4th Cir. 2011). We must read the contract "to give effect to all its provisions and to render them

consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); *accord* *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 267 (4th Cir. 2011) (noting that contracts "must be read 'as a whole' " and so that provisions harmonize (citation omitted)). "Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." *M & G Polymers USA, LLC v. Tackett*, —— U.S. ——, 135 S.Ct. 926, 933, 190 L.Ed.2d 809 (2015) (quoting 11 R. Lord, Williston on Contracts § 30:6, p. 108 (4th ed. 2012)). [3]

B.

Applying these principles, we conclude that the Agreement preserves X Corp.'s privileges as to the Government. Holding otherwise would require us to discount the plain language of the Agreement's First Clause, which expressly reserves those privileges. The Government argues that, because the Agreement's Second Clause permits the Government to share the information it received from Doe with third parties in carrying out its responsibilities, the First Clause cannot mean what it says. Instead, the Government contends, the First Clause provides a basis for X Corp. to assert privilege only against third parties. ***247** We find nothing in the Agreement or the law to support such a construction. While the Agreement permits the Government to use the information it obtained from Doe in its investigation of X Corp., it precludes the Government from compelling Doe to testify to that information in a judicial proceeding.

The First Clause plainly conveys X Corp.'s intent not to waive any privileges. It states, "[T]o the extent any Protected Information is provided to the Fraud Section or EDVa pursuant to this agreement, [X Corp. and its directors] do not intend to waive the protection of the attorney work product doctrine, attorney-client privilege, or any other privilege." J.A. 39. This language contemplates that Doe would disclose privileged information in the interview and provides that X Corp. retains its privileges notwithstanding that initial disclosure. Nothing in the Agreement qualifies this reservation of privilege.

The Government argues that the First Clause has no effect on the Government. In its view, the Second Clause waives X Corp.'s privileges as to the Government by authorizing the Government to disclose the Protected Information to third parties. The Second Clause states that the Government will maintain the confidentiality of any privileged information that Doe provided "except to the extent that the Fraud Section or EDVa determines in its sole discretion that disclosure would be in furtherance of the Fraud Section's or EDVa's discharge of its duties and responsibilities or is otherwise required by law." J.A. 39. Therefore, according to the Government, the First Clause cannot preserve privilege against the Government's subpoena; its only effect is to preserve privilege against potential third-party requests for disclosure. We disagree.

The Government's reading fails to account for the difference between the topic of the First Clause—privilege—and that of the Second Clause—confidentiality. Privilege is "the right to refuse to disclose information in response to *judicial* inquiry." 23 Charles Alan Wright et al., Federal Practice & Procedure § 5423 (1st ed. 2018) (emphasis added). By agreeing in the First Clause that X Corp. retained its privileges, the parties agreed that the Government could not compel disclosure of the Protected Information in judicial proceedings. In contrast, confidentiality involves "prevent[ing] others from making *extrajudicial* disclosures." *Id.* (emphasis added). Thus, in the Second Clause, the parties agreed that the Government would not share the Protected Information with third parties outside judicial proceedings except in furtherance of its duties.

Contrary to the Government's position, the exception in the Second Clause qualifies only the Government's promise to keep the information confidential. *See* *Abbott v. United States*, 562 U.S. 8, 25-26, 131 S.Ct. 18, 178 L.Ed.2d 348 (2010) ("The 'grammatical and logical scope' of a proviso ... 'is confined to the subject-matter of the principal clause' to which it is attached." (quoting *United States v. Morrow*, 266 U.S. 531, 534-35, 45 S.Ct. 173, 69 L.Ed. 425 (1925))). It does not modify the First Clause and thus does not negate X Corp.'s reservation of privilege. The Second Clause's exception allows the Government to share the Protected Information in certain circumstances out of court, but it does not permit the Government to compel disclosure of that information in court. To be sure, absent an agreement, voluntary disclosures of information—whether Doe's initial disclosure to the Government or the Government's further disclosure to other parties—vitiate the attorney-client privilege and work-product protection. *See* *In re Grand Jury Subpoena*, 341 F.3d 331, 336 (4th Cir. 2003) (attorney-client privilege); ***248** *In re Martin Marietta*, 856 F.2d at 625 (work-product protection). But,

here, the First Clause prevents that result; it preserves X Corp.'s privileges, at least as to the Government, even if Doe disclosed the information in the interview and even if the Government in turn disclosed it to a third party. [4]

Moreover, we find the Government's interpretation of the First Clause unpersuasive. Saying that the First Clause does not bind the parties that signed the Agreement, but instead potentially addresses X Corp.'s rights against third parties that did not sign it, effectively renders the First Clause meaningless. Disclosure agreements, such as the one here, bind only the parties to the agreement, not third parties. *See* Fed. R. Evid. 502(e) (providing that agreements limiting effect of waiver by disclosure do not bind third parties unless incorporated into court orders). And, generally, waiver of privilege as to the Government results in waiver as to all other parties. [5] Nothing in the clause itself supports the distinction the Government draws either. Given both our obligation to give meaning to all clauses of a contract and the First Clause's plain language, we conclude that the First Clause means what it says: X Corp. retains its privileges as to the Government.

The Government further argues that the Agreement's Third Clause presumes a waiver of privilege and thus indicates that the preceding paragraphs do not preserve X Corp.'s privileges. The Third Clause states that the Government agrees not to assert that Doe's disclosure of privileged information gives the Government additional grounds to subpoena other privileged materials from X Corp. In the Government's view, this provision would be unnecessary if the First Clause preserved X Corp.'s privileges.

We agree that the Third Clause presumes a disclosure, which would cause a waiver absent an agreement, but nothing in the Third Clause requires finding that the other provisions create a waiver. The First and Third Clauses serve distinct purposes. While the First Clause preserves X Corp.'s privileges for the disclosed information, the Third Clause preserves X Corp.'s privileges for other related information. And the latter is not superfluous because Doe's disclosure would likely waive privilege not only for the specific information revealed, but for all information on the same subject matter. *See* *United States v. Bolander*, 722 F.3d 199, 222 (4th Cir. 2013); *Hawkins v. Stables*, 148 F.3d 379, 384 n.4 (4th Cir. 1998); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982).

***249** In essence, the Agreement maintains the status quo regarding X Corp.'s privileges. It nullifies the effect of both Doe's initial disclosure of privileged information and the Government's later disclosure of the same information on X Corp.'s ability to assert privilege against the Government. As a result, X Corp. may assert privilege here as if Doe had never disclosed the information in the first instance.

Construing the Agreement to preserve X Corp.'s privileges also serves important policy considerations. Cooperation between private entities and the Government furthers the truth-finding process. Such negotiations "give potential defendants an opportunity to explain away suspicious circumstances, give the government an opportunity to avoid embarrassing and wasteful mistakes, and give the public a greater likelihood of a just result." *In re Keeper of Records*, 348 F.3d 16, 28 (1st Cir. 2003). Declining to hold the Government to the terms of an agreement it struck would discourage private entities from cooperating with the Government in the future.

IV.

For the foregoing reasons, the district court's decision denying X Corp.'s motion for a protective order is

VACATED AND REMANDED.

NIEMEYER, Circuit Judge, concurring in the judgment:
While I would read the Second Clause to modify the First Clause, concluding that they both implicate the attorney-client privilege—as confidentiality is an essential aspect of that privilege—I find the exception in the Second Clause and its effect on the privilege to be ambiguous. To make the exception meaningful, it must be referring to some external event that prompts the Justice Department to conclude that it must, as a matter of duty, disclose the privileged material. Otherwise, the exception would swallow the promise of confidentiality, rendering it meaningless. But the exception provides no guidance as to what such an event might be. Because a waiver of the attorney-client privilege—one of the most important and protected in the law—should be clear, I agree that we should not, in such an ambiguous circumstance, default to find a waiver. Accordingly, I concur in the judgment.

All Citations

740 Fed.Appx. 243

Footnotes

1 The identity of the Appellant in this case is sealed. We therefore refer to the Appellant by the pseudonym "X Corp." and use other pseudonyms or generic terms to identify related actors.

2 The Government concedes that the Agreement precludes it from seeking additional information not disclosed in the interview.

3 We reject the Government's suggestion that, because courts construe the attorney-client privilege narrowly, we should disfavor a finding that a contract's language preserves privilege. Principles governing the scope of the attorney-client privilege have no bearing on the contract-interpretation question before us.

4 We do not decide whether the Agreement preserves X Corp.'s privileges vis-à-vis a third party to whom the Government disclosed information from Doe's interview, as that is not the question before us. For the same reason, we find inapposite the cases the Government cites involving attempts by third parties to access information a company shared with the government under a confidentiality agreement. *See* *In re Pacific Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012); *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179 (10th Cir. 2006); *In re Mutual Funds Investment Litigation*, 251 F.R.D. 185 (D. Md. 2008).

5 All but one of our sister circuits have rejected the selective-waiver doctrine. *See* *Pacific Pictures*, 679 F.3d at 1127 (collecting cases). And, although the Fourth Circuit has not expressly decided the selective-waiver question, we do not think a party as well-represented as X Corp. would gamble on us joining the one circuit that recognizes the doctrine—particularly in light of our prior cases. *See* *In re Weiss*, 596 F.2d 1185, 1186 (4th Cir. 1979) (per curiam) (finding that selective-waiver argument raised as defense to grand-jury subpoena was not "compelling reason" to reverse district court decision compelling testimony).

572 F.2d 596
United States Court of Appeals,
Eighth Circuit.

DIVERSIFIED INDUSTRIES, INC., Petitioner,
v.
The Honorable James H. MEREDITH, Chief Judge of the United States District Court for the Eastern District of Missouri, Respondent.

No. 77-1043.
|
Submitted April 11, 1977.
|
Decided Aug. 9, 1977.
|
On En Banc Hearing Feb. 5, 1978.

Synopsis

Corporate defendant in a pending case instituted a mandamus proceeding, seeking to protect from discovery the contents of certain memorandum and report prepared for its benefit by law firm. The Court of Appeals, Henley, Circuit Judge, held that the memorandum was not protectible from disclosure under either the attorney-client or work product privilege. On hearing en banc, the Court further held, Heaney, Circuit Judge, that the Harper & Row test, with the limitations announced in the instant opinion, is applicable to determine the extent of a corporation's attorney-client privilege; and that the interviews of corporate employees by law firm, retained by the corporation to investigate and report on charges of corporate wrongdoing, were confidential communications of the corporate client and entitled to the attorney-client privilege.

Petition granted in part and denied in part.

Henley, Circuit Judge, filed an opinion concurring in part and dissenting in part on the hearing en banc.

Gibson, Chief Judge, filed an opinion concurring in part and dissenting in part on the hearing en banc.

Bright, Circuit Judge, filed a dissenting opinion on the hearing en banc.

West Headnotes (18)

[1] **Mandamus** Modification or vacation of judgment or order

Mandamus Proceedings in civil actions in general

Writ of mandamus is not ordinarily available to a litigant to obtain appellate review of interlocutory discovery orders entered by a district court as litigation proceeds, but where a claim of attorney-client privilege has been raised in and rejected by a district court, mandamus is available as a means of immediate appellate review. 28 U.S.C.A. § 1292(b); Fed.Rules Civ.Proc. rule 26(b)(3), 28 U.S.C.A.

8 Cases that cite this headnote

[2] **Privileged Communications and Confidentiality** Absolute or qualified privilege

Confidential communications between an attorney and his client are absolutely privileged from disclosure against the will of the client.

134 Cases that cite this headnote

[3] **Federal Civil Procedure** Work Product Privilege; Trial Preparation Materials

Information or materials assembled by or for a person in anticipation of litigation or in preparation for trial may be qualifiedly privileged from disclosure to an opposing party under the "work product" rule. Fed.Rules Civ.Proc. rule 26(b)(3), 28 U.S.C.A.

47 Cases that cite this headnote

[4] **Privileged Communications and Confidentiality** Elements in general; definition

Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his

instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.

48 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality** Construction

While the attorney-client privilege, where it exists, is absolute, the adverse effect of its application on the disclosure of truth may be such that a privilege is strictly construed.

39 Cases that cite this headnote

[6] **Privileged Communications and Confidentiality** Relation of Attorney and Client

In order for the attorney-client privilege to be applicable, the parties to the communication in question must bear the relationship of attorney and client; moreover, the attorney must have been engaged or consulted by the client for the purpose of obtaining legal services or advice—services or advice that a lawyer may perform or give in his capacity as a lawyer, not in some other capacity.

63 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality** Professional Character of Employment or Transaction

A communication is not privileged simply because it is made by or to a person who happens to be a lawyer.

41 Cases that cite this headnote

[8] **Privileged Communications and Confidentiality** Corporations, partnerships, associations, and other entities

Although the question whether the parties to a given communication are, respectively, attorney and client is a question which ordinarily presents no difficulty, a problem arises where the client is a corporation that can communicate or receive communications only by or through its human agents; in such case, the question arises as to whether the attorney-client privilege extends to communications by or to all classes of corporate agents or employees or whether the privilege is limited to communications by or to only limited classes of such agents or employees.

3 Cases that cite this headnote

[9] **Federal Civil Procedure** Work Product Privilege; Trial Preparation Materials

Qualified immunity or privilege accorded to "work product" by Federal Rule of Civil Procedure is to some extent broader than the absolute attorney-client privilege; while the "work product" may be, and often is, that of an attorney, the concept of "work product" is not confined to information or materials gathered or assembled by lawyer; further, the communication may be immune from discovery as work product even though it was not made to or by a "client" of an attorney. Fed.Rules Civ.Proc. rule 26(b)(3), 28 U.S.C.A.

69 Cases that cite this headnote

[10] **Federal Civil Procedure** Work Product Privilege; Trial Preparation Materials

Information or material sought to be protected as "work product" must have been obtained "in anticipation of litigation or for trial"; otherwise, the work product privilege, often referred to as "qualified immunity," is not available. Fed.Rules Civ.Proc. rule 26(b)(3), 28 U.S.C.A.

51 Cases that cite this headnote

[11] **Federal Civil Procedure** Work Product Privilege; Trial Preparation Materials

Privileged Communications and Confidentiality Documents and records in general

Memorandum prepared for the corporate petitioner by law firm was not protectible from disclosure under either the attorney-client or work product privilege, since the memorandum contained no confidential information and did little more than reveal the relationship between

the parties, the purpose for which the law firm had been engaged, and the steps which the firm intended to take in discharging its investigatory obligations. Fed.Rules Civ.Proc. rule 26(b)(3), 28 U.S.C.A.

75 Cases that cite this headnote

[12] Federal Civil Procedure Work Product Privilege; Trial Preparation Materials

The "work product" rule does not come into play merely because there is a remote prospect of future litigation. Fed.Rules Civ.Proc. rule 26(b)(3), 28 U.S.C.A.

61 Cases that cite this headnote

[13] Privileged Communications and Confidentiality Corporations, partnerships, associations, and other entities

Attorney-client privilege applies to corporations.

85 Cases that cite this headnote

[14] Privileged Communications and Confidentiality Corporations, partnerships, associations, and other entities

"Control group" test is inadequate for determining the extent of a corporation's attorney-client privilege; rather, the *Harper & Row* test provides a more reasoned approach to the problem by focusing upon why an attorney was consulted, rather than with whom the attorney communicated—the test extends the privilege to communications made by any corporate employee if the communication is made at the direction of the employee's superior and concerns the performance of his duties.

54 Cases that cite this headnote

[15] Privileged Communications and Confidentiality Corporations, partnerships, associations, and other entities

Attorney-client privilege is applicable to a corporate employee's communications to the corporation's counsel if (1) the communication was made for the purpose of securing legal advice, (2) the employee made the communication at the direction of his corporate superior, (3) the superior made the request so that the corporation could secure legal advice, (4) the subject matter of the communication was within the scope of the employee's corporate duties, and (5) the communication was not disseminated beyond those persons who, because of the corporate structure, needed to know its contents.

107 Cases that cite this headnote

[16] Privileged Communications and Confidentiality Corporations, partnerships, associations, and other entities

Interviews of corporate employees by law firm retained by the corporation to investigate and report on charges of corporate wrongdoing were confidential communications of the corporate client and entitled to the attorney-client privilege, since the communications were made for the purpose of securing legal advice for the corporation, since the corporate resolution authorizing the investigation specifically instructed all employees to cooperate fully, since the interviews explored only areas within the bounds of employees' corporate duties, and since the corporation avoided disseminating such information to other than those immediately concerned.

55 Cases that cite this headnote

[17] Privileged Communications and Confidentiality Waiver of privilege

Since it was in a separate and nonpublic investigation by the Securities and Exchange Commission that corporation voluntarily surrendered certain material protected by the attorney-client privilege, only a limited waiver of the privilege occurred.

41 Cases that cite this headnote

[18] Privileged Communications and Confidentiality Corporations, partnerships, associations, and other entities

> Ordinarily, the attorney-client privilege belongs to the corporation and a corporate employee cannot himself claim the privilege and prevent disclosure of communications between himself and the corporation's counsel if the corporation has waived the privilege; however, circumstances may reveal that the employee sought legal advice from the corporation's counsel for himself or that counsel acted as a joint attorney, and under such circumstances the employee may have the privilege.
>
> 19 Cases that cite this headnote

Attorneys and Law Firms

***598** Thomas J. Guilfoil, St. Louis, Mo., for petitioner; Stuart Symington, Jr., Jim J. Shoemake and J. Richard McEachern, St. Louis, Mo., on the briefs.

Thomas E. Wack, St. Louis, Mo., for respondent; Walter M. Clark, St. Louis, Mo., on the briefs.

Before LAY, HEANEY and HENLEY, Circuit Judges.

HENLEY, Circuit Judge.

This is an original petition for a writ of mandamus directed at The Honorable James H. Meredith, Chief Judge of the United States District Court for the Eastern District of Missouri, by Diversified Industries, Inc. which is the defendant in a ***599** case pending in the district court entitled The Weatherhead Company, Plaintiff v. Diversified Industries, Inc., Defendant, Docket No. 76-623C (1). In the instant proceeding Diversified seeks to protect from discovery the contents of a certain memorandum, dated June 19, 1975, and a written report, dated December, 1975, both prepared for the benefit of Diversified by the Washington, D. C. law firm of Wilmer, Cutler & Pickering, hereinafter called Law Firm. Petitioner also seeks to protect certain corporate minutes in which reference is made to the memorandum and report of Law Firm.

Weatherhead sought to obtain the materials in question by means of pretrial interrogatories and a motion for production of documents to which Diversified objected. In November, 1976 the district court overruled the objections without opinion. Diversified moved for reconsideration and alternatively asked the district court to certify the questions presented as appropriate for interlocutory appeal under 28 U.S.C. s 1292(b). On December 30, 1976 respondent refused both reconsideration and s 1292(b) certification, and in that connection filed a memorandum opinion. Finally, on January 6, 1977 the district court affirmatively ordered disclosure of the materials and Diversified applied to this court for relief.

Petitioner contends that the documents in question are not subject to disclosure because they fall within the scope of the traditional attorney-client privilege and also are protected by the "work product" privilege dealt with in the leading case of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), and now expressed in Fed.R.Civ.P. 26(b)(3) which became effective in 1970.

Respondent, actually Weatherhead, denies that the material in question is covered by either privilege, and also contends that any originally existing privilege was waived effectively for purposes of the litigation in the district court when petitioner turned the material over to the Securities and Exchange Commission without protest in response to an agency subpoena in the course of an investigation that the Commission was conducting.

We heard the matter preliminarily on January 14, 1977 and entered an order staying operation of the district court's order of January 6 as it affected Law Firm's memorandum and report and portions of the corporate minutes of Diversified relating to those documents pending final disposition of the case. We also called for the filing of briefs within a comparatively short period of time.

We have considered the petition, the response thereto, the exhibits tendered by the respective parties, and their briefs. And we have also considered in camera material that was submitted to the district court and later to us. That material includes the memorandum and report of Law Firm and copies of the minutes of certain meetings of Diversified's Board of Directors.

[1] The writ of mandamus is not ordinarily available to a litigant to obtain appellate review of interlocutory discovery orders entered by a district court as litigation proceeds. However, where a claim of attorney-client privilege has been raised in and rejected by a district court, we have held that mandamus is available as a means of immediate appellate review. Pfizer, Inc. v. Lord, District Judge, 456 F.2d 545, 547-48 (8th Cir. 1972). See also Harper & Row Publishers v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd without opinion by an equally divided Supreme Court, 400 U.S. 348, 91 S.Ct.

479, 27 L.Ed.2d 433 (1971). We concluded, therefore, that we should consider the instant petition on the merits.

Petitioner is a Delaware corporation with its principal place of business in Clayton, Missouri. Its operations include sales of scrap copper which is the principal component of brass. Some and perhaps many of petitioner's sales are made in interstate commerce.

Weatherhead is an Ohio corporation having its principal place of business at Cleveland. It is engaged in the manufacture and sale of brass and brass products, and it maintains a mill at Angola, Indiana.

***600** For a number of years prior to the filing of its suit against Diversified in July, 1976 Weatherhead purchased large quantities of copper from Diversified which copper was shipped from Clayton to Angola. Naturally, there were extensive dealings between employees of Weatherhead engaged in the purchasing of copper and employees of Diversified engaged in the sale of copper. Diversified sold copper not only to Weatherhead but also to other purchasers.

In 1974 and 1975 Diversified became engaged in two lawsuits in federal court in the Eastern District of Missouri, which litigation involved what is commonly known as a "proxy fight." In the course of that litigation it came to light that Diversified may have established and maintained a "slush fund" which was used to bribe purchasing agents of other business entities including Weatherhead, and perhaps for other improper purposes.

Disclosures made in the course of the 1974-75 litigation, which litigation had no direct relationship to the suit that is now pending in the district court, attracted the interest of the Securities and Exchange Commission. In due course the Commission conducted an official investigation of the affairs of Diversified and other corporations and individuals, and it later filed a suit for an injunction against Diversified and others in the United States District Court for the District of Columbia; a consent decree was entered in that case in late 1976.

In July, 1975 Weatherhead commenced its suit against Diversified in the district court alleging an unlawful conspiracy between Diversified and Weatherhead employees whereby the latter were paid large sums of money out of Diversified's alleged "slush fund" to procure the purchase from Diversified by Weatherhead of large amounts of inferior copper. Weatherhead alleged conspiracy, tortious interference with the contractual relationships between itself and its employees, and violation of s 4 of the Clayton Antitrust Act, 15 U.S.C. s 15. On the common law counts of the complaint actual and punitive damages and an accounting of profits were sought. Treble damages were sought under the antitrust count. We assume that Diversified denies liability.

Weatherhead has employed extensive discovery in the case in the district court and doubtless has been able to acquire much information of value to it. However, Weatherhead has not yet been able to obtain access to Law Firm's memorandum and report.

The history of those documents may be summarized as follows.

The 1974-75 litigation involving Diversified was settled amicably and before any official action had been taken by the SEC. However, the Board of Directors of Diversified concluded that it should cause an investigation to be made of the business practices of the company in the context of the disclosures that had been made in the course of the litigation. In the spring of 1975 Law Firm was employed to make that investigation and to report the results thereof to Diversified's Board. Law Firm was not employed to give legal advice to Diversified and was not employed to represent diversified in any pending or potential litigation. The reason for the employment of Law Firm was its supposed expertise in the relevant field.

The memorandum of June 19, 1975 was of a purely preliminary nature and was written at a time when the employment of Law Firm was still somewhat tentative. Basically, the memorandum is a statement of historical matters, and an outline of how Law Firm proposed to conduct the investigation. The memorandum also discussed the extent to which information developed by the investigation would be immune from disclosure should disclosure be sought officially. As to the method of investigation, Law Firm stated that it proposed to interview individuals, including employees of Diversified, and Law Firm requested the Board to instruct corporate employees to cooperate in the investigation and to participate in interviews with Law Firm's representatives. Law Firm also indicated that it intended to examine relevant records, and ***601** that it might find it necessary or convenient to employ an independent firm of accountants to assist in the investigation.

This memorandum was satisfactory to the Board, and Diversified employees were instructed to cooperate with

Law Firm and to furnish information to Law Firm's representatives.

The December, 1975 report was quite different from the June memorandum. The December document was a full and detailed report of the investigation; it identified persons who had been interviewed and set out the substance of what they had said; it also identified individuals who had refused to give any information. The report also dealt with the accounting aspect of the investigation which had been handled by the firm of Arthur Andersen & Co. The report further contained a number of recommendations both on the part of Law Firm and on the part of the accountants.

It may be doubted that the report itself would be admissible in evidence at a trial of the Weatherhead-Diversified case, but it obviously contains a great deal of material which is relevant to the controversy between the parties, and might well be extremely useful to counsel for Weatherhead in discovering and developing relevant and admissible evidence.

Included in the in camera material that we have examined are copies of corporate minutes covering meetings of the Board held from time to time between early May, 1975 and July, 1976. Those minutes would be privileged, if at all, only to the extent that they may reveal privileged matter communicated by Law Firm.

The minutes of many of the meetings refer to the fact that Law Firm had been employed, that a report had been received including recommendations, and that the recommendations were to be followed. For the most part, however, the minutes say nothing about what was in the report or what the recommendations were.

One exception is the minutes of a meeting of the Board that was held on September 3, 1975, while the investigation was in progress. Two representatives of Law Firm attended the meeting and advised the Board as to the status of the investigation and as to some of the Law Firm's tentative findings.

The in camera material also includes a memorandum, dated January 30, 1976, from Mr. Woodlief, the President of Diversified, to all corporate officers and heads of subsidiaries and divisions of the company. And that memorandum reveals to some extent the results of the investigation.

[2] **[3]** Coming now to the issues, it should be kept in mind that we are dealing with a claim of privilege based on two separate and distinct rules. The first is the long established rule that confidential communications between an attorney and his client are absolutely privileged from disclosure against the will of the client. That rule expresses the "attorney-client" privilege proper. The second rule is that information or materials assembled by or for a person in anticipation of litigation or in preparation for trial may be qualifiedly privileged from disclosure to an opposing party. That rule is known as the "work product" rule, and, as indicated, is now covered by Fed.R.Civ.P. 26(b) (3). Both rules are discussed thoroughly in 8 Wright & Miller, Federal Practice & Procedure, Civil, ss 2017 and 2021-28.

In the frequently cited case of United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358-59 (D.Mass.1950), Judge Wyzanski stated the conditions under which the attorney-client privilege is applicable. He said:

> . . . The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in ***602** some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

[4] A shorter definition of the privilege, cited with approval in 8 Wright & Miller, op. cit., p. 133, is contained in Wonneman v. Stratford Securities Co., 23 F.R.D. 281, 285 (S.D.N.Y.1959): ". . . where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived."

[5] While the privilege, where it exists, is absolute, the adverse effect of its application on the disclosure of truth may

be such that the privilege is strictly construed. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir. 1963); Underwater Storage, Inc. v. United States Rubber Co., 314 F.Supp. 546, 547-48 (D.D.C.1970); United States v. United Shoe Machinery Corp., supra, 89 F.Supp. at 358.

[6] **[7]** In order for the privilege to be applicable, the parties to the communication in question must bear the relationship of attorney and client. Moreover, the attorney must have been engaged or consulted by the client for the purpose of obtaining legal services or advice services or advice that a lawyer may perform or give in his capacity as a lawyer, not in some other capacity. A communication is not privileged simply because it is made by or to a person who happens to be a lawyer. 8 Wright & Miller, op. cit., p. 136. See Underwater Storage, Inc. v. United States Rubber Co., supra; In re Natta, 264 F.Supp. 734, 741 (D.Del.1967), aff'd on other issues, 388 F.2d 215 (3d Cir. 1968); Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 464 (S.D.N.Y.1956); Zenith Radio Corp. v. Radio Corp. of America,121 F.Supp. 792, 794 (D.Del.1954).

[8] Whether the parties to a given communication are, respectively, attorney and client is a question which ordinarily presents no difficulty. A problem arises, however, where the client is a corporation that can communicate or receive communications only by or through its human agents. In such a case the question arises as to whether the privilege extends to communications by or to all classes of corporate agents or employees or whether the privilege is limited to communications by or to only limited classes of such agents or employees.

On that question the authorities are clearly divided. The existing state of the law was stated succinctly by District Judge Warriner in Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D.Va.1975):

Two tests exist with respect to whether an employee of a corporation is a "client" for purposes of the lawyer-client privilege when dealing with communications from such employee to the lawyer for the corporation. The test most widely employed, apparently is the "control group" test formulated by the decision in Philadelphia v. Westinghouse Electric Corporation, 210 F.Supp. 483 (E.D.Pa.1962). This test requires that the communicant be in a position to control or take a substantial part in a decision about any action to be taken upon the advice of the lawyer, or that the communicant be a member of a group having such authority.

The control group test was rejected in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd per curiam by equally divided Court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971). The Decker test holds that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's lawyer is privileged where the employee made the communication at the direction of his superiors and where the subject matter upon which the lawyer's advice was sought by the corporation and dealt with in the communication was within the performance by the employee of the duties of his employment.

***603** Reference may also be made to the opinion of District Judge Hamphill in Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1163-67 (D.S.C.1974).

As to the work product rule, Fed.R.Civ.P. 26(b)(3) in pertinent part provides:

(3) Trial Preparation: Materials.

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule 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 attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. 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. . . .

[9] From a reading of Rule 26(b)(3) and of the discussion of the work product rule appearing in 8 Wright & Miller, op. cit., ss 2021-28, it is at once apparent that the qualified immunity or privilege accorded to "work product" by the rule

is to some extent broader than the absolute attorney-client privilege that has been discussed. While the "work product" may be, and often is, that of an attorney, the concept of "work product" is not confined to information or materials gathered or assembled by a lawyer. Further, a communication may be immune from discovery as work product even though it was not made to or by a "client" of an attorney.

[10] However, the text of the rule makes it clear that the information or materials sought to be protected as "work product" must have been obtained "in anticipation of litigation or for trial." Otherwise, the privilege, often referred to as "qualified immunity" is not available.

With the foregoing in mind, we pass to a consideration of Diversified's claim of privilege with respect to the several documents that are in controversy here.

[11] We have no difficulty in upholding the action of the district court in refusing to accord protection to Law Firm's memorandum of June 19, 1975. That memorandum contained no confidential information. It did little more than reveal the relationship between the parties, the purpose for which Law Firm had been engaged, and the steps which the Firm intended to take in discharging its obligation to Diversified. Such a document is not privileged. See Colton v. United States, 306 F.2d 633, 636 (2d Cir. 1962), cert. denied, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963); Bailey v. Meister Brau, Inc., 55 F.R.D. 211, 214-15 (N.D.Ill.1972); 8 Wright & Miller, op. cit., p. 138.

The questions presented with respect to the December, 1975 report of Law Firm are more difficult. We have concluded, however, that the report is not entitled to protection on the basis of either attorney-client privilege or work product immunity.

We find it unnecessary to decide whether the persons interviewed by the Firm's representatives should be considered as "clients" because we are persuaded that Law Firm was not hired by Diversified to provide legal services or advice. It was employed solely for the purpose of making an investigation of facts and to make business recommendations with respect to the future conduct of Diversified in such areas as the results of the investigation might suggest. The work that Law Firm was employed to perform could have been performed just as readily by non-lawyers aided to the extent necessary by a firm of public accountants. Thus Diversified has failed to satisfy one of the requisites of a successful claim of attorney-client privilege.

That the contents of the report constituted "work product" cannot be denied; nor is there any question that the report contained ***604** the mental impressions, conclusions and opinions of those who wrote it, including their interpretations of what the interviews with individuals revealed.

However, it is obvious that Law Firm's work was not done in preparation for any trial, and we do not think that the work was done in "anticipation of litigation," as that term is used in Rule 26(b)(3), although, of course, all parties concerned must have been aware that the conduct of employees of Diversified in years past might ultimately result in litigation of some sort in the future.

[12] It may be conceded to Diversified that material may be assembled in "anticipation of litigation" even though no suit has actually been filed. However, the work product rule does not not come into play merely because there is a remote prospect of future litigation. Zenith Radio Corp. v. Radio Corp. of America, supra, 121 F.Supp. at 795.

In 8 Wright & Miller, op. cit., pp. 198-99, it is said:

> . . . Prudent parties anticipate litigation, and begin preparation prior to the the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.

Law Firm's investigation was not made and its report was not prepared because of any prospect of litigation involving Diversified. Law Firm was employed simply because the Board of Directors of Diversified wanted to know what actually had been going on and wanted to frame policies and procedures that in the future would protect it against

repetitions of the prior misdeeds, if any, of its employees committed in the past.

As to the corporate minutes involved in the case, little need be said. Those minutes were not privileged in themselves, and since the report of Law Firm is not privileged, the minutes are not privileged to the limited extent to which they may disclose contents of the memorandum and report.

Since we conclude that the materials are not privileged, we do not reach the question of waiver raised by Weatherhead, which is a serious one. [1]

The petition for the writ of mandamus is denied.

HEANEY, Circuit Judge, concurring and dissenting.

I agree that we should consider the petition for mandamus on its merits. I am, moreover, convinced that Diversified did not waive its lawyer-client privilege by voluntarily surrendering privileged material to the SEC in obedience to a subpoena from that agency. "A waiver of the privilege must occur in the same proceeding in which it is sought to be invoked." United States v. Goodman, 289 F.2d 256, 259 (4th Cir.), vacated and remanded on other grounds, 368 U.S. 14, 82 S.Ct. 127, 7 L.Ed.2d 75 (1961); Bucks County Bank & Trust Company v. Storck, 297 F.Supp. 1122, 1123 (D.Haw. 1969); 8 Wigmore on Evidence s 2276 at 470-472 (McNaughton rev. 1961). But see Supreme Court Standard 511; In Re Penn Central Commercial Paper Litigation, 61 F.R.D. 453, 464 n. 25 (S.D.N.Y.1973).

I disagree, however, with the majority's holding that no lawyer-client privilege existed as to the June 19, 1975, memorandum of Wilmer, Cutler & Pickering, to the December, 1975, report of Wilmer, Cutler & Pickering and to the minutes of the Board of Directors of September 3, 1975, to the ***605** extent that they contained excerpts from the law firm's memorandum or report.

The majority opinion is, in my view, contrary to Supreme Court Standard 503 relating to the lawyer-client privilege which reads, in relevant part, as follows: [1]

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communication made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Under the standard, the privilege extends to communications between the lawyer and the client for the purposes of obtaining legal services or advice. Advisory Committee Note to Supreme Court Standard 503. The client need not be involved in litigation for the privilege to attach. See 8 Wigmore on Evidence ss 2294-2295 (McNaughton rev. 1961).

Wilmer, Cutler & Pickering was retained by Diversified in order to obtain professional legal services. The corporation sought and indeed received something infinitely more important than a report from a lay investigator or a detective. The law firm submitted a comprehensive report detailing specific conduct considered by it to be violative of the law and characterizing various employees of the corporation as being cooperative or uncooperative with its investigation. The report contained recommendations as to a course of conduct to be followed by Diversified to avoid future violations of the law.

The Association of the Bar of the City of New York stated, in 1970, that "rules of evidence should not result in discouraging communications to lawyers made in a good faith effort to promote compliance with the complex laws governing corporate activities." Report of the Committee on Federal Courts of the Association of the Bar of the City of New

York, 43-45, May, 1970, quoted in 2 Weinstein's Evidence, P 503(01) at 503-12, n. 1. I agree with this observation. Lawyers are acting in a professional capacity when they undertake a comprehensive examination of a corporation's activities in order to determine whether the corporation is operating in accordance with the law and make recommendations on how to avoid illegal activities in the future. This is true whether or not the legal firm conducting the investigation is expected to engage in litigation.

Since, unlike the majority, I am persuaded that the law firm was retained by ***606** Diversified to provide legal services or advice, it is necessary to determine whether the Diversified employees interviewed by the law firm, or its representatives, should be considered to be "clients" of the law firm. There are two principal approaches to this question. Under one approach, the lawyer-client privilege is limited to only those communications by and to the control group of the corporation.[2] City of Philadelphia v. Westinghouse Electric Corp., 210 F.Supp. 483 (E.D.Pa.), mandamus and prohibition denied sub nom. General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3rd Cir. 1962), cert. denied, 372 U.S. 943, 83 S.Ct. 937, 9 L.Ed.2d 969 (1963). This approach is not a realistic one and was expressly rejected by the Seventh Circuit in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), affirmed by an equally divided Court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971). I would adopt the Seventh Circuit approach together with modifications suggested in 2 Weinstein's Evidence P 503(b)(04) (1975). I would first require the corporation to show that the lawyer was acting as a legal adviser when the communication was made. The mere receipt by a lawyer of a routine report would not make the communication privileged. Second, I would require that the subject matter of the communication be the performance by the employee of the duties of his employment. This would remove from the scope of the privilege any communication which is within the employee's knowledge solely because he happened to witness or observe an event. Third, the corporation must establish that the communication was not disseminated beyond those with the need to know. I think it is clear that all of the requirements are met here.

In my judgment, justice will be furthered if we extend the lawyer-client privilege to situations of this type. It will encourage corporations to seek out wrongdoing in their own house and to do so with lawyers who are not only professionally trained but who are obligated by their code of ethics to make a thorough and complete report.

ON HEARING EN BANC

Before GIBSON, Chief Judge, and LAY, HEANEY, BRIGHT, ROSS, STEPHENSON and HENLEY, Circuit Judges, en banc.[*]

Opinion

HEANEY, Circuit Judge.

This matter is before the Court en banc on a petition for a writ of mandamus. When the matter was first considered, a panel of this Court held that it had jurisdiction to entertain the petition but denied the petition on its merits. Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (Heaney, J., concurring and dissenting). It held that Diversified Industries, Inc., was not entitled to protect from discovery a memorandum dated June 19, 1975, and a report dated December, 1975, as well as certain corporate minutes and a letter dated January 30, 1976, from the President of Diversified that refer to the documents. These documents were prepared for Diversified by the Washington, D. C., law firm of Wilmer, Cutler & Pickering. It reasoned that the June 19 memorandum was not entitled to protection under the attorney-client privilege because the memorandum contained no confidential information and that the December report was not entitled to protection under the privilege because the law firm was not hired by Diversified to provide legal services or advice. It further reasoned that Diversified could not claim protection under the work product rule since the law firm did not prepare the report for trial or in anticipation of litigation as that term is used in Fed.R.Civ.P. 26(b)(3). It held the corporate minutes and the January 30 letter to be unprotected for the same reasons.

***607** On petition from Diversified, we agreed to hear the matter en banc because of the important issues raised with respect to the proper application of the attorney-client privilege. After careful consideration, we leave untouched our earlier opinion insofar as it holds that mandamus is available as a means of immediate appellate review and that the June 19, 1975, memorandum is unprotected.

A brief restatement of the facts will bring into focus the issues concerning the December, 1975, report, the corporate minutes and the January 30 letter.

Diversified is a Delaware corporation with its principal place of business in Clayton, Missouri. It is engaged

primarily in manufacturing and processing nonferrous metals. Weatherhead is an Ohio corporation with its principal place of business in Cleveland, Ohio. It manufactures and sells brass and brass products. For many years, Diversified sold Weatherhead large quantities of copper, the principal component of brass.

In 1974 and 1975, during proxy fight litigation involving Diversified, facts surfaced indicating that Diversified may have established and maintained a "slush" fund to bribe purchasing agents of companies with whom Diversified dealt, presumably including Weatherhead.

On July 9, 1976, Weatherhead filed a complaint in the District Court alleging that Diversified conspired with Weatherhead employees to sell Weatherhead an inferior grade of copper and that in return for accepting the inferior copper, Weatherhead employees were paid bribes out of a "slush" fund. Weatherhead also alleged tortious interference with its employment contracts and violations of s 4 of the Clayton Act, 15 U.S.C. s 15.

As a result of the disclosures made during the 1974-1975 litigation, the Board of Directors of Diversified passed the following resolution:

RESOLVED, that, as this Board of Directors deems it to be in the best interests of this Corporation and its stockholders, the General Counsel of the Corporation be and he hereby is authorized, in behalf of this Board of Directors, to engage the services of Wilmer, Cutler & Pickering, Washington, D. C. to conduct an investigation and inquiry into the matters disclosed and discussed in this regard at this meeting for the purposes of eliciting facts, making certain findings, and providing to the Board of Directors of this Corporation a report possibly containing recommendations as to course of action, so that the Board of Directors of this Corporation may properly discharge its duties, and, further

RESOLVED, that Wilmer, Cutler & Pickering be and they hereby are authorized to procure assistance as may be reasonably required, in the above-designated inquiry, from accounting firms and others to conclude in a prompt and diligent manner the above commissioned inquiry and investigation, and, further

RESOLVED, that this Board of Directors hereby delegates to the Audit Committee of this Board the power and authority to review this matter in detail with Wilmer, Cutler & Pickering and, where necessary and appropriate, to provide to that firm any necessary interim authorizations or advice as may be necessary or desirable for the efficient handling and conclusion of the above mentioned inquiry and investigation, and, further

RESOLVED, that the officers and directors of this Corporation be and they hereby are directed to cooperate fully, and to ensure that all employees of this Corporation cooperate fully with Wilmer, Cutler & Pickering and such other persons as Wilmer, Cutler & Pickering may retain in the foregoing matters.

The law firm was subsequently directed to report to the Board of Directors rather than to the Audit Committee. The company President subsequently advised employees that he would take any steps necessary or appropriate to insure employee cooperation. During the course of the investigation, the law firm interviewed several employees of Diversified, including some who were not in a position to control or take a ***608** substantial part in a decision the corporation might make based on the law firm's advice. The December report summarized these interviews, analyzed the accounting data, evaluated the conduct of certain employees, drew conclusions as to the propriety of their conduct and made recommendations as to steps Diversified should take. Certain corporate minutes and parts of the January 30 letter restate critical portions of the report. [1]

[13] The attorney-client privilege applies to corporations. Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314, 323 (7th Cir.), cert. denied, 375 U.S. 929, 84 S.Ct. 330, 11 L.Ed.2d 262 (1963). However, because a corporation can speak or hear only through its human agents, we must determine the circumstances in which employee communications can be classified as the corporate client's communications.

Two tests have developed in the federal courts. The first is the "control group" test formulated in City of Philadelphia v. Westinghouse Electric Corp., 210 F.Supp. 483 (E.D.Pa.), mandamus and prohibition denied sub nom., General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3rd Cir. 1962), cert. denied, 372 U.S. 943, 83 S.Ct. 937, 9 L.Ed.2d 969 (1963). In this test, an employee's statement is not considered a corporate communication unless the employee "is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority (.)" Id. at 485. It is the

most widely used test. Virginia Electric & Pow. Co. v. Sun Shipbuilding & D.D. Co., 68 F.R.D. 397, 400 (E.D.Va.1975).

The second test is that formulated in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971). In this test, "an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation * * * where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." Id. at 491-492.

Although it predominates, the control group test has come under increasing criticism. See, e. g., Kobak, The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts, 6 Ga.L.Rev. 339 (1972); Note, Privileged Communications Inroads on the "Control Group" Test in the Corporate Area, 22 Syracuse L.Rev. 759 (1971); Note, The Application in the Federal Courts of the Attorney-Client Privilege to the Corporation, 39 Fordham L.Rev. 281 (1970); Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege, 12 B.C.Ind. & Comm.L.Rev. 873 (1970). But see, e. g., Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 Harv.L.Rev. 424 (1970). The principal criticism is that the control group test attempts to equate corporate clients with individual clients. An individual client both communicates to a lawyer and, based on the lawyer's advice, decides on an appropriate course of action. Similarly, before an employee's communication will be deemed the corporate client's communication, the control group test demands that the employee communicate to the attorney and be in a position to control or play a substantial role in any decision based on the attorney's advice. In practice, this results in protecting only communications of top level executives which fails to take into account the realities of corporate life.

[14] In a corporation, it may be necessary to glean information relevant to a legal problem from middle management ***609** and nonmanagement personnel as well as from top executives. The attorney dealing with a complex legal problem "is thus faced with a 'Hobson's choice'. If he interviews employees not having 'the very highest authority', their communications to him will not be privileged. If, on the other hand, he interviews only those with 'the very highest authority', he may find it extremely difficult, if not impossible, to determine what happened." Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege, supra at 876. Thus, the control group test inhibits the free flow of information to a legal advisor and defeats the purpose of the attorney-client privilege. See 8 Wigmore, Evidence s 2291 (McNaughton rev. 1961). Moreover, the test may result in discouraging communications to lawyers made in a good faith effort to promote compliance with the complex laws governing corporate activity. See Report of the Committee on Federal Courts of the Association of the Bar of the City of New York, 43-45, May, 1970, quoted in 2 Weinstein's Evidence, P 503(01) (1975) at 503-512 n.1. We conclude that the control group test is inadequate for determining the extent of a corporation's attorney-client privilege.

The Harper & Row test provides a more reasoned approach to the problem by focusing upon why an attorney was consulted, rather than with whom the attorney communicated. The test extends the privilege to communications made by any employee if a communication is made at the direction of the employee's superior and concerns the performance of his duties. In contrast to the control group test, it encourages the free flow of information to the corporation's counsel in those situations where it is most needed.

This test also has its critics. They argue, not unjustifiably, that the Harper & Row test can shield data from the discovery process. See, e. g., Note, Privileged Communications Inroads on the "Control Group" Test in the Corporate Area, supra at 766. The critics fear that many corporations will attempt to funnel most corporate communications through their attorneys in order to prevent subsequent disclosure. Judge Jack B. Weinstein, in his text on evidence, suggests several modifications that substantially limit whatever potential for abuse the Harper & Row test presents. 2 Weinstein's Evidence P 503(b)(04) (1975).

[15] We feel that the limitations suggested by Judge Weinstein have merit and that the attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. We note, moreover, that the corporation has the

burden of showing that the communication in issue meets all of the above requirements.

This modified Harper & Row test will better protect the purpose underlying the attorney-client privilege. Under this test, the mere receipt of routine reports by the corporation's counsel will not make the communication privileged, either because the communication will have been made available to those who do not need to know or because the communication was not made for the purpose of securing legal advice. Moreover, application of the attorney-client privilege will do little to further encourage this type of communication since they will continue to be made for independent business reasons. By confining the subject matter of the communication to an employee's corporate duties, we remove from the scope of the privilege any communication in which the employee functions merely as a fortuitous witness.[2] These are also communications that ordinarily would be made in any event.

***610** We now apply these standards to the employee interviews to determine whether they are within the scope of the attorney-client privilege. We begin by deciding whether the communications were made for the purpose of securing legal advice for the corporation. We think it clear that they were.

Dean Wigmore has perceptively set forth the following generalized test:

It is not easy to frame a definite test for distinguishing legal from nonlegal advice. * * * (T)he most that can be said by way of generalization is that a matter committed to a professional legal adviser is prima facie so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice.

Obviously, much depends upon the circumstances of individual transactions.

8 Wigmore, Evidence s 2296 (McNaughton rev. 1961) (emphasis included). See also Supreme Court Standard 503; McLaughlin, The Treatment of Attorney-Client Privileges in the Proposed Rules of Evidence for the United States District Courts, 26 The Record 31 (1971).

Here, the matter was committed to Wilmer, Cutler & Pickering, a professional legal adviser. Thus, it was prima facie committed for the sake of legal advice and was, therefore, within the privilege absent a clear showing to the contrary. No such showing was made. Rather, the December report contained communications which were uniquely legal.

The charge to the professional legal adviser was a broad one. The law firm was given complete autonomy to conduct a professional investigation and inquiry. It was authorized to procure such assistance including accounting services as reasonably required. It was authorized to interview any employee of the corporation who might have knowledge of the facts from the President to the nonmanagerial employees. Perhaps most importantly, it was given the authority to analyze the accounting data, to evaluate and draw conclusions as to the propriety of past actions and to make recommendations for possible future courses of action. Accountants could have been hired by Diversified to audit the books and records and lay investigators could have been employed to interview employees; but neither would have had the training, skills and background necessary to make the independent analysis and recommendations which the Board felt essential to the future welfare of the corporation.[3] To be sure, there are possibilities of abuse, but the application of the attorney-client privilege to this matter and others like it will encourage corporations to seek out and correct wrongdoing in their own house and to do so with attorneys who are obligated by the Code of Professional Responsibility to conduct the inquiry in an independent and ethical manner. See Report of the Committee on Federal Courts of the Association of the Bar of the City of New York, supra.

It is clear that the remaining requirements of the test set forth by Judge Weinstein and adopted by us have been met. The resolution authorizing the law firm to conduct the investigation specifically instructed all corporate employees to cooperate fully with the law firm for purposes of the investigation. An examination of the report reveals that the interviews explored only areas within the bounds of the employees' corporate duties. Finally, the corporation ***611** scrupulously avoided disseminating this information to other than those immediately concerned with the results of the investigation.

[16] We conclude that these employee interviews are confidential communications of the corporate client and entitled to the attorney-client privilege. Thus, the report and the relevant portions of the corporate minutes and January 30 letter are also privileged because disclosure would reveal

directly or inferentially the contents of the interviews.[4] See Mead Data Central, Inc. v. United States Department of the Air Force, 566 F.2d 242 at 254 (D.C.Cir.1977); Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir.), cert. denied, 352 U.S. 833, 77 S.Ct. 48, 1 L.Ed.2d 52 (1956); United States v. International Business Machines Corp., 66 F.R.D. 206, 212 (S.D.N.Y.1974); 8 Wigmore, Evidence s 2320 (McNaughton rev. 1961).

[17] We finally address the issue of whether Diversified waived its attorney-client privilege with respect to the privileged material by voluntarily surrendering it to the SEC pursuant to an agency subpoena. As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred. See Bucks County Bank and Trust Company v. Storck, 297 F.Supp. 1122 (D.Haw.1969). Cf. United States v. Goodman, 289 F.2d 256, 259 (4th Cir.), vacated on other grounds, 368 U.S. 14, 82 S.Ct. 127, 7 L.Ed.2d 75 (1961). To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.

[18] In concluding, we note that the litigants are not foreclosed from obtaining the same information from non-privileged sources. Litigants may still examine business documents, depose corporate employees and interview nonemployees, obtain preexisting documents and financial records not prepared by Diversified for the purpose of communications with the law firm in confidence.[5] See Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962), cert. denied, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963).

Accordingly, a writ of mandamus will issue compelling the respondent district judge to stay his order of January 6, 1977, with respect to those documents protected by the attorney-client privilege.[6]

The petition for the writ is granted in part and denied in part. Each party shall bear its own costs.

HENLEY, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority of the court that mandamus is a remedy available to ***612** Diversified in this action, and that the privileges claimed by Diversified, if originally extant, were not waived by the voluntary disclosures made by Diversified to the Securities & Exchange Commission (SEC). I further agree with the majority that the memorandum of June 19, 1975 prepared for Diversified by the law firm of Wilmer, Cutler & Pickering (Law Firm) is not privileged, and that certain corporate minutes of Diversified are not privileged, except perhaps to the extent that they may disclose otherwise protected matter.

To the extent that the court holds that Law Firm's report to Diversified's Board of Directors, dated December 5, 1975, or any other material related to that report is privileged from disclosure on the basis of the traditional attorney-client privilege, I respectfully dissent.[1] In so doing I lay to one side what is to me the very serious question of whether or not this entire controversy has become moot due to the disclosures that have now been made by SEC by virtue of which Weatherhead and its attorneys have been able to obtain all of the information that they sought originally.[2]

In United States v. United Shoe Machinery Corp., 89 F.Supp. 357 (D.Mass.1950), a frequently cited case, Judge Wyzanski stated the conditions under which the attorney-client privilege is applicable. He said (89 F.Supp. at 358-59):

> . . . The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort;

> and (4) the privilege has been (a) claimed and (b) not waived by the client.

A somewhat shorter definition of the privilege, cited with approval in 8 Wright & Miller, Federal Practice & Procedure, s 2017, p. 133, is to be found in Wonneman v. Stratford Securities Co., 23 F.R.D. 281, 285 (S.D.N.Y.1959): ". . . where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived."

While the attorney-client privilege, where it exists, is absolute, the adverse effect of its application on the disclosure of truth is potentially such that the privilege should be construed strictly. See Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir. 1963); Underwater Storage, Inc. v. United States Rubber Co., 314 F.Supp. 546, 547-48 (D.D.C.1970); United States v. United Shoe Machinery Corp., supra, 89 F.Supp. at 358.

In order for the privilege to come into play, it must appear that the relationship of the parties to the communication sought to be protected was that of attorney and client. It must also appear that the attorney was engaged or consulted by the client for the purpose of obtaining legal services or advice that a lawyer may perform or give in his capacity as a lawyer, not in some other capacity. A communication is not privileged simply because one of the parties to it is a lawyer. 8 Wright & Miller, op. cit., p. 136. See Underwater Storage, Inc. v. United States Rubber Co., supra; In re Natta, 264 F.Supp. 734, 741 (D.Del.1967), aff'd on other issues, 388 F.2d 215 (3d Cir. 1968); ***613** Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 464 (S.D.N.Y.1956); Zenith Radio Corp. v. Radio Corp. of America, 121 F.Supp. 792, 794 (D.Del.1954).

Where an attorney-client relationship in fact exists and where the client is a corporation, a question may arise as to how far down the corporate table of organization the privilege extends. Is the privilege limited to corporate personnel who may be said to be in the corporation's "control group", as many of the cases seem to have held? Or is the privilege the broader one defined in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971)?

Much of the discussion that appears in the opinion of the majority in this case is devoted to the question mentioned in the preceding paragraph, and it is only after the majority adopts the Harper & Row test, as modified to some extent by Judge Weinstein, that the majority turns to a consideration of the underlying questions of whether Diversified was Law Firm's client and whether Law Firm was employed to perform legal services or to give legal advice.

If I were able to accept the majority's premise that Diversified employed Law Firm as its attorney to give it legal advice or to perform legal services, I would not, at least to a point, have any trouble with the adoption of a modified Harper & Row test to be applied in identifying corporate personnel whose communications would be considered as falling within the attorney-client privilege, although I might have some trouble in including within the privileged category communications involving officers or employees of corporations that are subsidiaries of or affiliated with the corporate client or involving corporate personnel who have dealt adversely to the corporate client. [3]

My point of departure from the majority is that I cannot accept its premise.

The majority having defined what it deems to be the applicable standards in Harper & Row-Weinstein terms undertakes to apply those standards "to the employee interviews to determine whether they are within the scope of the attorney-client privilege." And the majority first addresses itself to the question of whether "the communications were made for the purpose of securing legal advice for the corporation." Having answered that question in the affirmative, the majority determines that "the remaining requirements of the test set forth by Judge Weinstein and adopted by us have been met," and the final conclusion of the majority is that the December, 1975 report of Law Firm, the "relevant portions of the corporate minutes," and the January 30, 1976 letter of Diversified's president are all covered by the attorney-client privilege. I cannot agree.

In answering the question of the purpose for which the communications were made the court refers to certain language appearing in 8 Wigmore on Evidence, s 2296, pp. 566-67 (McNaughton rev. 1961). I think that the quotation

should be expanded to some extent so as to include all of the language that appears in s 2296 on pp. 566-67.
s 2296. Advice sought for sundry nonlegal purposes; Consultation with prosecuting attorneys. A lawyer is sometimes employed without reference to his knowledge and discretion in the law as where he is charged with finding a profitable investment for trust funds. So, too, one not a lawyer is sometimes asked for legal advice as where a policeman or a clerk of court is consulted. It is not easy to frame a definite test for distinguishing legal from nonlegal advice. Where the general purpose concerns legal rights and ***614** obligations, a particular incidental transaction would receive protection, though in itself it were merely commercial in nature (footnote omitted) as where the financial condition of a shareholder is discussed in the course of a proceeding to enforce a claim against a corporation. But apart from such cases, the most that can be said by way of generalization is that a matter committed to a professional legal adviser is prima facie so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice.

Obviously, much depends upon the circumstances of individual transactions.

With regard to that language, I think that it is going too far to say that every time a matter is entrusted to a lawyer communications developed in the course of the entrustment are prima facie privileged, and that the burden is on the party seeking disclosure of the communications to make it "clearly appear" that the entrustment is "lacking aspects requiring legal advice." And I doubt that Dean Wigmore intended to go so far. The difficulty is that, at least in many instances, the party seeking disclosure does not know in advance and has no way of knowing why the matter in question was turned over to the lawyer, or why the communications were developed, or what they amounted to or contained. Thus, apart from in camera proceedings, such as the one that was had in this case, there is no way for the party seeking disclosure to meet the prima facie case of privilege mentioned by Wigmore.

However, my dissent is not based upon any question of the incidence of burden of proof in the area of attorney-client privilege or on any question of whether Weatherhead made any evidentiary showing that it may have been required to make.

I have given careful consideration to the material that Judge Meredith considered in camera, and particularly to the documents that reflected the employment of Law Firm and the December, 1975 report that Law Firm submitted to Diversified's Board of Directors. From that consideration I am satisfied that Law Firm was not employed to provide legal services or advice. It was employed to make a factual investigation and business recommendations in such areas as the results of the investigation might suggest. And Law Firm did just that. The work that Law Firm was employed to perform and the work that it performed could have been performed just as readily by non-lawyers, aided to the extent necessary by a firm of public accountants, just as Law Firm was assisted by Arthur Andersen & Co. Thus, one of the primary requisites of a successful claim of attorney-client privilege never came into existence.

The majority takes note of the fact that Joseph B. Woodlief, who became president of Diversified two months after Law Firm was employed, testified by deposition that he did not believe that Law Firm "represented Diversified 'in the context of advice of attorney to client.' " As to that testimony, the majority after observing the date of Woodlief's employment in relation to the date of the employment of Law Firm goes on to say: "We cannot tell from his deposition whether he thought of attorney-client advice solely in the context of litigation. In any event, his characterization is only one fact to consider in determining whether the communications were privileged. The totality of the circumstances indicates that the communications were privileged." And the majority also observes that the fact that the report contains some nonlegal matter does not destroy the privilege because in the majority's eyes the nonlegal matter is "insubstantial."

If Mr. Woodlief misconceived the connection between Diversified and Law Firm, then his misconception was shared by the corporation's Board of Directors and, perhaps more importantly, by Law Firm itself.

The minutes of the Board which relate to the employment of Law Firm indicate that the Firm was hired as an investigator and not as legal counsel. The fact that the Firm is referred to as "Special Counsel" and ***615** the fact that it doubtless had some expertise in SEC practice do not in and of themselves create any attorney-client relationship.

In its original memorandum which was prepared in June, 1975 and which all of the members of the court agree contained no privileged matter, Law Firm clearly warned Diversified that communications made and data assembled in the process

of the proposed investigation might well be the subject of enforced disclosure.

The critical document involved in the case is the December, 1975 report to the Board which is a succinct and well written document. Since the majority holds that the report is privileged and is unwilling to dispose of the case on the ground of mootness of controversy notwithstanding the fact that Weatherhead and its lawyers have now obtained a copy of the report, I am somewhat handicapped in discussing the report and its contents.

The report consists of a factual statement of the historical background of Law Firm's investigation, a description of the investigation, factual findings, a discussion of certain limitations upon the investigation, accounting recommendations made by Arthur Andersen & Co., and certain recommendations made by Law Firm itself. Affixed to the report are certain items of documentary material.

In the introductory portion of the report Law Firm explains that the report is based on the joint efforts of Law Firm and Arthur Andersen & Co., that much documentary material had been examined, that a number of identified persons had been interviewed, and that a number of identified persons had not been interviewed.

Law Firm made findings with respect to the question of whether cash funds had in fact been surreptitiously created and used in violation of Diversified's established business procedures and internal controls. Some transactions involving substantial sums of money Law Firm found itself unable to explain. One isolated transaction which does not appear to involve either "slush funds" or Weatherhead is described. The report recites that the over-all investigation was hampered to some extent by the fact that some individuals refused to be interviewed and that other individuals were not available.

One of the attachments to the report consists of the accounting recommendations of Arthur Andersen & Co. I see nothing in those recommendations that would constitute "legal advice." There was one specific statement of Arthur Andersen & Co. which Law Firm deemed it well to stress. That statement, introductory in nature, was as follows:

> . . . At the outset . . . we wish to emphasize that the institution of these (recommended) procedures will be meaningless if the personnel who have responsibility for their implementation are not faithful in the performance of their duties. There is no system of internal control that can presently be devised which cannot be circumvented if the responsible persons conspire to do so.

That statement is but an expression of the obvious. A business man certainly does not need a lawyer to tell him that the internal controls that he has established with respect to his business operations are valueless if they are intentionally violated or ignored by those whose duty it is to administer them.

Law Firm made three recommendations of its own which may be summarized as follows: (1) That the accounting procedures recommended by Arthur Andersen & Co. be adopted; (2) that the Board make such changes in personnel as it deemed necessary in the light of the report to prevent a recurrence of certain practices; and (3) that the Board should consider whether appropriate steps should be taken to restore allegedly misused assets.

Those recommendations could have been made by any firm of private investigators, or by accountants, or by bankers, or, for that matter, by any person possessing ordinary common sense and business prudence. And I do not consider that the making of the investigation or the making of the recommendations ***616** based thereon amounted to the performance of legal services or the giving of legal advice.

Finally, it appears to me that if Law Firm had felt that it had been employed as legal counsel and that the information that it had collected was privileged, it would hardly have concluded its report by referring to what Law Firm had always felt was a serious disclosure problem and suggesting that Diversified consult its regular counsel in that connection.

This opinion may be too long. I hope that it does not appear to be too critical or quarrelsome. In another factual setting I would have no trouble agreeing with much of what is said by way of principle in the opinion of the court. As it is, I am of the view that the majority's holding on the issue of attorney-client privilege simply is not geared to the facts of the instant case. I would dismiss the petition in its entirety.

GIBSON, Chief Judge, concurring in part and dissenting in part.

The majority opinion describes the controversy that exists as to what communications, by which corporate agents, are protected by the attorney-client privilege. I am pleased to concur in Judge Heaney's analysis and in the granting of the writ insofar as it relates to the reports from Wilmer, Cutler in December 1975. I also agree that the June report is unprotected.

The separate problems involved in holding corporate minutes to be protected have received little attention in reported decisions. See generally, Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus.Law. 901 (1969). In the present case the briefs of the parties do not address discoverability of the minutes as a separate issue. After carefully considering the nature of corporate minutes and the policies justifying the attorney-client privilege, I have concluded that I must dissent from the granting of the writ to protect the minutes of Diversified.

This privilege, as with all privileges, should be confined to the narrowest limits compatible with the purpose of and the justification for the privilege. The corporate minutes in this case are not communications to the law firm. They can be considered privileged only as memorializations of the report which contained protected material. However, corporations are required to keep minutes by statute. See, e. g., s 351.215 Mo.Rev.Stat.1969. Minutes are available for inspection by shareholders under penalty of monetary sanctions. See, e. g., s 351.215 Mo.Rev.Stat.1969; State ex rel. Aimonette v. C. & R. Heating & Service Co., 475 S.W.2d 409 (Mo.App.1971). This shareholder right is occasionally limited; for example, Alabama restricts the right to examination "for any proper purpose." Garner v. Wolfinbarger, 430 F.2d 1093, 1104 n.21 (5th Cir. 1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971). Surely few would question the propriety of a shareholder's investigating whether the corporation or its agents have engaged in unlawful conduct. Therefore I conclude that if the plaintiff in this action were a shareholder of Diversified, he would be entitled to discover the minutes. See 5 W. Fletcher, Cyclopedia of Private Corporations s 2240 (rev. 1976).

If confidentiality of these communications is to be maintained, there are procedures available for doing so without disclosing them on the corporate minutes. Because corporate minutes are open to shareholder inspection, in my view publication therein of parts of the December report constituted a waiver of the privilege. Continued confidentiality is a predicate for operation of the privilege. That predicate is missing in this case.

At least one commentator has criticized Garner, supra, because the rationale of that case emphasized the identity of the opposing party in determining the extent of the privilege. He stated:

> Since the availability of the privilege primarily turns on the nature and attributes of the adversary party, the corporation is deprived of any advance certainty that the communication will later be protected. Without the predictive certainty needed to induce disclosure by the client, ***617** the privilege is effectively vitiated; none of the benefits flowing from disclosure will be realized, and counsel will be made less effective.

Note, The Attorney-Client Privilege and the Corporation in Shareholder Litigation, 50 So.Cal.L.Rev. 303, 322 (1977). This limitation on the practical utility of the privilege when applied to corporate minutes strengthens my conviction that the corporate minutes in this case are not privileged.

I do not mean that third parties have discovery rights identical with stockholders. It might be appropriate to require disclosure of other records or information to stockholders that would be privileged vis-a-vis third parties. However, in light of the statutory requirement that minutes be kept and the common law and statutory right of shareholder examination, I feel the minutes cannot be considered privileged.

BRIGHT, Circuit Judge, dissenting:

As noted in my brother Henley's dissent, Weatherhead, the plaintiff in the underlying action against Diversified, now advises us it (Weatherhead) has obtained the information here in question from Diversified's reports filed with the SEC. This change in circumstances in the litigation, in my opinion, moots this controversy and renders improper any issuance of a writ of mandamus to Chief District Judge Meredith, the respondent herein.

Although reluctant to express an opinion on the merits because of my view that the controversy is moot, I agree in the main with the dissenting views of Judge Henley.

All Citations

572 F.2d 596, 23 Fed.R.Serv.2d 1473, 24 Fed.R.Serv.2d 1201,
1977-2 Trade Cases P 61,591, 1978-1 Trade Cases P 61,879

Footnotes

1 We would be reluctant to hold that voluntary surrender of privileged material to a governmental agency in obedience to an agency subpoena constitutes a waiver of the privilege for all purposes, including its use in subsequent private litigation in which the material is sought to be used against the party which yielded it to the agency.

1 Even though Congress failed to adopt Supreme Court Standard 503 as part of the Federal Rules of Evidence, it still serves as a useful guide to the law of privileges to be applied in the federal courts. The standard, with a few minor exceptions, is a restatement of the lawyer-client privilege at common law. McLaughlin, The Treatment of Attorney-Client and Related Privileges in the Proposed Rules of Evidence for the United States District Courts, 26 The Record 31 (1971). “Consequently, despite the failure of Congress to enact a detailed article on privileges, Standard 503 should be referred to by the courts.” 2 Weinstein's Evidence P 503(02) at 503-17 (1975).

2 The control group approach was followed in the first draft of Rule 503, but was deleted in the second draft because of the 4-4 split in the Supreme Court on the issue in Decker v. Harper & Row Publishers, Inc., 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971).

* WEBSTER, Circuit Judge, took no part in the consideration or decision of this case.

1 In particular, the September 3, 1975, minutes discuss the contents of the report and the results of the investigation. The February 3, 1976, and March 3, 1976, minutes also discuss the investigation as applied to Mr. Harry Simmons. The remaining minutes only mention the existence of the investigation and do not reveal the contents of the report.

2 However, the work product rule may apply in such situations. See Fed.R.Civ.P. 26(b)(3). See also Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

3 We have considered the deposition of Joseph B. Woodlief, the President of Diversified. He stated that he did not believe that Wilmer, Cutler & Pickering represented Diversified “in the context of advice of attorney to client.” Woodlief's employment began two months after the law firm was retained. We cannot tell from his deposition whether he thought of attorney-client advice solely in the context of litigation. In any event, his characterization is only one fact to consider in determining whether the communications were privileged. The totality of the circumstances indicates that the communications were privileged.
The fact that the report contains some nonlegal matter does not destroy the privilege since it is insubstantial. See United States v. United Shoe Machinery Corporation, 89 F.Supp. 357, 359 (D.Mass.1950).

4 Protection may not be claimed for the remaining portions of the in camera material on the basis of the work product rule. These materials were not prepared in anticipation of litigation or for trial. See Fed.R.Civ.P. 26(b)(3); Zenith Radio Corp. v. Radio Corp. of America, 121 F.Supp. 792, 795 (D.Del.1954); 8 Wright & Miller, Federal Practice and Procedure: Civil s 2024. We note, however, that the client need not be involved in litigation for the attorney-client privilege to attach. See Supreme Court Standard 503; 8 Wigmore, Evidence ss 2294-2295 (McNaughton rev. 1961).

5 We need not address at this time the situation where an employee's confidential communications to the corporation's counsel may reveal potential liability of the employee. Ordinarily, the privilege belongs to the corporation and an employee cannot himself claim the attorney-client privilege and prevent disclosure of communications between himself and the corporation's counsel if the corporation has waived the privilege. In

re Grand Jury Proceedings, Detroit, Mich. Aug., 434 F.Supp. 648 (E.D.Mich.1977). However, circumstances may reveal that the employee sought legal advice from the corporation's counsel for himself or that counsel acted as a joint attorney. Under such circumstances, he may have a privilege. See generally 8 Wigmore, Evidence s 2312 (McNaughton rev. 1961).

6 Subsequent to oral argument, the respondent obtained a copy of the December, 1975, report. They now ask that the petition be dismissed on grounds of mootness. We decline to do so. On remand, the District Court may determine what further action, if any, is appropriate in the light of this Court's holding that the report is privileged.

1 As will be seen, I do not consider that the attorney-client privilege is available to Diversified in this case. Nor do I consider that the material in question is protected "work product" under Fed.R.Civ.P. 26(b)(3), which codifies the rule laid down in the leading case of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

2 Had the court been willing to dismiss this appeal on the ground of mootness, I would have concurred gladly.

3 In this case Law Firm's investigations, which were assisted by the accounting firm of Arthur Andersen & Co., which reported to Law Firm, were not limited to officers, employees and records of Diversified itself. The investigation involved in some measure the personnel and records of subsidiary or affiliated corporations, and there is reason to believe that in at least one instance a substantial sum of money turned over by Diversified to the president of a subsidiary corporation for a particular purpose, perhaps unlawful, was not used for that purpose but was diverted to the private pockets of the two individuals involved in the transaction.

9 F.3d 230
United States Court of Appeals,
Second Circuit.

In re STEINHARDT PARTNERS, L.P., Steinhardt Management Co., Inc., and Michael Steinhardt, Defendants–Petitioners.
SALOMON BROTHERS TREASURY LITIGATION, Plaintiff–Respondent,
v.
STEINHARDT PARTNERS, L.P., Steinhardt Management Co., Inc., and Michael Steinhardt, Defendants–Petitioners,
Securities and Exchange Commission, Amicus Curiae.

No. 873, Docket 93–3079.
|
Argued Oct. 15, 1993.
|
Decided Nov. 8, 1993.

Synopsis

In civil class action suit alleging manipulation of the market for treasury notes, the United States District Court for the Southern District of New York, Robert P. Patterson, Jr., J., granted motion to compel trader to produce documents. Trader petitioned for writ of mandamus to prevent discovery. The Court of Appeals, Tenney, Senior District Judge, sitting by designation, held that trader's voluntary submission of legal memorandum to Securities and Exchange Commission (SEC), with whom trader stood in adversarial position as subject of SEC investigation in connection with which memorandum was sought, waived protections of work product doctrine in instant case.

Petition denied.

West Headnotes (8)

[1] **Mandamus** Proceedings in civil actions in general

Dispute involving issue of whether disclosure of attorney work product in connection with government investigation waived that privilege in later civil discovery presented circumstances permitting use of mandamus to review district court's order allowing discovery, as Court of Appeals had not resolved issue, decision from at least one other circuit supported argument that district court's order undermined privilege, and alleged privilege would be lost if review had to await final judgment.

30 Cases that cite this headnote

[2] **Mandamus** Nature and scope of remedy in general

Court of Appeals applies stringent standard of review to petition for mandamus; petitioner must show that he or she lacks adequate alternative means to obtain relief sought, and must demonstrate clear and indisputable right to issuance of writ, amounting to clear abuse of discretion or usurpation of judicial power.

11 Cases that cite this headnote

[3] **Mandamus** Scope of inquiry and powers of court

Standard of review on petition for mandamus requires showing of extreme need of reversal; it is not enough that Court of Appeals might disagree with district judge's decision were it conventional appeal from final judgment.

2 Cases that cite this headnote

[4] **Federal Civil Procedure** Objections and Grounds for Refusal

Treasury note trader's voluntary submission of legal memorandum to Securities and Exchange Commission (SEC), with whom trader stood in adversarial position as subject of SEC investigation in connection with which memorandum was sought, waived protections of work product doctrine as to subsequent civil litigants seeking memorandum from trader. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

53 Cases that cite this headnote

[5] **Federal Civil Procedure** Work Product Privilege; Trial Preparation Materials

Attorney's protected thought processes include preparing legal theories, planning litigation strategies and trial tactics, and sifting through information. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

39 Cases that cite this headnote

[6] **Federal Civil Procedure** Work Product Privilege; Trial Preparation Materials

Common sense and practicalities of litigation define limits of work product doctrine. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

24 Cases that cite this headnote

[7] **Federal Civil Procedure** Waiver

Once party allows adversary to share otherwise privileged thought processes of counsel, need for privilege disappears and courts therefore accept waiver doctrine as limitation on work product protection; "waiver doctrine" provides that voluntary disclosure of work product to adversary waives privilege as to other parties. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

206 Cases that cite this headnote

[8] **Federal Civil Procedure** Work Product Privilege; Trial Preparation Materials

Crafting rules relating to work product privilege in matters of governmental investigations must be done on case-by-case basis. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

23 Cases that cite this headnote

Attorneys and Law Firms

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Paul Gonson, Solicitor, S.E.C., Washington, DC, for amicus curiae S.E.C.

***232** Before: NEWMAN, Chief Judge, KEARSE, Circuit Judge, and TENNEY [1], District Judge.

Opinion

TENNEY, Senior District Judge.

Defendants-petitioners Steinhardt Partners, L.P., Steinhardt Management Co. and Michael Steinhardt (collectively "Steinhardt") are codefendants with several other parties in a civil class action suit alleging manipulation of the market for two-year Treasury notes during the Spring and Summer of 1991. In answer to a discovery request in the class action suit, Steinhardt identified as responsive a memorandum prepared by its attorneys and previously submitted to the Securities and Exchange Commission (SEC). Steinhardt declined to produce the memorandum, claiming that the memorandum was attorney work product. Plaintiffs moved to compel production. The district court granted the motion to compel, holding that the prior disclosure of the memorandum to the SEC waived the claim for work product protection. Steinhardt filed this petition for a writ of mandamus to prevent discovery of the document. The court's jurisdiction arises under 28 U.S.C. § 1651 and the petition is denied.

Background

This petition for a writ of mandamus arises out of highly publicized allegations of wrongdoing in the market for Treasury notes. In June 1991, the SEC began an informal investigation of the Treasury markets. As part of this informal investigation, the SEC asked Steinhardt, among many others, to provide certain documents related to its trading activities. In August of 1991, the SEC began a formal investigation of the Treasury markets, and issued subpoenas to Steinhardt and others. Steinhardt complied with these subpoenas.

In the Spring of 1992, the SEC's Enforcement Division solicited Steinhardt's views regarding several issues in the investigation. The SEC explained to counsel that it had not yet decided whether to initiate enforcement proceedings against Steinhardt. Apparently, existing case law did not provide complete answers to some of the possible legal bases for an enforcement action in the Treasury markets. After two meetings between the SEC and Steinhardt, the Enforcement Division asked Steinhardt's counsel to submit a memorandum that would address the facts and issues involved in the case and discuss the relevant legal theories. Steinhardt claims that the SEC stated that this would not be a so-called *Wells* submission, although the SEC's amicus brief now characterizes the memorandum as a *Wells* submission. *See* 17 C.F.R. § 202.5(c). We do not address the question of whether the memorandum was in fact a *Wells* submission, since we do not believe that characterizing the memorandum as such alters our conclusion.

Counsel prepared and submitted a memorandum and accompanying exhibits to the SEC on June 26, 1992. A notice reading "FOIA Confidential Treatment Requested" appeared on the document. Steinhardt does not dispute the SEC's assertion that there was no agreement that the SEC would maintain the confidentiality of the memorandum. *See* Amicus Brief of SEC at 8. To date, the SEC has not brought any enforcement proceedings against Steinhardt related to its trading activities in the Treasury markets during 1991.

While the SEC investigated the Treasury markets, civil suits commenced against Steinhardt and numerous other defendants. Now consolidated as a class action, the suits allege various acts of fraud and manipulation in the Treasury markets, and have not reached a hearing on the merits. During discovery, plaintiffs requested all documents previously produced by defendants to any investigating government agency. Steinhardt identified the June 26, 1992 memorandum as responsive to the request, but declined to produce the document, citing the work product doctrine. On June 3, 1993, plaintiffs moved to compel production of the memorandum. After hearing the parties on June 17, 1993, the district court granted the motion to compel ***233** on June 30, 1993. Steinhardt promptly filed a petition for mandamus. This court entered a stay of the order compelling production, pending consideration of the petition for mandamus.

Discussion

I.

[1] As a threshold matter, the court must determine whether it will use mandamus to review the district court's order compelling production of the memorandum. We have consistently expressed reluctance to use mandamus as a means to circumvent the general rule that pretrial discovery orders are not appealable. *In re W.R. Grace & Co.,* 984 F.2d 587, 589 (2d Cir.1993). "Unlike other circuits, we have rarely used the extraordinary writ of mandamus to overturn a discovery order involving a claim of privilege." *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC,* 964 F.2d 159, 163 (2d Cir.1992). The circuit will use mandamus to review discovery orders involving a claim of privilege only when:

> (i) an issue of importance and of first impression is raised; (ii) the privilege will be lost in the particular case if review must await a final judgment; and (iii) immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege.

W.R. Grace, 984 F.2d at 589, *quoting* *Turner & Newall,* 964 F.2d at 163.

This dispute presents one of the very rare circumstances permitting the use of mandamus to review a district court order. The circuit has not previously resolved the important question of whether disclosure of attorney work product in connection with a government investigation waives the privilege in later civil discovery. The district courts of the circuit have addressed similar questions, arriving at different results. *See* *Enron Corp. v. Borget,* 1990 WL 144879 (S.D.N.Y. Sept. 22, 1990) (no waiver of work product protection); *Teachers Ins. & Annuity Ass'n v. Shamrock Broadcasting Co.,* 521 F.Supp. 638 (S.D.N.Y.1981) (disclosure to SEC waived attorney-client privilege); *Byrnes v. IDS Realty Trust,* 85 F.R.D. 679 (S.D.N.Y.1980) (applying Eighth Circuit law and holding attorney-client privilege not waived); *GAF Corp. v.*

Eastman Kodak Co., 85 F.R.D. 46 (S.D.N.Y.1979) (no waiver of work product protection). The circuits have also split on this issue. *Compare Westinghouse Elec. Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3rd Cir.1991) (waiver of work product and attorney-client privilege upon voluntary disclosure of information to SEC and Department of Justice) *and In re Subpoenas Duces Tecum,* 738 F.2d 1367 (D.C.Cir.1984) (waiver of work product and attorney-client privilege upon voluntary disclosure of information to SEC) *with Diversified Indus., Inc. v. Meredith,* 572 F.2d 596, 606 (8th Cir.1977) (en banc) (no waiver of attorney-client privilege).

In addition, the alleged privilege will be lost if review must await final judgment. Disclosure of the memorandum will destroy the alleged privilege and moot the question. As to the final part of the *Turner & Newall* test, Steinhardt's argument that the district court's order will lead to discovery practices undermining the privilege is not a mere conclusory allegation, but is supported by the decisions of at least one circuit. *See Diversified,* 572 F.2d at 611. Given the fact that this court is yet to resolve this important issue, a decision from at least one circuit supporting petitioner's argument that the district court's order undermines the privilege, and the need for immediate resolution before the alleged privilege is lost, this petition satisfies the conditions of the *Turner & Newall* test.

II.

[2] **[3]** On the merits, we apply a stringent standard of review to petitions for mandamus. The petitioner must show that he or she lacks an adequate alternative means to obtain the relief sought, and must demonstrate a clear and indisputable right to the issuance of the writ, amounting to a clear abuse of discretion or a usurpation of judicial power. *Mallard v. United States District Court,* 490 U.S. 296, 309, 109 S.Ct. 1814, 1822, 104 L.Ed.2d 318 (1989). This standard requires a showing of an "extreme need for reversal." ***234** *In re Weisman,* 835 F.2d 23, 27 (2d Cir.1987). It is not enough that the court of appeals might disagree with the district judge's decision were it a conventional appeal from a final judgment. *Id.* " '[E]ven if the judge was wrong, indeed very wrong ... that is not enough.' " *Id., quoting United States v. DiStefano,* 464 F.2d 845, 850 (2d Cir.1972).

In considering the merits, we do not address the question of whether the memorandum actually constituted attorney work product. The record does not state that the district judge conducted an *in camera* review of the memorandum to determine whether it was indeed work product. Believing the question of waiver dispositive of the motion, the district court stated that "[t]he present motion involves only whether the protection of the work-product doctrine has been waived as to the Memorandum, not whether the protection ever existed." A66. The record indicates that in the district court, plaintiffs did not dispute the fact that the memorandum constituted attorney work product. *See id.* Since the issue was not raised in the district court, we accept the district court's assumption that the memorandum includes the mental impressions, conclusions, opinions, or legal theories of an attorney within the meaning of Fed.R.Civ.P. 26(b)(3).

[4] The district court found that Steinhardt had disclosed the work product to an adversary, and that the disclosure was voluntary. A65. The district court then held, as a matter of law, that the voluntary disclosure waived the privilege in this subsequent civil suit. The district court followed the analysis of the *Westinghouse* and *In re Subpoenas Duces Tecum* opinions that the policy considerations behind the work product doctrine do not merit the creation of an exception to the waiver rule. A69.

The district court's finding that Steinhardt voluntarily disclosed the memorandum to an adversary was not erroneous. The court correctly concluded that Steinhardt disclosed the memorandum voluntarily. The declarations submitted by Steinhardt in connection with the motion to compel do not allege that the SEC coerced or required compliance in any way. This case is therefore distinguishable from situations in which disclosure to an adversary is only obtained through compulsory legal process. *See generally, In re Subpoenas Duces Tecum,* 738 F.2d at 1373.

We agree with the district court's conclusion that the SEC stood in an adversarial position to Steinhardt when it requested assistance. *See e.g., Westinghouse,* 951 F.2d at 1428; *In re Subpoenas Duces Tecum,* 738 F.2d at 1372. This was not a case in which a party complied with a benign request to assist the SEC in performing its routine regulatory duties. The determinative fact in analyzing the adversarial nature of the relationship is that Steinhardt knew that it was the subject of an SEC investigation, and that the memorandum was sought as part of this investigation.

The fact that the request came from the SEC's Enforcement Division further supports the conclusion that this was an adversarial relationship. Even though the SEC's investigation has not resulted in any formal enforcement proceedings against Steinhardt, the presence of an adversarial relationship does not depend on the existence of litigation. Additionally, the fact that Steinhardt cooperated voluntarily does not transform the relationship from adversarial to friendly.

[5] Given these findings of fact by the district court, we now turn to its holding that voluntary disclosure to the SEC waived the privilege as a matter of law. The logic behind the work product doctrine is that opposing counsel should not enjoy free access to an attorney's thought processes. *Hickman v. Taylor,* 329 U.S. 495, 511, 67 S.Ct. 385, 1958, 91 L.Ed. 451 (1947); *In the Matter of Grand Jury Subpoenas,* 959 F.2d 1158, 1166–67 (2nd Cir.1992). An attorney's protected thought processes include preparing legal theories, planning litigation strategies and trial tactics, and sifting through information. *See Hickman,* 329 U.S. at 511, 67 S.Ct. at 1958. "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles,* 422 U.S. 225, 238, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975). "[T]he doctrine grants counsel an opportunity to think or prepare a client's case without fear of intrusion by an adversary." ***235** *In re Six Grand Jury Witnesses,* 979 F.2d 939, 944 (2d Cir.1992), *cert. denied,* 509 U.S. 905, 113 S.Ct. 2997, 125 L.Ed.2d 691 (1993).

[6] **[7]** Common sense and the practicalities of litigation define the limits of the work product doctrine. *Nobles,* 422 U.S. at 238, 95 S.Ct. at 2170. Once a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears. Courts therefore accept the waiver doctrine as a limitation on work product protection. The waiver doctrine provides that voluntary disclosure of work product to an adversary waives the privilege as to other parties. *See Nobles,* 422 U.S. at 239, 95 S.Ct. at 2170; *In re John Doe Corp.,* 675 F.2d 482, 489 (2d Cir.1982).

Steinhardt relies on the Eighth Circuit's opinion in *Diversified* for the proposition that voluntary disclosure of privileged material to an investigatory government agency does not waive the privilege as to subsequent private litigants. The en banc opinion in *Diversified* addressed this question in the context of the attorney-client privilege, rather than in the context of the work product doctrine. *See Diversified,* 572 F.2d at 611 n. 4. This is not fatal to Steinhardt's argument, since much of the reasoning in *Diversified* has equal, if not greater, applicability in the context of the work product doctrine.

Examination of conflicting authority and of the purposes of the work product doctrine convinces us that Steinhardt waived any work product protection by voluntarily submitting the memorandum to the SEC. The *Diversified* opinion based its "selective waiver" theory on the policy consideration that if voluntary disclosure to the SEC waives privilege as to subsequent private litigants, parties might be discouraged from cooperating with governmental investigations. *Id.; see also Byrnes,* 85 F.R.D. at 688–89. Corporations might also hesitate before initiating an independent investigation of wrongdoing within the corporation when asked to by government authorities. *Diversified,* 572 F.2d at 611.

However, the Supreme Court has rejected attempts to use "the work-product doctrine to sustain a unilateral testimonial use of work-product materials...." *Nobles,* 422 U.S. at 239–40, 95 S.Ct. at 2170–71. We have previously denied a claim of privilege after a claimant decided to selectively disclose confidential materials in order to achieve other beneficial purposes. *In re John Doe Corp.,* 675 F.2d at 489. Similarly, we now reject Steinhardt's attempt to use the doctrine to sustain the unilateral use of a memorandum containing counsel's legal theories voluntarily submitted to an investigatory body.

The D.C. Circuit rejected the selective waiver theory, in part based on the perception that the selective waiver doctrine allows a party to manipulate use of the privilege through selective assertion. *Permian Corp. v. United States,* 665 F.2d 1214, 1221 (D.C.Cir.1981). We agree that selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage. The *Permian* court noted that the basis for the attorney-client privilege is that frank communication between attorney and client will be fostered by confidentiality, and that the "privilege ceases when the client does not appear to have been desirous of secrecy.... Voluntary cooperation with government investigations may

be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship." *Id.* at 1220–21. "The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." *Id.* at 1221. Although *Permian* was limited to a discussion of the attorney-client privilege, the D.C. and Third Circuits applied similar reasoning to work product in *In re Sealed Case,* 676 F.2d 793 (D.C.Cir.1982), and *Westinghouse Elec. Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3rd Cir.1991), respectively.

Voluntary disclosure is generally made because a corporation believes that there is some benefit to be gained from disclosure. *See generally,* James D. Cox, *Insider Trading Regulation and the Production of Evidence,* 64 Wash.U.L.Q. 421 (1986) (analyzing market incentives for disclosure of positive ***236** and negative information). The SEC's amicus brief argues convincingly that the protection of privilege is not required to encourage compliance with SEC requests for cooperation with investigations. *See* Amicus Brief of SEC at 20–25. The SEC has continued to receive voluntary cooperation from subjects of investigations, notwithstanding the rejection of the selective waiver doctrine by two circuits and public statements from Directors of the Enforcement Division that the SEC considers voluntary disclosures to be discoverable and admissible. *See id.* at 3, 20–25; SEC Form 1662.

The D.C. Circuit recognizes that a corporation has substantial incentives to cooperate with SEC requests for assistance. Voluntary cooperation offers a corporation an opportunity to avoid extended formal investigation and enforcement litigation by the SEC, the possibility of leniency for prior misdeeds, and an opportunity to narrow the issues in any resulting litigation. *In re Subpoenas Duces Tecum,* 738 F.2d at 1369; *In re Sealed Case,* 676 F.2d at 801; *see In re Worlds of Wonder Securities Litigation,* 147 F.R.D. 208, 213 (N.D.Cal.1992). These incentives exist regardless of whether private third party litigants have access to attorney work product disclosed to the SEC. "When a corporation elects to participate in a voluntary disclosure program like the SEC's, it necessarily decides that the benefits of participation outweigh the benefits of confidentiality.... It forgoes some of the traditional protections of the adversary system in order to avoid some of the traditional burdens that accompany adversary resolution of disputes, especially disputes with such formidable adversaries as the SEC." *In re Subpoenas Duces Tecum,* 738 F.2d at 1372; *quoting* *In re Sealed Case,* 676 F.2d at 822–23.

Petitioner alleges that a denial of the petition will present those in similar situations with a Hobson's choice between waiving work product protection through cooperation with investigatory authorities, or not cooperating with the authorities. Whether characterized as forcing a party in between a Scylla and Charybdis, a rock and a hard place, or some other tired but equally evocative metaphoric cliché, the "Hobson's choice" argument is unpersuasive given the facts of this case. An allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine.

[8] In denying the petition, we decline to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection. Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis. *Upjohn Co. v. United States,* 449 U.S. 383, 396, 101 S.Ct. 677, 686, 66 L.Ed.2d 584 (1981); *see In re Six Grand Jury Witnesses,* 979 F.2d at 944 (work product doctrine to be applied in a common sense manner in light of reason and experience as determined on a case-by-case basis). Establishing a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials. *See* *In re Sealed Case,* 676 F.2d at 817 (work product protection only waived if privileged material is disclosed to a party who doesn't share such common interests); *In re LTV Securities Litigation,* 89 F.R.D. 595, 614–15 (N.D.Tex.1981) (SEC and corporation shared interest in analyzing facts and legal theories upon appointment of an independent special investigatory officer by consent decree).

Conclusion

At the time of the submission of the memorandum to the Enforcement Division, the SEC and Steinhardt stood in an adversarial position. Steinhardt's voluntary submission of

the memorandum to the Enforcement Division waived the protections of the work product doctrine as to subsequent civil litigants seeking the memorandum from Steinhardt.

The petition is denied and the stay is lifted.

All Citations

9 F.3d 230, 62 USLW 2318, Fed. Sec. L. Rep. P 97,818, 27 Fed.R.Serv.3d 726

Footnotes

1 The Honorable Charles H. Tenney, Senior United States District Judge for the Southern District of New York, sitting by designation.

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United States District Court,
S.D. New York.

Perry A. GRUSS, Plaintiff,
v.
Daniel B. ZWIRN, D.B. Zwirn & CO., L.P., and D.B. Zwirn Partners, L.L.C., Defendants.

No. 09 Civ. 6441(PGG)(MHD).
|
July 10, 2013.

MEMORANDUM OPINION & ORDER

PAUL G. GARDEPHE, District Judge.

***1** This is a defamation, breach of contract, and promissory estoppel action brought by Plaintiff Perry A. Gruss against Defendants D.B. Zwirn & Co., L.P.; D.B. Zwirn Partners, LLC (collectively, the "Zwirn Entities"); and Daniel B. Zwirn. (Dkt. No. 1 (Complaint)) Gruss was formerly Chief Financial Officer of, and a partner in, D.B. Zwirn & Co., L.P. and its predecessor company. Zwirn is the Chief Executive Officer and managing partner of the Zwirn Entities. (Cmplt.¶ 8)

Pending before the Court is Gruss's objection—brought under Federal Rule of Civil Procedure 72(a)—to Magistrate Judge Dolinger's July 14, 2011 order (the "Order") denying Gruss's motion to compel production of certain interview notes and summaries that Defendants claim are protected by the attorney-client privilege and work-product doctrine. For the reasons set forth below, Judge Dolinger's July 14, 2011 Order will be reversed to the extent that it holds that Defendants did not waive the attorney-client privilege and work product protection as to attorney notes and summaries of interviews, excerpts of which were voluntarily supplied to the Securities and Exchange Commission.

BACKGROUND

In 2006, Defendants operated several hedge funds holding billions of dollars in assets. In the summer of 2006, it came to light that investor funds had been used to purchase Zwirn's Gulfstream IV jet and that the Zwirn Entities had collected management fees from investor funds before they were due. (Cmplt.¶¶ 1–2, 25–29) The Zwirn Entities hired Schulte, Roth and Zabel, LLP to conduct an internal investigation regarding these financial irregularities. (Cmplt.¶ 30) Schulte Roth attorneys interviewed employees of the Zwirn Entities, including Gruss and Zwirn, and drafted summaries of these interviews. *Gruss v. Zwirn,* 276 F.R.D. 115, 122 (S.D.N.Y.2011). Gruss was ultimately blamed for the financial irregularities and resigned in the fall of 2006. *Id.;* (Cmplt.¶¶ 31–33).

In October 2006, Zwirn contacted investors in the Zwirn Entities' hedge funds and other stakeholders in the Zwirn Entities to inform them of Gruss's resignation. *Gruss,* 276 F.R.D. at 122; (Cmplt.¶ 34). In these communications, Zwirn relied on talking points prepared by Schulte Roth. *Gruss,* 276 F.R.D. at 122.

Defendants later hired Gibson, Dunn and Crutcher LLP to conduct a second internal investigation regarding the financial irregularities, and to notify the SEC of those irregularities and of the firm's findings. (Cmplt.¶ 39) Gibson Dunn made presentations to the SEC concerning these matters on January 9 and March 20, 2007. *See Gruss,* 276 F.R.D. at 122–23. The Commission subsequently commenced its own investigation of the Zwirn Entities. *Id.* at 123; (Cmplt.¶ 41). Defendants' disclosures to the SEC were entirely voluntary, and were not in response to a subpoena or any sort of investigative demand.

After Gibson Dunn completed its investigation, Zwirn disclosed the financial irregularities and the internal investigations to investors in the Zwirn Entities. *Gruss,* 276 F.R.D. at 123. In these disclosures, Zwirn blamed Gruss for the irregularities and absolved himself of any responsibility. *Id.;* (Cmplt.¶¶ 34–56).

***2** In the Complaint, Gruss asserts that Zwirn's statements to investors were false and defamatory. (Cmplt.¶¶ 65–84) In particular, Gruss asserts that Zwirn misrepresented the results of Schulte Roth's investigation, which " 'concluded that Harold Kahn, the Chief Operating Officer of the Zwirn Entities, was at a minimum willfully blind to both the use of investor funds for Zwirn's private jet *and* the early taking of management fees.' " (*Id.* (quoting Oct. 12, 2010 Pltf. Br. 3)) The Complaint also includes breach of contract and

promissory estoppel claims in which Gruss asserts that he is owed several million dollars under the partnership agreement. (Cmplt.¶¶ 57–64, 85–96)

Defendants produced a number of documents regarding the Schulte Roth and Gibson Dunn internal investigations during discovery, including (1) a Schulte Roth memorandum dated September 11, 2006, which describes the firm's findings; (2) talking points generated by Schulte Roth for Zwirn's communications with hedge fund investors regarding Gruss's resignation; (3) Gibson Dunn PowerPoint presentations that the firm used in reporting its findings to the SEC on January 9 and March 20, 2007; (4) a second set of talking points, also generated by Schulte Roth, for Zwirn's further communications with investors regarding the financial irregularities and the internal investigations; and (5) a March 26, 2007 memorandum from the Zwirn Entities—concerning Gibson Dunn's findings—that the Zwirn Entities issued to investors. *Gruss,* 276 F.R.D. at 123.

The Gibson Dunn PowerPoint presentations to the SEC purport to set forth summaries of what twenty-one witnesses told Gibson Dunn and Schulte Roth. (Oct. 12, 2010 Brecher Aff., Exs. F, G) Gibson Dunn's presentations to the Commission are governed by a November 14, 2006 agreement entered into by Fried, Frank, Harris, Shriver & Jacobson LLP—Defendants' regulatory counsel—and the SEC. (Oct. 26, 2010 O'Brien Decl., Ex. H) That agreement reads as follows:

> Our firm represents D.B. Zwirn & Co. L.P. ("DBZ") and in connection with that representation we contacted the Staff of the U.S. Securities and Exchange Commission (the "Staff") on October 30, 2006. As a result of that call, a meeting is scheduled with the Staff of the Northeast Regional Office on November 15, 2006. This letter is written to set forth the understandings between the Staff and DBZ with respect to that meeting.
>
> On or about October 16, 2006, DBZ retained Gibson, Dunn & Crutcher LLP ("Gibson Dunn") to commence an investigation into certain issues at DBZ. In connection with this matter, Schulte Roth & Zabel LLP ("Schulte Roth") previously reviewed certain issues at DBZ currently under investigation by Gibson Dunn. Fried, Frank, Harris, Shriver & Jacobson LLP is representing DBZ in connection with the subject matter of the investigation and in any litigation or other matters arising out of the investigation, including regulatory interaction. In light of the interest of the Staff in determining whether there have been any violation of the federal securities laws, and DBZ's interest in investigating and analyzing the circumstances and people involved in the events at issue, DBZ will provide an oral briefing by the above counsel to the Staff on November 15, 2006 and in the future at agreed upon intervals (the "Briefings"). In the course of the Briefings, it is anticipated that counsel for DBZ, including Schulte Roth and Gibson Dunn, may discuss and disclose, among other things, matters that are subject to DBZ's attorney-client privilege or to work product protection ("Protected Materials").
>
> ***3** Please be advised that by providing or disclosing the Protected Materials to the Staff pursuant to this agreement, DBZ does not intend to waive the protection of the attorney-work product doctrine, attorney-client privilege, or any other privilege applicable as to third parties. DBZ believes that the Protected Materials are protected by, at minimum, the attorney work product doctrine and the attorney client privilege. DBZ believes that the Protected Materials warrant protection from disclosure.
>
> The Staff will maintain the confidentiality of the Protected Materials pursuant to this agreement and will not disclose them to any third party, except to the extent that the Staff determines that disclosure is required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities.
>
> The Staff will not assert that the disclosure of the Protected Materials constitutes a waiver of the protection off the attorney work product doctrine, the attorney-client privilege, or any other privilege applicable as to any third party. The Staff agrees that disclosure of the Protected Materials provides the Staff with no additional grounds to subpoena testimony, documents or other privileged materials from DBZ, although such grounds that may exist apart from such discussions shall remain unaffected by this agreement.
>
> The Staff's agreement to the terms of this letter is signified by your signature on the line provided below.

(*Id.*)

After receiving the PowerPoint presentations and the other documents listed above in discovery, Gruss sought production of attorneys' notes and summaries of all witness interviews conducted by Schulte Roth and Gibson Dunn attorneys

during their respective investigations. *Gruss,* 276 F.R.D. at 123–24. Defendants opposed Plaintiff's discovery requests, claiming that the notes and summaries are protected by the attorney-client privilege and the work-product doctrine. *Id.* at 124. Plaintiff subsequently moved to compel production of these materials under Federal Rule of Civil Procedure 37. *Id.*

The Magistrate Judge's Decision

This Court referred the parties' discovery dispute to Magistrate Judge Dolinger on November 10, 2010. (Dkt. No. 30) On July 14, 2011, Judge Dolinger issued an order denying Plaintiff's motion to compel. *Gruss,* 276 F.R.D. 115, (Dkt. No. 37).

In a thorough and scholarly opinion, Judge Dolinger made a number of rulings that Plaintiff has not challenged, including the following:

1. the notes and summaries of interviews prepared by Gibson Dunn and Schulte Roth are protected by the attorney-client privilege (*id.* at 125);

2. to the extent that the witness interview notes and summaries contain opinion work product, they are protected by the work-product privilege (*id.* at 129); and

3. Plaintiff has not made a sufficient showing to justify discovery of the opinion work product contained in the interview notes and summaries. *Id.* at 131.

***4** Judge Dolinger also addressed Plaintiff's argument that Defendants had waived the attorney-client privilege and work product protection as to the witness interview notes and summaries by making " 'selective use of [these] privileged materials' "—quoting certain portions of the interview notes and summaries—in their presentations to the SEC. *Id.* at 132 (quoting Oct. 12, 2010 Pltf. Br. 16).

In considering Plaintiff's waiver argument, Judge Dolinger began by noting that

> [t]he attorney-client privilege and work-product immunity may be waived by selective disclosure of only part of a protected communication or document, since a party "may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications."

Id. at 140 (quoting *Deutsche Bank Trust Co. of Ams. v. Tri–Links Inv. Trust,* 43 A.D.3d 56, 64, 837 N.Y.S.2d 15 (1st Dept.2007). Judge Dolinger further noted that, in such circumstances, the privilege is waived and work product protection is lost both as to the adversary to whom the selective disclosure was made (*id.* at 141, 837 N.Y.S.2d 15 (citing *SEC v. Beacon Hill Asset Mgmt. LLC,* 231 F.R.D. 134, 143 (S.D.N.Y.2004); *In re Kidder Peabody Secs. Litg.,* 168 F.R.D. 459, 472 (S.D.N.Y.2000)), and as to third parties. *Id.* (citing *In re Steinhardt Partners, L.P.,* 9 F.3d 230, 235–36 (2d Cir.1993).

Judge Dolinger also acknowledged, however, that the Second Circuit has suggested, in *dicta,* that waiver might not be found where " 'the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials,' " (*id.* (quoting *Steinhardt,* 9 F.3d at 236)), and noted that "defendants' limited disclosures to the SEC were pursuant to an express confidentiality agreement, which reserved the application of the attorney-client and work-product privileges." *Id.* at 142 (citing O'Brien Decl., Ex. H). Judge Dolinger further noted that: (1) Defendants had not "voluntarily disclosed part or all of the interview notes and summaries to any ... actual or potential adversary [other than the SEC]"; and (2) that Plaintiff sought the disclosure not of the materials given to the SEC, but rather the witness interview notes and summaries underlying the Powerpoint presentations made to the SEC. *Id.* "Given the existence of defendants' confidentiality agreement with the SEC and the absence of any other circumstances arguing in favor of a subsequent waiver," Judge Dolinger found that "defendants' disclosures to the SEC [do not constitute] a waiver of the privilege in the undisclosed portions of the interview notes and summaries as to plaintiff." *Id.*

On July 27, 2011, Plaintiff objected to that portion of Judge Dolinger's Order holding that "Defendants did not waive any privileges associated with the Gibson Dunn and Schulte Roth interview notes and summaries when they produced the findings of these firms' investigations—including portions of the substance of the interview notes and summaries in the form of witness statements—to the Securities and Exchange Commission." (July 27, 2011 Pltf. Br. (Dkt. No. 38) at 1)

Plaintiff's submissions state, however, that he is seeking only "factual interview notes reflecting the statements made by the witness[es]," and that Plaintiff is not seeking disclosure of the interview notes and summaries that disclose "counsels' opinion or analytical process." *See* Aug. 26, 2011 Pltf. Reply Br. 1 n. 1; July 27, 2011 Pltf. Br. 11.

DISCUSSION

I. *STANDARD OF REVIEW*

***5** Pretrial discovery matters, "including those regarding privilege issues, are nondispositive matters." *Eisai Ltd. v. Dr. Reddy's Labs., Inc.,* 406 F.Supp.2d 341, 342 (S.D.N.Y.2005) (citing *Tompkins v. R.J. Reynolds Tobacco Co.,* 92 F.Supp.2d 70, 74 (N.D.N.Y.2000)). Under Federal Rule of Civil Procedure 72, "[w]hen a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide.... [t]he district judge ... must consider timely objections [to the magistrate judge's decision] and modify or set aside any part of the order that is clearly erroneous or contrary to law." Fed.R.Civ.P. 72(a).

A ruling is "clearly erroneous" where, "although there is evidence to support it, the reviewing court ... is left with the definite and firm conviction that a mistake has been committed." *United States v. Chowdhury,* 639 F.3d 583, 585 (2d Cir.2011) (citing *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)); *see also Ritchie Risk–Linked Strategies Trading (Ireland), Ltd. v. Coventry First LLC,* 282 F.R.D. 76, 78 (S.D.N.Y.2012) (" 'The reviewing court must be left with the definite and firm conviction that a mistake has been committed to overturn the magistrate judge's resolution of a nondispositive matter.' ") (quoting *AMBAC Fin. Servs., LLC v. Bay Area Toll Auth.,* No. 09 Civ. 7062(RJH), 2010 WL 4892678, at *2 (S.D.N.Y. Nov.30, 2010)). "An order is 'contrary to law' when it 'fails to apply or misapplies relevant statutes, case law or rules of procedure.' " *WestLB AG v. BAC Fla.D Bank,* No. 11 Civ. 5398(LTS)(AJP), 2012 WL 3135773, at *3 (S.D.N.Y. Aug. 2, 2012) (quoting *Collens v. City of N.Y.,* 222 F.R.D. 249, 251 (S.D.N.Y.2004)).

"Magistrate judges are given broad latitude in resolving discovery disputes, including questions of privilege." *Thompson v. Keane,* No. 95 Civ. 2442(SHS)(AJP), 1996 WL 229887, at * 1 (S.D .N.Y. May 6, 1996) (citing *Alpex Computer Corp. v. Nintendo Co., Ltd.,* No. 86 Civ. 1740(KMW), 1992 WL 51534, at * 1 (S.D.N.Y. Mar.10, 1992)). "Courts in this Circuit have held that a magistrate's ruling on a discovery dispute should be overturned only for an abuse of discretion." *Arista Records LLC v. Lime Group LLC,* No. 06 Civ. 5936(KMW), 2011 WL 781198, at *2 (S.D.N.Y. Mar.4, 2011) (citing *Edmonds v. Seavey,* No. 08 Civ. 5646(HB), 2009 WL 2150971, at *2 (S.D.N.Y. July 20, 2009) (noting that the fact that "reasonable minds may differ on the wisdom of granting [a party's] motion is not sufficient to overturn a magistrate judge's decision")).

II. *THE SELECTIVE WAIVER DOCTRINE*

The Second Circuit has not issued a precedential decision addressing the question posed by Gruss's appeal: whether voluntary disclosure of privileged documents to a governmental agency such as the SEC constitutes a waiver of the privilege as to underlying documents and vis-à-vis third parties, where the disclosing party and the governmental agency entered into the type of confidentiality agreement at issue here. The Court will first address the origin and current viability of the "selective waiver" doctrine, and then address the effect of the agreement entered into by Defendants and the SEC.

A. *Origin and Viability of the Selective Waiver Doctrine*

***6** The leading case for "selective waiver"—in the context of attorney-client privilege—is *Diversified Industries, Inc. v. Meredith,* 572 F.2d 596 (8th Cir.1978) (*en banc*). In that case, Diversified had provided the documents at issue—memoranda of employee interviews conducted by outside counsel—to the SEC in response to a subpoena. *Diversified,* 572 F.2d at 599, 601. A third party sought these memoranda in a subsequent tortious interference and antitrust litigation. *Id.* at 600. The Eighth Circuit concluded that "[a]s Diversified disclosed these documents in a separate and nonpublic SEC investigation ... only a limited waiver of the [attorney-client] privilege occurred." *Id.* at 611. The court noted that "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." *Id.*

The reasoning of the *Diversified* court—on which the selective waiver doctrine is premised—has been uniformly

rejected by the Courts of Appeal, including by the Second Circuit in *In re Steinhardt Partners, L.P.,* 9 F.3d 230 (2d Cir.1993).

B. *The Second Circuit's Steinhardt Decision*

In *Steinhardt,* the SEC was investigating allegations of wrongdoing in the market for Treasury notes, and asked Steinhardt's counsel to "submit a memorandum that would address the facts and issues involved in the case and discuss the relevant legal theories." *Steinhardt,* 9 F.3d at 232. Counsel prepared a submission that apparently persuaded the SEC not to bring an enforcement action. *Id.* The submission was provided to the SEC with no agreement as to confidentiality. Several parties in a related class action later sought production of these materials. *Id.*

The Second Circuit found that the memorandum and its exhibits had been submitted voluntarily to the SEC, and that Steinhardt was in an adversarial posture with the SEC at that time. *Id.* at 234. In making this finding, the court noted that "the presence of an adversarial relationship does not depend on the existence of litigation," and "the fact that Steinhardt cooperated voluntarily does not transform the relationship from adversarial to friendly." *Id.*

The court then turned to the issue of whether Steinhardt's voluntary disclosure of its counsel's memorandum to the SEC resulted in a waiver of work-product protection.

> The logic behind the work product doctrine is that opposing counsel should not enjoy free access to an attorney's thought processes. An attorney's protected thought processes include preparing legal theories, planning litigation strategies and trial tactics, and sifting through information.... Common sense and the practicalities of litigation define the limits of the work product doctrine. *Once a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears.* Courts therefore accept the waiver doctrine as a limitation on work product protection. *The waiver doctrine provides that voluntary disclosure of work product to an adversary waives the privilege as to other parties.*

***7** *Id.* at 234–35 (emphasis added and citations omitted).

The court went on to find that "Steinhardt waived any work product protection by voluntarily submitting the memorandum to the SEC." *Id.* at 235. In doing so, the Circuit explicitly rejected the reasoning of *Diversified:*

> The *Diversified* opinion based its "selective waiver" theory on the policy consideration that if voluntary disclosure to the SEC waives privilege as to subsequent private litigants, parties might be discouraged from cooperating with governmental investigations....
>
> However, the Supreme Court has rejected attempts to use the work-product doctrine to sustain a unilateral testimonial use of work-product materials. [And w]e have previously denied a claim of privilege after a claimant decided to selectively disclose confidential materials in order to achieve other beneficial purposes. Similarly, we now reject Steinhardt's attempt to use the doctrine to sustain the unilateral use of a memorandum containing counsel's legal theories voluntarily submitted to an investigatory body.

Id. (internal quotation and citations omitted).

In finding that work product protection had been waived, the Second Circuit emphasized that "selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage." *Id.* The court also noted that those waiving such protection generally do not do so for altruistic reasons: "[v]oluntary disclosure is generally made because a corporation believes that there is some benefit to be gained from disclosure.... Voluntary cooperation offers a corporation an opportunity to avoid extended formal investigation and enforcement litigation by the SEC, the possibility of leniency for prior misdeeds, and an opportunity to narrow the issues in any resulting litigation." *Id.* at 235–36.

Nevertheless, the *Steinhardt* court "decline[d] to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection":

> Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis. Establishing a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.

Id. at 236 (citations omitted).

In sum, in *Steinhardt,* the Second Circuit held that a party's voluntary submission to a governmental agency in an adversarial posture of a document containing attorney work product waives work product protection in that document. [1] The court suggested in *dicta* that a different outcome might be appropriate where the disclosing party and the government shared a common interest, or where the government agency had explicitly agreed to maintain the disclosed materials as confidential.

III. *WHETHER DEFENDANTS' CONFIDENTIALITY AGREEMENT WITH THE SEC PROTECTS THE ATTORNEY NOTES AND SUMMARIES OF WITNESS INTERVIEWS FROM DISCLOSURE*

***8** There is no question here that the relationship between Defendants and the SEC was adversarial, regardless of the fact that the disclosures were voluntary. Defendants do not contend otherwise. It is clear that they self-reported the financial irregularities to the SEC in order to escape or limit liability. Indeed, the confidentiality agreement on which Defendants rely recites that the SEC is engaged in an investigation designed to "determin[e] whether there have been any violations of the federal securities laws...." (O'Brien Decl., Ex. H) Under such circumstances, an adversarial relationship exists. *See, e.g.,* *Steinhardt,* 9 F.3d at 234 ("The determinative fact in analyzing the adversarial nature of the relationship is that Steinhardt knew that it was the subject of an SEC investigation.... Even though the SEC's investigation has not resulted in any formal enforcement proceedings against Steinhardt, the presence of an adversarial relationship does not depend on the existence of litigation.... Additionally, the fact that Steinhardt cooperated voluntarily does not transform the relationship from adversarial to friendly.")

Under *Steinhardt* and its progeny, when a party provides documents to a government adversary under such circumstances, it ordinarily waives both attorney-client privilege and work product protection as to those documents. Perhaps in recognition of these precedents, Defendants produced in discovery the materials they supplied to and used during their presentations to the SEC. Defendants argue, however, that a different outcome is required as to the attorney notes and summaries of witness interviews underlying their presentations to the SEC, even though they presented excerpts of these witness interviews to the SEC. Defendants contend that these attorney notes and summaries are protected from disclosure because of their confidentiality agreement with the SEC. [2] (Aug. 10, 2011 Def. Br. 7–12)

A. *Steinhardt*

The *Steinhardt* court suggested in *dicta* that the presence of a confidentiality agreement between the disclosing party and the government agency might affect the waiver analysis. The court had no occasion to address the sort of confidentiality agreement that might affect the waiver analysis, of course, because Steinhardt had no confidentiality agreement of any sort with the SEC.

The confidentiality agreement at issue here provides no meaningful protection to Defendants because—in essence—it grants the SEC discretion to disclose the submitted materials whenever it chooses. The agreement provides that

> [t]he [SEC] Staff will maintain the confidentiality of the Protected Materials pursuant to this agreement and will not disclose them to any third party, except to the extent that the Staff determines that disclosure is required by law or *would be in furtherance of the Commission's discharge of its duties and responsibilities.*

(O'Brien Decl., Ex. H) (emphasis added). In giving the SEC unfettered discretion to disclose the allegedly protected materials whenever it decides that disclosure "would be in furtherance of the Commission's discharge of its duties and responsibilities," the agreement provides for an exception that swallows the rule. *See In re Stone Energy Corp.,* No. 05–2088, 2008 WL 4868086, at *6 (W.D.La. Nov.4, 2008) ("the confidentiality agreement between Stone and the SEC gave the SEC broad discretion to disclose the documents 'in furtherance of the Commission[ ]'s discharge of its duties and responsibilities,' and therefore gave little expectation of privacy to Stone") Where one party to a contract has, as here, "the unilateral right to cancel," the agreement is illusory. *See, e.g .,* *Dorman v. Cohen,* 66 A.D.2d 411, 415, 413 N.Y.S.2d 377 (1st Dept.1979). There is no reason to believe that the *Steinhardt* court intended that an illusory agreement of the sort at issue here—essentially a fig leaf that permits the producing party to claim, as to third parties, that attorney-client privilege and work product protection are preserved—would justify setting aside the standard rule that materials provided to an adversary lose attorney-client privilege and work product protection. A contrary finding would exalt form over substance.

B. *Other Circuit Authority Concerning the Effect of Confidentiality Agreements with Government Agencies*

***9** At least in the context of precedential decisions, the Courts of Appeal have uniformly rejected the argument that a producing party can preserve the attorney-client privilege and work product protection as to documents produced to an adverse government agency through use of a confidentiality agreement.

In *In re Pacific Pictures Corporation,* 679 F.3d 1121 (9th Cir.2012), for example, the Ninth Circuit—relying in part on the reasoning of *Steinhardt*—observed that

> Petitioners have provided no convincing reason that *post hoc* contracts regarding how information may be revealed encourage frank conversation at the time of the advice. Indeed, as the Sixth Circuit has noted, while this approach "certainly protects the expectations of the parties to the confidentiality agreement, it does little to serve the 'public ends' of adequate legal representation that the attorneyclient privilege is designed to protect." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.,* 293 F.3d 289, 303 (6th Cir.2002). Instead, recognizing the validity of such a contract "merely [adds] another brush on an attorney's palette [to be] utilized and manipulated to gain tactical or strategic advantage." *Steinhardt,* 9 F.3d at 235. And it would undermine the public good of promoting an efficient judicial system by fostering uncertainty and encouraging litigation.

In re Pacific Pictures Corp., 679 F.3d at 1128–29 (quoting *Steinhardt,* 9 F.3d at 235) (other citations omitted). The court went on to hold that the attorney-client privilege had been waived as to documents produced to the U.S. Attorney's Office, despite the existence of a confidentiality agreement. *Id.* at 1129.

The Sixth Circuit has also rejected the argument that a confidentiality agreement preserves attorney-client privilege and work product protection as to materials disclosed to an adverse government agency. In *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation,* 293 F.3d 289 (6th Cir.2002), the Department of Justice ("DOJ") was investigating Columbia/HCA for Medicare and Medicaid fraud. *Id.* at 291. Columbia/HCA began negotiations with DOJ concerning a possible settlement of the fraud investigation and, in connection with those negotiations, produced to the Government internal audits of its Medicare patient records and related documents. *Id.* at 292. The disclosures were governed by a confidentiality agreement between Columbia/HCA and DOJ. *Id.* Private insurance companies subsequently sued Columbia/HCA and moved to compel production of the internal audits. *Id.* at 292–93. Columbia/HCA refused to produce these documents, arguing that disclosure to the DOJ had not waived the attorney-client privilege and work product protection, given the confidentiality agreement. *Id.* at 293.

In affirming the district court's order compelling Columbia/HCA to produce the documents, the Sixth Circuit ruled that both attorney-client privilege and work product protection had been waived in documents Columbia/HCA had provided to DOJ during the fraud investigation. *Id.* at 302–03, 306–07. The court also commented that the Government should not "assist in obfuscating the 'truth-finding process' by entering into such confidentiality agreements.... The investigatory agencies of the Government should act to bring to light illegal activities, not to assist wrongdoers in concealing the information from the public domain." *Id.* at 303.

***10** The law in the Third Circuit is the same. In *Westinghouse Electric Corporation v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir.1991), Westinghouse disclosed to the SEC and to DOJ certain documents generated by its outside counsel, which had conducted an internal investigation of allegations that Westinghouse had obtained contracts by bribing foreign officials. *Id.* at 1417. After concluding that Westinghouse was in an adversarial relationship visà-vis the SEC and DOJ—which were conducting an investigation of Westinghouse—the court noted that "a party who discloses documents protected by the work-product doctrine may continue to assert the doctrine's protection only when the disclosure furthers the doctrine's underlying goal." *Id.* at 1425, 1429. In holding that Westinghouse had waived both attorneyclient and work product protection for the documents it had produced to government agencies, the court noted that "[w]hen a party discloses protected materials to a government agency investigating allegations against it, it uses those materials to forestall prosecution (if the charges are unfounded) or to obtain lenient treatment (in the case of well-founded allegations). These objectives, however rational, are foreign to the objectives underlying the work-product doctrine." *Id.* at 1429. Rather than promoting the goals of the work-product doctrine, the Third Circuit reasoned that "[c]reating an exception for disclosures to government agencies may actually hinder the operation of the work-product doctrine. If internal investigations are undertaken with an eye to later disclosing the results to a government agency, the outside counsel conducting the investigation may hesitate to pursue unfavorable information or legal theories about the corporation." *Id.* at 1429–30.

The Third Circuit found that DOJ's agreement not to disclose the information did not preserve either the attorney-client privilege or work product protection vis-à-vis third parties. As to attorney-client privilege, the court noted that "under traditional waiver doctrine a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else." *Id.* at 1427. As to work product, the court held that the confidentiality agreement did not preserve protection where Westinghouse had "deliberately disclosed work product to two government agencies investigating allegations against it." *Id.* at 1431; *see also* *id.* at 1430 ("We also reject Westinghouse's argument that it did not waive the work-product protection because it reasonably expected the agencies to keep the documents it disclosed to them confidential.").

Similarly, in *In re Qwest Communications International Inc.,* 450 F.3d 1179 (10th Cir.2006), the Tenth Circuit rejected a selective waiver argument, despite the presence of a confidentiality agreement governing disclosures to the SEC and DOJ. In reaching this result, the court noted that the confidentiality agreements gave the government broad discretion to disclose the purportedly protected material: "[t]he record does not support reliance on the Qwest agreements with the SEC and the DOJ to justify selective waiver.... [T]he confidentiality agreements gave the agencies broad discretion to use the Waiver Documents as they saw fit...." *Id.* at 1194; *see also* *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.,* 860 F.2d 844, 846–47 (8th Cir.1988) (disclosure of tape to class action plaintiffs during settlement discussions waived work-product protection as to the government, despite non-disclosure agreement with class action plaintiffs). [3]

* * * *

***11** In light of the consistent authority discussed above from a variety of circuit courts throughout the nation, this Court is left with the "definite and firm conviction" that—in finding no waiver—the magistrate judge was mistaken. *See Chowdhury,* 639 F.3d at 585.

As discussed above, while the *Steinhardt* court's *dicta* suggests that there may be circumstances in which privilege can be preserved through use of a confidentiality agreement, there is no evidence that the Second Circuit had in mind the type of illusory agreement entered into by Defendants here. In any event, *Steinhardt* is now nearly twenty years old, and more recent circuit court decisions have not permitted parties who produce documents to an adverse government agency to assert attorney-client privilege and work product protection as to those same documents when demanded by a third party in an unrelated litigation.

Moreover, strategic and manipulative use of the attorney-client privilege and work product doctrine has been explicitly rejected by the Second Circuit. As the *Steinhardt* court observed, "selective assertion of privilege should not be merely another brush on an attorney's palette, utilized

and manipulated to gain tactical or strategic advantage." *Steinhardt,* 9 F.3d at 235. In choosing to produce in discovery the presumably favorable witness interview excerpts shown to the SEC—while refusing to produce the witness summaries and notes from which the favorable excerpts were drawn—Defendants have manipulated their evidentiary privileges to serve their interests. *See* *Permian Corp. v. United States,* 665 F.2d 1214, 1221 (D.C.Cir.1981) ("[A] client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit .").

The reasons to reject selective, manipulative and strategic use of evidentiary privileges are numerous. As an initial matter, because all evidentiary privileges impede the truth-finding process, they must be narrowly construed. *See, e.g.,* *Trammel v. United States,* 445 U.S. 40, 50, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) ("Testimonial exclusionary rules and privileges contravene the fundamental principle that ' "the public ... has a right to every man's evidence." ' As such, they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' ") (citations omitted); *see also* *Westinghouse,* 951 F.2d at 1425 ("[B]ecause privileges obstruct the truth-finding process, the Supreme Court has repeatedly warned the federal courts to be cautious in recognizing new privileges.") (citing *Univ. of Penn. v. EEOC,* 493 U.S. 182, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990)).

Recognizing selective waiver requires an exceedingly broad construction of the attorney-client and work-product privileges amounting to the creation of "an entirely new privilege." *Westinghouse,* 951 F.2d at 1425. Recognition of such a new privilege is particularly inappropriate here, given that Congress "has declined broadly to adopt a new privilege to protect disclosures of attorney-client privileged materials to the government...." *Pacific Pictures,* 679 F.3d at 1128. The Supreme Court has been "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." *Univ. of Pennsylvania,* 493 U.S. at 189.

***12** Judge Dolinger also suggested that the outcome might be different if Defendants had made " 'repeated voluntary disclosures to adversarial parties.' " *Gruss,* 276 F.R.D. at 142 (quoting *In re Initial Public Offering Sec. Litig.,* 249 F.R.D. 457, 466 (S.D.N.Y.2008)). But the general rule is that a one-time voluntary disclosure of privileged documents to an adverse party is sufficient to destroy both the attorney-client privilege and work product protection. *See* *Steinhardt,* 9 F.3d at 235 ("Once a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears ."). [4]

Judge Dolinger also noted that this is not "a situation where —as in *In re [Initial Public Offering Securities Litigation]*— plaintiff seeks disclosure of the same materials already produced to other parties; instead, plaintiff seeks disclosure of additional documents underlying what was disclosed to the SEC." *Gruss,* 276 F.R.D. at 142. Defendants have not argued to this Court, however, that the attorney notes and summaries of witness interviews are protected from disclosure because only excerpts of these materials were disclosed to the SEC. In any event, the law is to the contrary.

As a general matter, when a party selectively discloses attorney-client communications to an adverse government entity, the privilege is waived not only as to the materials provided, but also as to the underlying source materials. *In re Kidder Peabody Securities Litigation,* 168 F.R.D. 459 (S.D.N.Y.1996) is illustrative. In that case, shareholders sought production of notes and summaries created by outside counsel for the defendant corporation when the attorneys interviewed the defendant's employees as part of an internal investigation into financial irregularities that gave rise to the litigation. 168 F.R.D. at 461–62. Defendant's counsel incorporated excerpts of these interviews into a draft report that was provided to the SEC as part of an effort to convince the Commission that the financial irregularities were "the work of one employee, acting alone." *Id.* at 462, 464, 468, 470–71. The court found that "[t]he submission of the draft report to the SEC at a time when the Commission was considering the question of who was responsible for the scandal suffices to waive any privilege for the underlying documents." *Id.* at 472; *see also* *In re Martin Marietta Corp.,* 856 F.2d 619, 623 (4th Cir.1988) (attorney-client privilege waived as to attorneys' notes of interviews where

interviews were incorporated into position paper provided to United States Attorney); *United States v. Treacy,* No. S208 Cr. 366(JSR), 2009 WL 812033, at *1–2 (S.D.N.Y. Mar. 24, 2009) (requiring production of attorney interview memoranda produced to government or conveyed in detailed oral presentations).

As with the attorney-client privilege, waiver of work product protection can occur where a party discloses the substance of attorney work product to a government entity. For example, in *Bank of America, N.A. v. Terra Nova Insurance Company,* 212 F.R.D. 166 (S.D.N.Y.2002), plaintiffs sought production of documents created by a consultant hired by defendant's counsel and voluntarily shared with two government agencies. *Id.* at 168. The documents were prepared by the consultant during an investigation into wrongdoing by one of defendant's employees. *Id.* The consultant and defendant's counsel orally presented the results of that investigation to the New York State Insurance Department and an Assistant United States Attorney. *Id.* The court held that, in making the presentation, the defendant had waived any work product privilege associated with the investigation, "be it the actual facts revealed to the government or the underlying documents upon which the presentation was based." *Id.* at 175. Accordingly, the court ordered the defendant to produce "any documents relating to the investigation that were in [the consultant's] possession as of [the date of the presentation to the governmental authorities,]" including but not limited to "any investigation documents actually given to the government agencies." *Id.; see also SEC v. Vitesse Semiconductor Corp.,* No. 10 Civ. 9239(JSR), 2011 WL 2899082, at *3 (S.D.N.Y. July 14, 2011) (holding that corporation waived work product protection for attorney's handwritten notes of interviews of corporation's employees by providing oral summary of interviews to SEC).

***13** The situation is analogous here. Excerpts of Defendants' attorneys' work product—the interview notes and summaries—were deliberately, voluntarily, and selectively disclosed to the SEC via the PowerPoint presentations. As a result, any work product protection associated with the factual portions of the interview notes and summaries was forfeited. Because Plaintiff does not seek disclosure of portions of the interview notes and summaries that constitute opinion work product, the Court does not reach the issue of whether Defendants' waiver extends to such material. *See* Fed.R.Civ.P. 26(b)(3)(B) ("If the court orders discovery of [work product] materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."); *see also Bank of Am.,* 212 F.R.D. at 175 (defendants waived "fact" but not "opinion" work product by presenting to government authorities the facts gathered during attorney-directed internal investigation); *In re Kidder Peabody Secs. Litig.,* 168 F.R.D. at 473 (ordering production of documents underlying final report prepared by attorney, but not materials deemed to "encompass core attorney mental processes").

CONCLUSION

For the reasons stated above, the magistrate judge's July 14, 2011 ruling is clearly erroneous in holding that no waiver occurred when Defendants disclosed portions of the interview notes and summaries to the SEC. Accordingly, the July 14,2011 is reversed to that extent. By July 17,2013, Defendants will produce for this Court's *in camera* inspection interview notes and summaries pertaining to the twenty-one witnesses whose statements were disclosed to the SEC. The Court will determine what portion of these documents constitutes opinion work product, and will order production of the rest.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 3481350

Footnotes

1 The Second Circuit's rejection of the selective waiver doctrine is consistent with the law throughout the nation. *See, e.g., In re Pacific Pictures Corp.,* 679 F.3d 1121, 1127–28 (9th Cir.2012) (rejecting selective waiver doctrine and reasoning of *Diversified* in context of attorneyclient privilege; noting that doctrine does not

encourage full disclosure to one's attorney, but rather encourages voluntary disclosure to the government, "thereby extending the privilege beyond its intended purpose" and essentially "creating an entirely new privilege" that Congress had not endorsed); *In re Qwest Commc'ns Int'l Inc.,* 450 F.3d 1179, 1195 (10th Cir.2006) (rejecting selective waiver doctrine in the context of both attorney-client privilege and work product where documents had been provided to SEC and DOJ; "the proposed exception would [not] promote the purposes of the attorney-client privilege or work-product doctrine ... [but] could have the opposite effect of inhibiting such communication [;][i]f officers and employees knew their employer could disclose privileged information to the government without risking a further waiver of attorney-client privilege, they may well choose not to engage the attorney or do so guardedly"; "selective waiver does little to further [the] purpose [of enabling counsel to prepare a case in privacy,] and in some cases, may instead encourage counsel to conduct investigations with an eye toward pleasing the government"); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.,* 293 F.3d 289, 302–03, 306–07 (6th Cir.2002) ("reject[ing] the concept of selective waiver, in any of its various forms[,]" including in the context of both the attorney-client privilege and work product doctrine; "[t]he attorney-client privilege was never designed to protect conversations between a client and the Government—*i.e.,* an adverse party—rather, it pertains only to conversations between the client and *his* or *her* attorney"; "attorneyclient privilege is a matter of common law right[,] ... not a creature of contract, arranged between parties to suit the whim of the moment"; "[o]ther than the fact that the initial waiver must be to an 'adversary,' there is no compelling reason for differentiating waiver of work product from waiver of attorney-client privilege[;] [m]any of the reasons for disallowing selective waiver in the attorney-client privilege context also apply to the work product doctrine"; "[e]ven more than attorney-client privilege waiver, waiver of the protections afforded by the work product doctrine is a tactical litigation decision"); *United States v. Mass. Inst. of Tech.,* 129 F.3d 681, 687 (1st Cir.1997) ("MIT's disclosure to the audit agency was a disclosure to a potential adversary. The disclosures did not take place in the context of a joint litigation where the parties shared a common legal interest.... The cases treat this situation as one in which the work product protection is deemed forfeit."); *Westinghouse Elec. Corp. v. Republic of Phil.,* 951 F.2d 1414, 1418, 1425, 1429 (3d Cir.1991) (holding that "by disclosing documents to the SEC and to the DOJ, Westinghouse waived both the attorney-client privilege and the work product doctrine with respect to those documents .... as against all other adversaries"); *In re Martin Marietta Corp.,* 856 F.2d 619, 623–24 (4th Cir.1988) ("The Fourth Circuit has not embraced the concept of limited waiver of attorney-client privilege."); *In re Subpoenas Duces Tecum,* 738 F.2d 1367, 1372 (D.C.Cir.1984) ("We are convinced that the health of the adversary system—which spawned the need for protection of an attorney's work product from discovery by an opponent—would not be well served by allowing appellants the advantages of selective disclosure to particular adversaries, a differential disclosure often spurred by considerations of self-interest.")

2 Given Defendants' assertion that their confidentiality agreement with the SEC preserves attorney-client privilege and work product protection as to materials shared with the SEC, it is curious that they produced the PowerPoint presentations in discovery. This strategic decision suggests either that Defendants are not confident that the confidentiality agreement preserves privilege, or that they believe producing the presentations they made to the SEC—while withholding the underlying witness notes and summaries—serves their interests in this litigation.

3 Courts in this district have split on the question of whether privilege can be maintained through use of a confidentiality agreement. *Compare In re Natural Gas Commodity Litig.,* No. 03 Civ. 6186(VM)(AJP), 2005 WL 1457666, at *8 (S.D.N.Y. June 21, 2005) ("[E]xplicit written confidentiality and non-waiver agreements with the government agencies ... go[ ] a long way to a finding of non-waiver ....") *and Police & Fire Retirement Sys. of the City of Detroit v. SafeNet, Inc.,* No. 06 Civ. 5797(PAC), 2010 WL 935317, at *2 (S.D.N.Y. Mar.12, 2010) ("The factual circumstances in this case favor applying the selective waiver doctrine. SafeNet produced the Privileged Materials to the government, not private litigants, pursuant to Confidentiality Agreements that

provide for non-wavier.") *with* *In re Initial Public Offering Sec. Litig.,* 249 F.R.D. 457, 466 (S.D.N.Y.2008) ("Voluntary disclosure of attorney work product, regardless of the existence of a confidentiality agreement, will waive work product privilege absent special circumstances.").

4 See also *Steinhardt,* 9 F.3d at 235 ("The waiver doctrine provides that voluntary disclosure of work product to an adversary waives the privilege as to other parties."); *Mass. Inst. of Tech.,* 129 F.3d at 687 ("[D]isclosure to an adversary, real or potential, forfeits work product protection."); *Jacob v. Duane Reade, Inc.,* No. 11 Civ. 0160(JMO)(THK), 2012 WL 651536, at *3 (S .D.N.Y. Feb. 28, 2012) ("The attorney-client privilege is waived if the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the communication to a third party or stranger to the attorney-client relationship."); *Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Inc.,* No. 08 Civ. 7508(SAS), 2011 WL 4716334, at *4 (S.D.N.Y. Oct.3, 2011) ("[I]t is well-established that voluntary disclosure of confidential material to a third party typically waives any applicable attorney-client privilege...."); *Complex Sys., Inc. v. ABN AMRO Bank N.V.,* 279 F.R.D. 140, 147 (S.D.N.Y.2011) ("Work product protection is waived by the disclosure of documents to third parties ... if the disclosure 'substantially increases the opportunity for potential adversaries to obtain the information.' ") (quoting *In re Pfizer Inc. Sec. Litig.,* No. 90 Civ. 1260(SS), 1993 WL 561125, at *6 (S.D.N.Y. Dec.23, 1993)).

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